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Const 1963, art 1, § 17
Const 1963, art 1, § 20
Crane v Kentucky
Davis v Alaska
Driscoll v Delo
Gagne v Booker
Gordon v United States
Greer v Mitchell
Harris v New York
Massaro v United States
MCL 750.520b
MCL 750.520d
McMeans v Brigano
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People v Adair
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People v Dobben
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ABELA v MARTIN, 348 F3d 164

ABELA v MARTIN, 348 F3d 164

United States Court of Appeals, Sixth Circuit.

Argued: March 26, 2003.

Decided and Filed: October 22, 2003. Pursuant to Sixth Circuit Rule 206

ARGUED: James Sterling Lawrence, (argued and briefed), Detroit, Michigan, for Appellant.

William C. Campbell, (argued and briefed), OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

ON BRIEF: James Sterling Lawrence, Detroit, Michigan, for Appellant.

William C. Campbell, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

Before: BOGGS, Chief Circuit Judge; MARTIN, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, and ROGERS, Circuit Judges.

BOYCE F. MARTIN, JR., delivered the opinion of the court, in which DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, JJ., joined. SILER, J. (pp. 173-174), delivered a separate dissenting opinion, in which BOGGS, C. J., BATCHELDER, GIBBONS, and ROGERS, JJ., joined.

OPINION

BOYCE F. MARTIN, JR., Circuit Judge.

1

This action arises from a Michigan manslaughter conviction and subsequent petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court found the habeas petition timely filed but denied it on the merits. Kevin Mark Abela appealed that denial. A panel of this court heard argument in this case, but it declined to reach the merits. The panel held that under this court's rule in Isham v. Randle, 226 F.3d 691 (6th Cir.2000), cert. denied, 531 U.S. 1201, 121 S.Ct. 1211, 149 L.Ed.2d 124 (2001), Abela's petition was not timely because the statute of limitations was not tolled by Abela's petition for writ of certiorari from the United States Supreme Court following post-conviction litigation in state court. The panel held that Abela's habeas petition was barred by the statute of limitations set forth in 28 U.S.C. § 2244(d)(1). A majority of the active judges of this court having agreed to rehear the case en banc, we now hold that Abela's petition was timely filed.

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Abela was convicted by a jury of voluntary manslaughter and carrying a concealed weapon on July 24, 1991. He was sentenced to a term of seven to fifteen years for voluntary manslaughter and a concurrent sentence of forty months to five years for carrying a concealed weapon.

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Abela appealed his conviction on February 17, 1992, by raising three issues in the Michigan Court of Appeals. The Michigan Court of Appeals affirmed Abela's conviction and sentence in an unpublished disposition. People v. Abela, No. 144005 (Mich. Ct.App. July 22, 1994). The Michigan Supreme Court denied Abela's delayed application for leave to appeal these issues. People v. Abela, 448 Mich. 901, 533 N.W.2d 313 (1995).

4

On August 20, 1996, Abela filed a motion for relief from judgment in the Oakland County Circuit Court, raising six claims. The motion was denied "for lack of merit on the grounds presented." People v. Abela, No. 90-101083 (Oakland County Cir. Ct. Oct. 22, 1996). Abela raised the same six issues on appeal to the Michigan Court of Appeals, which also denied leave to appeal and a motion to remand. People v. Abela, No. 200930

(Mich.Ct.App. July 22, 1997). On August 9, 1997, Abela again raised these six issues in his delayed application for leave to appeal to the Michigan Supreme Court, which likewise denied his petition. People v. Abela, 457 Mich. 880, 586 N.W.2d 923 (1998). On August 3, 1998, Abela filed a petition for certiorari with the United States Supreme Court, which was denied on October 19, 1998. Abela v. Michigan, 525 U.S. 948, 119 S.Ct. 374, 142 L.Ed.2d 309 (1998).

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On April 26, 1999, before his parole term had ended, Abela sought a writ of habeas corpus pursuant to section 2254, raising the same claims as in his motion for relief from judgment (except for his claim regarding the trial court's decision to reconsider its dismissal of the concealed weapon charge). The district court issued a memorandum opinion and denied the petition for habeas relief on October 31, 2000. On December 28, 2000, the district court denied Abela's motion for a certificate of appealability.

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Abela appealed his denial of the motion to this court. We granted his certificate of appealability on the issues before us on April 20, 2001.

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Between August 20, 1996, and May 28, 1998, Abela sought state collateral relief in the Michigan trial, appellate, and high courts. The limitations period was clearly tolled during this period because Abela's state collateral relief motions were pending in the various state courts. See Carey v. Saffold, 536 U.S. 214, 220, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002). In Carey, the Court held that "until the application has achieved final resolution through the State's post-conviction procedures, by definition it remains `pending.'" Id. Thus, the key issue before us today is whether the one-year statute of limitations applicable to federal habeas corpus petitions is also tolled during the period in which a petitioner may seek, and the Supreme Court considers whether to grant, certiorari review of the denial of the petitioner's state collateral relief motion.

8

Title 28 U.S.C. § 2244(d)(1) provides a one-year period of limitations for people "in custody pursuant to the judgment of a State court" to file an application for a writ of habeas corpus. Title 28 U.S.C. § 2244(d)(2) provides for tolling of this one-year period as follows: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

9

For prisoners whose convictions became final prior to April 24, 1996, the effective date of the Anti Terrorism and Effective Death Penalty Act, the one-year limitations period runs against them as of that date. Austin v. Mitchell, 200 F.3d 391, 393 (6th Cir.1999).

Abela's judgment of conviction became final prior to April 24, 1996, so his one-year limitations period began running on that date.

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The Supreme Court recently concluded that a federal habeas corpus petition does not constitute "State post-conviction or other collateral review" in order to toll the one-year limitations period pursuant to section 2244(d)(2). Duncan v. Walker, 533 U.S. 167, 182, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). Significantly, for our purposes, the Court construed the phrase "State post-conviction or other collateral review" to mean "State post-conviction [review]" and "other State collateral review."Id. at 175-76, 121 S.Ct. 2120. Accordingly, the section 2241(d)(1) limitations period is not tolled while federal habeas corpus proceedings are pending, because federal habeas proceedings are neither "State post-conviction" nor "other State collateral review." Id. at 181-82, 121 S.Ct. 2120. Thus, the more narrow question presented here is whether a petition for writ of certiorari to the Supreme Court may constitute a "properly filed" and "pending" application for "State post-conviction [review]" or "other State collateral review" so as to toll the section 2244(d)(1) limitation period.

11

This Court's pre-Duncan decision in Isham v. Randle, 226 F.3d 691 (6th Cir. 2000), cert. denied, 531 U.S. 1201, 121 S.Ct. 1211, 149 L.Ed.2d 124 (2001), upon which the panel opinion relied, dealt with the situation where a petitioner could have sought, but did not seek, certiorari review of his Ohio collateral review motion. We held that "the one year limitations period is not tolled during the ninety days in which defendant could have petitioned the Supreme Court for a writ of certiorari...." Id. at 692.

12

First, we reasoned, based on the statute's plain language, the word "State" in section 2244(d)(2) modifies "post-conviction or other collateral relief." Id. at 695. This court concluded that "[a] petition for certiorari to the United States Supreme Court is not `state post-conviction relief.' Neither is such a petition `other state collateral relief.'" Id. Thus, we decided, as had the Tenth Circuit, that "a petition for writ of certiorari to the United States Supreme Court is `simply not an application for state review of any kind.'" Id. (citing Rhine v. Boone, 182 F.3d 1153, 1156 (10th Cir.1999)). We also reasoned that our holding was bolstered by the fact that seeking certiorari in the United States Supreme Court is not a mandatory part of state court review, as it is not a prerequisite to pursuing habeas corpus. Fay v. Noia, 372 U.S. 391, 435, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963). Finally, we concluded that differences in section 2244(d)(1)(A) and section 2244(d)(2) suggest that Congress did not intend section 2244(d)(2) tolling to apply to potential Supreme Court review. Isham, 226 F.3d at 695. Specifically, section 2244(d)(1)(A) provides that the one-year limitations period begins to run after "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," whereas Congress neglected to use similar language in section 2244(d)(2). Id.

13

The Supreme Court has decided cases since Isham that cast that case in a different light. As to Isham's first rationale, Duncan confirmed our interpretation that the word "State" in section 2244(d)(2) modifies "post-conviction or other collateral relief." 533 U.S. at 175-76, 121 S.Ct. 2120. As to Isham's second rationale, that petitioning for certiorari on the underlying conviction is not required in order to seek habeas corpus review, the Supreme Court's recent decision in Clay v. United States,537 U.S. 522, 123 S.Ct. 1072, 1075, 155 L.Ed.2d 88 (2003), offers an analogy for the question before us. In that case, the Court determined that a federal criminal conviction becomes final, for the purposes of calculating the one-year time period in which to move to vacate pursuant to 28 U.S.C. § 2255, when the time expires for filing a petition for certiorari to contest the federal appellate court's affirmance of conviction. Id. at 1075. The Court discussed the meaning of finality, id. at 1076:

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Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. See, e.g., Caspari v. Bohlen,510 U.S. 383, 390, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994); Griffith v. Kentucky, 479 U.S. 314, 321, n. 6, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987); Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983); United States v. Johnson, 457 U.S. 537, 542, n. 8, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982); Linkletter v. Walker,381 U.S. 618, 622, n. 5, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965).

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Further, the Court noted that "[t]he Courts of Appeals have uniformly interpreted `direct review' in § 2244(d)(1)(A) to encompass review of a state conviction by this Court." Clay, 123 S.Ct. at 1077, n. 3 (citations omitted). The reasoning underlying the Court's decision in Clay is analogous to the situation before us. The Supreme Court's direct review of a federal criminal conviction is not identical to its review of a state habeas petition, but in each situation the decision of the federal appellate court and the highest court in the state, respectively, is not final, if certiorari is sought, until the Supreme Court denies certiorari, and, if certiorari is not sought, until the period for seeking certiorari expires.

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Finally, as to Isham's third rationale, highlighting the difference in language between sections 2244(d)(1)(A) and 2244(d)(2) as supportive of the narrow reading of the latter, the Supreme Court recently said, "`The ... presumption — that the presence of a phrase in one provision and its absence in another reveals Congress'[s] design — grows weaker with each difference in the formulation of the provisions under inspection.'" Clay, 123 S.Ct. at 1079 (citing Columbus v. Ours Garage & Wrecker Serv., Inc.,536 U.S. 424, 435-36, 122 S.Ct. 2226, 153 L.Ed.2d 430 (2002)).

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Isham, nevertheless, is in line with the majority of our sister circuits. The Tenth Circuit concluded, using broad language, that section 2244(d)(2) did not toll the limitations period where the petitioner had actually sought certiorari in the Supreme Court. Rhine, 182 F.3d at 1156. The Fourth Circuit agreed where, as here, the petitioner had actually sought certiorari. Crawley v. Catoe, 257 F.3d 395, 399-400 (4th Cir.2001). Other circuits, relying on Rhine, have reached the same conclusion with respect to petitioners who had not actually sought certiorari review — the scenario presented in Isham. See Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir.2001);Bunney v. Mitchell, 262 F.3d 973, 974 (9th Cir.2001); Coates v. Byrd, 211 F.3d 1225, 1227(11th Cir.2000); Ott v. Johnson, 192 F.3d 510, 513 (5th Cir.1999); see also Isham, 226 F.3d 691.

18

Until recently the Third Circuit distinguished situations where certiorari is actually sought from those where it is not. In particular, in 1999, the Third Circuit concluded that the limitations period was tolled during the period where a petitioner actually sought certiorari. See Morris v. Horn, 187 F.3d 333, 336-37 (3d Cir.1999). However, subsequent to the decision in Morris, the Third Circuit concluded that the ninety-day period for seeking certiorari review in the Supreme Court should not be considered to toll the limitations period under section 2244(d)(2) where the petitioner has not actually sought certiorari. See Nara v. Frank, 264 F.3d 310, 318 & n. 4 (3d Cir.2001);Stokes v. Dist. Attorney of the County of Phila., 247 F.3d 539 (3rd Cir.2001). This distinction relied on the use of the word "pending" in section 2244(d)(2), concluding that where no petition for certiorari is actually filed, nothing can be "pending" under section 2244(d)(2). Nara, 264 F.3d at 318. Recently, however, the Third Circuit abandoned this distinction altogether, joining the majority of the circuits. See Miller v. Dragovich, 311 F.3d 574 (3d Cir.2002). The court said, "To avoid Duncan we would have to hold that Congress intended to distinguish between the exercise of Supreme Court certiorari jurisdiction and federal habeas corpus jurisdiction in enacting section 2244(d)(2)." Id. at 579.

19

The Second and Seventh Circuits adopted a narrow version of the approach taken in Isham, Coates, Ott, Miller, and Rhine, limiting their holdings to a rule that the period during which certiorari may be sought cannot toll the limitations period where certiorari is not actually sought. See Gutierrez v. Schomig, 233 F.3d 490, 491-92 (7th Cir.2000); Smaldone v. Senkowski, 273 F.3d 133, 137-38 (2d Cir.2001). The Seventh Circuit focused on whether there was any "properly filed" application where the petitioner had not sought certiorari to the United States Supreme Court, concluding that where nothing had been filed, nothing could be "properly filed" under section 2244(d)(2). Gutierrez, 233 F.3d at 492. The Seventh Circuit also concluded that where no petition for certiorari had been filed, nothing could be "pending" under section 2244(d)(2). Id. Ultimately, however, the Seventh Circuit declined to address whether "State post-conviction" review or "other state collateral review" may include a "properly filed," "pending" petition for certiorari to the United States Supreme Court. Id. The Second Circuit, likewise faced with a situation

where the petitioner had not sought certiorari, adopted the reasoning of the Seventh Circuit, stating, "Our holding is limited to the facts of this case, and we do not reach the questions that would have been raised if a certiorari petition had been properly filed." Smaldone, 273 F.3d at 138. The Second and Seventh Circuits continue to distinguish between situations in which a petition for certiorari review of the denial of state habeas relief is actually sought and those cases where it is not.

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Although we find this distinction no longer tenable, we take each situation in turn. First, as to the question presented here, where a petition for certiorari was actually filed, we find instructive the reasoning of the dissent in White v. Klitzkie, 281 F.3d 920 (9th Cir.2002). In dissent in White, Judge Berzon reasons that "[t]he statute surely tolls only where there is a `properly filed application for State post-conviction or other collateral review.' But the question is not whether White's application fits this description ... but whether that application could still be `pending' once the state courts are finished with it." Id. at 926 (Berzon, J., dissenting). She goes on to say, id.,

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[W]hile the application is one for State post-conviction relief, just as state criminal proceedings can raise federal issues reviewable in the United States Supreme Court, so can state habeas proceedings. A state criminal proceeding... is still "pending" even though the state courts are finished with it, until any petition filed is finally decided. Similarly, if there is a certiorari petition pending to review the validity of the state's denial of such an application for state post-conviction review, the application is still "pending" — that is, not finally decided. The application does not thereby stop being a state habeas proceeding or turn into a federal rather than a state application; it is just not finally decided yet.

22

We agree. In a slightly different context, the Supreme Court, in Carey v. Saffold, discussed the word "pending": "The dictionary defines `pending' (when used as an adjective) as `in continuance' or `not yet decided.' It similarly defines the term (when used as a preposition) as `through the period of continuance ... of,' `until the... completion of.'" 536 U.S. at 219, 122 S.Ct. 2134 (citing Webster's Third New International Dictionary 1669 (1993)). We believe that a petition for certiorari from a state court's denial of an application for habeas corpus necessitates that the application is still pending, because it is "`in continuance' or `not yet decided.'" Id. The focus of section 2244(d)(2) is not on the court in which the application is pending but on the application itself. As long as the petition for certiorari involves an application for state court relief, section 2244(d)(2) requires that the statute of limitations be tolled. The court where the application is pending is irrelevant. While Duncan clarified that "State" modifies "review," it nowhere asserts that "State" also modifies "pending."

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Judge Berzon's dissent in White continues, 281 F.3d. at 926-27:

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Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001), does not suggest a different interpretation of § 2244(d)(2). That case based its holding that a federal habeas petition does not toll the limitations period on the ground "that an application for federal habeas corpus review is not an `application for State post-conviction or other collateral review' within the meaning of 28 U.S.C. § 2244(d)(2)." Id. at 2129. But an application for state habeas review, as opposed to an application for federal habeas review, is "an application for State post-conviction review or other collateral review," regardless of whether that application is being considered on appeal by a state supreme court or by the United State Supreme Court on certiorari. Thus, unlike the reading of § 2244(d)(2) rejected in Duncan, the interpretation I suggest gives full meaning to the word "State," but recognizes that the United States Supreme Court ... can consider state ... cases when they raise federal issues. Otherwise, what is the United States Supreme Court hearing when it considers a state habeas petition on certiorari? Not an application for federal post-conviction or other collateral review.

25

We agree with Judge Berzon's reasoning.

26

Furthermore, to require a petitioner to file his petition seeking federal habeas corpus relief before he has sought certiorari to the Supreme Court does not promote the finality of state court determinations and encourages the simultaneous filing of two actions seeking essentially the same relief. This disposition would also raise concerns about comity and exhaustion. If we chose to follow the panel decision in this case, a prisoner could file his petition for writ of certiorari to the United States Supreme Court on the day the highest state court denies him collateral relief, but if the United States Supreme Court takes more than a year to decide his case, the prisoner will be required to file a federal habeas petition before the Supreme Court had an opportunity to rule on his motion for state collateral relief. We doubt that Congress intended, in the Anti-Terrorism and Effective Death Penalty Act, to force prisoners to choose between federal habeas relief and seeking certiorari to the Supreme Court, or to do both simultaneously. While as a practical matter it is unlikely that many petitioners will be put in this position, because the federal habeas court could simply stay the habeas motion pending the Supreme Court's resolution of the certiorari petition, see Miller, 311 F.3d at 580-81, we do not believe it is appropriate or necessary to read the federal statutes to dictate such a rule.

27

We now turn to the question directly at issue in Isham, although not presented here, whether or not the period for filing certiorari tolls the statute of limitations where no petition is actually filed. Once a state supreme court has ruled on a petitioner's

application for state post-conviction relief, the petitioner has ninety days to decide whether to petition for a writ of certiorari. Sup. Ct. R. 13. Section 2244(d)(2) provides that the one-year statute of limitations is tolled while a properly filed application for state post-conviction relief is "pending," 28 U.S.C. § 2244(d)(2), but it offers no clue as to whether an application is "pending" during the ninety-day period for seeking Supreme Court review. If that determination depends on whether a petitioner ultimately applies for a writ of certiorari, then courts and litigants can never know whether the statute of limitations is running during the period following their state post-conviction review; that determination will depend on events that are to happen down the road.

28

Indeed, petitioners who are equally diligent may face drastically different fates. Imagine, for example, two state inmates who file their petitions for state post-conviction relief after three hundred days in their limitation period have run. Sixty-five days after their applications for state post-conviction relief are denied, having passed through the highest appellate court in the state, their limitations period under section 2244(d)(1) will expire. On the seventieth day, each proceeds to another stage in the process: one files a petition for habeas corpus relief in federal district court, and because that petition is untimely, the petition is denied; the other petitions for a writ of certiorari from the United States Supreme Court, and not only is the petition accepted for filing, but also the petitioner still has sixty-five days left to file a habeas corpus petition after the petition for a writ of certiorari is denied. That is, the petition for writ of certiorari would have retroactively tolled the second petitioner's limitations period, protecting his ability to seek section 2254 relief. The first petitioner, who was equally diligent — and who chose what is likely a more efficient route to federal habeas review — will be out of luck. Furthermore, a rule limiting the tolling to only those habeas corpus petitioners who actually file for certiorari would create a lock-in effect for the prison inmate who prepares a certiorari petition for sixty-nine days, but then changes tack on the seventieth day, deciding that it would be wiser strategically to file the habeas petition in the district court. Under the rule applied by a majority of our sister circuits, the inmate has to file a protective certiorari petition in order to preserve the opportunity to later file a habeas petition, generating an unnecessary and quite often futile hoop through which the inmate must hop. Failure to file such a protective certiorari petition because of a tactical change then retroactively obliterates the sixty-five days the inmate had left, even though the clock was not actually ticking during the sixty-nine days spent preparing the certiorari petition to the Supreme Court.

29

It makes little sense to allow events that happen after a limitations period appears to have expired to retroactively toll it, and the Supreme Court has explicitly rejected such a suggestion for collateral attacks by federal prisoners. In Clay, the Supreme Court held that the limitations period for a section 2255 petition does not run during the ninety-day period for seeking certiorari, even when the petitioner ultimately does not seek Supreme Court review. 123 S.Ct. at 1075. The only possible basis for distinguishing the Court's interpretation in Clay is that whereas there, the Court determined that a case

does not become "final" in the postconviction context until the conclusion of the time for seeking Supreme Court review, here, a court would be asked to determine when an application is no longer "pending." Although a case may not be "final" until the ninety-day period has expired, the argument goes, it is no longer "pending" once the state court has actually issued an order. This argument overlooks the almost tautological point that a case becomes "final" once it is no longer "pending"; they are but two sides of the same coin. Moreover, in Carey, the Supreme Court rejected the notion that a case is only "pending" for the purposes of section 2244(d)(2) until the court issues its order. 536 U.S. at 219-20, 122 S.Ct. 2134. The Court there concluded that an application for state post-conviction relief is pending even during the period between one state court's decision and the litigant's appeal to the next level. Accordingly, "pending" should not be construed to refer only to the time a court takes to evaluate a case at some stage of the post-conviction review process; "pending" also refers to the time allowed an inmate to file a certiorari petition regardless of whether such filing actually occurs.

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A statute of limitations should be clear. At any given point, courts and litigants should be able to determine whether the limitations period has begun, is running, is tolled, or has expired; whether a limitations period is running should not depend on events that happen only at a later date. Whether the limitations period is tolled during the ninety days that a petitioner has to seek certiorari should not depend on whether the petitioner actually decides to seek certiorari.

31

Because Clay explicitly holds that federal petitioners are to receive the benefit of the ninety-day certiorari period even when they seek no such relief, because Careyadvances a broad definition of when a petition for state relief is "pending" under section 2244(d)(2), and because the contrary view leads to an unstable limitations scheme prone to subsequent revision, we hold that under section 2244(d)(2), the statute of limitations is tolled from the filing of an application for state post-conviction or other collateral relief until the conclusion of the time for seeking Supreme Court review of the state's final judgment on that application independent of whether the petitioner actually petitions the Supreme Court to review the case.

32

For the foregoing reasons, we AFFIRM the judgment of the district court with respect to the timeliness of Abela's habeas petition, and the case is otherwise returned to the original panel for consideration on the merits.

DISSENT

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SILER, Circuit Judge, dissenting.

34

The position espoused by the majority sounds good and provides an easy way to determine whether the one-year limitations period under 28 U.S.C. § 2244(d)(1) is tolled. However, it is a position which has been repudiated by all other Circuits which have interpreted this statute and is a stretch of the law. After all, "Our task is to construe what Congress has enacted. We begin, as always, with the language of the statute." Duncan v. Walker, 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001).

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As the majority correctly analyzes the issue, it is whether the time under 28 U.S.C. § 2244(d)(2) for tolling purposes also includes the time between the denial of petitioner's state post-conviction claim and the denial of his petition for a writ of certiorari on that claim before the Supreme Court. The majority holds that this time is also included. We previously held in Isham v. Randle, 226 F.3d 691, 692 (6th Cir.2000), cert. denied, 531 U.S. 1201, 121 S.Ct. 1211, 149 L.Ed.2d 124 (2001), that the time was not included for tolling purposes when the petitioner did not seek certiorari review of his collateral attack. I would extend that holding from Isham to the present situation, where the petitioner did file for certiorari to the Supreme Court. In addition to refusing to apply Isham's reasoning to circumstances in which the petitioner has filed for certiorari review following exhaustion of post-conviction relief, the majority of this court, while conceding that the issue is not properly before us, nonetheless suggests in dicta that Isham itself is not good law. Rather than casting doubt upon Isham, I would extend its holding to the present situation, in which the petitioner did file for certiorari to the Supreme Court. Thus, I would find that the time between May 28, 1998, when the Michigan Supreme Court denied leave on Abela's motion for relief from judgment until October 19, 1998, when the Supreme Court denied certiorari, is not excludable time for tolling under 28 U.S.C. § 2244(d)(2). The reasons are explained herein.

36

As the majority explains, there is no Circuit authority in Abela's favor. Morris v. Horn, 187 F.3d 333, 337 (3d Cir.1999), is the only case to hold that the statute of limitations is tolled under § 2244(d) during the pendency of a petition for certiorari, following the denial of post-conviction relief. However, that case has been repudiated in Miller v. Dragovich, 311 F.3d 574, 580 (3d Cir.2002). The majority has recognized the plethora of authority in agreement with Isham and Miller. See, e.g., Bunney v. Mitchell, 241 F.3d 1151, 1155-56 (9th Cir.), withdrawn on other grounds, 249 F.3d 1188 (9th Cir.2001); Crawley v. Catoe, 257 F.3d 395, 399-400 (4th Cir. 2001); Snow v. Ault, 238 F.3d 1033, 1035 (8th Cir.2001); Coates v. Byrd, 211 F.3d 1225, 1227 (11th Cir.2000); Ott v. Johnson, 192 F.3d 510, 513 (5th Cir.1999); Rhine v. Boone, 182 F.3d 1153, 1156 (10th Cir.1999).

37

The authority the majority here uses to justify its decision is from a dissent by Judge Berzon in White v. Klitzkie, 281 F.3d 920, 926 (9th Cir.2002) (Berzon, J., dissenting). But the majority in that case very clearly held that "[a] petition for a writ of certiorari to the United States Supreme Court is simply not an application for state review." Id. at 924.

38

All of these cases follow the same basic reasoning. That is, they hold that the time under which a petition for certiorari is or could be filed is not considered the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). I would adopt that reasoning also.

39

The plain text of the statute does not suggest otherwise. Obviously the pragmatic approach has its merits, because it promotes an efficient administration of habeas corpus cases, but if Congress sees a need to change the system, it may amend the statute just as it has in the past. The recent decisions in Clay v. United States, 537 U.S. 522, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003); and Duncan, 533 U.S. at 167, 121 S.Ct. 2120, do not affect our decision in Isham.

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More specifically, Duncan construed § 2244(d)(2) in the same way that Isham did, that is, that "State" modified both "post-conviction" and "other collateral review."Duncan, 533 U.S. at 172, 121 S.Ct. 2120. Likewise, Clay followed the majority rule from the Circuits that § 2255 is interpreted to mean that "[A] judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction." Clay, 123 S.Ct. at 1075. However, that case involved the issue of when the limitations began to run on a federal conviction, not a state collateral attack. And, although that decision states that "[t]he Courts of Appeals have uniformly interpreted `direct review' in § 2244(d)(1)(A) to encompass review of a state conviction by this Court," id. at 1077 n. 3, it never takes up the issue we are facing, the interpretation of § 2244(d)(2).

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Therefore, I would continue to follow Isham in finding that "the denial of state post-conviction relief becomes final ... after a decision by the state's highest court," id. at 695, and I would reverse the judgment of the district court finding Abela's habeas corpus petition was timely filed.

Baja v. Ducharme

187 F.3d 1075 (9th Cir. 1999)

THOMAS BAJA, Petitioner-Appellant,

v.

KENNETH DUCHARME, Superintendent of Washington State Reformatory; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington, Respondents-Appellees.

No. 98-35594

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Submitted July 12, 1999[1]

Filed August 9, 1999

Lana C. Glenn, Spokane, Washington, for the petitioner-appellant.

Thomas J. Young, Assistant Attorney General, Olympia, Washington, for the respondents-appellees.

Appeal from the United States District Court for the Western District of Washington John C. Coughenour, Chief District Judge, Presiding. D.C. No. CV 97-00343-JCC.

Before: Alfred T. Goodwin, Thomas M. Reavley[2] and M. Margaret McKeown, Circuit Judges. Opinion by Judge Goodwin

OPINION

GOODWIN, Circuit Judge:

Thomas Baja appeals the district court's denial of his petition for a writ of habeas corpus, brought under 28 U.S.C. S 2254. Pursuant to the Certificate of Appeal ability granted by this court under 28 U.S.C. S 2253(c)(3), we consider only whether the district court erred by not holding an evidentiary hearing on the petitioner's claim of ineffective assistance of counsel. Because the petitioner's claim fails to meet the requirements set forth in S 2254(e)(2), as amended by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), we hold that the district court did not err, and therefore affirm the judgment.

PROCEDURAL BACKGROUND

Petitioner Thomas Baja was indicted in 1988 on two counts of aggravated first degree murder. At his trial, Baja did not seriously contest that he killed his estranged wife and a companion, but entered a plea of not guilty by reason of insanity. Defense counsel argued that Baja, a veteran of the Vietnam war who allegedly suffers from post-traumatic stress disorder, thought he was on a recon mission in Vietnam at the time of the crime. Counsel did not assert any theory of diminished capacity during the trial, and no instruction regarding diminished capacity was given to the jury. Baja was convicted on both counts and is presently serving a life sentence at a state detention facility in Washington.

After bringing several unsuccessful direct appeals in Washington state courts, Baja filed a personal restraint petition before the state Court of Appeals alleging ineffective

assistance of counsel. Baja's petition was denied, and his request for discretionary review by the Supreme Court of Washington was also denied. Baja then filed the instant petition for a writ of habeas corpus in the district court, also alleging ineffective assistance of counsel.

The magistrate to whom the case was assigned determined, after reviewing the entirety of the record, that no evidentiary hearing was needed and recommended dismissal of the claim. The district court adopted the recommendation of the magistrate, and denied Baja's petition with prejudice.

STANDARD OF REVIEW

Under pre-AEDPA law, we reviewed for an abuse of discretion a district court's decision to deny a habeas petitioner's request for an evidentiary hearing. Villafuerte v. Stewart, 111 F.3d 616, 633 (9th Cir. 1997), cert. denied, 118 S. Ct. 860 (1998). However, as amended by the AEDPA, 28 U.S.C. S 2254(e) now substantially restricts the district court's discretion to grant an evidentiary hearing. We review de novo whether 28 U.S.C. S 2254(e) removes from the district court's discretion the decision whether to grant or deny a request for an evidentiary hearing. See, e.g., Tierney v. Kupers, 128 F.3d 1310, 1311 (9th Cir. 1997). We review for clear error findings of fact made by the district court relevant to its decision. Moran v. McDaniel, 80 F.3d 1261, 1268 (9th Cir. 1996).

DISCUSSION

Baja contends that the record developed in the state proceedings did not contain sufficient evidence on which the magistrate could determine the merits of the ineffective assistance claim, and that he was therefore entitled to an evidentiary hearing as a matter of law. However, Baja has failed to establish that an evidentiary hearing was permissible, much less required, under the new statutory requirements contained in 28 U.S.C. S 2254(e), as revised by the AEDPA.3

The Fourth Circuit has aptly summarized the impact of the AEDPA revisions on a district court's decision to deny a request for an evidentiary hearing. See Cardwell v. Greene, 152 F.3d 331, 336-340 (4th Cir.), cert. denied , 119 S. Ct. 587 (1998). Before the enactment of the AEDPA, the decision concerning an evidentiary hearing with respect to a habeas petition was firmly committed to the discretion of the district courts, subject to some judicially-created limitations on that discretion. Id.; see also Townsend v. Sain, 372 U.S. 293 (1963), as modified by Keeney v. Tamayo-Reyes , 504 U.S. 1 (1992). The amendments contained in the AEDPA, by contrast, impose "an express limitation on the power of a federal court to grant an evidentiary hearing," Cardwell, 152 F.3d at 336, and have reduced considerably the degree of the district court's discretion. The amended statute now provides, in pertinent part:

(e)(1) In a proceeding instituted by an applicant for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that . . . the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence and . . . the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. S 2254(e).

Under the amended statutory scheme, a district court presented with a request for an evidentiary hearing, as in this case, must determine whether a factual basis exists in the record to support the petitioner's claim. If it does not, and an evidentiary hearing might be appropriate, the

court's first task in determining whether to grant an evidentiary hearing is to ascertain whether the petitioner has "failed to develop the factual basis of a claim in State court." If so, the court must deny a hearing unless the applicant establishes one of the two narrow exceptions set forth in S 2254(e)(2)(A) & (B). If, on the other hand, the applicant has not "failed to develop" the facts in state court, the district court may proceed to consider whether a hearing is appropriate, or required under Townsend .

Cardwell, 152 F.3d at 337.

A. Factual Basis in the Record

Baja presented his claim of ineffective assistance of counsel to the state court by way of a personal restraint petition. The petition was denied by the state Court of Appeals on the ground that he failed to present a prima facie case of ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). The Court of Appeals apparently did not review evidence from the trial, or consider additional evidence outside the record, because Baja failed to come forward with evidence of a colorable claim. The Washington Supreme Court denied Baja's motion for discretionary review of the appeals court's decision on the same grounds.

In the absence of any evidentiary hearing or consideration of additional evidence presented on appeal to the state courts, no factual basis for Baja's ineffective assistance of counsel claim was developed. See, e.g., United States v. Sitton, 968 F.2d 947, 960 (9th Cir. 1992) ("Ineffective assistance claims are ordinarily reviewed only in collateral proceedings because such claims usually cannot be resolved without the development of facts outside the original record.").

B. Failure to Develop Factual Basis

Several of our sister circuits have considered the impact of a habeas petitioner's "failure to develop" a factual basis for a claim at the state court level, within the meaning of S2254(e)(2). We agree that "where an applicant has diligently sought to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so

by the state court, S 2254(e)(2) will not preclude an evidentiaryhearing in federal court." Cardwell, 152 F.3d at 337. See also McDonald v. Johnson, 139 F.3d 1056, 1059 (5th Cir. 1998); Burris v. Parke, 116 F.3d 256, 258-59 (7th Cir. 1997); Love v. Morton, 112 F.3d 131, 136 (3d Cir. 1997); see, e.g., Jones v. Wood, 114 F.3d 1002, 1013 (9th Cir. 1997) (applying pre AEDPA law, but asserting that if "the state courts simply fail to conduct an evidentiary hearing, the AEDPA does not preclude a federal evidentiary hearing"). We therefore consider whether the absence of a factual basis for Baja's claim in this case was the result of a curtailed proceeding at the state level.

The state Court of Appeals properly found that, with respect to the claim of ineffective assistance of counsel presented in the personal restraint petition, Baja could make a prima facie case by supporting his allegation with evidence in the record, or by demonstrating that there was competent, admissible evidence with respect to facts outside the record that would support his allegations. See In re Rice, 828 P.2d 1086, 1092 (Wash. 1992) ("As a threshold matter, the petitioner must state in his petition the facts underlying the claim . . . and the evidence available to support the factual allegations . . . . [P]etitioner must state with particularity facts which, if proven, would entitle him to relief."). State law not only permitted but required Baja to come forward with affidavits or other evidence, to the extent that his claim relied on evidence outside the trial record. Clearly, Baja had the opportunity in state proceedings to come forward with evidence to support his allegation that Counsel was ineffective at trial, but failed to do so. He therefore failed to develop the factual basis of his claim in state court proceedings within the meaning of 28 U.S.C. S 2254(e).

C. Requirements of 28 U.S.C. S 2254(e)(2)

Where a habeas petitioner has failed to develop a factual basis for his claim in state proceedings and requests the opportunity to do so in an evidentiary hearing before the district court, the petitioner must show that "the claim relies on . . . a factual predicate that could not have been previously discovered through the exercise of due diligence and. . . the facts underlying the claim would . . . establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. S 2254(e)(2).

Baja has asserted that the failure of trial counsel to explore and research the use of a diminished capacity defense constituted ineffective assistance of counsel. A claim of ineffective assistance of counsel must allege that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different. See Strickland, 466 U.S. at 687. Baja has not explained why the evidence needed to support his ineffective assistance claim could not have been developed during the course of the state proceedings. Furthermore, he has not offered any evidence or other rationale to suggest that he was prejudiced by Counsel's failure to offer a diminished capacity defense. Baja's petition falls far short of the substantial requirements contained in Section 2254(e)(2).

CONCLUSION

The district court committed no error under the amended statute when it denied Baja's request for an evidentiary hearing.

AFFIRMED.

Notes:

The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

The Honorable Thomas M. Reavley, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

Baja's petition was filed on March 19, 1997, after the enactment of the AEDPA.

Barnes v Elo

231 F.3d 1025 (6th Cir. 2000)

Stewart Barnes, Petitioner-Appellant,

v.

Frank Elo, Respondent-Appellee.

No. 99-1784

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Argued: October 24, 2000

Decided and Filed: November 9, 2000

Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor. No. 97-60150--George C. Steeh, District Judge.[Copyrighted Material Omitted]

Kenneth P. Tableman, Lansing, Michigan, Stewart Barnes, Jackson, Michigan, for Appellant.

Vincent J. Leone, ASSISTANT ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

Before: MARTIN, Chief Judge; NORRIS, Circuit Judge; FORESTER, District Judge*.

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

Stewart Barnes, a state prisoner, appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on the grounds that he received ineffective assistance of counsel in violation of the Sixth Amendment. For the following reasons, we vacate the ruling of the district court and remand for a hearing on the competence of Barnes's trial counsel.

I.

Barnes was convicted on the eyewitness testimony of the then twelve-year old complainant. The complainant testified that after going to bed around 3:30 a.m. on July 29, 1990, she was awakened by an unidentified man kissing the side of her face. After a struggle, the suspect ran down the stairs and out of the house. The complainant's mother also testified to seeing a man running down the stairs and out the door. Although both the complainant and her mother ran after the suspect, they were unable to catch him. The initial report given by the complainant did not state that the suspect had a limp, but on a later occasion the complainant told an officer that her assailant had a limp.

At the bench trial, the parties stipulated that Barnes suffers from post-polio syndrome and wears a brace on his leg. This was the only medical evidence presented at trial. Barnes's trial counsel filed an alibi notice, but no alibi witness testified at trial. Barnes was convicted of breaking and entering with intent to commit criminal sexual conduct, assault with intent to commit second degree criminal sexual conduct, and felonious assault. He was sentenced to concurrent terms of six to fifteen years on the breaking and entering, three to five years on the assault with intent to commit second degree criminal sexual conduct, and two and a half to four years on the felonious assault.

After his conviction, Barnes made a timely motion to remand for an evidentiary hearing, known in Michigan as a Ginther hearing[1] , claiming ineffective assistance of trial counsel for failure to call medical witnesses to testify to Barnes's inability to run and failure to call two alibi witnesses. Although the record is not entirely clear, it appears that Barnes did submit supporting medical reports by Dr. William Waring, Barnes's treating physician. On September 7, 1993, two weeks after the due date, Barnes's appellate counsel filed a supplement to the motion to remand consisting of an affidavit from Dr. Waring which stated that he had not been contacted by Barnes's trial counsel, that he would have been available to testify, and that he would have testified that Barnes was physically unable to run down the stairs and out the door as the complainant testified her assailant had done. The Michigan Court of Appeals denied the order to remand "for failure to persuade the court of the necessity of a remand at this time," People v. Barnes, No. 153885 (Mich. Ct. App. Sept. 28, 1993), and the Michigan Supreme Court denied leave to appeal this order. People v. Barnes, No. 97871 (Mich. Mar. 29, 1994). It is unclear whether either courtconsidered Dr. Waring's affidavit in denying Barnes an evidentiary hearing.

The Michigan Court of Appeals denied Barnes's direct appeal of his conviction, stating that despite the fact that a Ginther hearing was not held, Barnes was not denied effective assistance of counsel at trial. People v. Barnes, No. 153885 (Mich. Ct. App. Mar.

2, 1995). The court continued that while Barnes "was given the opportunity to file an affidavit [to support his motion to remand]. . . [he] failed to avail himself of this opportunity" and therefore "there is no evidence properly before this [c]ourt to affirmatively support defendant's claim that he is incapable of running." Barnes filed a timely motion for a rehearing, stating in part that Dr. Waring's affidavit was filed as a supplement to the motion to remand, but rehearing was denied by the Michigan Court of Appeals and the Michigan Supreme Court.

On June 9, 1999 the district court denied Barnes's petition for a writ of habeas corpus. Agreeing that trial counsel was not ineffective, the district court merely noted that Dr. Waring's affidavit arrived after the deadline and stated that "[t]here is no indication . . . that the court of appeals did not consider Dr. Waring's affidavit when ruling on [Barnes's] appeal." The district court continued that because the court of appeals had the affidavit when it denied the motion for rehearing, "the court of appeal's [sic] ruling was not a [sic] unreasonable application of clearly established federal law."

II.

A.

Because ineffective assistance of counsel is a mixed question of law and fact, the state court's determination that Barnes received effective assistance of counsel is reviewed de novo. See Sims v. Livesay, 970 F.2d 1575, 1579 (6th Cir. 1992). District court findings of fact are reviewed for clear error. See Carter v. Sowders, 5 F.3d 975, 978 (6th Cir. 1993).

Federal habeas review of the state court's decision is governed by the standards set forth in the Antiterrorism & Effective Death Penalty Act of 1996. The Act applies to this case because Barnes filed his habeas corpus petition after the effective date of the Act. See Lindh v. Murphy, 521 U.S. 320 (1997). Section 2254(d) of the Act provides, in relevant part, that a federal court shall not grant a petition for a writ of habeas corpus unless the state court adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). This section applies to mixed questions of law and fact. See Harpster v. Ohio, 128 F.3d 322, 326 (6th Cir. 1997).

Williams v. Taylor clarified that an "unreasonable application" occurs when "the state court identifies the correct legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Williams v. Taylor, 120 S.Ct. 1495, 1523 (2000). The inquiry is "whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 1521. Additionally, we may only look to decisions of the Supreme Court of the United States when determining "clearly established federal law." Williams v. Taylor, 120 S.Ct. at 1523; Harris v. Stoval, 212 F.3d 940, 944 (6th Cir. 2000) (noting that "it was error for the district court to rely on authority other than that of the Supreme Court of the United States in its analysis under section 2254(d)").

The standards for determining claims of ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984), are clearly established federal law. See Williams v. Taylor, 529 U.S. 362 at___, 120 S.Ct. at 1512. Strickland requires a defendant to show that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense such that the defendant was denied a fair trial. Strickland, 466 U.S. at 687. Scrutiny must be highly deferential, and we must indulge the presumption that trial counsel provided reasonable professional assistance. Id at 689.

B.

Barnes argues that he was denied effective assistance of counsel by his trial attorney's failure to investigate or call a medical witness to establish Barnes's inability to run in the manner that the complainant testified her assailant had run. It is unclear from the record whether or to what extent trial counsel investigated Barnes's medical condition, and why he failed to contact Dr. Waring. Absent an evidentiary hearing and clear finding of fact, it is impossible to determine whether trial counsel's failure to investigate and call Dr. Waring was sound trial strategy, see Strickland, 466 U.S. at 690-91 ("Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."), or was constitutionally deficient performance. See id. at 691 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."). Given Dr. Waring's ability to testify that Barnes was incapable of running as the complainant described, he certainly would have been an essential witness. Without an evidentiary hearing, we cannot meaningfully review whether the Michigan state courts' determination that Barnes's trial counsel was not ineffective for failing to call a medical witness was an unreasonable application of Strickland.

III.

Because Barnes never received an evidentiary hearing and consequently the record before us fails to clarify facts central to the determination of whether the adjudication of Barnes's claim by the Michigan state courts "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court," we VACATE the ruling of the district court and REMAND for a hearing on the competency of Barnes's trial counsel.

Bronaugh v Ohio

235 F.3d 280 (6th Cir. 2000)

D'Juan Bronaugh, Petitioner-Appellant,

v.

State of Ohio, Respondent-Appellee.

No. 99-3886

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Argued: September 20, 2000

Decided and Filed: December 19, 2000

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 98-00549, S. Arthur Spiegel, District Judge.

Paul Mancino, Jr., MANCINO, MANCINO & MANCINO, Cleveland, Ohio, for Appellant.

Stuart A. Cole, Assistant Attorney General, Office of the Attorney General, Corrections Litigation Section, Columbus, OH, Laurence R. Snyder, OFFICE OF THE ATTORNEY GENERAL OF OHIO, CORRECTIONS LITIGATION SECTION, Cleveland, Ohio, for Appellee.

Before: JONES and MOORE , Circuit Judges; MATIA , Chief District Judge*.

MOORE, J., delivered the opinion of the court, in which JONES, J., joined. MATIA, D. J., concurred in the judgment only.

OPINION

KAREN NELSON MOORE, Circuit Judge.

D'Juan Bronaugh, an Ohio prisoner who was convicted of aggravated murder in 1995, appeals the federal district court's dismissal of his petition for habeas corpus relief as time-barred under the one-year statute of limitations of 28 U.S.C. §2244(d). Bronaugh filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 that was ultimately transferred to the U.S. District Court for the Southern District of Ohio. Bronaugh raised nine claims in his habeas petition, including ineffective assistance of trial and appellate counsel and several claims alleging that his due process right to a fair trial was violated. Respondent, the State of Ohio ("State"), moved to dismiss Bronaugh's petition as both procedurally defaulted and time-barred. While the district court did not agree that Bronaugh had procedurally defaulted his claims at the state court level, it granted the State's motion to dismiss on the grounds that Bronaugh's habeas petition was filed beyond the one-year statute of limitations of §2244(d)1 As part of the district court's order dismissing Bronaugh's habeas petition as untimely, the court granted a certificate of appealability "solely with respect to the issue addressed in this order as to whether the instant habeas corpus petition is barred from review under Sec. 2244(d)." Joint Appendix ("J.A.") at 192 (District Court's Order Dismissing Habeas Petition). Thus, this court will only address the question of whether Bronaugh's habeas petition was timely filed. For the reasons set forth below, weREVERSE the district court's holding that

Bronaugh's habeas petition is barred by the one-year statute of limitations set forth in §2244(d), and REMAND to that court for further proceedings.

I. BACKGROUND

On June 3, 1994, a Hamilton County, Ohio grand jury returned an indictment charging D'Juan Bronaugh with one count of aggravated murder with a firearm specification. On May 3, 1995, a jury found Bronaugh guilty of aggravated murder with a firearm specification and he was sentenced to life imprisonment. The Ohio Court of Appeals affirmed his conviction on April 24, 1996.

Following the judgment of the court of appeals, Bronaugh's appointed counsel failed to make a timely appeal to the Supreme Court of Ohio because his appeal omitted a copy of the court of appeals opinion and the judgment entry being appealed, as required by Ohio Sup. Ct. R. III, §1(D). Following the Ohio Supreme Court's denial of his subsequent motion for delayed appeal, Bronaugh filed in the state court of appeals an application to reopen his direct appeal due to ineffective assistance of appellate counsel pursuant to Ohio R. App. P. 26(B)2. The Ohio Court of Appealsdenied Bronaugh's application as untimely, stating that he did not show good cause for filing his application more than ninety days after journalization of that court's judgment, as required by Rule 26(B). The Supreme Court of Ohio dismissed Bronaugh's appeal of the denial of his Rule 26(B) application as "not involving any substantial constitutional question." J.A. at 178.

The timing of various events in this case's complicated procedural history is vital to determining whether Bronaugh's habeas petition is timely under §2244(d). Those events are detailed in the following procedural timeline:

May 3, 1995: Bronaugh is sentenced after being found guilty of aggravated murder with a firearm specification.

April 24, 1996: Ohio Court of Appeals affirms Bronaugh's conviction.

June 10, 1996: Bronaugh's time for filing an appeal to the Supreme Court of Ohio expires.

June 19, 1996: Bronaugh files in the Supreme Court of Ohio a motion for delayed appeal.

July 31, 1996: Supreme Court of Ohio denies motion for delayed appeal.

April 7, 1997: Bronaugh files in the Ohio Court of Appeals a Rule 26(B) application to reopen his direct appeal.

October 21, 1997:Ohio Court of Appeals denies Bronaugh's application to reopen his appeal, stating that he did not show good cause for filing his application more than ninety days after the Court of Appeals's judgment was first journalized.

December 2, 1997: Bronaugh appeals the denial of his Rule 26(B) application to the Supreme Court of Ohio.

January 28, 1998: Supreme Court of Ohio dismisses Bronaugh's appeal of his Rule 26(B) application.

June 30, 1998: Bronaugh files petition for habeas corpus relief in the U.S. District Court for the Northern District of Ohio. Bronaugh's petition is transferred to the Southern District of Ohio on July 28, 1998.

November 4, 1998: State of Ohio files motion to dismiss Bronaugh's habeas corpus petition.

December 8, 1998: District court grants State's motion to dismiss on the grounds that Bronaugh's petition was filed outside the one-year statute of limitations as imposed by §2244(d).

Bronaugh then appealed the district court's dismissal of his habeas corpus petition to this court.

II. ANALYSIS

This court reviews a district court's disposition of a habeas corpus petition de novo. See Harris v. Stovall, 212 F.3d 940, 941 (6th Cir. 2000). Because Bronaugh's habeas petition was filed after the Antiterrorism and Effective Death Penalty Act (AEDPA) became effective on April 24, 1996, the provisions of that act apply to this case. AEDPA states that a "1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." 28 U.S.C. §2244(d)(1). The statute of limitations begins to run from the latest of four circumstances, one of which is the "date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. §2244(d)(1)(A). The one-year period of limitations is tolled, however, for that amount of time in which "a properly filed application for State post-convictionor other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. §2244(d)(2).

Whether Bronaugh's petition for federal habeas corpus is timely hinges, in part, on when the one-year statute of limitations under §2244(d) first begins to run. This circuit has recently decided in Isham v. Randle, 226 F.3d 691, 694-95 (6th Cir. 2000), that, under §2244(d)(1)(A), the one-year statute of limitations does not begin to run until the time for filing a petition for a writ of certiorari for direct review in the United States Supreme Court has expired[3]. A criminal defendant has only ninety days following the entry of judgment by the "state court of last resort" in which to file a petition for a writ of certiorari. Sup. Ct. R. 13.

In this case, the State contends that the last day on which Bronaugh could file an appeal of his conviction to the Supreme Court of Ohio was June 10, 1996. See Appellee's Br. at 16. It was on June 10, 1996 that Bronaugh's appointed counsel filed an appeal with the Ohio Supreme Court, only to have it rejected by that court's assignment clerk for failure to comply with the court's administrative requirement that a copy of the court of appeals opinion and judgment entry being appealed be included in the filing. See Ohio

Sup. Ct. R. III, §1(D). The United States Supreme Court, pursuant to 28 U.S.C. §1257(a), only has jurisdiction over those state court cases in which final judgments or decrees have been rendered "by the highest court of a State in which a decision could be had." The U.S. Supreme Court has held in a previous case that a similar action by the Clerk of the Supreme Court of Ohio, who refused to file an appeal when the petitioner failed to include the mandatory docket and filing fees, constituted a final judgment over which the U.S. Supreme Court could assert its jurisdiction pursuant to 28 U.S.C. §12574. See Burnsv. Ohio, 360 U.S. 252, 256-57 (1959). Thus, if, as the State contends, Bronaugh's time for filing an appeal to the Supreme Court of Ohio expired on June 10, 1996, and further assuming that the assignment clerk of the Ohio Supreme Court rejected Bronaugh's appeal on this same day,5 then the ninety-day period in which to petition for a writ of certiorari with the United States Supreme Court would begin to run on June 11, 19966. See Sup. Ct. R. 30 (stating that, in calculating the ninety-day window in which to file a petition for a writ of certiorari, "the day of the act, event, or default from which the designated period begins to run is not included"). Bronaugh's ninety-day window in which to file a petition for a writ of certiorari in the United States Supreme Court ended on Sunday, September 8, 1996, yet Supreme Court Rule 30 also states that the last day of the filing period shall be included unless it is a Saturday, Sunday, or federal legal holiday. Thus, the last day on which Bronaugh could have filed a petition for a writ of certiorari in the United States Supreme Court was Monday, September 9, 1996. See Sup. Ct. R. 30.

If the last day on which Bronaugh could petition for a writ of certiorari was September 9, 1996, the next question this court must address is whether §2244(d)'s one-year statute of limitations begins to run on the very same day, or not until the following day, September 10, 1996. We will follow this circuit's unpublished opinion in Gould v. Jackson, No. 98-1743, 2000 WL 303002, at *1 (6th Cir. Mar. 14, 2000), as well as the decisions of several other circuits addressing the question, in applying Federal Rule of Civil Procedure 6(a)'s standards for computing periods of time to §2244(d)'s one-year statute of limitations. See Hernandez v. Caldwell, 225 F.3d 435, 439 (4th Cir. 2000); Flanagan v. Johnson, 154 F.3d 196, 200-02 (5th Cir. 1998); Ross v. Artuz, 150 F.3d 97, 103 (2d Cir. 1998). See also United States v. Marcello, 212 F.3d 1005, 1009-10 (7th Cir. 2000) (applying Rule 6(a) to 28 U.S.C. §2255's one-year statute of limitations); Rogers v. United States, 180 F.3d 349, 355 & n.13 (1st Cir. 1999) (same); Moore v. United States, 173 F.3d 1131, 1132-35 (8th Cir. 1999) (same). Rule 6(a) states that "[i]n computing any period of time prescribed or allowed by these rules, ... or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included." In Gould, 2000 WL 303002, at *1, as well as in the decisions of the other circuits, Rule 6(a) was applied so as to start §2244(d)'s statute of limitations on April 25, 1996, the day after AEDPA became effective, thus giving prisoners convicted before the effective date of AEDPA untilApril 24, 1997 to file a petition for federal habeas corpus relief, assuming there was no tolling. See Hernandez, 225 F.3d at 439; Flanagan, 154 F.3d at 200-02; Ross, 150 F.3d at 103; Marcello, 212 F.3d at 1009-10; Rogers, 180 F.3d at 355 & n.13; Moore, 173 F.3d at 1132-35.

Now we will apply the principles of Rule 6(a) to this case. As stated above, the last day on which Bronaugh could have filed a petition for a writ of certiorari in the United States

Supreme Court was September 9, 1996. Section 2244(d)(1)(A)'s one-year statute of limitations begins to run at the "expiration of the time for seeking" direct review, which is September 9, 1996, and because Rule 6(a) states that "the day of the act, event, or default from which the designated period of time begins to run shall not be included[,]" Bronaugh's one-year statute of limitations began to run on September 10, 1996. If nothing tolled Bronaugh's statute of limitations, the last day on which he could have filed for habeas relief would have been September 9, 1997. See Fed. R. Civ. P. 6(a). Bronaugh, however, did not file his petition for habeas relief with the district court until June 30, 1998. Thus, the question of whether Bronaugh's Rule 26(B) application to reopen direct appeal tolled §2244(d)'s statute of limitations is crucial to determining the timeliness of his habeas petition.

The State argues that we should consider Bronaugh's Rule 26(B) application to reopen direct appeal as a form of post-conviction or collateral review. See Appellee's Br. at 20. If treated as a form of post-conviction or other collateral review, then this court, under §2244(d)(2), must ask whether Bronaugh "properly filed" his Rule 26(B) application so as to toll the one-year statute of limitations under §2244(d)(1)[7]. See §2244(d)(2). The State claims that, because Bronaugh failed to comply with Ohio R. App. P. 26(B) by filing his application to reopen direct appeal more than ninety days after the journalization of the Ohio Court of Appeals's judgment affirming his conviction, and because he failed to show good cause for filing late, Bronaugh's application to reopen his appeal was not "properly filed" as required under §2244(d)(2)[8]. If not properly filed, the State argues, then the time spent from the filing of the Rule 26(B) application with the Ohio Court of Appeals until it was denied by the Supreme Court of Ohio cannot toll the one-year period of limitations. See Appellee's Br. at 20-23.

If a Rule 26(B) application to reopen direct appeal is considered part of the direct review process, however, then there is no need to analyze whether it is a "properly filed application for State post-conviction or other collateral review." §2244(d)(2). Instead, if a Rule 26(B) application is part of the direct appeal, then §2244(d)(1)(A) is the relevant limitations provision. Moreover, because §2244(d)(1)(A) states that the one-year period of limitations should not run until the "conclusion of direct review[,]" the statute of limitations could not continue to run while a defendant's Rule 26(B) application to reopen direct appeal was being considered by the Ohio appellate courts.

This court's classification of Rule 26(B) applications is controlled by the recent Sixth Circuit precedent of White v. Schotten, 201 F.3d 743 (6th Cir. 2000), cert. denied, 121 S. Ct. 332 (2000). In White, this circuit analyzed whether a criminal defendant was entitled to effective assistance of counsel through the course of filing a Rule 26(B)application for ineffective assistance of appellate counsel. See id. at 752-53. The court reasoned that, because Ohio courts did not consider an attack on the adequacy of appellate counsel to be proper in a state habeas proceeding, see State v. Murnahan, 584 N.E.2d 1204, 1208 (Ohio 1992), a Rule 26(B) application claiming ineffective assistance of appellate counsel must still be a part of the activities related to the direct appeal itself. See White, 201 F.3d at 752-53. Thus, the court explained that if a Rule 26(B) application was part of the direct appeal, then the defendant still has a right to effective assistance of counsel "throughout all phases of that stage." Id. at 753.

We follow the White court's express holding that Rule 26(B) applications to reopen direct appeal are part of the direct appeal process9. See id. Given the clear statement in White that 26(B) applications are part of direct review, a discussion of whether an untimely Rule 26(B) application is a "properly filed" application for post-conviction relief is unnecessary. Instead, because §2244(d)(1)(A) states that the one-year period of limitations will not run until the "conclusion of direct review[,]" and because we have held in White that Rule 26(B) applications are part of direct review, the statute of limitations should not run during the time in which Bronaugh's Rule 26(B) application was pending in the Ohio courts. It is important to note that Bronaugh will not be able to benefit from his delay in bringing a Rule 26(B) application to reopen direct appeal by requesting that §2244(d)(1)(A)'s one-year statute of limitations not begin until after his Rule 26(B) application has run its course through the courts. Instead, the statute of limitations is tolled only for that period of time in which the Rule 26(B) application is actually pending in the Ohio courts10.

With this in mind, we now specifically examine the timeliness of Bronaugh's federal habeas corpus petition. As discussed earlier, because §2244(d)(1)(A)'s one-year statute of limitations does not begin to run until after the time for seeking a writ of certiorari from the United States Supreme Court has expired, Bronaugh's one-year period of limitations did not begin to run until September 10, 1996. A total of 209 days passed from September 10, 1996 to April 7, 1997 before Bronaugh filed his Rule 26(B) application to reopen his direct appeal with the Ohio Court of Appeals. All of that time is counted toward his one-year period of limitations. After the Ohio Court of Appeals denied Bronaugh's application, he appealed that denial to the Supreme Court of Ohio. The Ohio Supreme Court dismissed his appeal on January 28, 1998. On January 29, 1998, the one-year period of limitations began to run again. See Fed. R. Civ. P. 6(a). From January 29, 1998 to June 30, 1998, the date Bronaugh filed his federal habeas petition, a total of 153 days passed. Thus, after tolling that period of time in which Bronaugh's Rule 26(B) application to reopen direct appealwas considered by the Ohio courts, only 362 days passed between the completion of direct review and the filing of Bronaugh's federal habeas corpus petition. This meets the one-year (365-day) statute of limitations in §2244(d)(1)(A), and Bronaugh's habeas corpus petition is timely.

III. CONCLUSION

For the foregoing reasons, we REVERSE the district court's order dismissing Bronaugh's habeas petition as untimely under §2244(d), and REMAND to that court for further proceedings.

Notes:

The Honorable Paul R. Matia, Chief United States District Judge for the Northern District of Ohio, sitting by designation.

The district court, following the State's motion to amend the district court's judgment on the issue of procedural default, vacated its order denying the State's motion to dismiss on procedural default grounds, but still refused to grant the State's motion to dismiss

on the grounds of procedural bar. Instead, the court relied solely on its prior holding that Bronaugh's habeas petition was time-barred as the basis of its dismissal.

Ohio R. App. P. 26(B)(1) states:

A defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel. An application for reopening shall be filed in the court of appeals where the appeal was decided within ninety days from journalization of the appellate judgment unless the applicant shows good cause for filing at a later time.

In Isham, the court held that, when seeking post-conviction relief under §2244(d)(2), the one-year period of limitations is not tolled during that "time in which a defendant could have potentially filed a petition for certiorari with the United States Supreme Court [ ] following a state court's denial of post-conviction relief." Isham, 226 F.3d at 695. In arriving at this conclusion, the court compared the language of §2244(d)(1)(A), the provision dealing with when the statute of limitations should begin to run following direct review, with the language of the post-conviction provision, §2244(d)(2). The court noted that §2244(d)(1)(A) states that the one-year statute of limitations "begins to run on 'the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.'" Id.(quoting §2244(d)(1)(A)). The court, acknowledging that other courts have concluded this language to mean that the statute of limitations should not run following direct review until after the time for petitioning for a writ of certiorari with the United States Supreme Court has expired, stated that, because §2244(d)(2) did not contain similar language to §2244(d)(1)(A), it was "clear that Congress intended to exclude potential Supreme Court review as a basis for tolling the one year limitations period" during post-conviction proceedings. Id.

Even if we assume that the United States Supreme Court would hold that the Ohio Supreme Court's filing requirements constitute an adequate and independent state procedural ground that precludes it from hearing Bronaugh's appeal, Bronaugh would still have the right to petition for a writ of certiorari with the United States Supreme Court to challenge whether this rule is indeed independent and adequate to support the judgment without consideration of any federal questions. The Supreme Court has held consistently that the determination of whether a state procedural ground is adequate and independent to support a state court judgment is a federal question that the Supreme Court itself must decide. See Henry v. Mississippi, 379 U.S. 443, 447 (1965); Abie State Bank v. Weaver, 282 U.S. 765, 773 (1931). The Supreme Court has also stated that the procedural grounds used by state courts to dispose of cases will "not prevent vindication of [ ] federal rights unless the State's insistence on compliance with its procedural rule[s] serve[] a legitimate state interest." Henry, 379 U.S. at 447. The Supreme Court, in reviewing a case dismissed due to a procedural violation similar to that in Bronaugh's case, granted a petition for a writ of certiorari and held that, even though petitioners failed to certify the circuit court record, as required by Florida court rules, when they submitted it with an otherwise timely petition for a writ of certiorari in the Florida District Court of Appeals, this procedural ground was not adequate to bar the United States Supreme Court from reviewing the case. See Parrot v. City of

Tallahassee, 381 U.S. 129 (1965). Thus, because Bronaugh could challenge in a petition for a writ of certiorari the adequacy and independence of the state procedural ground invoked to prevent his otherwise timely appeal, the one-year statute of limitations in §2244(d)(1)(A) should not begin to run until expiration of the ninety-day period in which he could have petitioned for a writ of certiorari.

The assignment clerk's letter notifying Bronaugh's counsel of the defective appeal was dated June 11, 1996.

We assume, without deciding, that the ninety-day period in which to petition for a writ of certiorari in the United States Supreme Court began the day after Bronaugh's counsel failed to file a timely appeal to the Supreme Court of Ohio, as opposed to the day after Bronaugh's motion for delayed appeal was denied by the Ohio Supreme Court. As will be discussed in more detail below, whether the ninety-day period began to run on the day after Bronaugh's appeal to the Supreme Court of Ohio was determined defective (June 11, 1996), or on the day after the Supreme Court of Ohio denied his motion for delayed appeal (August 1, 1996), so long as the time during which his Rule 26(B) application was filed and appealed is tolled, Bronaugh's habeas petition would be timely.

Section 2244(d)(2) states that "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."

Bronaugh's conviction was affirmed by the Ohio Court of Appeals on April 24, 1996. He failed to file his Rule 26(B) application until April 7, 1997.

Under 6th Cir. R. 206, published panel opinions are binding on all subsequent panels. To the extent this circuit's unpublished order in Morgan v. Money, No. 99-3251, 2000 WL 178421 (6th Cir. Feb. 8, 2000), contradicts White's holding, it is not binding on this court. Nor does the dicta in Scott v. Mitchell, 209 F.3d 854, 862 (6th Cir. 2000), labeling Rule 26(B) applications as post-conviction proceedings, reduce the precedential force of White. In Isham, 226 F.3d at 693-94, the defendant argued that his Rule 26(B) application, although untimely, was a properly filed application for state post-conviction review under §2244(d)(2). The Isham court, given the facts of that case, found it unnecessary to address the issue of whether the defendant's Rule 26(B) application was properly filed, nor was it necessary for the court to address whether Rule 26(B) applications are a part of the direct appeal. See id. Of course, the Isham court was also bound by the earlier White decision.

We assume, without deciding, that Bronaugh cannot toll §2244(d)(1)(A)'s statute of limitations for an additional ninety days in which to file a petition for a writ of certiorari in the United States Supreme Court following the Ohio Supreme Court's denial of his Rule 26(B) application.

hambers v Mississippi

410 U.S. 284

93 S.Ct. 1038

35 L.Ed.2d 297

Leon CHAMBERS, Petitioner,

v.

State of MISSISSIPPI.

No. 71—5908.

Argued Nov. 15, 1972.

Decided Feb. 21, 1973.

Syllabus

After petitioner was arrested for murder, another person (McDonald) made, but later repudiated, a written confession. On three separate occasions, each time to a different friend, McDonald orally admitted the killing. Petitioner was convicted of the murder in a trial that he claimed was lacking in due process because petitioner was not allowed to (1) cross-examine McDonald (whom petitioner had called as a witness when the State failed to do so), since under Mississippi's common-law 'voucher' rule a party may not impeach his own witness, or (2) introduce the testimony of the three persons to whom McDonald had confessed, the trial court having ruled their testimony inadmissible as hearsay. The Mississippi Supreme Court affirmed. Held: Under the facts and circumstances of this case, petitioner was denied a fair trial, in violation of the Due Process Clause of the Fourteenth Amendment. Pp. 294—303.

(a) The application of the 'voucher' rule prevented petitioner, through cross-examination of McDonald, from exploring the circumstances of McDonald's three prior oral confessions and challenging his renunciation of the written confession, and thus deprived petitioner of the right to contradict testimony that was clearly 'adverse.' Pp. 295—298.

(b) The trial court erred in excluding McDonald's hearsay statements, which were critical to petitioner's defense and which bore substantial assurances of trustworthiness, including that each was made spontaneously to a close acquaintance, that each was corroborated by other evidence in the case, that each was in a real sense against McDonald's interest, and that McDonald was present and available for cross-examination by the State. Pp. 298 303.

Miss., 252 So.2d 217, reversed and remanded.

Peter Westen for petitioner, pro hac vice, by special leave of Court.

Timmie Hancock, Meadville, Miss., for respondent.

Mr. Justice POWELL delivered the opinion of the Court.

Petitioner, Leon Chambers, was tried by a jury in a Mississippi trial court and convicted of murdering a policeman. The jury assessed punishment at life imprisonment, and the Mississippi Supreme Court affirmed, one justice dissenting. 252 So.2d 217 (1971). Pending disposition of his application for certiorari to this Court, petitioner was granted bail by order of the Circuit Justice, dated February 1, 1972. Two weeks later, on the State's request for reconsideration, that order was reaffirmed. 405 U.S. 1205, 92 S.Ct. 751, 30 L.Ed.2d 773 (1972). Subsequently, the petition for certiorari was granted, 405 U.S. 987, 92 S.Ct. 1272, 31 L.Ed.2d 453 (1972), to consider whether petitioner's trial was conducted in accord with principles of due process under the Fourteenth Amendment. We conclude that it was not.

* The events that led to petitioner's prosecution for murder occurred in the small town of Woodville in southern Mississippi. On Saturday evening, June 14, 1969, two Woodville policemen, James Forman and Aaron 'Sonny' Liberty, entered a local bar and pool hall to execute a warrant for the arrest of a youth named C. C. Jackson. Jackson resisted and a hostile crowd of some 50 or 60 persons gathered. The officers' first attempt to handcuff Jackson was frustrated when 20 or 25 men in the crowd intervened and wrestled him free. Forman then radioed for assistance and Liberty removed his riot gun, a 12-gauge sawed-off shotgun, from the car. Three deputy sheriffs arrived shortly thereafter and the officers again attempted to make their arrest. Once more, the officers were attacked by the onlookers and during the commotion five or six pistol shots were fired. Forman was looking in a different direction when the shooting began, but immediately saw that Liberty had been shot several times in the back. Before Liberty died, he turned around and fired both barrels of his riot gun into an alley in the area from which the shots appeared to have come. The first shot was wild and high and scattered the crowd standing at the face of the alley. Liberty appeared, however, to take more deliberate aim before the second shot and hit one of the men in the crowd in the back of the head and neck as he ran down the alley. That man was Leon Chambers.

Officer Forman could not see from his vantage point who shot Liberty or whether Liberty's shots hit anyone. One of the deputy sheriffs testified at trial that he was standing several feet from Liberty and that he saw Chambers shoot him. Another deputy sheriff stated that, although he could not see whether Chambers had a gun in his hand, he did see Chambers 'break his arm down' shortly before the shots were fired. The officers who saw Chambers fall testified that they thought he was dead but they made no effort at that time either to examine him or to search for the murder weapon. Instead, they attended to Liberty, who was placed in the police car and taken to a hospital where he was declared dead on arrival. A subsequent autopsy showed that he had been hit with four bullets from a .22-caliber revolver.

Shortly after the shooting, three of Chambers' friends discovered that he was not yet dead. James Williams,[1] Berkley Turner, and Gable McDonald loaded him into a car and

transported him to the same hospital. Later that night, when the county sheriff discovered that Chambers was still alive, a guard was placed outside his room. Chambers was subsequently charged with Liberty's murder. He pleaded not guilty and has asserted his innocence throughout.

The story of Leon Chambers is intertwined with the story of another man, Gable McDonald. McDonald, a lifelong resident of Woodville, was in the crowd on the evening of Liberty's death. Sometime shortly after that day, he left his wife in Woodville and moved to Louisiana and found a job at a sugar mill. In November of that same year, he returned to Woodville when his wife informed him that an acquaintance of his, known as Reverend Stokes, wanted to see him. Stokes owned a gas station in Natchez, Mississippi, several miles north of Woodville, and upon his return McDonald went to see him. After talking to Stokes, McDonald agreed to make a statement to Chambers' attorneys, who maintained offices in Natchez. Two days later, he appeared at the attorneys' offices and gave a sworn confession that he shot Officer Liberty. He also stated that he had already told a friend of his, James Williams, that he shot Liberty. He said that he used his own pistol, a nine-shot .22-caliber revolver, which he had discarded shortly after the shooting. In response to questions from Chambers' attorneys, McDonald affirmed that his confession was voluntary and that no one had compelled him to come to them. Once the confession had been transcribed, signed, and witnessed, McDonald was turned over to the local police authorities and was placed in jail.

One month later, at a preliminary hearing, McDonald repudiated his prior sworn confession. He testified that Stokes had persuaded him to confess that he shot Liberty. He claimed that Stokes had promised that he would not go to jail and that he would share in the proceeds of a lawsuit that Chambers would bring against the town of Woodville. On examination by his own attorney and on cross-examination by the State, McDonald swore that he had not been at the scene when Liberty was shot but had been down the street drinking beer in a cafe with a friend, Berkley Turner. When he and Turner heard the shooting, he testified, they walked up the street and found Chambers lying in the alley. He, Turner, and Williams took Chambers to the hospital. McDonald further testified at the preliminary hearing that he did not know what had happened, that there was no discussion about the shooting either going to or coming back from the hospital, and that it was not until the next day that he learned the Chambers had been felled by a blast from Liberty's riot gun. In addition, McDonald stated that while he once owned a .22-caliber pistol he had lost it many months before the shooting and did not own or possess a weapon at that time. The local justice of the peace accepted McDonald's repudiation and released him from custody. The local authorities undertook no further investigation of his possible involvement.

Chambers' case came on for trial in October of the next year.[2] At trial, he endeavored to develop two grounds of defense. He first attempted to show that he did not shoot Liberty. Only one officer testified that he actually saw Chambers fire the shots. Although three officers saw Liberty shoot Chambers and testified that they assumed he was shooting his attacker, none of them examined Chambers to see whether he was still alive or whether he possessed a gun. Indeed, no weapon was ever recovered from the

scene and there was no proof that Chambers had ever owned a .22-caliber pistol. One witness testified that he was standing in the street near where Liberty was shot, that he was looking at Chambers when the shooting began, and that he was sure that Chambers did not fire the shots.

Petitioner's second defense was that Gable McDonald had shot Officer Liberty. He was only partially successful, however, in his efforts to bring before the jury the testimony supporting this defense. Sam Hardin, a lifelong friend of McDonald's, testified that he saw McDonald shoot Liberty. A second witness, one of Liberty's cousins, testified that he saw McDonald immediately after the shooting with a pistol in his hand. In addition to the testimony of these two witnesses, Chambers endeavored to show the jury that McDonald had repeatedly confessed to the crime. Chambers attempted to prove that McDonald had admitted responsibility for the murder on four separate occasions, once when he gave the sworn statement to Chambers' counsel and three other times prior to that occasion in private conversations with friends.

In large measure, he was thwarted in his attempt to present this portion of his defense by the strict application of certain Mississippi rules of evidence. Chambers asserts in this Court, as he did unsuccessfully in his motion for new trial and on appeal to the State Supreme Court, that the application of these evidentiary rules rendered his trial fundamentally unfair and deprived him of due process of law.[3] It is necessary, therefore, to examine carefully the rulings made during the trial.

II

Chambers filed a pretrial motion requesting the court to order McDonald to appear. Chambers also sought a ruling at that time that, if the State itself chose not to call McDonald, he be allowed to call him as an adverse witness. Attached to the motion were copies of McDonald's sworn confession and of the transcript of his preliminary hearing at which he repudiated that confession. The trial court granted the motion requiring McDonald to appear but reserved ruling on the adverse-witness motion. At trial, after the State failed to put McDonald on the stand, Chambers called McDonald, laid a predicate for the introduction of his sworn out-of-court confession, had it admitted into evidence, and read it to the jury. The State, upon cross-examination, elicited from McDonald the fact that he had repudiated his prior confession. McDonald further testified, as he had at the preliminary hearing, that he did not shoot Liberty, and that he confessed to the crime only on the promise of Reverend Stokes that he would not go to jail and would share in a sizable tort recovery from the town. He also retold his own story of his actions on the evening of the shooting, including his visit to the cafe down the street, his absence from the scene during the critical period, and his subsequent trip to the hospital with Chambers.

At the conclusion of the State's cross-examination, Chambers renewed his motion to examine McDonald as an adverse witness. The trial court denied the motion, stating: 'He may be hostile, but he is not adverse in the sense of the word, so your request will be overruled.' On appeal, the State Supreme Court upheld the trial court's ruling,

finding that 'McDonald's testimony was not adverse to appellant' because '(n)owhere did he point the finger at Chambers.' 252 So.2d, at 220.

Defeated in his attempt to challenge directly McDonald's renunciation of his prior confession, Chambers sought to introduce the testimony of the three witnesses to whom McDonald had admitted that he shot the officer. The first of these, Sam Hardin, would have testified that, on the night of the shooting, he spent the late evening hours with McDonald at a friend's house after their return from the hospital and that, while driving McDonald home later that night, McDonald stated that he shot Liberty. The State objected to the admission of this testimony on the ground that it was hearsay. The trial court sustained the objection.4

Berkley Turner, the friend with whom McDonald said he was drinking beer when the shooting occurred, was then called to testify. In the jury's presence, and without objection, he testified that he had not been in the vafe that Saturday and had not had any beers with McDonald. The jury was then excused. In the absence of the jury, Turner recounted his conversations with McDonald while they were riding with James Williams to take Chambers to the he had not been in the cafe that Saturday said anything regarding the shooting of Liberty, Turner testified that McDonald told him that he 'shot him.' Turner further stated that one week later, when he met McDonald at a friend's house, McDonald reminded him of their prior conversation and urged Turner not to 'mess him up.' Petitioner argued to the court that, especially where there was other proof in the case that was corroborative of these out-of-court statements, Turner's testimony as to McDonald's self-incriminating remarks should have been admitted as an exception to the hearsay rule. Again, the trial court sustained the State's objection.

The third witness, Albert Carter, was McDonald's neighbor. They had been friends for about 25 years. Although Carter had not been in Woodville on the evening of the shooting, he stated that he learned about it the next morning from McDonald. That same day, he and McDonald walked out to a well near McDonald's house and there McDonald told him that he was the one who shot Officer Liberty. Carter testified that McDonald also told him that he had disposed of the .22-caliber revolver later that night. He further testified that several weeks after the shooting, he accompanied McDonald to Natchez where McDonald purchased another .22 pistol to replace the one he had discarded.5 The jury wsa not allowed to hear Carter's testimony. Chambers urged that these statements were admissible, the State objected, and the court sustained the objection.6 On appeal, the State Supreme Court approved the lower court's exclusion of these witnesses' testimony on hearsay grounds. 252 So.2d, at 220.

In sum, then, this was Chambers' predicament. As a consequence of the combination of Mississippi's 'party witness' or 'voucher' rule and its hearsay rule, he was unable either to cross-examine McDonald or to present witnesses in his own behalf who would have discredited McDonald's repudiation and demonstrated his complicity. Chambers had, however, chipped away at the fringes of McDonald's story by introducing admissible testimony from other sources indicating that he had not been seen in the cafe where he said he was when the shooting started, that he had not been having beer with Turner, and that he possessed a .22 pistol at the time of the crime. But all that remained from

McDonald's own testimony was a single written confession countered by an arguably acceptable renunciation. Chambers' defense was far less persuasive than it might have been had he been given an opportunity to subject McDonald's statements to cross-examination or had the other confessions been admitted.

III

The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948), identified these rights as among the minimum essentials of a fair trial:

'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.' See also Morrissey v. Brewer, 408 U.S. 471, 488—489, 92 S.Ct. 2593, 2603—2604, 33 L.Ed.2d 484 (1972); Jenkins v. McKeithen, 395 U.S. 411, 428—429, 89 S.Ct. 1843, 1852—1853, 23 L.Ed.2d 404 (1969); Specht v. Patterson, 386 U.S. 605, 610, 87 S.Ct. 1209, 1212, 18 L.Ed.2d 326 (1967). Both of these elements of a fair trial are implicated in the present case.

A.

Chambers was denied an opportunity to subject McDonald's damning repudiation and alibi to cross-examination. He was not allowed to test the witness' recollection, to probe into the details of his alibi, or to 'sift' his conscience so that the jury might judge for itself whether McDonald's testimony was worthy of belief. Mattox v. United States, 156 U.S. 237, 242—243, 15 S.Ct. 337, 339—340, 39 L.Ed. 409 (1895). The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process.' Dutton v. Evans, 400 U.S. 74, 89, 91 S.Ct. 210, 220, 27 L.Ed.2d 213 (1970); Bruton v. United States, 391 U.S. 123, 135—137, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). It is, indeed, 'an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.' Pointer v. Texas, 380 U.S. 400, 405, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). Of course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. E.g., Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). But its denial or significant diminution calls into question the ultimate "integrity of the fact-finding process" and requires that the competing interest be closely examined. Berger v. California, 393 U.S. 314, 315, 89 S.Ct. 540, 541, 21 L.Ed.2d 508 (1969).

In this case, petitioner's request to cross-examine McDonald was denied on the basis of a Mississippi common-law rule that a party may not impeach his own witness. The rule rests on the presumption—without regard to the circumstances of the particular case—that a party who calls a witness 'vouches for his credibility.' Clark v. Lansford, 191 So.2d

123, 125 (Miss.1966). Although the historical origins of the 'voucher' rule are uncertain, it appears to be a remnant of primative English trial practice in which 'oath-takers' or 'compurgators' were called to stand behind a particular party's position in any controversy. Their assertions were strictly partisan and, quite unlike witnesses in criminal trials today, their role bore little relation to the impartial ascertainment of the facts.7

Whatever validity the 'voucher' rule may have once enjoyed, and apart from whatever usefulness it retains today in the civil trial process, it bears little present relationship to the realities of the criminal process.8 It might have been logical for the early common law to require a party to vouch for the credibility of witnesses he brought before the jury to affirm his veracity. Having selected them especially for that purpose, the party might reasonably be expected to stand firmly behind their testimony. But in modern criminal trials, defendants are rarely able to select their witnesses: they must take them where they find them. Moreover, as applied in this case, the 'voucher' rule's9 impact was doubly harmful to Chambers' efforts to develop his defense. Not only was he precluded from cross-examining McDonald, but, as the State conceded at oral argument,10 he was also restricted in the scope of his direct examination by the rule's corollary requirement that the party calling the witness is bound by anything he might say. He was, therefore, effectively prevented from exploring the circumstances of McDonald's three prior oral confessions and from challenging the renunciation of the written confession.

In this Court, Mississippi has not sought to defend the rule or explain its underlying rationale. Nor has it contended that its rule should override the accused's right of confrontation. Instead, it argues that there is no incompatability between the rule and Chambers' rights because no right of confrontation exists unless the testifying witness is 'adverse' to the accused. The State's brief asserts that the 'right of confrontation applies to witnesses 'against' an accused.'11 Relying on the trial court's determination that McDonald was not 'adverse,' and on the State Supreme Court's holding that McDonald did not 'point the finger at Chambers,'12 the State contends that Chambers' constitutional right was not involved.

The argument that McDonald's testimony was not 'adverse' to, or 'against,' Chambers is not convincing. The State's proof at trial excluded the theory that more than one person participated in the shooting of Liberty. To the extent that McDonald's sworn confession tended to incriminate him, it tended also to exculpate Chambers.13And, in the circumstances of this case, McDonald's retraction inculpated Chambers to the same Extent that it exculpated to the same extent that it exculpated that McDonald's testimony was in fact seriously adverse to Chambers. The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State. We reject the notion that a right of such substance in the criminal process may be governed by that technicality or by any narrow and unrealistic definition of the word 'against.' The 'voucher' rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.

B

We need not decide, however, whether this error alone would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses. The trial court refused to allow him to introduce the testimony of Hardin, Turner, and Carter. Each would have testified to the statements purportedly made by McDonald, on three separate occasions shortly after the crime, naming himself as the murderer. The State Supreme Court approved the exclusion of this evidence on the ground that it was hearsay.

The hearsay rule, which has long been recognized and respected by virtually every State, is based on experience and grounded in the notion that untrustworthy evidence should not be presented to the triers of fact. Out-of-court statements are traditionally excluded because they lack the conventional indicia of reliability: they are usually not made under oath or other circumstances that impress the speaker with the solemnity of his statements; the declarant's word is not subject to cross-examination; and he is not available in order that his demeanor and credibility may be assessed by the jury. California v. Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). A number of exceptions have developed over the years to allow admission of hearsay statements made under circumstances that tend to assure reliability and thereby compensate for the absence of the oath and opportunity for cross-examination. Among the most prevalent of these exceptions is the one applicable to declarations against interest14—an exception founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made. Mississippi recognizes this exception but applies it only to declarations against pecuniary interest.15 It recognizes no such exception for declarations, like McDonald's in this case, that are against the penal interest of the declarant. Brown v. State, 99 Miss. 719, 55 So. 961 (1911).

This materialistic limitation on the declaration-against-interest hearsay exception appears to be accepted by most States in their criminal trial processes,16 although a number of States have discarded it.17 Declarations against penal interest have also been excluded in federal courts under the authority of Donnelly v. United States, 228 U.S. 243, 272—273, 33 S.Ct. 449, 459, 57 L.Ed. 820 (1913), although exclusion would not be required under the newly proposed Federal Rules of Evidence.18 Exclusion, where the limitation prevails, is usually premised on the view that admission would lead to the frequent presentation of perjured testimony to the jury. It is by any compulsion of guilt. The Court are often motivated by extraneous considerations and, therefore, are not as might well have known at the time he pecuniary or proprietary interest. While that rationale has been the subject of considerable scholarly criticism,19 case, no such basis for doubting McDonald's statements. See Note, 43 Miss.L.J. serve some valid state purpose by excluding untrustworthy testimony.

The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald's confessions was made spontaneously to a close

acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case—McDonald's sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each. Third, whatever may be the parameters of the penal-interest rationale,[20] each confession here was in a very real sense self-incriminatory and unquestionably against interest. See United States v. Harris, 403 U.S. 573, 584, 91 S.Ct. 2075, 2082, 29 L.Ed.2d 723 (1971); Dutton v. Evans, 400 U.S., at 89, 91 S.Ct., at 219. McDonald stood to benefit nothing by disclosing his role in the shooting to any of his three friends and he must have been aware of the possibility that disclosure would lead to criminal prosecution. Indeed, after telling Turner of his involvement, he subsequently urged Turner not to 'mess him up.' Finally, if there was any question about the truthfulness of the extrajudicial statements, McDonald was present in the courtroom and was under oath. He could have been cross-examined by the State, and his demeanor and responses weighed by the jury. See California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). The availability of McDonald significantly distinguishes this case from the prior Mississippi precedent, Brown v. State, supra, and from the Donnelly-type situation, since in both cases the declarant was unavailable at the time of trial.[21]

Few rights are more fundamental than that of an accused to present witnesses in his own defense. E.g., Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330 (1972); Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting. the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

We conclude that the exclusion of this critical evidence, coupled with the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures. Rather, we hold quite simply that under the facts and circumstances of his case the rulings and circumstances of this case the rulings of a fair trial.

The judgment is reversed and the case is remanded to the Supreme Court of Mississippi for further proceedings not inconsistent with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice WHITE, concurring.

We would not ordinarily expect an appellate court in the state or federal system to remain silent on a constitutional issue requiring decision in the case before it. Normally, a court's silence on an important question would simply indicate that it was unnecessary to decide the issue because it was not properly before the court or for some other reason. As my Brother REHNQUIST points out, the Court stated in Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969), that 'when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'

Under this rule it becomes the petitioner's burden to demonstrate that under the applicable state law his claim was properly before the state court and was therefore necessarily rejected, although silently, by affirmance of the judgment. If he fails to do so, we need not entertain and decide the federal question that he presses.

It is not our invariable practice, however, that we will not ourselves canvass state law to determine whether the federal question, presented to but not discussed by the state supreme court, was properly raised in accordance with state procedures. The Court surveyed state law in Street, itself, with little if any help from the appellant; and I think it is appropriate here where the State does not contest our jurisdiction and seemingly concedes that the question was properly raised below and necessarily decided by the Mississippi Supreme Court.

There is little doubt that Mississippi ordinarily enforces a rule of contemporaneous objection with respect to evidence; the three opinions in Henry v. State, 253 Miss. 263, 154 So.2d 289 (1963); 253 Miss., at 266, 174 So.2d 348 (1965); Miss., 198 So.2d 213 (1967), make this sufficiently clear. Also, that case came here, and we not only noted the existence of the rule but recognized that it served a legitimate state interest. Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965). The same rule obtains where the proponent of evidence claims error in its exclusion:

'The rejection of evidence not apparently admissible is not error, in the absence of an offer or sufficient statement of the purpose of its introduction, by which the court may determine its relevancy or admissibility. . . . This Court has consistently followed this rule requiring definiteness and sufficiency of an offer of proof. . . .' Freeman v. State, 204 So.2d 842, 847—848 (Miss. 1967) dissenting opinion).

There are Mississippi cases stating that in proper circumstances the contemporaneous-objection rule will not be enforced and that the State Supreme Court in some

circumstances will consider an issue raised there for the first time. In Carter v. State, 198 Miss. 523, 21 So.2d 404 (1945), the only issue in the appellate court concerned appellant's mental condition at the time of the crime, an issue not raised at trial. The court said '(t)he rule that questions not raised in the trial court cannot be raised for the first time on appeal, is not without exceptions, among which are errors 'affecting fundamental rights of the parties . . . or affecting public policy,' . . . if to act on which will work no injustice to any party to the appeal.' Id., at 528, 21 So.2d, at 404. The court proceeded to consider the issue. In Brooks v. State, 209 Miss. 150, 155, 46 So.2d 94, 97 (1950), a convicted defendant asserted in the State Supreme Court for the first time the inadmissibility of certain evidence on the grounds of an illegal search and seizure, violation of the rule against self-incrimination, and improper cross-examination. The court considered these questions and reversed the conviction, saying that '(e)rrors affecting fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal. . . . (W)here fundamental and constitutional rights are ignored, due process does not exist, and a fair trial in contemplation of law cannot be had.'

The reach of these cases was left in doubt when, in affirming the judgment in Henry v. State, 253 Miss. 263, 154 So.2d 289 (1963), the Mississippi Supreme Court refused to consider a claim of illegally obtained evidence because the matter had not been presented to the trial court. The case did not come within Brooks v. State, supra, the court ruled, because Henry's counsel were experienced and adequate, and Henry was bound by their mistakes. This Court vacated that judgment and remanded for determination whether there had been a deliberate bypass, reading Mississippi law as extending no discretion to give relief from the contemporaneous-objection rule where 'petitioner was represented by competent local counsel familiar with local procedure.' Henry v. Mississippi, 379 U.S., at 449 n. 5, 85 S.Ct., at 568. In its initial opinion on remand, the Supreme Court of Mississippi reasserted the necessity to object at the time testimony is offered in the trial court, but it said '(n) evertheless if it appears to the trial judge that the foregoing rule of procedure would defeat justice and bring about results not justified or intended by substantive law, the rule may be relaxed and subordinated to the primary purpose of the law to enforce constitutional rights in the interest of justice.' Henry v. State, 253 Miss., at 287, 174 So.2d, at 351.*

In King v. State, 230 So.2d 209, 211 (Miss.1970), this statement from the 1965 Henry opinion was interpreted as giving the Supreme Court of the State, as well as the trial court, sufficient latitude to treat the request for a peremptory instruction to the jury after failure to object to the introduction of allegedly illegally obtained evidence as if the appellant had made timely objection.

Moreover, in Wood v. State, 257 So.2d 193, 200 (Miss.1972), where a convicted defendant complained of a wide-ranging and allegedly unfair cross-examination of defense witnesses, and where there had been a failure to object to part of the prejudicial inquiry, the State Supreme Court nevertheless considered the question, stating: '(W)e note also that no objection was made to the testimony of Donald Ray Boyd when he was asked whether he had ever been in jail. However, it was stated in Brooks, supra, that in extreme cases a failure to object to questions which were violative of a

constitutional right did not in all events have to be objected to before they would receive consideration by this Court. The appellant in this case was being tried for murder. The evidence of defendant's guilt was extremely close. A shred of evidence one way or the other could have been persuasive to the jury. In our opinion, this warrants our consideration of the questions and responses to which repeated objections were made and sustained by the court, as well as the consideration of the testimony of Donal Ray Boyd wherein he was asked whether he had been in jail or not though no formal objection was made thereto.'

These cases seemingly preserve some aspects of the Brooks rule, and hence anticipate some situations where the contemporaneous-objection requirement will not be enforced, despite Henry. There will be occasions where the Supreme Court of Mississippi will consider constitutional claims made in that court for the first time.

Where this leaves the matter of our jurisdiction in the light of decisions such as Williams v. Georgia, 349 U.S. 375, 75 S.Ct. 814, 99 L.Ed. 1161 (1955), is not clear. There, while acknowledging that motions for a new trial after final judgment were not favored in Georgia, the Court recognized that such motions had been granted in 'exceptional' or 'extraordinary' cases, their availability being within the well-informed discretion of the courts. It was claimed that denying Williams' motion was an adequate state ground precluding review here, but 'since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us.' Id., at 389, 75 S.Ct., at 822.

In the circumstances before us, where there were repeated offers of evidence and objections to its exclusion, although not on constitutional grounds, where the matter was presented in federal due process terms to the State Supreme Court and where the State does not now deny that the issue was properly before the state court and could have been considered by it, I am inclined, although dubitante, to conclude with the Court that we have jurisdiction.

As to the merits, I would join in the Court's opinion and judgment.

Mr. Justice REHNQUIST, dissenting.

Were I to reach the merits in this case, I would have considerable difficulty in subscribing to the Court's further constitutionalization of the intricacies of the common law of evidence. I do not reach the merits, since I conclude that petitioner failed to properly raise in the Mississippi courts the constitutional issue that he seeks to have this Court decide.

Title 28 U.S.C. § 1257 provides in pertinent part as follows:

'Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

'(3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.'

We deal here with a limitation imposed by Congress upon this Court's authority to review judgments of state courts. It is a jurisdictional limitation, Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969), that has always been interpreted with careful regard for the delicate nature of the authority conferred upon this Court to review the judgments of state courts of last resort:

'Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.' Oxley Stave Co. v. Butler County, 166 U.S. 648, 655, 17 S.Ct. 709, 711, 41 L.Ed. 1149 (1897).

In Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969), cited by the Court in its n. 3, the following language from the earlier case of New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928), was quoted:

'No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time.' 394 U.S., at 584, 89 S.Ct. at 1362 (emphasis added).

The question of whether a constitutional issue has been raised in 'due time' in the state courts is one generally left to state procedure, subject to the important condition that the state procedure give no indication 'that there was an attempt on the part of the state court to evade the decision of Federal questions, duly set up, by unwarranted resort to alleged rules under local practice.' Louisville & Nashville R. Co. v. Woodford, 234 U.S. 46, 51, 34 S.Ct. 739, 741, 58 L.Ed. 1202 (1914). More recently, the Court has stated in Henry v. Mississippi, 379 U.S. 443, 447, 85 S.Ct. 564, 567, 13 L.Ed.2d 408 (1965) that:

'These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.'

Since the Court in Henry was dealing with a rule of trial procedure from the State of Mississippi, its analysis in that case is particularly helpful in deciding this one. It was conceded by all parties there that the Mississippi rules required contemporaneous objection to evidentiary rulings, and this Court commented:

'The Mississippi rule . . . clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided.' Id., at 448, 85 S.Ct. at 568.

In that case, the petitioner had made his motion to exclude the evidence at the close of the State's case, and this Court observed that a ruling on the motion at that point would very likely have prevented the possibility of reversal and new trial just as surely as a ruling on a motion made contemporaneously with the offer of the evidence.

Here, however, the record of the state proceedings shows that the first occasion on which petitioner's counsel even hinted that his previous evidentiary objection had a constitutional basis was at the time he filed a motion for new trial. By delaying his constitutional contention until after the evidence was in and the jury had retired and returned a verdict of guilty against him, petitioner denied the trial court an opportunity to reconsider its evidentiary ruling in the light of the constitutional objection. While this Court in Henry expressed doubt as to the adequacy for federal purposes of Mississippi's differing treatment of a motion to exclude at the close of the State's case and an objection made contemporaneously with the offer of the evidence, there can be no doubt that the policy supporting Mississippi's requirement of contemporaneous objection cannot be served equally well by a motion for new trial following the rendition of the jury's verdict.

It is perfectly true, as the Court states in n. 3 of its opinion, that petitioner 'objected during trial to each of the court's rulings.' But this is only half the test; the litigant seeking to have a decision here on a constitutional claim must not only object or otherwise advise the lower court of his claim that a ruling is error, but he must make it clear that his claim of error is constitutionally grounded. In Bailey v. Anderson, 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945), the petitioner argued in this Court that a state court condemnation award that failed to include interest from the date of possession denied him just compensation in violation of the Due Process Clause of the Fourteenth Amendment. This Court noted that in the state circuit court petitioner had requested that the award include interest from the date of taking, and that the circuit court without explanation had rejected this claim. But this Court went on to say:

'But throughout the proceedings in the circuit court appellant made no claim to interest on constitutional grounds, and made no attack on the constitutionality of the award or the court's decree because of the asserted denial of interest.' Id., at 206, 66 S.Ct., at 68.

Concluding from an examination of the opinion of the Supreme Court of Appeals of Virginia that although appellant had raised his constitutional claim there, it had not been passed upon by that court, this Court held that the 'appeal must be dismissed for want of any properly presented substantial federal question.' Id., at 207, 66 S.Ct., at 68.

Neither the majority nor the dissenting opinions of the Supreme Court of Mississippi contain one syllable that refers expressly or by implication to any claim based on the Constitution of the United States. Those opinions did, of course, treat the evidentiary objections and proffers that this Court now holds to be of constitutional dimension, but it passed on them in terms of nonconstitutional evidentiary questions that are one of the staples of the business of appellate courts that regularly review claims of error in the conduct of trial. Since Mississippi requires contemporaneous objection to evidentiary rulings during the trial, it would have been entirely proper for the Supreme

Court of Mississippi to conclude that even though petitioner might have asserted constitutional claims in his brief there, they had been raised too late to require consideration by it.

This Court said in Street v. New York:

'Moreover, this Court has stated that when, as here, the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' 394 U.S., at 582, 89 S.Ct., at 1360.

If, by some extraordinarily lenient construction of the decisional requirement that the constitutional claim be made 'in due time' in the state proceedings, the making of such a claim for the first time in a motion for a new trial were deemed timely, it is still extraordinarily doubtful that this petitioner adequately raised any constitutional claims in his motion for new trial. That motion consisted of the following pertinent points:

'3rd, the Court erred in refusing to declare Gable McDonald a hostile and adverse witness and permitting the Defendant to propound leading questions as on cross-examination.

'4th, the Court erred in refusing to permit the Defendant to introduce evidence corroborating the admission of Gable McDonald admitting the killing of Aaron Liberty.

'6th, the trial of the Defendant was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution of the United States and Article Three, Sections Fourteen and Twenty-Six of the Constitution of the State of Mississippi.'

It would have to be an extraordinarily perceptive trial judge who could glean from this motion that the separately stated third and fourth points, dealing as they do in customary terms of claims of trial error in the exclusion or admission of evidence, were intended to be bolstered by the generalized assertion of the violation of due process contained in a separately stated point. The contention of the sixth point, standing by itself, that 'the trial of the Defendant was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution of the United States,' directs the trial court to no particular ruling or decision that he may have made during the trial; it is a bald assertion that the trial from beginning to end was somehow fundamentally unfair. Even the most lenient construction of that part of 28 U.S.C. § 1257 that requires that the 'title, right, privilege or immunity' be 'specially set up or claimed' could not aid petitioner in his claim that this point properly raised a federal constitutional issue.

This Court under the Constitution has the extraordinarily delicate but equally necessary authority to review judgments of state courts of last resort on issues that turn on construction of the United States Constitution or federal law. But before we undertake to tell a state court of last resort that its judgment is inconsistent with the mandate of the Constitution, it behooves us to make certain that in doing so we adhere to the

congressional mandate that limits our jurisdiction. Believing as I do that petitioner has not complied with 28 U.S.C. § 1257(3), I would dismiss the writ of certiorari.

James Williams was indicted along with Chambers. The State, however, failed to introduce any evidence at trial implicating Williams in the shooting. At the conclusion of the State's case-in-chief, the trial court granted a directed verdict in his favor.

Upon Chambers' motion, a change of venue was granted and the trial was held in Amite County, to the east of Woodville. The change of trial setting was in response to petitioner's claim that, because of adverse publicity and the hostile attitude of the police and sheriff's staffs in Woodville, he could not obtain a fair and impartial trial there.

On the record in this case, despite the State Supreme Court's failure to address the constitutional issue, it is clear that Chambers' asserted denial of due process is properly before us. He objected during trial to each of the court's rulings. As to the confrontation claim, petitioner asserted, both before and during trial, his right to treat McDonald as an adverse witness. His motion for new trial, filed after the jury's verdict, listed as error the trial court's refusal to permit cross-examination of McDonald and the exclusion of evidence corroborative of McDonald's guilt. The motion concluded that the trial 'was not in accord with fundamental fairness guaranteed by the Fourteenth Amendment of the Constitution.' Chambers reasserted those claims on appeal to the State Supreme Court. After the affirmance of his conviction by that court, Chambers filed a petition for rehearing addressed almost entirely to the claim that his trial had not been conducted in a manner consistent with traditional notions of due process. The State Supreme Court raised no question that Chambers' claims were not properly asserted, and no claim has been made by the State—in its response to the petition for certiorari, in its brief on the merits, or at oral argument—that the questions are not properly reviewable by this Court. See Street v. New York, 394 U.S. 576, 581—585, 89 S.Ct. 1354, 1360—1362, 22 L.Ed.2d 572 (1969); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67—68, 49 S.Ct. 61, 63, 73 L.Ed. 184 (1928).

Unlike Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), this case does not involve the state procedural requirement of contemporaneous objection to the admission of evidence. Petitioner's contention, asserted before the trial court on motion for new trial and subsequently before the Mississippi Supreme Court, is that he was denied 'fundamental fairness guaranteed by the Fourteenth Amendment' as a result of several evidentiary rulings. His claim, the substance of which we accept in this opinion, rests on the cumulative effect of those rulings in frustrating his efforts to develop an exculpatory defense. Although he objected to each ruling individually, petitioner's constitutional claim—based as it is on the cumulative impact of the rulings—could not have been raised and ruled upon prior to the conclusion of Chambers' evidentiary presentation. Since the State has not asserted any independent state procedural ground as a basis for not reaching the merits of petitioner's constitutional claim, we have no occasion to decide whether—if such a ground exists—its imposition in this case would serve any 'legitimate state interest.' Id., at 447, 85 S.Ct., at 567. Under these circumstances, we cannot doubt the propriety of our exercise of jurisdiction.

Hardin's testimony, unlike the testimony of the other two men who stated that McDonald had confessed to them, was actually given in the jury's presence. After the State's objection to Hardin's account of McDonald's statement was sustained, the trial court ordered the jury to disregard it.

A gun dealer from Natchez testified that McDonald had made two purchases. The witness' business records indicated that McDonald purchased a nine-shot .22-caliber revolver about a year prior to the murder. He purchased a different style .22 three weeks after Liberty's death.

It is not entirely clear whether the trial court's ruling was premised on the same hearsay rationale underlying the exclusion of the other testimony. In this instance, the State argued that Carter's testimony was an impermissible attempt by petitioner to impeach a witness (McDonald) who was not adverse to him. The trial court did not state why it was excluding the evidence but the State Supreme Court indicated that it was excluded as hearsay. 252 So.2d, at 220.

3A J. Wigmore, Evidence § 896, pp. 658—660 (J. Chadbourn ed. 1970); C. McCormick, Evidence § 38, pp. 75—78 (2d ed. 1972).

The 'voucher' rule has been condemned as archaic, irrational, and potentially destructive of the truth-gathering process, C. McCormick, supra, n. 7; E. Morgan, Basic Problems of Evidence 70—71 (1962); 3A J. Wigmore, supra, n. 7, § 898, p. 661.

The 'voucher' rule has been rejected altogether by the newly proposed Federal Rules of Evidence, Rule 607, Rules of Evidence for United States Courts and Magistrates (approved Nov. 20, 1972, and transmitted to Congress to become effective July 1, 1973, unless the Congress otherwise determines). (56 F.R.D. 183, 266.)

Tr. of Oral Arg. 35—37.

Brief for Respondent 9 (emphasis supplied).

252 So.2d, at 220.

See Donnelly v. United States, 228 U.S. 243, 272, 33 S.Ct. 449, 459, 57 L.Ed.2d 820 (1913).

Jefferson, Declarations Against Interest: An Exception to the Hearsay Rule, 58 Harv.L.Rev. 1 (1944).

H. McElroy, Mississippi Evidence § 46 (1955); Forrest County Coop. Assn. v. McCaffrey, 253 Miss. 486, 493, 176 So.2d 287, 289—290 (1965).

C. McCormick, supra, n. 7, § 278, p. 673; 5 J. Wigmore, Evidence § 1476, pp. 283—287 n. 9 (1940).

See, e.g., People v. Spriggs, 60 Cal.2d 868, 36 Cal.Rptr. 841, 389 P.2d 377 (1964); People v. Lettrich, 413 Ill. 172, 108 N.E.2d 488 (1952); People v. Brown, 26 N.Y.2d 88, 308

N.Y.S.2d 825, 257 N.E.2d 16 (1970); Hines v. Commonwealth, 136 Va. 728, 117 S.E. 843 (1923).

Rule 804, supra, n. 9.

See, e.g., Committee on Rules of Practice & Procedure, Rules of Evidence for United States Courts and Magistrates 129—131 (rev. draft, Mar. 1971); 5 J. Wigmore, supra, n. 16, § 1476, p. 284; Wright, Uniform Rules and Hearsay, 26 U.Cin.L.Rev. 575 (1957); United States v. Annunziato, 293 F.2d 373, 378 (CA2), cert. denied, 368 U.S. 919, 82 S.Ct. 240, 7 L.Ed.2d 134 (1961) (Friendly, J.); Scolari v. United States, 406 F.2d 563, 564 (CA9), cert. denied, 395 U.S. 981, 89 S.Ct. 2140, 23 L.Ed.2d 769 (1969).

The Mississippi case which refused to adopt a hearsay exception for declarations against penal interest concerned an out-of-court declarant who purportedly stated that he had committed the murder with which his brother had been charged. The Mississippi Supreme Court believed that the declarant might have been motivated by a desire to free his brother rather than by any compulsion ofguilt. The Court also noted that the declarant had fled, was unavailable for cross-examination, and might well have known at the time the made the statement that he would not suffer for it. Brown v. State, 99 Miss. 719, 55 So. 961 (1911). There is, in the present case, no such basis for doubting Mr. Donald's statements. See Note, 43 Miss.L.J. 122, 127—129 (1972).

McDonald's presence also deprives the State's argument for retention of the penal-interest rule of much of its force. In claiming that '(t)o change the rule would work a travesty on justice,' the State posited the following hypothetical:

'If the rule were changed, A could be charged with the crime; B could tell C and D that he committed the crime; B could go into hiding and at A's trial C and D would testify as to B's admission of guilt; A could be acquitted and B would return to stand trial; B could then provide several witnesses to testify as to his whereabouts at the time of the crime. The testimony of those witnesses along with A's statement that he really committed the crime could result in B's acquittal. A would be barred from further prosecution because of the protection against double jeopardy. No one could be convicted of perjury as A did not testify at his first trial, B did not lie under oath, and C and D were truthful in their testimony.' Brief for Respondent 7 n. 3 (emphasis supplied).

Obviously, B's absence at trial is critical to the success of the justice-subverting ploy.

The trial court on remand from the 1965 Henry decision, 253 Miss., at 266, 174 So.2d, at 348, found there had been deliberate bypass, and, affirming on appeal, 198 So.2d 213 (1967), the Mississippi Supreme Court did not mention Brooks v. State, 209 Miss. 150, 46 So.2d 94 (1950), or the rule for like cases.

Chapman v California

386 U.S. 18

87 S.Ct. 824

17 L.Ed.2d 705

Ruth Elizabeth CHAPMAN and Thomas LeRoy Teale, Petitioners,

v.

STATE OF CALIFORNIA.

No. 95.

Argued Dec. 7 and 8, 1966.

Decided Feb. 20, 1967.

Rehearing Denied March 27, 1967.

See 386 U.S. 987, 87 S.Ct. 1283.

Morris Lavine, Los Angeles, Cal., for petitioners.

Arlo E. Smith, San Francisco, Cal., for respondent.

Mr. Justice BLACK delivered the opinion of the Court.

Petitioners, Ruth Elizabeth Chapman and Thomas LeRoy Teale, were convicted in a California state court upon a charge that they robbed, kidnaped, and murdered a bartender. She was sentenced to life imprisonment and he to death. At the time of the trial, Art I, § 13, of the State's Constitution provided that 'in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury.' Both petitioners in this case chose not to testify at their trial, and the State's attorney prosecuting them took full advantage of his right under the State Constitution to comment upon their failure to testify, filling his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom.[1] The trial court also charged the jury that it could draw adverse inferences from petitioners' failure to testify.[2] Shortly after the trial, but before petitioners' cases had been considered on appeal by the California Supreme Court, this Court decided Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, in which we held California's constitutional provision and practice invalid on the ground that they put a penalty on the exercise of a person's right not to be compelled to be a witness against himself, guaranteed by the Fifth Amendment to the United States Constitution and made applicable to California

and the other States by the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. On appeal, the State Supreme Court, 63 Cal.2d 178, 45 Cal.Rptr. 729, 404 P.2d 209, admitting that petitioners had been denied a federal constitutional right by the comments on their silence, nevertheless affirmed, applying the State Constitution's harmless-error provision, which forbids reversal unless 'the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'[3] We granted certiorari limited to these questions:

'Where there is a violation of the rule of Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?' Chapman v. California, 383 U.S. 956—957, 86 S.Ct. 1228, 16 L.Ed.2d 300.

In this Court petitioners contend that both these questions are federal ones to be decided under federal law; that under federal law we should hold that denial of a federal constitutional right, no matter how unimportant, should automatically result in reversal of a conviction, without regard to whether the error is considered harmless; and that, if wrong in this, the various comments on petitioners' silence cannot, applying a federal standard, be considered harmless here.

I.

Before deciding the two questions here—whether there can ever be harmless constitutional error and whether the error here was harmless—we must first decide whether state or federal law governs. The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the 'independent' federal courts would be the 'guardians of those rights.'[4] Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.

II.

We are urged by petitioners to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50

States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for 'errors or defects which do not affect the substantial rights of the parties.' 28 U.S.C. § 2111.5 None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.

III.

In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.

The federal rule emphasizes 'substantial rights' as do most others. The California constitutional rule emphasizes 'a miscarriage of justice,'6 but the California courts have neutralized this to some extent by emphasis, and perhaps overemphasis, upon the court's view of 'overwhelming evidence.'7 We prefer the approach of this Court in deciding what was harmless error in our recent case of Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171. There we said: 'The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' Id., at 86—87, 84 S.Ct. at 230. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,8 this statement in Fahy itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that 'affect substantial rights' of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.9 There is little, if any, difference between our statement in Fahy v. State of Connecticut about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held

harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test,10 it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our Fahy, case.

IV.

Applying the foregoing standard, we have no doubt that the error in these cases was not harmless to petitioners. To reach this conclusion one need only glance at the prosecutorial comments compiled from the record by petitioners' counsel and (with minor omissions) set forth in the Appendix. The California Supreme Court fairly summarized the extent of these comments as follows:

'Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime.' 63 Cal.2d, at 196, 45 Cal.Rptr., at 740, 404 P.2d, at 220.

Thus, the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the failure of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that by their silence petitioners had served as irrefutable witnesses against themselves. And though the case in which this occurred presented a reasonably strong 'circumstantial web of evidence' against petitioners, 63 Cal.2d, at 197, 45 Cal.Rptr., at 740, 404 P.2d, at 220, it was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession. See, e.g., Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844. Petitioners are entitled to a trial free from the pressure of unconstitutional inferences.

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

Argument and Comments by the Prosecutor on the Failure of the Defendants to Take the Witness Stand

'Now, ladies and gentlemen, I don't know which one of these weapons was purchased first, I don't know that it particularly makes any difference, but as you know, we have had no testimony at all in that regard, in fact, I might add that the only person or persons that could give testimony in that regard would be, of course, the defendants themselves.

'Now, this, there's no question about what this represents, or for the record here, no question in your minds, this is not the weapon that Ruth Elizabeth Chapman purchased in Reno, Nevada, on October the 12th, 1962. I don't know where that weapon is, ladies and gentlemen, and you don't know where it is, you've heard no testimony from the stand at all, and once again, the only person or persons that could tell us about where the original .22 caliber Vestpocket is today would be one or the other of the defendants or both.

'This would indicate that there was no small struggle—it would indicate that the body, almost lifeless, was dragged or left in some fashion which would cause a shirt or an article of clothing to tear, one or the other. Once again, ladies and gentlemen, I don't know, I wasn't out there, you were not our there. You heard no testimony on the stand. The only individuals that could give you that information would be the defendants, either one or both of them, Thomas Leroy Teale and Ruth Elizabeth Chapman. And of course you know that you have not heard from them.

'Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an adverse inference to any fact within their knowledge that they couldn't testify to, and they have not subjected themselves, either one or both, to cross-examination. Now, that is—so there is no question in your mind, once again with reference to a defendant taking the stand, none—you are—you or I or anyone else is not required under our legal system in these United States and under the Constitution, you can not be made to testify against yourself or for yourself, as far as that goes.

'So, it is a Constitutional right, and both of these defendants have seen fit to avail themselves of that Constitutional right, but I say to you ladies and gentlemen, there are many things in this case, and I will try to point them out to you, at least some, probably not all, that these defendants are in a position to take that stand and to testify under oath and give you facts concerning. They have not seen fit to avail themselves of that opportunity.

'Now whether or not Mr. Teale had any other money at the time or was in the habit of concealing his money in different departments, I don't know, and ladies and gentlemen, you don't know, because you have not had any testimony from that witness stand, and the only person that could clear this up for us ladies and gentlemen is the defendant

Thomas Leroy Teale. Ladies and gentlemen, he has not seen fit to tell you about that. But certainly we know that bogus checks are being written, and as I recall we know that—I don't—we may infer, if you wish to believe there is an inference which Mr. Teale could have cleared up, that that was all the money that he had, and he didn't clear it up, so you may draw an adverse inference from that, that that was all the money he had, or in fact that he—at that time he was in desperate need of funds, and you know that through some kind of a discussion between these two defendants in regard to Mr. Teale shooting dice, that this was all he had.

'Now, ladies and gentlemen, in reference to the weapons being purchased in Reno, Nevada on October 12th, you have heard, ladies and gentlemen, no testimony, and you will recall clearly, you are going to have some difficulty, you really are in reference to what is and what isn't evidence in this case, and believe me I have a few comments to say on that a little later on, but if you will recall as far as evidence is concerned of the truth of anything at all, you don't have any evidence on why these—why these pistols were purchased. Why did Ruth Elizabeth Chapman buy two weapons? Well, you do recall that she told on one occasion that she had had a pistol stolen from her vehicle, her automobile, when she was taking a little trip across country, you remember that testimony, and you can rely on the testimony that you actually hear, ladies and gentlemen, from the stand. She told that, and of course you can only rely that she told the gentleman that, that she had had another one stolen, and so that she needed one to replace it. But why two, ladies and gentlemen? You don't need two. If she is going to be attacked she wasn't going to use one in each hand I assume to defend herself, and there is another area, ladies and gentlemen, besides this that I mentioned to you before, that since you have no testimony from the stand, you must surmise from all facts and circumstances as to the exact reason why they were purchased, because the only one in this room that could tell you why these guns were purchased is either one or both of the defendants. Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court. * * *

'So, we know, ladies and gentlemen, that they had the motive, we know that they had the means, we know that they had the opportunity. We also know that they were at that scene, ladies and gentlemen, they were with that man just a matter of minutes before he was shot in the head three times with a gun similar to People's Exhibit No. 12. Now, if they weren't there, and I think the evidence clearly shows they were, scientific evidence, that we'll talk about a little later. Once again, why don't they come up and raise their right hand and tell you about it?

'To me they are charged with serious crimes, ladies and gentlemen. They can come up and testify and then it will be evidence for you to consider in this case. If they had just come up and told you about this, because they were there. If they left the Spot Club and just went on their way, well, of course they didn't, the evidence clearly shows they didn't, but you may draw the adverse inference from their refusal to come before you

and raise that right hand and incidentally, of course, subject themselves to cross-examination.

'I think it is not an unreasonable inference to infer at this time if the defendants were drinking beer earlier in the evening in Croce's, it's not unreasonable to infer they continued drinking the same thing, therefore the two glasses remaining that had been washed, but not put up were the defendants'. I don't know, it is an inference, I wasn't there, we have had no testimony whatsoever as to what they were drinking at the Spot Club, once again, neither one of the defendants have seen their way clear to come up and tell you what they were drinking if it was beer.

'So you can see that whichever one of these defendants shot him, and once again, ladies and gentlemen, here is an area that I don't know who shot him, and you don't know who shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right hand and testify in this regard and subject themselves to cross-examination, so all we know is that one of them shot him.

'We don't know the time here, it doesn't say. We don't have any testimony, ladies and gentlemen, in this regard, and I might say once again in reference to this last, the use of the name, T. L. Rosenthal, Mr. and Mrs., we don't know why, ladies and gentlemen, that name was used. We don't know why, ladies and gentlemen, that UZV 155—was 156 originally on here. You don't know that, and I don't because we haven't had the testimony from the witness stand on it. Now we know it is in the handwriting of Ruth Elizabeth Chapman, and there is no question about that. She wrote it. It could be evidence, ladies and gentlemen, for you. It could be evidence as to why she wrote that name, and why that five was changed to a six. We could have it. But we don't because either one or both of the defendants, neither one, have even seen fit to take the stand and to testify in that regard. Then this would be evidence that you can consider. But also ladies and gentlemen, subject to taking the oath and subject to cross-examination.

'We see it here in Mountain View, the Mountain View Motel, the name of Teale, but we don't have the testimony of the defendants and ladies and gentlemen they are the only ones here in this case that could get up there and tell you why they used a phony name two hours after the crime and why they didn't put the correct license down and whatever inference you draw you are permitted to draw since they do not choose to tell you an adverse interest, and I would say, ladies and gentlemen, that it is an adverse interest to the defendants. It shows a consciousness of guilt.

'Now, ladies and gentlemen, what is this—first of all, 'I thought I'd better let you know that Tom arrived here today and we're going south tomorrow'? Now, what does that mean? Well, I think without saying a great deal more about it that each one of you can certainly infer as to what it very readily could mean, especially if one has in fact committed a robbery and kidnapped someone from the premises and that individual has ended up dead, shot three times in the head. And further, ladies and gentlemen,

the only other thing I can say about it is this, who can really tell you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is Ruth Elizabeth Chapman, ladies and gentlemen. If it didn't mean what you can reasonably infer that it means then I say, ladies and gentlemen, she could have come up here and testified, gotten on the witness chair. We have had many witnesses in this case, no one I would assume more interested than Ruth Elizabeth Chapman, or the co-defendant, neither one took the stand. She in no way, nor has there been any way, ladies and gentlemen, any kind of evidence that has actually been admitted for the truth of the evidence, in no way is there any evidence as to why she wrote that letter, and what she meant by 'Tom is arriving today and we're going south.' Once again, she did not choose to tell you. So, we may only infer, and this will be, of course, you will have to in your final analysis draw any inferences from that that you feel are appropriate and are proper—

'He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professional and they know what they are doing and one of them had a gun out and he never had an opportunity to use it, and none of us here will ever know from all the testimony, from the actual testimony on the stand why he had the weapon with him fully loaded, because Mr. Teale has never taken the stand in this case and testified for you. These things are things only within his knowledge, ladies and gentlemen. If there is any fact in this case of any relevancy of any importance it is within the knowledge of a defendant, and they chose not to take the stand and tell you about it, where incidentally they are under oath and can be cross-examined. You may draw an adverse inference from the fact that they do not take it. I think the inference is very clear, too, why they had this weapon here and why he never why it was fully loaded. Remember there was never an opportunity to use it. The weapon was purchased by Ruth Elizabeth Chapman. Now when he is apprehended and fleeing from the State he had it with him and it was fully loaded. Once again, I don't know where the original is here, and you know the only two that can tell us where that is.

'Now, you recall also that when Mr. Basham took him back in, was fingerprinting him, etc., he told him he was wanted in California and no one mentioned anything about Lodi, and he said that he would waive extradition, and he also did say he said, 'They will have a hard time proving I was there.' And Teale himself did mention Lodi. Well, I don't know what he meant by that statement. I certainly can draw my own conclusion, and you sure will draw yours as the triers of the facts and the judges of the facts, ladies and gentlemen, but once again Mr. Teale did not take the stand and testify under oath in this case, and Mr. Teale has not desired to take the stand and explain what he meant by it. He didn't have to, of course, but once again you can draw whatever inferences you may feel, and the law is clear that you may draw an adverse—where a defendant does not explain and he does not choose to take the stand and explain it to you you can draw an adverse inference.

'Photographs. You've seen them, ladies and gentlemen, but as you recall the doctor now is pointing, and this is the picture of the deceased, the back of his head, as to where he was shot in the back of the head, you recall the other one as to where he was shot in

the side of the head, right here on the left in the general area of where the glassess would be, I think it's a most reasonable inference, ladies and gentlemen. Now, once again we have had no testimony except what would seem clearly logical from the experts, the way the body was found, where he'd been shot, what he'd been shot with, and the position of the glasses in relation to the body at the death scene, we had no other testimony. Certainly none from the defendants in this case.

'* * * Agent Gilmore has drawn and made some notations in reference to where that blood was located, blood found on these shoes. Now, all we know, ladies and gentlemen, as far as evidence in this case is concerned, is that these shoes belonged to Ruth Elizabeth Chapman and they were in her possession when she was apprehended in St. Joseph, Missouri, and why do I say that's all you know? That's all you may take into consideration, ladies and gentlemen, because we have no other testimony on this witness stand in relation to any of these articles of clothing that are actually admitted into evidence.

'You have two box lids, two of them, and you've heard the questions concerning them, they would indicate that they were sent to a Mrs. Howard Smith at 2206 Castle Avenue, St. Joseph, Missouri, and I believe it was on the 11th of October, says from Thomas Teale, 1105 Del Norte, Eureka, California, they both say essentially the same thing, 10 11, there's no year, but I think we can surely infer it was in 1962, and apparently from Reno.

'Now, ladies and gentlemen, there's been a lot of talk, suggestion, and whatever you want to call it, I'll call it a smoke screen, in reference to these two lids that came off, and we'll assume there was a box underneath them, I don't think there's any question about that. Where have you ever heard from that witness stand, ladies and gentlemen, what was ever in those boxes? Now, you've heard some self-serving declarations that are not admitted into evidence because they come through someone else who in some fashion gets testimony before you, but no cross-examination of the original party who is giving that kind of testimony, and you can't consider it.

'Thank you, Your Honor. Counsel has interjected himself into this, and he'll have every opportunity to make his own comments, and I'm sure he'll most adequately express himself when the times comes. I'm telling you, ladies and gentlemen, that the only evidence that you have is that you have two box tops. Now, he's just suggested to you, so I'll answer this ahead of time, but the evidence is clear that Mr. Sperling packed these boxes, but you will recall Mr. Sperling was not at the original scene when they were taken. Maybe it isn't unusual to infer there may have been clothes, but what I'm getting at is this is what clothing? You don't even know there was clothing in them when they were shipped. It could have been other household articles. And even if we assume it was clothing, and that's not unreasonable because basically these are the items we found and brought back with us to Lodi, we don't know which clothing she shipped at this time. Couldn't this be cleared up for us, though? It could be cleared up so easily. Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, but once again she did not take the stand, raise

her right hand, and tell you about that. She didn't take the stand at all, ladies and gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable.

'Now, anything that—is clearly, and I'm sure you know by now and I don't have to repeat it too often, anything in this case that Mr. Teale could get up here now, he don't have to get up here, but all of the things that have been said in this trial and all of the physical evidence and the testimony, he's right here in Court and could he not get up and if there is anything to be said he has the opportunity to say it. Otherwise, you may draw the adverse inference from the fact that he doesn't get up there and tell you about it, and that, ladies and gentlemen, is his defense. Mr. Fransen said in the beginning that what happened in this case is not as the prosecution described it. That the facts will show an entirely different version. Well, I haven't heard any facts, ladies and gentlemen, that show an entirely different version.

'We went through a business with a—dress. We held it up, and then we pointed out the one that she's wearing now, and frankly, ladies and gentlemen, the only one in the Court room that can tell you whether or not it is the same dress is Ruth Elizabeth Chapman, because you know from the evidence no one has ever had an opportunity to examine that dress to see whether it has been dry cleaned, whether or not it was purchased—when it was purchased or the labels on it or anything else. All that has been done in this thing is to wear a blue knit dress, ladies and gentlemen, which is similar to the one that—she is fact apparently wore on that night.

'So. I suppose that just through the wearing of it, having it in Court, it is hoped that you will draw something from it, which I have heard no testimony on the stand, except that it looks like or is similar to it. * * *

'But what she told that doctor is not evidence in this case, and yet you know that repeatedly and over and over and over again Mr. Johnson in every way that he could, he would get the story again before you. Now, why? You know why. He did it because he hopes that you wouldn't forget it, although he could put it and make it evidence in this case, which it is not, and if you put Ruth Elizabeth Chapman up on that stand to testify, so it is one way of doing, ladies and gentlemen, if you are going to be taken in by it, indirectly what you can't do directly, because there is no other way that he can get that thing before you without putting her up on that stand.

'But she gave a story on the night of the 17th and early hours of the 18th. She was in San Francisco. Now, why pick on that date so specifically if you are not—if not to beware of that date, that you want to beware. Well, he says, 'You have given two different stories. Do you have problems with blackouts or excessive drinking', and she says 'No.' And I tell you, ladies and gentlemen, that anybody, and there is no evidence to the contrary in this case, if you don't honestly remember what occurred and you know, you are in a situation where there is a fugitive warrant and you have just been arrested and you in all honesty don't remember where you were, that is the first thing that you are going to say. You're not going to sit up and trump up excuses and make out a story which you know to be a lie about specific dates and times. And, ladies and gentlemen,

there is no legal evidence before you that it is anything to the contrary, because the only one now that can come up and tell you has not seen fit to do so.

'* * * Mr. Johnson would have you believe that everything she said was the truth. I think there are some instances that indicate already—I have indicated some, the purpose of the guns, two different ideas there as to why they were purchased, but that is the only legal purpose for that. So it's not evidence, although Mr. Johnson again I say argued and referred to it as though it was. We have no evidence from the lips of Mrs. Chapman. Now, as Mr. Ferguson told you, it is their constitutional right, and I won't go into that again, because I think he handled it very clearly as well as the others, but that is within her right to do as she sees fit. But, you can consider it for the purposes and under the circumstances that Mr. Ferguson indicated a number of times.

'Originally when Dr. Winkler examined her on the 31st, I believe it was, of October, 1962, she told him that she had forgotten after the first shot was fired, after the first shot was fired. Since that time what has happened? The amnesia, or disassociative state, or disassociative reaction, which ever way you want to look at it, psychiatrically or otherwise, seems to have backed up from Dillard Road back up to the Spot Club, back up down Highway 99 south to just outside of Croce's, and by the time we get through cross-examining Dr. Sheuerman it even backed in to Croce's. A vague area. Very interesting. We could have put it on, put the statement in. It's evidence? It's not. Again, the sancitity and worthiness of evidence would have to come from her lips, hers on the stand here. Why? Here again, because witnesses would be under oath again, and I repeat, and I repeat for emphasis, they would have to be under oath subject to cross-examination before your very eyes so that you could evaluate it. Oh yes. She said this and she said that. Who said it? Who said it? Ruth Elizabeth Chapman on the stand? No. Dr. Sheuerman said that she said it. Dr. Winkler said that she said. Mr. Johnson said that she said. Well, it's an interesting thing that the only witnesses who weren't here, or weren't on the stand to be cross-examined, the only witnesses who are alive today to the perpetration of these offenses, are these two defendants. That's all. They don't have to take the stand. That's been gone over many times, but you know it would be a fine thing, very fine deed if persons who perpetrated offenses gave a story, put a story on by somebody else, have somebody else speak for you—wouldn't it? It would be a very interesting thing. You would never have the benefit of evaluating their credibility. This is what Mr. Johnson would have you believe that we should have done. Monday morning quarterbacking. And I submit to you—you know, you—you have heard much about lawyers being referred to as 'mouthpieces.' It's actually a very rare thing, really, that that type of appellation is applicable to lawyers really. But, I think you have seen a demonstration here, and I'm not saying it in rancor, not anything of it at all, because this is a demonstration where actually Ruth Elizabeth Chapman is speaking through Mr. Johnson. A 'mouthpiece.'

'Maybe there is another reasonable one, other than the fact that it was Adcock's blood, because all three who were in the car had type A. Maybe there is, but you haven't heard it. You haven't heard any reasonable explanation of that. So, you can draw an adverse inference that it was Billy Dean Adcock's blood. * * *

'Mr. Johnson said these several things which I will go over again. The evidence showed here that she bought two guns for Teale. What evidence? No witness on the stand got up there and said specifically under oath, and the only one that could do it would be Elizabeth Chapman herself. This is hearsay, what she told somebody else for the sole purpose of determining what her state of mind was at the time. It's not evidence. There's some evidence from her own lips through Dennis Mack as to the reason she bought the gun, which is different than what she said otherwise. Mr. Johnson said the evidence shows there was an argument in Fresno. Here again I would say, 'What evidence?' The next one—there are only two people there to that argument, and the only way it would be evidence, or testimony in this case, would be if either one or both of them got up there and said there was an argument. They chose not to do it. You can draw an adverse inference that that being within their knowledge, that they could explain, whether it was or not. You can draw an inference that it wasn't the type of argument that Mr. Johnson claims the evidence shows, because the evidence doesn't show that at all.

'So far as the motive is concerned for murder in a perpetration of a robbery, the motive was set, to gain for their own desires and lusts and so forth, to gain from it. It was a crime of gain, and perhaps another thing too, in deciding—we don't know who pulled the trigger—we may never know. The defendants haven't indicated it, except through Teale in one—Mr. Vowell's testimony, as to what Mr. Teale said, but that is not admissible against, and you shouldn't consider it against, Ruth Elizabeth Chapman, but maybe the circumstances of who pulled the trigger might have been a factor that might have been important to you. Only two people know. They didn't tell you. That is the way they want to proceed. But nonetheless, you can consider that too.

'So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult task from the very only two people remaining who were at the scene, but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too.

'You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. Now, this is something that perhaps might have been of help to you in deciding what punishment to mete out, whether both should be punished equally in this case, or whether there should be some distinction between the two. It might have been helpful to know who pulled that trigger, for if it was Ruth Elizabeth Chapman you could well deduce that it was either her intoxication or emotional stress or a jealousy of Teale, or anger, and a lot of things other than the motive to destroy a witness; whereas, with respect to Mr. Teale it would seem to be a logical thing to conclude that he wanted to get rid of the only eyewitness. Differences there, you see. But you don't know. You don't know whether they did it in consort (sic). You don't know that as far as pulling the trigger. But, this is a factor which has not been brought to light, and you can consider that factor which has not been, from the standpoint there have been two people that might have explained that.

'I have gone into the statement here and why it hasn't been presented. If you are going to decide things such as character and sympathy, the law says you may take into consideration, how can you do it by a statement? Now, we are talking about this phase of the case. This now. You like to know that persons get—if there is something about their character that they can tell you, or something about their background that they can tell you, you like to hear it from them, because you have a very serious and difficult task, and the fact that they chose to rest upon whatever evidence there is here in the case in chief is something that you can consider in deciding whether or not they had been fair with you.

'This is the chance that they take by not having taken the stand.'

Mr. Justice STEWART, concurring in the result.

In devising a harmless-error rule for violations of federal constitutional rights, both the Court and the dissent proceed as if the question were one of first impression. But in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.' Illustrations of the principle are legion.

When involuntary confessions have been introduced at trial, the Court has always reversed convictions regardless of other evidence of guilt. As we stated in Lynumn v. State of Illinois, 372 U.S. 528, 537, 83 S.Ct. 917, 922, 9 L.Ed.2d 922, the argument that the error in admitting such a confession 'was a harmless one * * * is an impermissible doctrine.' That conclusion has been accorded consistent recognition by this Court. Malinski v. People of State of New York, 324 U.S. 401, 404, 65 S.Ct. 781, 783, 89 L.Ed. 1029; Payne v. State of Arkansas, 356 U.S. 560, 568, 78 S.Ct. 844, 850; Spano v. People of State of New York, 360 U.S. 315, 324, 79 S.Ct. 1202, 1207, 3 L.Ed.2d 1265; Haynes v. State of Washington, 373 U.S. 503, 518—519, 83 S.Ct. 1336, 1345, 10 L.Ed.2d 513; Jackson v. Denno, 378 U.S. 368, 376 377, 84 S.Ct. 1774, 1780, 12 L.Ed.2d 908. Even when the confession is completely 'unnecessary' to the conviction, the defendant is entitled to 'a new trial free of constitutional infirmity.' Haynes v. State of Washington, supra, 373 U.S., at 518—519, 83 S.Ct., at 1346.[1]

When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. 'The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680. That, indeed, was the whole point of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, overruling Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595. Even before trial, when counsel has not been provided at a critical stage, 'we do not stop to determine whether prejudice resulted.' Hamilton v. State of Alabama, 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed.2d 114; White v. State of Maryland, 373 U.S. 59, 60, 83 S.Ct. 1050, 10 L.Ed.2d 193.

A conviction must be reversed if the trial judge's remuneration is based on a scheme giving him a financial interest in the result, even if no particular prejudice is shown and

even if the defendant was clearly guilty. Tumey v. Ohio, 273 U.S. 510, 535, 47S.Ct. 437, 445. To try a defendant in a community that has been exposed to publicity highly adverse to the defendant is per se ground for reversal of his conviction; no showing need be made that the jurors were in fact prejudiced against him. Sheppard v. Maxwell, 384 U.S. 333, 351 352, 86 S.ct. 1507, 1515, 16 L.Ed.2d 600; cf. Rideau v. State of Louisiana, 373 U.S. 723, 727, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663. See also Estes v. State of Texas, 381 U.S. 532, 542—544, 85 S.Ct. 1628, 1632—1633, 14 L.Ed.2d 543; 381 U.S. 562—564, 85 S.Ct. 1642 1643 (Warren, C. J., concurring); 381 U.S. 593—594, 85 S.Ct. 1665 1666 (Harlan, J., concurring).

When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict. Bollenbach v. United States, 326 U.S. 607, 614—615, 66 S.Ct. 402, 405—406, 90 L.Ed. 350. Reversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained. Stromberg v. People of State of California, 283 U.S. 359, 367—368, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Williams v. State of North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279. In a long line of cases leading up to and including whitus v. Georgia, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant.

To be sure, constitutional rights are not fungible goods. The differing values which they represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another. I would not foreclose the possibility that a harmless-error rule might appropriately be applied to some constitutional violations.2 Indeed, one source of my disagreement with the court's opinion is its implicit assumption that the same harmless-error rule should apply indiscriminately to all constitutional violations.

But I see no reason to break with settled procedent in this case, and promulgate a novel rule of harmless error applicable to clear violations of Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229.3 The adoption of any harmlesserror rule, whether the one proposed by the Court, or by the dissent, or some other rule, commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge.

A rule of automatic reversal would seem best calculated to prevent clear violations of Griffin v. State of California. This case is one in which the trial occurred before the Griffin decision but which was not final on appeal until afterwords, so the doctrine of prospectivity announced in Tehan v. United Staes ex rel. Shott, 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453, does not reach it. But the number of such cases is strictly limited. Prosecutors are unlikely to indulge in clear violations of Griffin in the future, and if they do I see no reason why the sanction of reversal should not be the result.

For these reasons I believe it inappropriate to inquire whether the violation of Griffin v. State of California that occurred in this case was harmless by any standard, and accordingly I concur in the reversal of the judgment.

Mr. Justice HARLAN, dissenting.

The Court today holds that the harmlessness of a trial error in a state criminal prosecution, such error resulting from the allowance of prosecutorial comment barred by the Fourteenth Amendment, must be determined under a 'necessary rule' of federal law. The Court imposes a revised version of the standard utilized in Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, on state appellate courts, not because the Constitution requires that particular standard, but because the Court prefers it.

My understanding of our federal system, and my view of the rationale and function of harmless-error rules and their status under the Fourteenth Amendment, lead me to a very different conclusion. I would hold that a state appellate court's reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment. Believing this to be the situation here, I would dismiss the writ. Viator v. Stone, 336 U.S. 948, 69 S.Ct. 882, 93 L.Ed. 1104.

I.

The key to the Court's opinion can, I think, be found in its statement that it cannot 'leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights,' and that 'in the absence of appropriate congressional action 'the Court must fashion protective rules. The harmless-error rule now established flows from what is seemingly regarded as a power inherent in the Court's constitutional responsibilities rather than from the Constitution itself. The Court appears to acknowledge that other harmless-error formulations would be constitutionally permissible. It certainly indicates that Congress, for example, could impose a different formulation.[1]

I regard the Court's assumption of what amounts to a general supervisory power over the trial of federal constitutional issues in state courts as a startling constitutional development that is wholly out of keeping with our federal system and completely unsupported by the Fourteenth Amendment where the source of such a power must be found. The Fourteenth Amendment guarantees individuals against invasions by the States of fundamental invasions by the States of Connecticut, 302 U.S. 319, 58 S.Ct. 149, 82 L.Ed. 288 and under more recent decisions of this Court some of the specifics of the Bill of Rights as well. See, e.g., in the context of this case, Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653; Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229. It thus serves as a limitation on the actions of the States, and lodges in this Court the same power over state 'laws, rules, and remedies' as the Court has always had over the 'laws, rules, and remedies' created by Congress. This power was classically described by Chief Justice Marshall in Marbury v. Madison, 1 Cranch 137, 178, 2 L.Ed. 60:

'So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. * * *'

Nothing in the Fourteenth Amendment purports to give federal courts supervisory powers, in the affirmative sense of McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819, over state courts. See id., at 340—341, 63 S.Ct., at 612—613. Moreover, where the constitutional power described by Marshall has been invoked, the Court has always been especially reluctant to interfere with state procedural practices. See Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606. From the beginning of the federal Union, state courts have had power to decide issues of federal law and to formulate 'authoritative laws, rules, and remedies' for the trial of those issues. The primary responsibility for the trial of state criminal cases still rests upon the States, and the only constitutional limitation upon these trials is that the laws, rules, and remedies applied must meet constitutional requirements. If they do not, this Court may hold them invalid. The Court has no power, however, to declare which of many admittedly constitutional alternatives a State may choose.2 To impose uniform national requirements when alternatives are constitutionally permissible would destroy that opportunity for broad experimentation which is the genius of our federal system.

Even assuming that the Court has the power to fashion remedies and procedures binding on state courts for the protection of particular constitutional rights, I could not agree that a general harmless-error rule falls into that category. The harmless-error rules now utilized by all the States and in the federal judicial system are the product of judicial reform early in this century. Previously most American appellate courts, concerned about the harshness of criminal penalties, followed the rule imposed on English courts through the efforts of Baron Parke, and held that any error of substance required a reversal of conviction. See Orfield, Criminal Appeals in America 190. The reform movement, led by authorities like Roscoe Pound and Learned Hand, resulted in allowing courts to discontinue using reversal as a 'necessary' remedy for particular errors and 'to substitute judgment for the automatic application of rules * * *.' 4 Barron, Federal Practice and Procedure § 2571, at 438. This Court summarized the need for that development in the leading case of Koteakos v. United States, 328 U.S. 750, 759, 66 S.Ct. 1239, 1245, 90 L.Ed. 1557:

's 269 (a federal harmless error provision) and similar state legislation grew out of widespread and deep conviction over the general course of appellate review in American criminal causes. This was shortly, as one trial judge put it after § 269 had become law, that courts of review, 'tower above the trials of criminal cases as impregnable citadels of technicality.' * * * (C)riminal trial became a game for sowing reversible error in the record.'

Holding, as is done today, that a special harmless-error rule is a necessary remedy for a particular kind of error revives the unfortunate idea that appellate courts must act on particular errors rather than decide on reversal by an evaluation of the entire

proceeding to determine whether the cause as a whole has been determined according to properly applicable law. In this case, California has recognized the impropriety of the trial comment here involved, and has given clear direction to state trial courts for the future. Certainly this is the appropriate remedy for the constitutional error committed. The challenged decision has no direct relation to federal constitutional provisions, rather it is an analysis of the question whetehr this admittedly improper comment had any significant impact on the outcome of the trial. In Kotteckos, supra, this Court described the 'material factors' in harmless-error determinations as 'the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole * * *.' Id., at 762, 66 S.Ct., at 1246. None of these factors has any relation to substantive constitutional provisions, and I think the Court errs in conceiving of an application of harmless-error rules as a remedy designed to safeguard particular constitutional rights.3 It seems clear to me that harmless-error rules concern, instead, the fundamental integrity of the judicial proceedings as a whole.

As indicated above, I am of the opinion that the validity of a challenged state harmless-error rule itself is a federal constitutional question. Harmless-error rules may, as the Court says, 'work very unfair and mischievous results.' And just concern can be expressed over the possibility that state harmless-error decisions may result in the dilution of new constitutional doctrines because of state hostility to them. However, the record is barren of any showing that the California courts, which have been in the vanguard in the development of individual safeguards in criminal trials,4 are using their harmless-error rule to destroy or dilute constitutional guarantees. If the contrary were the case and the harmless-error rule itself were shown to have resulted in a course of convictions significantly influenced by constitutionally impermissible factors, I think it clear that constitutional due process could not countenance the continued application of the rule.5 And individual applications of a permissible rule would still be subject to scrutiny as to the tenability of the independent and adequate state ground. See Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654; Terre Haute & Indianapolis Railroad Co. v. State of Indiana ex rel. Ketcham, 194 U.S. 579, 24 S.Ct. 767, 48 L.Ed. 1124; Note, The Untenable Non-federal Ground in the Supreme Court, 74 Harv.L.Rev. 1375.

I thus see no need for this new constitutional doctrine.6 Decision of this case should turn instead on the answers to two questions: Is the California harmless-error provision consistent with the guarantee of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment? See Palko v. Connecticut, supra. Was its application in this instance by the California Supreme Court a reasonable one or was the rule applied arbitrarily to evade the underlying constitutional mandate of fundamental fairness? These issues will now be considered.

II.

The California harmless-error rule, is incorporated in that State's constitution. It was first adopted by a vote of the people in 1911 and readopted as part of the revised constitution in 1966. While its language allows reversal only where there has been a

'miscarriage of justice,' a long course of judicial decisions has shaped the rule in a manner which cannot be ignored. California courts will not allow a conviction based upon an improperly obtained confession to stand. See, e.g., People v. Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361; People v. Sears, 62 Cal.2d 737, 44 Cal.Rptr. 330, 401 P.2d 938. Nor will the fact that sufficient evidence to support the conviction is present absent the tainted evidence preclude a reversal. See, e.g., People v. Patubo, 9 Cal.2d 537, 71 P.2d 270, 113 A.L.R. 1303; People v. Mahoney, 201 Cal. 618, 258 P. 607. And reversal will be required when the tainted evidence is introduced in intentional violation of constitutional standards. See People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934. Thus the California rule and the 'federal rule' today declared applicable to state adjudication are parallel in these special instances[7] and their divergence, if any, arises from the general formulation found in the opinions of the California Supreme Court.

In People v. Watson, 46 Cal.2d 818, 299 P.2d 243, the California Supreme Court undertook a general discussion of the application of the state harmless-error rule. It declared that the 'final test' was 'the 'opinion' of the reviewing court, in the sense of its belief or conviction, as to the effect of the error; and that ordinarily where the result appears just, and it further appears that such result would have been reached if the error had not been committed, a reversal will not be ordered.' Reversal would be required only when 'it is reasonably probable that a result more favorable to the appealing party would have been reached,' and this judgment 'must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated.' 46 Cal.2d, at 835—837, 299 P.2d, at 254—255. This formulation may sound somewhat different from that announced today, but on closer analysis the distinction between probability and possibility becomes essentially esoteric. In fact, California courts have at times equated the California standard with the standard utilized by this Court in Fahy v. State of Connecticut, supra. See, e.g., People v. Jacobson, 63 Cal.2d 319, 331, 46 Cal.Rptr. 515, 523, 405 P.2d 555, 563.

Similarly members of this Court have used a variety of verbal formulae in deciding questions of harmless error in federal cases, ranging from today's 'reasonable doubt' standard to the ability to 'say with fair assurance * * * that the jury was not substantially swayed * * *.' Fiswick v. United States, 329 U.S. 211, 218, 67 S.Ct. 224, 228, 91 L.Ed. 196. And the circuit courts have been equally varied in their expressions. United States v. Brown, 79 F.2d 321; United States v. Feinberg, 2 Cir., 140 F.2d 592; United States v. McMaster, 6 Cir., 343 F.2d 176.

Against this background the California rule can hardly be said to be out of keeping with fundamental fairness, and I see no reason for striking it down on its face as a violation of the guarantee of 'due process.'[8]

III.

A summary of the evidence introduced against the petitioners and events of the trial will make it apparent that the application of the California rule in this case was not an unreasonable one. California courts have not hesitated to declare that comment has

caused a miscarriage of justice when that conclusion has been warranted by the circumstances, see, e.g., People v. Keller, 234 Cal.App.2d 395, 44 Cal.Rptr. 432; People v. Sigal, 235 Cal.App.2d 449, 45 Cal.Rptr. 481, but the posture of this case minimized the possible impact of the comment.

Petitioners were tried for the murder of a night club bartender in the course of a robbery of the club. The State established that petitioners were the last customers remaining in the club on the night of the murder. Three people with descriptions matching those of Chapman, Teale, and the victim were seen leaving the club together. The club had been ransacked and its condition indicated that the victim had been forced out of it. He was later shot from close range with a .22-caliber weapon and left beside a country road. It was shown that Chapman had purchased a similar weapon five days before the murder and this weapon was in Teale's possession when he was arrested. Blood matching the type of the victim was found on the floormat of the vehicle in which Chapman and Teale had been traveling. Other scientific testimony established that the victim had been in petitioners' car. Blood (untypable) was found on Chapman's clothes, and blood matching the victim's was found on her shoes. Similar evidence connected Teale with the murder.

After his arrest Teale made admissions, amounting almost to a full confession, to a fellow prisoner and these were introduced against him. The jury was cautioned to disregard them as against Chapman. Petitioners pleaded not guilty, but offered no defense on the merits. The only defense witness was a Dr. Sheuerman who was called by Chapman in an effort to establish a defense of lack of capacity to form the requisite intent because of 'disassociative reaction.'

The prosecutor's comment on petitioners' failure to explain away or challenge the evidence presented against them was admittedly extensive.9 The California Supreme Court found it harmless error for a number of reasons. First the court noted the convincing and unchallenged evidence presented by the State. It next observed that the jurors were certain to take notice of petitioners' silence whether or not there was comment since the evidence itself cried for an explanation. I think this point crucial, since it seems to me that this Court has confused the impact of petitioners' silence on the jury with the impact of the prosecution's comment upon that silence. The added impact of that comment would seem marginal in a case of this type where the jury must inevitably look to petitioners for an explanation of the innuendo of the real evidence and in Teale's case of his damaging admissions. Finally the California Supreme Court noted that Chapman, against whom the evidence was less strong, had keyed her defense to evidence of her mental defect, a subject upon which the comment had not touched. From this discriminating analysis it was concluded that another result was not 'reasonably probable' absent the erroneous comments.

I cannot see how this resolution can be thought other than a reasonable, and therefore constitutional, application of the California harmless-error rule.

IV.

When we consider how little is empirically known about the workings of a jury, see Kalven & Zeisel, The American Jury, passim, it seems to me highly inappropriate for this Court to presume to take upon itself the power to pass directly on the correctness of impact evaluations coming from 50 different jurisdictions. Juries must invariably react differently to particular items of evidence because of local predispositions and experience factors. The state courts, manned by local judges aware of and in touch with the special factors affecting local criminal trials, seem the best, and the constitutionally required, final authority for ruling on the effect of the admission of inadmissible evidence in state criminal proceedings, absent the application of a fundamentally unfair rule, or any unreasonable application of a proper rule manifesting a purpose to defeat federal constitutional rights. Once it appears that neither of these factors is present in a state harmless-constitutional-error decision, federal judicial responsibility should be at an end. This decision, however, encompasses much more. It imposes on this Court, in cases coming here directly from state courts, and on the lower federal courts, in cases arising on habeas corpus, the duty of determining for themselves whether a constitutional error was harmless. In all but insubstantial instances, this will entail a de novo assessment of the entire state trial record.

For one who believes that among the constitutional values which contribute to the preservation of our free society none ranks higher than the principles of federalism, and that this Court's responsibility for keeping such principles intact is no less than its responsibility for maintaining particular constitutional rights, the doctrine announced today is a most disturbing one. It cuts sharply into the finality of state criminal processes; it bids fair to place an unnecessary substantial burden of work on the federal courts; and it opens the door to further excursions by the federal judiciary into state judicial domains. I venture to hope that as time goes on this new doctrine, even in its present manifestation, will be found to have been strictly contained, still more that it will not be pushed to its logical extremes.

I respectfully dissent.

Excerpts of the prosecutor's argument are reproduced in the Appendix to this opinion.

The trial judge charged the jury:

'It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely on his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. * * *'

Cal.Const., Art. VI, § 4 1/2:

'No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for

any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'

'If they (the first ten amendments) are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.' 1 Annals of Cong., 439 (1789).

28 U.S.C. § 2111 provides:

'On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.'

Fed.Rule Crim.Proc. 52(a) provides:

'Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.'

See also Fed.Rule Civ.Proc. 61.

The California statutory rule, like the federal rule, provides that '(a) fter hearing the appeal, the Court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties.' Cal.Pen.Code § 1258.

The California Supreme Court in this case did not find a 'miscarriage of justice' as to petitioner Teale, because it found from 'other substantial evidence, (that) the proof of his guilt must be deemed overwhelming.' 63 Cal.2d, at 197, 45 Cal.Rptr., at 740, 404 P.2d, at 220.

See, e.g., Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (coerced confession); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (right to counsel); Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (impartial judge).

See generally 1 Wigmore, Evidence § 21 (3d ed. 1940).

Cf. Woodby v. Immigration Service, 385 U.S. 276, 87 S.Ct. 483, 17 L.Ed.2d 362.

None of these decisions suggests that the rejection of a harmless error rule turns on any unique evidentiary impact that confessions may have. Haynes v. State of Washington, 373 U.S. 503, 83 S.Ct. 1336, specifically contradicts that notion. In addition to the confession found inadmissible by this Court, the defendant in Haynes had given two prior confessions, the admissibility of which was not disputed, and 'substantial

independent evidence' of guilt existed. The Court accepted the prosecution's contention that the inadmissible confession played little if any role in the conviction.

For example, quite different considerations are involved when evidence is introduced which was obtained in violation of the Fourth and Fourteenth Amendments. The exclusionary rule in that context balances the desirability of deterring objectionable police conduct against the undesirability of excluding relevant and reliable evidence. The resolution of these values with interests of judicial economy might well dictate a harmless-error rule for such violations. Cf. Fahy v. State of Connecticut, 375 U.S. 85, 92, 84 S.Ct. 229, 233 (dissenting opinion).

Earlier this Term, in O'Connor v. Ohio, 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189, we reversed a conviction on the basis of Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, without pausing to consider whether the comment on the defendant's silence might have been harmless error under the rule the Court announces today, or any other harmless-error rule.

For myself, I intimate no view on congressional power with respect to state courts in this regard.

Cases in which lower federal courts, acting under the authority of the Fourteenth Amendment, as expanded by this Court's decision in Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, have promulgated their own reapportionment plans may superficially be thought to support such a power. E.g., Reynolds v. State Election Board, D.C., 233 F.Supp. 323. But such cases are quite apart from the present one because they arise from a situation where some positive constitutional action is a necessity and thus require the exercise of special equity powers. Here the ordinary remedy of striking down unconstitutional harmless-error rules and applications is sufficient to deal with any problem that may arise. There is no necessity for a State to have a harmless-error rule at all.

The Court indeed recognizes, as does my Brother STEWART in his concurring opinion, that errors of constitutional dimension can be harmless, a proposition supported by ample precedent. See Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674; Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150; Haines v. United States, 9 Cir., 188 F.2d 546; United States v. Donnelly, 7 Cir., 179 F.2d 227. Prsumably all errors in the federal courts will continue to be evaluated under the single standard of 28 U.S.C. § 2111 as interpreted today. Certainly there is nothing in the substantive provisions of the Bill of Rights which suggests any standard for assessing the impact of their violation.

See, e.g., People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513; People Dorado, 62 Cal.2d 338, 42 Cal.Rptr. 169, 398 P.2d 361.

It is clear enough that this is not the rationale that the Court is employing. The Court would leave California free to apply its harmless-error rule to errors of state law and must thus consider the rule itself consistent with constitutional due process. This leaves the anomalous situation where the impact of a particular piece of evidence is to be

assessed by a different 'constitutional' standard depending only on whether state law or federal constitutional law barred its admittance.

Fahy v. State of Connecticut, 375 U.S. 85, 84 S.Ct. 229, should not be deemed dispositive on such a far-reaching matter, which was entirely passed over in the Court's opinion in that case.

Some special limitations on harmless error have always been respected by this Court and seem to me essential to the fundamental fairness guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. These limitations stem from what I perceive as two distinct considerations. The first is a recognition that particular types of error have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless. E.g., Payne v. State of Arkansas, 356 U.S. 560, 78 S.Ct. 844 (confessions); see Fahy v. State of Connecticut, supra, at 95, 84 S.Ct. at 234 (dissenting opinion of Harlan, J.); cf. Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402 (independently sufficient evidence). The second is a recognition that certain types of official misbehavior require reversal simply because society cannot tolerate giving final effct to a judgment tainted with such intentional misconduct. E.g., Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (prosecutorial misconduct). Although they have never been viewed in this light, I would see violations of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799, as falling in the first category, and violations of Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, as falling in the second. However, as I understand my Brother STEWART's opinion concurring in the result, he would read all such limitations into the content of the Due Process Clause and limit the application of harmless-error rules with respect to constitutional errors to an undefined category of instances. I think it preferable to resolve these special problems from an analysis of the nature of the error involved rather than by an attempt to discover limitations in the policy underlying the substantive constitutional provisions. The latter course seems to me to blur analysis and lead to distinction by fiat among equally specific constitutional guarantees.

The rule was upheld by the Ninth Circuit in Sampsell v. People of State of California, 9 Cir., 191 F.2d 721, against an attack on its constitutionality.

The decision in Griffin v. State of California, 380 U.S. 609, 85 S.Ct. 1229, was not announced until after the trial of the case. Hence the trial was conducted according to what was, at the time, constitutional California law. No implication of prosecutorial misconduct can be drawn from these circumstances.

Clay v United States

537 U.S. 522

CLAY

v.

UNITED STATES.

No. 01-1500.

Supreme Court of United States.

Argued January 13, 2003.

Decided March 4, 2003.

Petitioner Clay was convicted of arson and a drug offense in Federal District Court. The Seventh Circuit affirmed his convictions on November 23, 1998, and that court's mandate issued on December 15, 1998. Clay did not file a petition for a writ of certiorari. The time in which he could have done so expired 90 days after entry of the Court of Appeals' judgment and 69 days after issuance of its mandate. One year and 69 days after the Court of Appeals issued its mandate, and exactly one year after the time for seeking certiorari expired, Clay filed a motion for postconviction relief under 28 U. S. C. § 2255. Such motions are subject to a one-year time limitation that generally runs from "the date on which the judgment of conviction becomes final." § 2255, ¶ 6(1). Relying on Circuit precedent, the District Court stated that when a federal prisoner does not seek certiorari, his judgment of conviction becomes final for § 2255 purposes upon issuance of the court of appeals' mandate. Because Clay filed his § 2255 motion more than one year after that date, the court denied it as time barred. The Seventh Circuit affirmed.

Held: For the purpose of starting the clock on § 2255's one-year limitation period, a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction. Pp. 527-532.

(a) Finality has a long-recognized, clear meaning in the postconviction relief context: Finality attaches in that setting when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. See, *e. g., Caspari* v. *Bohlen,* 510 U. S. 383, 390. Because the Court presumes "that Congress expects its statutes to be read in conformity with this Court's precedents," *United States* v. *Wells,* 519 U. S. 482, 495, the Court's unvarying understanding of finality for collateral review purposes would ordinarily determine the meaning of "becomes final" in § 2255. Pp. 527-528.

(b) Supporting the Seventh Circuit's judgment, the Court's invited *amicus curiae* urges a different determinant, relying on verbal differences between § 2255 and § 2244(d)(1), which governs petitions for federal habeas corpus by state prisoners. Where § 2255, ¶ 6(1), refers simply to "the date on which the judgment of conviction becomes final," § 2244(d)(1)(A) speaks of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." When "Congress includes particular language in one section of a statute but omits it in another section of

the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States,* 464 U. S. 16, 23. Invoking the maxim recited in *Russello, amicus* asserts that "becomes final" in § 2255, ¶ 6(1), cannot mean the same thing as "became final" in § 2244(d)(1)(A); reading the two as synonymous, *amicus* maintains, would render superfluous the words "by the conclusion of direct review or the expiration of the time for seeking such review" — words found only in the latter provision. If § 2255, ¶ 6(1), explicitly incorporated the first of § 2244(d)(1)(A)'s finality formulations, one might indeed question the soundness of interpreting § 2255 implicitly to incorporate § 2244(d)(1)(A)'s second trigger as well. As written, however, § 2255 leaves "becomes final" undefined. *Russello* hardly warrants a decision that would hold the § 2255 petitioner to a tighter time constraint than the petitioner governed by § 2244(d)(1)(A). An unqualified term, *Russello* indicates, calls for a reading surely no less broad than a pinpointed one. Moreover, one can readily comprehend why Congress might have found it appropriate to spell out the meaning of "final" in § 2244(d)(1)(A) but not in § 2255. Section 2244(d)(1) governs petitions by state prisoners. In that context, a bare reference to "became final" might have suggested that finality assessments should be made by reference to state-law rules. Those rules may differ from the general federal rule and vary from State to State. The qualifying words in § 2244(d)(1)(A) make it clear that finality is to be determined by reference to a uniform federal rule. Section 2255, however, governs only petitions by federal prisoners; within the federal system there is no comparable risk of varying rules to guard against. Pp. 528-531.

(c) Section 2263—which prescribes a limitation period for certain habeas petitions filed by death-sentenced state prisoners—does not alter the Court's reading of § 2255. First,*amicus*' reliance on § 2263 encounters essentially the same problem as does his reliance on § 2244(d)(1)(A): Section 2255, ¶ 6(1), refers to neither of the two events that § 2263(a) identifies as possible starting points for the limitation period — "affirmance of the conviction and sentence on direct review" and "the expiration of the time for seeking such review." Thus, reasoning by negative implication from § 2263 does not justify the conclusion that § 2255, ¶ 6(1)'s limitation period begins to run at one of those times rather than the other. Second, § 2263(a) ties the applicable limitation period to "affirmance of the conviction and sentence," while § 2255, ¶ 6(1), ties the limitation period to the date when "the judgment of conviction becomes final." "The *Russello* presumption . . . grows weaker with each difference in the formulation of the provisions under inspection." *Columbus* v. *Ours Garage & Wrecker Service, Inc.,* 536 U.S. 424, 435-436. Pp. 531-532.

30 Fed. Appx. 607, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Thomas C. Goldstein, by appointment of the Court, 537 U. S. 808, argued the cause for petitioner. With him on the briefs was *Amy Howe.*

Matthew D. Roberts argued the cause for the United States. With him on the briefs were *Solicitor General Olson, Assistant Attorney General Chertoff,* and *Deputy Solicitor General Dreeben.*

David W. DeBruin, by invitation of the Court, 536 U. S. 974, argued the cause and filed a brief as *amicus curiae* in support of the judgment below. With him on the brief was *Elaine J. Goldenberg.*

JUSTICE GINSBURG delivered the opinion of the Court.

A motion by a federal prisoner for postconviction relief under 28 U. S. C. § 2255 is subject to a one-year time limitation that generally runs from "the date on which the judgment of conviction becomes final." § 2255, ¶ 6(1). This case concerns the starting date for the one-year limitation. It presents a narrow but recurring question on which courts of appeals have divided: When a defendant in a federal prosecution takes an unsuccessful direct appeal from a judgment of conviction, but does not next petition for a writ of certiorari from this Court, does the judgment become "final" for post-conviction relief purposes (1) when the appellate court issues its mandate affirming the conviction, or, instead, (2) on the date, ordinarily 69 days later, when the time for filing a petition for certiorari expires?

In accord with this Court's consistent understanding of finality in the context of collateral review, and the weight of lower court authority, we reject the issuance of the appellate court mandate as the triggering date. For the purpose of starting the clock on § 2255's one-year limitation period, we hold, a judgment of conviction becomes final when the time expires for filing a petition for certiorari contesting the appellate court's affirmation of the conviction.

* In 1997, petitioner Erick Cornell Clay was convicted of arson and distribution of cocaine base in the United States District Court for the Northern District of Indiana. On November 23, 1998, the Court of Appeals for the Seventh Circuit affirmed his convictions. That court's mandate issued on December 15, 1998. See Fed. Rules App. Proc. 40(a)(1) and 41(b) (when no petition for rehearing is filed, a court of appeals' mandate issues 21 days after entry of judgment). Clay did not file a petition for a writ of certiorari. The time in which he could have petitioned for certiorari expired on February 22, 1999, 90 days after entry of the Court of Appeals' judgment, see this Court's Rule 13(1), and 69 days after the issuance of the appellate court's mandate.

On February 22, 2000—one year and 69 days after the Court of Appeals issued its mandate and exactly one year after the time for seeking certiorari expired—Clay filed a motion in the District Court, pursuant to 28 U. S. C. § 2255, to vacate, set aside, or correct his sentence. Congress has prescribed "[a] 1-year period of limitation" for such motions "run[ning] from the latest of" four specified dates. § 2255, ¶ 6. Of the four dates, the only one relevant in this case, as in the generality of cases, is the first: "the date on which the judgment of conviction becomes final." § 2255, ¶ 6(1).

Relying on *Gendron* v. *United States,* 154 F. 3d 672, 674 (CA7 1998) *(per curiam),* the District Court stated that "when a federal prisoner in this circuit does not seek certiorari

. . . , the conviction becomes `final' on the date the appellate court issues the mandate in the direct appeal." App. to Pet. for Cert. 8a. Because Clay filed his § 2255 motion more than one year after that date, the court denied the motion as time barred.

The Seventh Circuit affirmed. That court declined Clay's "invitation to reconsider our holding in *Gendron,*" although it acknowledged that *Gendron*'s "construction of section 2255 represents the minority view." 30 Fed. Appx. 607, 609 (2002). "Bowing to *stare decisis,*" the court expressed "reluctan[ce] to overrule [its own] recently-reaffirmed precedent without guidance from the Supreme Court." *Ibid.*

The Fourth Circuit has agreed with *Gendron*'s interpretation of § 2255. See *United States* v. *Torres,* 211 F. 3d 836, 838-842 (2000) (when a federal prisoner does not file a petition for certiorari, his judgment of conviction becomes final for § 2255 purposes upon issuance of the court of appeals' mandate). Six Courts of Appeals have parted ways with the Seventh and Fourth Circuits. These courts hold that, for federal prisoners like Clay who do not file petitions for certiorari following affirmance of their convictions, § 2255's one-year limitation period begins to run when the defendant's time for seeking review by this Court expires.[1] To secure uniformity in the application of § 2255's time constraint, we granted certiorari, 536 U. S. 957 (2002), and now reverse the Seventh Circuit's judgment.[2]

II

Finality is variously defined; like many legal terms, its precise meaning depends on context. Typically, a federal judgment becomes final for appellate review and claim preclusion purposes when the district court disassociates itself from the case, leaving nothing to be done at the court of first instance save execution of the judgment. See,*e. g., Quackenbush* v. *Allstate Ins. Co.,* 517 U. S. 706, 712 (1996); Restatement (Second) of Judgments § 13, Comment *b* (1980). For other purposes, finality attaches at a different stage. For example, for certain determinations under the Speedy Trial Act of 1974, 18 U. S. C. § 3161 *et seq.,* and under a now-repealed version of Federal Rule of Criminal Procedure 33, several lower courts have held that finality attends issuance of the appellate court's mandate. See Brief for *Amicus Curiae* by Invitation of the Court 22-28 (hereinafter DeBruin Brief) (citing cases). For the purpose of seeking review by this Court, in contrast, "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice)." This Court's Rule 13(3).

Here, the relevant context is postconviction relief, a context in which finality has a long-recognized, clear meaning: Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires. See, *e. g., Caspari* v. *Bohlen,*510 U. S. 383, 390 (1994); *Griffith* v. *Kentucky,* 479 U. S. 314, 321, n. 6 (1987); *Barefoot* v. *Estelle,* 463 U. S. 880, 887 (1983); *United States* v. *Johnson,* 457 U.S. 537, 542, n. 8 (1982); *Linkletter* v. *Walker,* 381 U. S. 618, 622, n. 5 (1965). Because "we presume that Congress expects its statutes to be read in conformity with this Court's precedents," *United States* v. *Wells,* 519 U. S. 482, 495

(1997), our unvarying understanding of finality for collateral review purposes would ordinarily determine the meaning of "becomes final" in § 2255.

Amicus urges a different determinant, relying on verbal differences between § 2255 and a parallel statutory provision, 28 U. S. C. § 2244(d)(1), which governs petitions for federal habeas corpus by state prisoners. See DeBruin Brief 8-20. Sections 2255 and 2244(d)(1), as now formulated, were reshaped by the Antiterrorism and Effective Death Penalty Act of 1996. See §§ 101, 105, 110 Stat. 1217, 1220. Prior to that Act, no statute of limitations governed requests for federal habeas corpus or § 2255 habeas-like relief. See *Vasquez* v. *Hillery,* 474 U. S. 254, 265 (1986); *United States* v. *Nahodil,* 36 F. 3d 323, 328 (CA3 1994). Like § 2255, § 2244(d)(1) establishes a one-year limitation period, running from the latest of four specified dates. Three of the four time triggers under § 2244(d)(1) closely track corresponding portions of § 2255. Compare §§ 2244(d)(1)(B)-(D) with § 2255, ¶ ¶ 6(2)-(4). But where § 2255, ¶ 6(1), refers simply to "the date on which the judgment of conviction becomes final," § 2244(d)(1)(A) speaks of "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."[3]

When "Congress includes particular language in one section of a statute but omits it in another section of the same Act," we have recognized, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States,* 464 U. S. 16, 23 (1983) (quoting *United States* v. *Wong Kim Bo,* 472 F. 2d 720, 722 (CA5 1972)). Invoking the maxim recited in *Russello, amicus* asserts that "becomes final" in § 2255, ¶ 6(1), cannot mean the same thing as "became final" in § 2244(d)(1)(A); reading the two as synonymous, *amicus* maintains, would render superfluous the words "by the conclusion of direct review or the expiration of the time for seeking such review"—words found only in the latter provision. DeBruin Brief 8-20. We can give effect to the discrete wording of the two prescriptions, *amicus* urges, if we adopt the following rule: When a convicted defendant does not seek certiorari on direct review, § 2255's limitation period starts to run on the date the court of appeals issues its mandate. *Id.,* at 36.[4]

Amicus would have a stronger argument if § 2255, ¶ 6(1), explicitly incorporated the first of § 2244(d)(1)(A)'s finality formulations but not the second, so that the § 2255 text read "becomes final *by the conclusion of direct review.*" Had § 2255 explicitly provided for the first of the two finality triggers set forth in § 2244(d)(1)(A), one might indeed question the soundness of interpreting § 2255 implicitly to incorporate § 2244(d)(1)(A)'s second trigger as well. As written, however, § 2255 does not qualify "becomes final" at all. Using neither of the disjunctive phrases that follow the words "became final" in § 2244(d)(1)(A), § 2255 simply leaves "becomes final" undefined.

Russello, we think it plain, hardly warrants the decision *amicus* urges, one that would hold the § 2255 petitioner to a tighter time constraint than the petitioner governed by § 2244(d)(1)(A). *Russello* concerned the meaning of a provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961 *et seq.,* that directed forfeiture to the United States of "any interest [a convicted defendant] has acquired ... in violation of [the Act]." § 1963(a)(1). The petitioner in *Russello* urged a narrow construction of the

unqualified words "any interest . . . acquired." Rejecting that argument, we observed that a succeeding subsection, § 1963(a)(2), reached "any interest in ... any enterprise" the defendant conducted in violation of RICO's proscriptions. (Internal quotation marks omitted.) At that point, we referred to the maxim invoked by *amicus.* See *supra,* at 528. The qualifying words "in ... any enterprise" narrowed § 1963(a)(2), but in no way affected § 1963(a)(1). The comparison of the two subsections, we said, "fortified" the broad construction we approved for the unmodified words "any interest ... acquired." *Russello,* 464 U. S., at 22-23 (internal quotation marks omitted); see *id.,* at 23 ("Had Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2).").

Far from supporting the Seventh Circuit's constricted reading of § 2255, ¶ 6(1), *Russello*'s reasoning tends in Clay's favor. An unqualified term—here "becomes final"—*Russello* indicates, calls for a reading surely no less broad than a pinpointed one—here, § 2244(d)(1)(A)'s specification "became final by the conclusion of direct review or the expiration of the time for seeking such review."

Moreover, as Clay and the Government urge, see Brief for Petitioner 22; Reply Brief for United States 7-8, one can readily comprehend why Congress might have found it appropriate to spell out the meaning of "final" in § 2244(d)(1)(A) but not in § 2255. Section 2244(d)(1) governs petitions by state prisoners. In that context, a bare reference to "became final" might have suggested that finality assessments should be made by reference to state-law rules that may differ from the general federal rule and vary from State to State. Cf. *Artuz* v. *Bennett,* 531 U.S. 4, 8 (2000) (an application for state postconviction relief is "*properly* filed" for purposes of 28 U. S. C. § 2244(d)(2) "when its delivery and acceptance are in compliance with the applicable [state] laws and rules governing filings"). The words "by the conclusion of direct review or the expiration of the time for seeking such review" make it clear that finality for the purpose of § 2244(d)(1)(A) is to be determined by reference to a uniform federal rule. Section 2255, however, governs only petitions by federal prisoners; within the federal system there is no comparable risk of varying rules to guard against.

Amicus also submits that 28 U. S. C. § 2263 "reinforces" the Seventh Circuit's understanding of § 2255. DeBruin Brief 20; accord, *Torres,* 211 F. 3d, at 840. Chapter 154 of Title 28 governs certain habeas petitions filed by death-sentenced state prisoners. Section 2263(a) prescribes a 180-day limitation period for such petitions running from "final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." That period is tolled, however, "from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review." § 2263(b)(1).

We do not find in § 2263 cause to alter our reading of § 2255. First, *amicus*' reliance on § 2263 encounters essentially the same problem as does his reliance on § 2244(d)(1)(A): Section 2255, ¶ 6(1), refers to *neither* of the two events that § 2263(a) identifies as possible starting points for the limitation period — "affirmance of the conviction and

sentence on direct review" and "the expiration of the time for seeking such review." Thus, reasoning by negative implication from § 2263 does not justify the conclusion that § 2255, ¶ 6(1)'s limitation period begins to run at one of those times rather than the other. Cf. *supra,* at 529-531. Second, § 2263(a) ties the applicable limitation period to "affirmance of the conviction and sentence," while § 2255, ¶ 6(1), ties the limitation period to the date when "the judgment of conviction becomes final." See *Torres,* 211 F. 3d, at 845 (Hamilton, J., dissenting). "The *Russello* presumption—that the presence of a phrase in one provision and its absence in another reveals Congress' design —grows weaker with each difference in the formulation of the provisions under inspection." *Columbus* v. *Ours Garage & Wrecker Service, Inc.,*536 U. S. 424, 435-436 (2002).

* * *

We hold that, for federal criminal defendants who do not file a petition for certiorari with this Court on direct review, § 2255's one-year limitation period starts to run when the time for seeking such review expires. Under this rule, Clay's § 2255 petition was timely filed. The judgment of the United States Court of Appeals for the Seventh Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Notes:

See*Derman* v. *United States,* 298 F. 3d 34, 39-42 (CA1 2002); *Kapral* v. *United States,* 166 F. 3d 565, 567-577 (CA3 1999); *United States* v. *Gamble,* 208 F. 3d 536, 537 (CA5 2000) *(per curiam); United States* v. *Garcia,* 210 F. 3d 1058, 1059-1061 (CA9 2000); *United States* v. *Burch,* 202 F. 3d 1274, 1275-1279 (CA10 2000);*Kaufmann* v. *United States,* 282 F. 3d 1336, 1337-1339 (CA11 2002).

Agreeing with the position advanced by the majority of the courts of appeals that have ruled on the question, the United States joins petitioner Clay in urging that Clay's § 2255 motion was timely filed. We therefore invited David W. DeBruin to brief and argue this case, as*amicus curiae,* in support of the Seventh Circuit's judgment. Mr. DeBruin's able advocacy permits us to decide the case satisfied that the relevant issues have been fully aired.

The Courts of Appeals have uniformly interpreted "direct review" in § 2244(d)(1)(A) to encompass review of a state conviction by this Court. See*Derman* v. *United States,* 298 F.3d, at 40-41; *Williams* v. *Artuz,* 237 F. 3d 147, 151 (CA2 2001); *Kapral* v. *United States,* 166 F. 3d, at 575; *Hill* v. *Braxton,* 277 F. 3d 701, 704 (CA4 2002); *Ott* v. *Johnson,* 192 F. 3d 510, 513 (CA5 1999); *Bronaugh* v. *Ohio,* 235 F. 3d 280, 283 (CA6 2000); *Anderson* v. *Litscher,* 281 F. 3d 672, 674-675 (CA7 2002);*Smith* v. *Bowersox,* 159 F. 3d 345, 347-348 (CA8 1998); *Bowen* v. *Roe,* 188 F. 3d 1157, 1159 (CA9 1999); *Locke* v. *Saffle,* 237 F. 3d 1269, 1273 (CA10 2001); *Bond* v.*Moore,* 309 F.3d 770, 774 (CA11 2002).

Although recognizing that "the question is not presented in this case," Tr. of Oral Arg. 27,*amicus* suggests that § 2255's limitation period starts to run upon issuance of the

court of appeals' mandate even in cases in which the defendant does petition for certiorari. *Id.,* at 27-28, 36-38, 41-42. As *amicus* also recognizes, however, *id.,* at 41, courts of appeals "have uniformly concluded that, if a prisoner petitions for certiorari, the contested conviction becomes final when the Supreme Court either denies the writ or issues a decision on the merits," *United States* v. *Hicks,* 283 F. 3d 380, 387 (CADC 2002).

Coddington v Langley

202 F.Supp.2d 687 (2002)

Mitchell CODDINGTON, Petitioner,

v.

Sally LANGLEY, Respondent.

No. 99-CV-70393.

United States District Court, E.D. Michigan, Southern Division.

March 15, **2002**.

688*688 John **F**. Royal, Detroit, MI, for Mitchell **Coddington**, petitioner.

Mitchell **Coddington**, Coldwater, MI, pro se.

Vincent J. Leone, Michigan Department of Attorney General, Habeas Corpus Division, Lansing, MI, for Carol Howls, respondent.

OPINION AND ORDER ADOPTING IN PART AND REJECTING IN PART THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION AND GRANTING PETITION FOR WRIT OF HABEAS CORPUS[1]

TARNOW, District Judge.

I. Introduction

Petitioner Mitchell **Coddington** is currently incarcerated at the Florence Crane Facility in Coldwater, MI. He filed a *pro se* petition for a *writ of habeas corpus* stating five grounds for relief: 1) malicious prosecution and abuse of process, 2) insufficient factual basis for the guilty plea, 3) involuntary guilty plea, 4) denial of motion to withdraw guilty plea, and 5) ineffective assistance of trial and appellate counsel. The Magistrate Judge issued a Report and Recommendation (R & R) denying all five grounds of relief sought by petitioner. Petitioner filed objections to the R & R.[2] He did not object to dismissal of the first ground, but he objected to dismissal of grounds two through five.

After review of the R & R and the petitioner's objections, the Court appointed an attorney for Mr.**Coddington**. On January 10, **2002**, and continued on February 15, **2002**, the Court held an evidentiary hearing on the voluntariness of the plea and ineffective assistance of trial and appellate counsel. After testimony on the matter, the Court finds Mr. **Coddington** received ineffective assistance of appellate 689*689 counsel and the plea was involuntary. Counsel's failure to raise meritorious issues, including the involuntariness of the guilty plea, the insufficient factual basis, and the denial of the withdrawal of the guilty plea prejudiced Mr. **Coddington**. Therefore, the Court GRANTS Mr. **Coddington's** petition for a *writ of habeas corpus.*

II. Substantive Facts and Procedural History

In March 1991, Petitioner Mitchell **Coddington** was charged with two counts of Criminal Sexual Conduct in the first degree and three counts of Criminal Sexual Conduct in the second degree. **MICH**. COMP. LAWS § 750.520c(1)(a). On July **13**, 1992, Mr. **Coddington** pled no contest to three counts, one in the first degree and two in the second degree, with the agreement that the other two charges would be dismissed. After the plea, he went to the probation department and asserted his innocence. At sentencing on August 17, 1992, Mr.**Coddington** moved to withdraw his no contest plea based on his assertion of innocence. The judge allowed Mr. **Coddington** to withdraw his plea, and the case went to trial in March 1993. At trial, the jury could not reach a unanimous verdict. The court declared a mistrial.

A new date was set for trial. However, at an appearance before the judge on October 15, 1993, Mr. **Coddington's** attorney, Charles Novelli, advised the court that the defendant wanted to plead guilty. Under the plea agreement, Mr. **Coddington** would plead to five counts Criminal Sexual Conduct in the second degree in exchange for dismissal of both first degree charges.

During the plea colloquy, the judge asked Mr. **Coddington** if he could "read, write and understand the English language." Mr. **Coddington** answered, "No, I can't read and write that good." The judge recited all of the constitutional rights Mr. **Coddington** would be relinquishing by pleading guilty. The judge also asked Mr. **Coddington** if anyone was forcing him to waive his rights, whether there had been "an undue influence, compulsion or duress used against [him] to plead guilty," whether anyone had made any promises to him to induce a guilty plea, or whether anyone had threatened him. Mr. **Coddington** answered "no" to all four questions.

After being assured that Mr. **Coddington** understood his rights, the judge asked him a series of questions to establish a factual basis for his plea. The first exchange went as follows:

THE COURT: And could you tell the Court, please, what you did? THE DEFENDANT: Touched her about five times around the 18th of March. THE COURT: Where did you touch her? THE DEFENDANT: Umm— MR. NOVELLI: Did you touch her in a sexual fashion? THE DEFENDANT: Yes, sir. THE COURT: Where? Mr. **Coddington**, in order for this Court to allow you to plead guilty, the Court has to be convinced that you know what you're doing, first of all, and secondly, that what you did actually constitutes the crime that's charged. So you're going to have to tell me on the record. 690*690 THE DEFENDANT: In her private parts. In her private parts, I guess. THE COURT: Well, what do you mean, you guess? ... THE COURT: Well, I want to make sure-when you say private parts that it constitutes a part that is permitted by law. Did you touch this young person

in the vaginal area? THE DEFENDANT: No. THE COURT: Where did you touch her then? THE DEFENDANT: (no response). THE COURT: Under the circumstances I don't think that this Court can accept any pleas as this point in time. If you want to talk to your client some more-it may be that he's nervous. That's understandable. I'll consider it later. But right now this Court's not convinced that there's a factual basis on any plea.

(Plea Tr., 10/15/93 at 11-12).

After a short recess, the Court tried again to elicit a factual basis:

THE COURT: Now I asked you what did you do. THE DEFENDANT: I touched her thighs and her butt with my hands. THE COURT: Did you do so for the purpose of sexual gratification? THE DEFENDANT: Pardon? THE COURT: Did you do so for the purpose of sexual gratification? THE DEFENDANT: No, sir. MS. MOSS: Well, I believe he indicated before it was a sexual touching. (assistant prosecutor) THE COURT: It wasn't an accident, was it? ... Did you deliberately do it? THE DEFENDANT: Yes. THE COURT: Why did you deliberately do it? THE DEFENDANT: Uh—I don't know. I— THE COURT: Was it under her clothes or on top of her clothes? ... THE DEFENDANT: On top of the clothes. THE COURT: I'm going to pass this.

(Plea Tr., 10/15/93 at **13**-14).

691*691 After the conference in the hall between defense counsel and the petitioner, the Court tried to elicit a factual basis a third time. The judge did not revisit any of the questions regarding whether Mr. **Coddington** had been threatened or pressured by anyone.

THE COURT: Okay, when you touched her, did you do so because you were a little bit sexually aroused? MR. NOVELLI: He's telling me that he doesn't know what you mean by that ... Did you touch her for sexual purposes—for a sexual reason? THE DEFENDANT: No. MS. MOSS: Your Honor, the statute requires that it either be for a sexual purpose or it can reasonably be construed to be for a sexual purpose ... and the defendant, at this point in time, has indicated that he's touching the buttocks and the upper thighs of this child. If it's not for a spanking or if it's not for— MR. NOVELLI: In the original inquiry he said for a sexual fashion. THE COURT: You weren't spanking her, were you? MR. NOVELLI: You weren't spanking her, were you? THE DEFENDANT: No. Just tapping her you know. THE COURT: But it wasn't—you weren't disciplining her? THE DEFENDANT: No. THE COURT: All right, and when you touched her on the thighs, show me where? THE DEFENDANT: Here and here (indicating), you know. On the leg and butt like. MS. MOSS: May I make just one inquiry? THE COURT: Go ahead. MS. MOSS: I believe when the judge was initially asking questions, you said that this was a sexual touch, is that right? THE DEFENDANT: Yes. Yes. THE COURT: Are you sure about that in your mind? THE DEFENDANT: Yeah. THE COURT: Mr. **Coddington**, this Court is convinced and I might add somewhat reluctantly—that the plea of guilty is understanding, voluntary and accurate, therefore, the Court's going to accept the plea of guilty to these five counts.

692*692 (Plea Tr., 10/15/93 at 15-18).

At the sentencing hearing on November 15, 1993, Mr. **Coddington** tried to withdraw his plea. He told the judge:

> *the only reason I took this plea is because I was ascared that my mother couldn't appear in Court and I wanted to enter my plea. Because my mother just had a heart attack and she said that she will come to Court if she has to. And everybody was forcing me and saying this and saying that, and I didn't even want to say what I said. That's it.*

(Sentencing Tr., 11/15/93 at 24). The prosecutor then reminded the judge that Mr. **Coddington**had already withdrawn his plea once. The judge would not allow Mr. **Coddington** to withdraw his guilty plea, and he was given five concurrent prison terms of five to fifteen years.

Mr. **Coddington's** sentence was incorrectly calculated. Mr. **Coddington's** appellate attorney, Jennifer Pilette asked the Michigan Court of Appeals to remand the case to trial court. The Michigan Appeals Court agreed to remand the case to the trial court. The trial court ruled the range was incorrect and lowered the sentence on July 11, 1994. Mr. **Coddington** was then sentenced to five concurrent prison terms of three to fifteen years.

After the new sentence, appellate counsel filed a motion for guidance with the Michigan Appeals Court. In her motion for guidance, appellate counsel told the Appeals Court that she:

> *discussed with the Defendant that they had prevailed on the only issue raised on appeal and Defendant agreed to dismiss his appeal as of right, given a favorable resentencing. However, Defendant is completely illiterate and refuses to allow anyone else inside the prison to assist him with his correspondence due to the nature of the charges.*

(*People v. **Coddington**,* No. 170643, Motion for Guidance, September 24, 1994). She further stated in the motion that she had agreed to send all of Mr. **Coddington's** correspondence to his sister, who would read it to him. With that arrangement in mind, she sent an affidavit of dismissal after the re-sentencing to Mr. **Coddington's** sister, but the sister had moved without leaving a forwarding address. She also sent several copies to Mr. **Coddington**, but received no response. Counsel concluded in her motion for guidance that she:

> *cannot move to perfect this appeal in light of her information and belief that Defendant-Appellant does not want to pursue this appeal (having already been granted the requested relief); and counsel cannot proceed to dismiss the appeal because of this Court's policy that stipulations to dismiss indigent criminal appeals will not be honored unless accompanied by the Defendant-Appellant's signed affidavit to that effect.*

In response to appellate counsel's motion for guidance, the Michigan Court of Appeals dismissed Mr. **Coddington's** appeal in an order dated November 8, 1994.

On February 27, 1997, Petitioner filed a *pro se* motion for relief from judgment in the state trial court, asserting the same five grounds raised in the current petition. The trial

court denied petitioner's motion for relief from judgment on June 12, 1997. *People v.* ***Coddington****,* No. 91-107735 FC. Petitioner's appeals to both the Michigan Court of Appeals and the Michigan Supreme Court were denied for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v.* ***Coddington****,* No. 204909 (**Mich**.Ct. App. Jan. 30, 1998);*People v.* ***Coddington****,* 459 **Mich**. 916, 589 N.W.**2d** 771 (1998).[3]

693*693 On February 2, 1999, Petitioner filed a petition for a *writ of habeas corpus* in this Court. Respondent filed a motion to dismiss the petition on July 28, 1999 arguing the statute of limitations had expired thirteen days before petitioner filed his petition. The Magistrate Judge, in his first R & R in this matter, recommended denying respondent's motion to dismiss, finding that the statute of limitations should be equitably tolled. On May 17, 2000, this Court adopted the Magistrate Judge's R & R and denied respondent's motion to dismiss.

On March 29, 2001, the Magistrate Judge issued a second R & R regarding the merits of the petition. The petitioner filed objections on May 4, 2001 and an amendment on May 31, 2001. He also filed an amendment to and clarification of his objections, which this Court accepted on January 9, **2002**. The Court appointed an attorney for Mr. **Coddington** and held an evidentiary hearing on January 10, **2002**, which was continued on February 15, **2002**.

At the evidentiary hearing, petitioner presented seven witnesses and respondent presented one. The petitioner's first witness, Paul Knuckman was a psychologist who worked for the Michigan Department of Corrections. Part of his duties included screening inmates for group sex offender therapy who were within two years of their earliest release date. Mr. Knuckman evaluated Mr.**Coddington** on June 12, 1996, to determine his eligibility for the therapy. He also met with Mr.**Coddington** on at least one previous occasion. He testified that petitioner could not receive group sex offender therapy due to his failure to admit to "any sexually deviant behavior." (P's Exh. 2). He stated that he tried to include inmates whenever possible, so when the inmate denied the sexual crime, he attempted to discover whether the denial is heartfelt or feigned. He concluded that he could not say whether Mr. **Coddington** actually committed the crime, but he said petitioner's story of why he pled to the crime, but kept claiming innocence, was consistent and made sense to Mr. Knuckman. In support of this testimony, petitioner introduced Mr. Knuckman's report written at the time of the evaluation, which states:

> *From the first interview, he has denied obtaining any sexual gratification from any of his contacts with his young daughter, his victim ... Over the course of our interviews he has admitted to touching his daughter in the genital area to check on and apply ointment on a rash ... When questioned closely he admits to touching his daughter in these, appropriately parental ways, but denies any sexual thoughts or motivations. Further, under close questioning, he states that when agreed to the plea bargain he thought he was admitting to touching his daughter in the genital area and did not understand the distinction between touching her for sexual gratification, which he denies, and touching 694*694 her for physical health. When he states: "I admit I did it," he means that he*

admits to touching her genital area but consistently and steadfastly denies any sexual intent. After our discussions, I find it credible that he did not fully understand what he was admitting to in accepting the plea bargain. In this case, it does appear that Mr. ***Coddington*** *has been consistent and is not "switching stories," admitting to the crime in court and denying it in prison.*

(P's Exh. 2).

Three of the witnesses testified regarding Mr. **Coddington's** mental abilities. For example, Mr. Knuckman stated in his report that "[h]is file contains IQ scores, which are generally validated through interviews, which suggest that he has rather limited intellectual resources and that he functions on a very concrete level with a greatly restricted ability to reason abstractly" (P's Exh. 2).

Psychologist Margaret Getty did an initial evaluation of Mr. **Coddington** on December 22, 1993, as part of his intake into the Michigan Department of Corrections. In her report, dated January 6, 1994 and admitted as Petitioner's Exhibit 1, Ms. Getty stated that Mr. **Coddington**has a history of special education. She reported he obtained a full-scale IQ score of 79 and concluded his intellectual ability was "estimated to be in the borderline range." She also stated that "[h]e may have a difficult time reasoning through verbal problems and expressing himself."

Finally, Mr. James Crenshaw testified regarding Mr. **Coddington's** intellectual capacity. He was petitioner's school principal while petitioner was trying to obtain his GED. He prepared a report on July 30, 1998, which the Court admitted as Petitioner's Exhibit 3. In the report, Mr. Crenshaw stated that although Mr. **Coddington** was a hard worker, he was making slow progress on his GED requirements, stating that "[h]e is struggling to advance despite daily effort." He stated that he "devotes large amounts of time to his assignments, unfortunately, his progress is slow due to low retention." Due to Mr. **Coddington's** learning impairments, Mr. Crenshaw asked for and received a waiver of the requirement in Mr. **Coddington's** case that every inmate must complete his GED prior to parole.

Next, Mr. **Coddington's** mother, Mary **Coddington**, and sister, Donna Mygatt, testified. They were both present at the October 15, 1993 guilty plea hearing and testified about what occurred in the hallway during the plea hearing recesses. Both declared that Mr. Novelli and Mary**Coddington** were putting a lot of pressure on Mr. **Coddington** to plead guilty.

Mary **Coddington** stated that her son Michael had just received twenty-five to fifty years after insisting on a trial. Mr. Novelli told her Mr. **Coddington** would get the same amount of time if he went to trial. Since she was scared, she tried to pressure Mr. **Coddington** to plead guilty. She also testified that her son always looked to her for advice and guidance. She stated that he lived with her, and she was the caretaker of his Social Security check, which he received due to his mental disability. She reaffirmed the testimony of her affidavit, describing how Mr. Novelli became more and more belligerent with Mr. **Coddington** during the plea hearing recesses. She testified that Mr. **Coddington** kept saying that he was not guilty and he was not going to plead guilty, but

Mr. Novelli continued to argue with him. She testified that Mr. Novelli called Mr.**Coddington** a "retarded bastard" and threatened to "bust his ass" unless he pled guilty.

Ms. Mygatt, petitioner's sister, confirmed her mother's testimony. She also testified that Mr. Novelli called her brother 695*695 "retarded" and threatened to "kick his ass" if he kept messing it up. She highlighted that Mr. **Coddington** relied "very heavily" on his mother's advice. She emphasized that Mr. **Coddington** did not want to plead guilty. She said that either her mother or Mr. Novelli suggested to Mr. **Coddington** that if he went to trial, he would be endangering his mother's life because of her bad heart. She also testified that "even up to the end when we walked in the courtroom the last time, I thought we were going for another trial." She testified that, at the hearing, the judge would ask Mr. **Coddington** something, and Mr. Novelli would nudge him in the arm. Then Mr. Novelli would whisper something in his ear, and Mr.**Coddington** would answer the judge. Finally, she testified that Mr. Novelli told Mr.**Coddington** that to plead guilty, he would simply have to say that he touched his daughter's genital area, and that he probably did not understand the difference between that and sexual gratification.

Mr. Novelli was the next witness. He testified that he did not think he could win a retrial, especially now that the prosecution had seen his entire case. He testified that Mr. **Coddington**always maintained his innocence in all conversations with him. He also testified that he did not remember the actual vote count, but the jury in the first trial was not eleven to one-it was more deadlocked than that.

He described Mr. **Coddington's** limited intellectual functioning as a "processing problem." He stated that Mr. **Coddington** "is a frustrating character, because he seems to understand, but then the question is did you lose him someplace or did he get lost or is he still on the same wavelength as you. Did his picture on this tv tube get fuzzy?" He said that he explained that the contact had to be of a sexual nature to Mr. **Coddington** at least five times. He admitted to getting angry and frustrated with Mr. **Coddington's** inability to plea, and he admitted using profanity.

Finally, he testified that this case "disturbed" him because the bargain they struck is now an "illusory bargain." He stated at the time he struck the bargain, the parole board had a policy of granting parole to offenders who served their minimum sentence and had remained ticket-free. During Mr. **Coddington's** confinement, a new parole board was appointed. Now, they have a very strong presumption of not granting parole to those who were convicted of criminal sexual conduct. Also, one cannot get parole unless they complete group sexual offender therapy, and one cannot get the therapy without admitting guilt in the crime. Thus, he thought Mr.**Coddington** would serve only three to five years on his sentence, which was a good bargain at the time. Now it appears he will have to serve the maximum of fifteen years because he will not admit his guilt. He concluded that he would have never advised Mr. **Coddington** to take this plea if he thought he would have to serve the maximum sentence.

Mr. **Coddington** was the final witness for the petitioner. He testified that he relied heavily on his mother for advice. He stated that Mr. Novelli called him names and told

him he was going to "beat his ass" if he did not plead. He testified that he did not go to the courthouse that day with the intention of pleading guilty. He testified that Mr. Novelli told him, "if you plead guilty you will get a little bit of time ... you can get out, prove you're innocent." He stated that he did not understand the terms the court was using, and he did not understand the nature of the crime to which he was pleading.

He also testified that he told his appellate attorney that he was innocent, that he had been forced to plead guilty, and that 696*696 his attorney threatened him. He said that at their meeting, Ms. Pilette said that she was going to go with a "time cut." He thought she was going to "go after the attorney too," but she did not. He testified that she was "not acting as my attorney like I wanted her to be."

The eighth and final witness to testify was Appellate Counsel Jennifer Pilette, the respondent's only witness. She did not have any independent recollection of her discussion or discussions with Mr. **Coddington**. Instead, she read her notes from her visit to petitioner into the record. Her notes indicated that she recognized the insufficient factual basis of the plea was a very good issue for appeal, but petitioner did not want to risk the life sentence he might get if re-tried on the original first degree counts. She testified that she does not remember, but she does not believe she visited Mr. **Coddington** after she successfully obtained some sentencing relief. She confirmed that it is the defendant's decision whether or not to plead guilty. Finally, like Mr. Novelli, she testified that parole board practices have changed since Mr. **Coddington** was sentenced, and if she knew then what she knows now, her advice to him may have been different.

III. Standard of Review

Title 28 U.S.C. § 2254 governs the authority of federal courts to consider applications for *writs of habeas corpus* submitted by state prisoners. This section was amended by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. The AEDPA applies to all petitions filed after April 24, 1996. Since Mr. **Coddington's** petition was filed after April 24, 1996, the AEDPA applies to this case.

Section 2254 provides that a *writ of habeas corpus:*

> *shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless [it]*
>
> *1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or*

2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); *see also Franklin v. Francis,* 144 **F**.3d 429 (6th Cir.1998).

Thus, under the ADEPA, a district court may grant *habeas* relief in three circumstances. Two are found in § 2254(d)(1). According to § 2254(d)(1), a district court must ask whether the state court decision was (1) "contrary to" or involved (2) an "unreasonable application" of clearly established federal law.

Recently in *Williams v. Taylor,* the United States Supreme Court explained the proper application of the "contrary to" clause:

A state-court decision will certainly be contrary to [the Supreme Court's] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases....

A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [the Court's] precedent.

529 U.S. 362, 120 S.Ct. 1495, 1519-20, 146 L.**Ed**.**2d** 389 (2000).

In *Williams,* the United States Supreme Court also elucidated the "unreasonable application" clause of § 2254(d)(1), defining it in the following way:

*[A] federal habeas court making the "unreasonable application" inquiry should ask whether the state court's application 697*697 of clearly established federal law was objectively unreasonable...*

An unreasonable application of federal law is different from an incorrect application of federal law.... Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

The third basis on which a district court can grant *habeas* relief is found in § 2254(d)(2), the "unreasonable determination" of facts clause. Under § 2254(d)(2), district courts must defer to the state court's factual conclusions unless they are based on an "unreasonable determination" of the facts in light of the evidence presented in the state court. Additionally, district courts must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1);*see also Cremeans v. Chapleau,* 62 **F**.3d 167, 169 (6th Cir. 1995) ("We give complete deference to state court findings unless they are clearly erroneous"). A petitioner may only rebut this presumption of correctness with

clear and convincing evidence. *Warren v. Smith,* 161**F**.3d 358, 360-61 (6th Cir.1998), *cert. denied,* 527 U.S. 1040, 119 S.Ct. 2403, 144 L.**Ed**.**2d** 802 (1999).

IV. Analysis

Petitioner claims five grounds for relief in his *habeas* petition:

> *I. The defendant was convicted, being innocent of the charges that were brought against him in a malicious and abusive use of process in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.*
>
> *II. Defendant's conviction is infirm where the trial court failed to establish a factual basis for defendant's plea of guilty, having refused to accept said plea twice, and having accepted the plea without being satisfied that defendant was in fact guilty of the elements necessary to support defendant's conviction for the crime charged.*
>
> *III. The trial court, prosecution and defense counsel arbitrarily and impermissibly exerted the authority of their positions against defendant, inducing defendant to plead guilty, violating the state and federal mandates requiring that a plea of guilty be voluntary.*
>
> *IV. The trial court constitutionally erred in not allowing defendant to withdraw his plea of guilty at sentencing when defendant claimed his innocence and asserted that he was forced to enter his plea.*
>
> *V. Defendant was denied his Sixth Amendment right to the effective assistance of both trial and appellate counsel.*

The Report and Recommendation (R & R) filed by the Magistrate Judge recommends dismissing all the grounds. In his objections, Mr. **Coddington** does not object to dismissal of the first ground, regarding malicious prosecution and abuse of process. The remaining grounds are addressed below.

A. Ineffective Assistance of Appellate Counsel

Respondent has repeatedly asserted that Mr. **Coddington's** petition should be procedurally barred due to failure to raise these substantive issues in his first state appeal; instead, petitioner only raised a sentencing issue. Mr. **Coddington** raised all the issues in the current petition in subsequent state appeals for relief, but both the

Michigan Court of Appeals and 698*698the Michigan Supreme Court held he was procedurally barred under M.C.R. 6.508(D). Thus, the state court has never addressed the merits of his substantive claims raised in the pending*habeas* petition.

Normally, failure to present the claims at the state level can bar them from *habeas* review.*Wainwright v. Sykes,* 433 U.S. 72, 84-86, 97 S.Ct. 2497, 53 L.**Ed**.**2d** 594 (1977); *Couch v. Jabe,* 951 **F**.**2d** 94, 96 (6th Cir.1991). Mr. **Coddington**, though, has asserted ineffective assistance of appellate counsel for failure to raise the substantive issues on the first appeal where the sentencing error was raised. As both the respondent and petitioner agreed at the evidentiary hearing, Mr. **Coddington** must prevail on his ineffective assistance of appellate counsel claim to overcome procedural default and reach the merits of his claims. *See Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S.Ct. 1587, 146 L.**Ed**.**2d** 518 (2000); *Murray v. Carrier,*477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.**Ed**.**2d** 397 (1986).

A criminal defendant is entitled to effective assistance of counsel on his first appeal of right.*Evitts v. Lucey,* 469 U.S. 387, 396, 105 S.Ct. 830, 83 L.**Ed**.**2d** 821 (1985). To prevail on ineffective assistance of appellate counsel, Mr. **Coddington** must show that: 1) his counsel's performance was "objectively unreasonable," and 2) he was "prejudiced," meaning "a reasonable probability that, but for his counsel's [actions], he would have prevailed on his appeal." *Smith v. Robbins,* 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.**Ed**.**2d** 756 (2000); *see also Strickland v. Washington,* 466 U.S. 668, **687**, 104 S.Ct. 2052, 80 L.**Ed**.**2d** 674 (1984).

There is no constitutional right to have every non-frivolous issue raised on appeal. *Jones v. Barnes,* 463 U.S. 745, 754, 103 S.Ct. 3308, 77 L.**Ed**.**2d** 987 (1983). Rather than showing incompetence, the "hallmark of effective appellate advocacy" is "winnowing out weaker arguments on appeal and focusing on" those more likely to succeed. *Smith v. Murray,* 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.**Ed**.**2d** 434 (1986) (internal citations omitted). However, appellate counsel can be "constitutionally deficient in omitting a dead-bang winner even while zealously pressing other strong ... claims." *Page v. U.S,* 884 **F**.**2d** 300, 302 (7th Cir.1989). A "dead-bang winner" has been defined as "an issue which was obvious from the trial record."*United States v. Cook,* 45 **F**.3d 388, 395 (10th Cir.1995); *see also Caver v. Straub,* 2001 WL 1254842 (**E.D.Mich**. Oct. 19, 2001) (unpublished).

In the present case, appellate counsel testified that she recognized that Mr. **Coddington** had a very good claim on insufficient factual basis and withdrawal of his guilty plea. However, she failed to raise those issues on direct appeal, instead seeking only sentencing relief. She testified that Mr. **Coddington** told her he did not want to seek relief on anything other than the sentence, because he did not want to risk the life sentence that first degree Criminal Sexual Conduct carries. Mr. **Coddington**, on the other hand, testified that he thought the appeal would "go after the lawyer" too.

Finding appellate counsel's performance "objectively unreasonable" would be difficult, if all the Court had before it was each side's testimony regarding their understanding of what issues would be appealed. However, the reason there is nothing but oral testimony is due to appellate counsel's failure to obtain a written waiver from Mr.

Coddington stating that he only wanted to seek relief on his less significant claims.[4] This Court will construe the failure to 699*699 make a written record against appellate counsel.

In addition, this Court finds that it was "objectively unreasonable" for appellate counsel to fail to ensure Mr. **Coddington** received notice of her intention to withdraw his appeal. There is ample testimony that Mr. **Coddington** has limited intellectual functioning. It is also undisputed that Mr. **Coddington** is illiterate. In her Motion for Guidance to the Michigan Court of Appeals, counsel demonstrated that she was aware of his illiteracy when she wrote, "Defendant is completely illiterate and refuses to allow anyone else inside the prison to assist him with his correspondence due to the nature of the charges." She testified that she was to send all of Mr.**Coddington's** correspondence to his sister, who had agreed to read it to him. Pursuant to that arrangement, after obtaining the sentencing relief, she sent Mr. **Coddington's** sister the paperwork necessary to voluntarily dismiss his appeal. However, the sister had moved without leaving a forwarding address. She sent several letters with the same information directly to Mr.**Coddington**, but she acknowledged that she knew he could not read it and would not allow anyone else to read it to him. There is no record that she visited him to ensure he understood the consequences of dismissing the appeal.

Furthermore, both trial and appellate counsel testified that it is defendant's decision whether or not to plead guilty, no matter what the judge, counsel and prosecutor think would be best for the defendant. However, it appears that neither counsel truly applied that principle in this case. Here, the record demonstrates that all of the people Mr. **Coddington** trusts were trying to wear him down and make him plead, "for his own good," but as soon as he got out from under their influence, he reasserted that he did not want to plead. For example, he pled no contest, but immediately afterwards, he proclaimed his innocence to the probation department, and he told the judge he wanted to withdraw his plea. Similarly, after the mistrial, the court eventually accepted petitioner's guilty plea after threats from his counsel and pressure from his mother, but afterwards, when the pressure ended, he again wanted to withdraw his plea. He has maintained both his innocence and his desire to go to trial in all subsequent proceedings. By not raising the coercion evident from the record, counsel ratified trial counsel's abusive actions and ignored her client's wishes.

Finally, the Court recognizes that but for the change in parole practices, this case would not be here; Mr. **Coddington** would already be paroled. The testimony at the evidentiary hearing established that under the parole board policies in place at the time, counsel believed Mr.**Coddington** would be paroled near his minimum release date. Thus, the minimum release date reduction from five to three years obtained on appeal was favorable relief. Instead, under new parole board policies it appears Mr. **Coddington** will serve the full fifteen years. He has already served more than eight years. Counsel cannot be held responsible for advice that was sound at the time but in hindsight is no longer sound. However, even with the unforeseen change in parole board policies, the failure to ensure Mr. **Coddington** knew the consequences of dismissing his appeal was still unreasonable.[5] For all of these reasons, 700*700 the

Court finds counsel's performance was objectively unreasonable, satisfying the deficiency prong.

Next, the Court must inquire whether counsel's deficient performance "prejudiced" petitioner; that is, whether petitioner would have prevailed on appeal if the issues had been raised. The petitioner raises four possible ways he was prejudiced: his guilty plea was involuntary, there was an insufficient factual basis for the plea, the judge did not allow him to withdraw his guilty plea, and his trial counsel was ineffective. Each claim is addressed below.

B. Involuntary Guilty Plea

Under *Boykin v. Alabama,* a plea must be both voluntary and intelligent. 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.**Ed**.**2d** 274 (1969). Whether a plea is voluntary "for the purposes of the federal Constitution is a question of federal law," *Marshall v. Lonberger,* 459 U.S. 422, 431, 103 S.Ct. 843, 74 L.**Ed**.**2d** 646 (1983), not within the presumption of correctness afforded state findings of fact. *Caudill v. Jago,* 747 **F**.**2d** 1046, 1050 (6th Cir.1984). Under *Brady v. United States,* a plea of guilty is involuntary when it is "induced by threats," "misrepresentation," or "by promises that are by their nature improper." 397 U.S. 742, 755, 90 S.Ct. 1463, 25 L.**Ed**.**2d** 747 (1970) (quoting Shelton v. United States, 246 **F**.**2d** 571, 572 n. 2 (5th Cir.1957)). "The voluntariness standard may be violated by coercion in the form of impermissible pressure of counsel on his client to plead guilty." *Ray v. Rose,* 392 **F**.**Supp**. 601, 619 (W.D.Tenn.1975).

The Magistrate Judge recommended dismissing this claim and placed much emphasis on Mr.**Coddington's** statement on the record that he was not coerced. While the Magistrate Judge cites case law stating that an admission of guilt at the plea colloquy is entitled to great deference, Mr. **Coddington** is claiming he was coerced to make that statement in the first place. *See United States v. Estrada,* 849 **F**.**2d** 1304 (10th Cir.1988) (while admissions by petitioner on the record stating there was no coercion carry a strong presumption of validity, the petitioner contends he was coerced to make that admission, and "we cannot say that his denial at the hearing of receiving threats is conclusive. We hold [petitioner] has `the right to support [his claims] by evidence'"). In addition, the record demonstrates that Mr. **Coddington**was coerced severely by counsel after his in-court statement that he was not coerced. The court took two recesses to allow defense counsel to talk to his client. After the second conference with counsel, the court "reluctantly" accepted Mr. **Coddington's** plea. Petitioner was not asked again after the sessions in the hall with defense counsel whether anyone had coerced or threatened him.

The other cases cited by the Magistrate Judge do not defeat Mr. **Coddington's** claim. For example, the R & R cites *Blackledge v. Allison* as stating that "[t]he subsequent

presentation of conclusory allegations unsupported by specifies is subject to summary dismissal." 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L.**Ed**.**2d** 136 (1977). However, *Blackledge* goes on to say, while a plea where petitioner stated on the record that he was not coerced is a formidable 701*701 barrier, it is not "invariably insurmountable;" thus, "federal courts cannot fairly adopt" a *per se* rule precluding a claim of a coerced plea. *Id.* at 75, 97 S.Ct. 1621. The Court found petitioner's allegations that his lawyer promised him the sentence would only be ten years, but it ended up being seventeen to twenty-one years, were not "so vague and conclusory" to warrant summary dismissal. *Id.* at 75-76, 97 S.Ct. 1621 (quoting *Machibroda v. United States,* 368 U.S. 487, 495, 82 S.Ct. 510, 7 L.**Ed**.**2d** 473 (1962)). The Court remanded the case for a possible evidentiary hearing, but at the least, plenary consideration of the claim. *Id.* at 82, 97 S.Ct. 1621.

Similarly, in *Mabry v. Johnson,* another case cited in the R & R, the quote used says that "it is well settled that a voluntary and intelligent plea of guilty...may not be collaterally attacked." However, Mr. **Coddington** is claiming it is not a voluntary plea of guilty, so this case does not apply to his claim.

While the majority of cases surveyed usually hold guilty pleas are not coerced, there are a few cases where appeals courts have remanded cases on the voluntariness of the plea. For example, in *Flippins v. United States,* without "undertaking even the slightest investigation," the defense attorney told his client to plead guilty, because he could get him a suspended sentence from his "old friend the judge." 747 **F**.**2d** 1089, 1090 (6th Cir.1984). He also told his client that the judge did not like people talking back, so he should just agree with the judge's questions. *Id.* The Sixth Circuit remanded the case for an evidentiary hearing, because the court found, despite petitioner's admissions on the record about the lack of coercion, the defendant was silenced by defense counsel's promises. *Id.* at 1092. Similarly, in *Iaea v. Sunn,*the defense counsel threatened to withdraw unless defendant pled guilty. The Ninth Circuit remanded for an evidentiary hearing on the voluntariness of the plea. 800 **F**.**2d** 861, 868 (9th Cir.1986). Finally, in *People v. Blewett,* the Supreme Court of Michigan, without comment, overturned an appellate court ruling that a plea was voluntary where there was some ambiguity on the record whether the defendant was actually admitting guilt. 382 **Mich**. 793, 171 N.W.**2d**649 (1969), *rev'g* 18 **Mich**.App. 327, 170 N.W.**2d** 897 (1969) (facts set forth in court of appeals decision).

By contrast, in *United States v. Carr,* the court held alleged coercion, where the defense attorney called his client "stupid" and "a f___ing idiot," was not enough to render the plea involuntary. 80 **F**.3d 413, 416 (10th Cir.1996). They held that the ultimate decision was still petitioner's to make. *Id.* While the court does not go any further into the facts, in contrast to the allegations presented in this case, it does not appear that defense counsel threatened physical violence. In *United States v. LaVallee,* defense attorneys asked defendant's mother to place pressure on him to plead guilty, so he would not get the death penalty. 424 **F**.**2d** 457, 459 (2nd Cir.1970). The court held that the pressure was not enough to render the plea involuntary, while it might be if the same statements were made by the state or the judge. *Id.* at 461. "The realities of the defendant's situation and the shattering effect of an unsuccessful defense are the very ingredients of a rational choice for one in Brown's position." *Id.* In this case, Mr.**Coddington** claims

pressure from his mother, and standing alone, that might not be enough. However, coupled with the threat of physical violence from defense counsel, it is enough to place the voluntariness of Mr. **Coddington's** plea in doubt.

Mr. **Coddington** has offered specific evidence that his plea was coerced. He alleges, and the testimony supports his 702*702 allegation, that he was screamed at and threatened with a beating by his own counsel. In addition, the petitioner has limited intellectual functioning. The record indicates that he, therefore, placed heavy reliance on his mother and others for guidance in decision-making. As explained *supra,* part A, under the influence of those he trusted with decisions, he stated a desire to plead guilty. After reflection each time, he reasserted his innocence and desire to go to trial.

The Court recognizes the difficulties faced by counsel and trial judges in trying to ensure a defendant, especially one with limited intellectual functioning, is apprized of all of his rights while balancing a defendant's reluctance to admit guilt. However, it is ultimately the client's decision whether to plead guilty. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999) ("the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify").

There is a tension between what was stated on the record at the time of the plea, and what is now clear from the entire record in this case. The entire record demonstrates that the decision was taken away from Mr. **Coddington** when he was coerced by counsel and others into pleading guilty. This finding satisfies the prejudice prong of the ineffective assistance of appellate counsel inquiry and is also a separate constitutional ground that warrants *habeas*relief.

C. Insufficient Factual Basis for Guilty Plea

At the plea hearing, the court passed the case twice before "reluctantly" accepting Mr.**Coddington's** plea on the third try. There are two versions for why he was unable to plea correctly the first two times. The respondent argues Mr. **Coddington** was too embarrassed or nervous to say the words until the third time. Petitioner argues he would not admit touching her sexually, because he is innocent. Thus, during the plea hearing, he told the truth-he only touched his daughter on her legs and thighs, in a non-sexual way, so the court was not satisfied with his plea. Mr. **Coddington** is mentally challenged. He thinks only on a concrete level. Therefore, when asked in a straightforward manner whether it was a sexual touch, he unequivocally denied it. However, later, the court was less straightforward, and he did not understand the question to which he responded. He concluded he never admitted the touching was of a sexual nature. The Michigan statute under which he was convicted requires that element; therefore, there is an insufficient factual basis for his plea.

As the Magistrate Judge and the respondent indicate, *habeas* relief is only available for violations of federal law, and "there is no constitutional requirement that a trial judge inquire into the factual basis of a plea." *Roddy v. Black,* 516 **F**.**2d** 1380 (6th Cir.1975), *cert. denied,* 423 U.S. 917, 96 S.Ct. 226, 46 L.**Ed**.**2d** 147 (1975); *United States v. McGlocklin,* 8 **F**.3d 1037, 1047 (6th Cir.1993) (en banc) (impliedly overruled on other grounds) ("While it is advisable to conduct an on-the-record inquiry into the factual basis for a plea, the failure of a state trial judge to do so will not serve as a basis for *habeas* relief"). Therefore, this ground cannot serve as an independent basis for granting *habeas* relief.

However, this ground is relevant to whether Mr. **Coddington** was prejudiced by his appellate counsel's failure to raise insufficient factual basis on direct appeal. Under Michigan law, a defendant may challenge the factual basis of his guilty plea on appeal. *People v. Barrows,* 358**Mich**. 267, 272, 99 N.W.**2d** 347 (1959), *superceded by rule on other grounds; see* 703*703 *also***MICH**. COMP. LAWS § 768.35 (West 2001).[6] To establish a factual basis in this case, the court had to find Mr. **Coddington** admitted the elements of second degree Criminal Sexual Conduct. In 1993, at the time the plea was taken, the statute stated:

> *(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:*
>
> *(a) That other person is under **13** years of age.*

MICH. COMP. LAWS § 750.520c (West 1991). In 1993, "sexual contact" was defined as:

> *the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification*

MICH. COMP. LAWS § 750.520a (West 1991).

However, the record indicates that Mr. **Coddington** did not understand the sexual terms used by the court. The testimony at the evidentiary hearing demonstrated Mr. **Coddington's** limited mental capacity. Also, Mr. Knuckman stated that it was credible that Mr. **Coddington's**statements at his plea hearing were consistent with his continued assertions of innocence. After a careful review of the plea transcript, the Court finds that Mr. **Coddington** did not understand that he had admit to touching his daughter for the purpose of sexual gratification. The plea transcript suggests that when he said the touch was a "sexual touch," he was admitting to touching his daughter in her private parts, not that he was touching for the purpose of sexual gratification. When asked directly about sexual gratification, he denied it. There is no second degree Criminal Sexual Conduct, if the touching cannot be "reasonably construed as for the purpose of sexual arousal or gratification." Therefore, the Court finds that there was an insufficient factual basis for the plea. Although not an independent ground for *habeas* relief, Michigan law requires a factual basis. The Court finds that insufficient factual basis is a "dead-bang winner," because Mr. **Coddington** would have prevailed if appellate counsel had raised it. Thus, the Court concludes that appellate counsel's failure to raise it was

prejudicial, satisfying the prejudice prong of his ineffective assistance of appellate counsel claim.

D. Withdrawal of Guilty Plea

Mr. **Coddington** claims the trial court erred by not allowing him to withdraw his guilty plea before sentencing. However, once again, there is no federal right to withdraw one's guilty plea, so it is not a cognizable claim in a petition for *habeas corpus* without a showing that petitioner was denied fundamental fairness. *Walker v. Engle,* 703 **F**.**2d** 959, 962 (6th Cir.1983), *cert. denied,* 464 U.S. 962, 104 S.Ct. 396, 78 L.**Ed**.**2d** 338 (1983).

However, once again, this ground is relevant to whether Mr. **Coddington** was 704*704 prejudiced by his appellate counsel for failure to raise it on direct appeal. There is no absolute right to withdraw a guilty plea. *People v. Bencheck,* 360 **Mich**. 430, 104 N.W.**2d** 191 (1960). However, where:

> *a defense of innocence is asserted at the time of a request to withdraw the plea, and the request is not obviously frivolous and is made before commencement of trial and before sentence, the plea should be granted. The right we deal with here is the right to a jury trial, and even what may prove a well-founded belief in defendant's guilt on the part of the trial judge should not impede the exercise of that right.*

Id. at 433, 104 N.W.**2d** 191.

Petitioner has maintained his innocence throughout these proceedings.[7] As stated *supra,* part C, the Court finds that his continued assertions of innocence are plausible. At the plea hearing, there was confusion about the terms used to describe the sexual acts to which petitioner was supposed to plead. Besides those few ambiguous statements at the plea hearing, the record clearly indicates that petitioner has repeatedly asserted his innocence at all other times. The Court finds this is also a "dead-bang winner," because Michigan courts would have found it was an abuse of discretion for the trial court to not allow Mr. **Coddington** to withdraw his guilty plea. Thus, the failure to raise the issue on appeal was prejudicial, satisfying the second prong of the ineffective assistance inquiry.

D. Ineffective Assistance of Trial Counsel

The Court concludes the three issues raised *supra* in parts B, C, and D are sufficient to demonstrate ineffective assistance of appellate counsel. Thus, the Court grants Mr.**Coddington's** petition for *habeas corpus* without reaching the issue of ineffectiveness of trial counsel.

V. Conclusion

For the reasons stated above, this Court ADOPTS IN PART the portion of the Magistrate Judge's Report and Recommendation, which recommends dismissing petitioner's first ground of relief. Thus, the Court DISMISSES petitioner's claims regarding malicious prosecution/abuse of process.

However, this Court REJECTS IN PART the portion of the Report and Recommendation that dismisses petitioner's third and fifth ground. Thus, the Court GRANTS petitioner's *writ of habeas corpus* on involuntariness of the guilty plea and ineffective assistance of appellate counsel. The Court declines to reach whether petitioner also received ineffective assistance of trial counsel.

The Court MODIFIES the Magistrate Judge's recommendation on petitioner's 705*705 second and fourth ground. The Court agrees that insufficient factual basis and denial of a motion to withdraw a guilty plea are not cognizable on *habeas* review. However, they are both relevant to the prejudice prong of ineffective assistance of counsel.

IT IS ORDERED that Petitioner **Coddington** is unconditionally released, unless a new date for a trial is scheduled within 90 days.

[1] Law Clerk Amy Harwell provided quality research assistance.

[2] Petitioner filed an amendment to his objections on May 31, 2201. Petitioner also filed an amendment to and clarification of his objections to the R & R, which this Court accepted in an order dated January 9, **2002**.

[3] Michigan Court Rule 6.508(D) states in relevant part:

The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion ...

(3) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

. . . . .

(ii) in a conviction entered on a plea of guilty ... the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand

[4] A letter to Mr. **Coddington** after visiting him at the prison confirming their discussion would also have been sufficient (assuming, of course, she ensured someone could read it to him). Instead, at the evidentiary hearing, counsel had very little independent recollection of her representation of Mr. **Coddington** and was only able to read her few notes from the conference.

[5] The American Bar Association's Model Rules of Professional Conduct are instructive here. Rule 1.3, Comment 3 states:

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client ... Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

MODEL RULES OF PROF'L CONDUCT R. 1.3, cmt. 3 (1999).

[6] **MICH**. COMP. LAWS § 768.35 (West 2001) states:

Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed.

[7] Petitioner did not explicitly state that he wanted to withdraw his plea, because he was innocent. He did tell the judge he only pled because he was forced, which implies a claim of innocence. More explicitly, petitioner told the probation department he was innocent, and that assertion was in the probation report. Also, his attorney told the court that "he maintains that he did not do this act." (Sentencing Tr., 11/15/93 at 23). It is clear from the court's statements that the court knew Mr. **Coddington's** claim of

innocence was a major part of the reason for his desire to withdraw his plea. The court stated,

I was the one who took the plea. I'm convinced that when I took the plea — and I wouldn't have accepted it if I wasn't convinced, that you were guilty of the offense and you gave me a factual basis for establishing the acceptance of the plea. So for you to come in here now and deny it, I just don't buy that ... I'm convinced, based on your plea, that you're guilty of the offenses that you were charged with.

(Sentencing Tr., 11/15/93 at 25).

Coleman v Thompson

501 U.S. 722

111 S.Ct. 2546

115 L.Ed.2d 640

Roger Keith COLEMAN, Petitioner,

v.

Charles E. THOMPSON, Warden.

No. 89-7662.

Argued Feb. 25, 1991.

Decided June 24, 1991.

Rehearing Denied Sept. 13, 1991.

See U.S., 112 S.ct. 27.

Syllabus

After a Buchanan County jury convicted petitioner Coleman of capital murder, he was sentenced to death, and the Virginia Supreme Court affirmed. He then filed a habeas corpus action in the County Circuit Court, which, after a 2-day evidentiary hearing, ruled against him on numerous federal constitutional claims that he had not raised on direct appeal. He filed a notice of appeal with that court 33 days after it entered its final judgment and subsequently filed a petition for appeal in the Virginia Supreme Court. The Commonwealth moved to dismiss the appeal on the sole ground that the notice of appeal was untimely under the Supreme Court's Rule 5:9(a), which requires that such a notice be filed within 30 days of final judgment. After both parties filed several briefs on

the subject of the dismissal motion and on the merits of Coleman's claims, the Supreme Court granted the motion "upon consideration [o]f" the filed papers. Coleman next filed a habeas petition in the Federal District Court, presenting, *inter alia,* seven federal constitutional claims he had first raised in state habeas. Among other things, the court concluded that, by virtue of the dismissal of his state habeas appeal, Coleman had procedurally defaulted the seven claims. The Court of Appeals affirmed, rejecting Coleman's argument that the Virginia Supreme Court had not "clearly and expressly" stated that its decision in state habeas was based on a procedural default, such that the federal courts could not treat it as such under *Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308. The court concluded that federal review of the claims was barred, since the Virginia Supreme Court had met *Harris'* "plain statement" requirement by granting a motion to dismiss that was based solely on procedural grounds, since that decision rested on independent and adequate state grounds, and since Coleman had not shown cause to excuse the default.

Held: Coleman's claims presented for the first time in the state habeas proceeding are not subject to review in federal habeas. Pp. 729-757.

(a) Because of comity and federalism concerns and the requirement that States have the first opportunity to correct their own mistakes, federal habeas courts generally may not review a state court's denial of a state prisoner's federal constitutional claim if the state court's decision rests on a state procedural default that is independent of the federal question and adequate to support the prisoner's continued custody. See, *e.g., Wainwright v. Sykes,* 433 U.S. 72, 81, 87, 97 S.Ct. 2497, 2503, 2506, 53 L.Ed.2d 594. Pp. 729-732.

(b) Since ambiguous state court decisions can make it difficult for a federal habeas court to apply the independent and adequate state ground doctrine, this Court has created a conclusive presumption that there is no such ground if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not "clearly and expressly" rely on an independent and adequate state ground. See *Harris, supra,* 489 U.S. at 261, 266, 109 S.Ct. at 1041, 1045; *Michigan v. Long,* 463 U.S. 1032, 1040-1041, 103 S.Ct. 3469, 3476-3477, 77 L.Ed.2d 1201. Pp. 732-735.

(c) There is no merit to Coleman's contention that the *Harris* presumption applies in all cases in which the state habeas court's decision does not "clearly and expressly" state that it was based on an independent and adequate state ground. The holding of *Harris, supra,* is not changed by the fact that, in one particular exposition of its rule, *id.,* at 263, 109 S.Ct., at 1043, the Court announced the "plain statement" requirement without mentioning the predicate requirement that the state court's decision must fairly appear to rest primarily on, or to be interwoven with, federal law. The *Harris* presumption, like all conclusive presumptions, is designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases. Coleman's proposed rule would greatly and unacceptably expand the risk of improper federal review in those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds. Applying Coleman's rule would have very little benefit to the federal

courts in such cases, since their task of determining the scope of the state court judgment would not be difficult. On the other hand, that rule would place great burdens on the States, which, if their courts neglected to provide a clear and express statement of procedural default, would have to respond to federal habeas review of the federal claims of prisoners in state custody for independent and adequate state law reasons, would have to pay the price in terms of the uncertainty and delay added to the enforcement of their criminal laws, and would have to retry the petitioner if the federal courts reversed his conviction. Coleman's rule would also burden the state courts, which would have to incorporate "plain statement" language in every state appeal and every denial of state collateral review that was potentially subject to federal review. Pp. 735-740.

(d) The *Harris* presumption does not apply in this case. The Virginia Supreme Court's dismissal order "fairly appears" to rest primarily on state law, since it does not mention federal law and granted the Commonwealth's dismissal motion, which was based solely on Coleman's failure to meet Rule 5:9(a)'s time requirements. There is no merit to Coleman's argument that the dismissal was not independent of federal law because the Virginia court applied its procedural bar only after determining that doing so would not abridge one of his federal constitutional rights, such that federal review is permissible under *Ake v. Oklahoma,* 470 U.S. 68, 75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53. Even if*Ake,* a direct review case, applies here, it does Coleman no good because the Virginia court relied on an independent state procedural ground. Moreover, it is clear that the rule of *Tharp v. Commonwealth,* 211 Va. 1, 3, 175 S.E.2d 277, 278—in which the Virginia court announced that it would no longer allow extensions of time for filing *petitions for writs of error with the Supreme Court* unless denial of an extension would abridge a constitutional right—was not applied here, where it was Coleman's *notice of appeal in the trial court* that was late. And, although in *O'Brien v. Socony Mobil Oil Co.,* 207 Va. 707, 709, 152 S.E.2d 278, 280, the Virginia court reviewed the merits of a constitutional claim before dismissing the case on the basis of an untimely civil notice of appeal, it also expressly declined to announce a rule that there is a constitutional exception to the notice of appeal time requirement. While some ambiguity is added to this case by the fact that the Virginia Supreme Court's dismissal order was issued "[u]pon consideration" of all the filed papers, including those discussing the merits of Coleman's federal claims, this Court cannot read that ambiguity as overriding the Virginia court's explicit grant of a dismissal motion based solely on state procedural grounds independent of federal law. This Court also accepts the Court of Appeals' conclusion that the procedural bar was adequate to support the judgment, since Coleman did not petition for certiorari on this question. Pp. 740-744.

(e) In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Cf., *e.g., Murray v. Carrier,* 477 U.S. 478, 485, 495, 106 S.Ct. 2639, 2644, 2649, 91 L.Ed.2d 397;*Harris, supra,* 489 U.S. at 265, 109 S.Ct. at 1044. Although Coleman would be entitled to relief if the "deliberate bypass" standard set forth in *Fay v. Noia,* 372 U.S. 391, 438-

439, 83 S.Ct. 822, 848-849, 9 L.Ed.2d 837, still applied, that standard has been superseded by the Court's subsequent decisions applying the cause and prejudice standard. The *Fay* standard was based on a conception of federal/state relations that undervalued the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them. Cf. *McCleskey v. Zant,* 499 U.S. ----, ----, 111 S.Ct. 1454, 113 L.Ed.2d 517, and, pp. 744-751.

(f) Coleman's contention that it was his attorney's error that led to the late filing of his state habeas appeal cannot demonstrate "cause" under the foregoing standard. *Carrier, supra,* 477 U.S., at 488, 106 S.Ct., at 2645, establishes that attorney error can be "cause" only if it constitutes ineffective assistance of counsel violative of the Sixth Amendment. Because there is no constitutional right to an attorney in state postconviction proceedings, see, *e.g., Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings, see, *Wainwright v. Torna,* 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475. Although Coleman argues that attorney error may be of sufficient magnitude to excuse a procedural default in federal habeas even though no Sixth Amendment claim is possible, this argument is inconsistent with the language and logic of *Carrier, supra,* 477 U.S., at 488, 106 S.Ct., at 2645, which explicitly says that, in the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation. Pp. 752-754.

(g) Nor is there merit to Coleman's contention that, at least as to the federal ineffective assistance claims that he first presented to the state habeas trial court, attorney error in his state habeas appeal must constitute "cause" because, under Virginia law at the time of his trial and direct appeal, claims of that type could be brought only in state habeas. Although an indigent criminal defendant is constitutionally entitled to an effective attorney in his "one and only appeal . . . as of right," *Douglas v. California,* 372 U.S. 353, 357, 358, 83 S.Ct. 814, 817, 9 L.Ed.2d 811; *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821. Coleman has had his "one and only appeal" as to the claims in question, since the County Circuit Court fully addressed and denied those claims. He does not have a constitutional right to counsel on appeal from *that* determination. Cf., *e.g., Finley, supra,* 481 U.S., at 556, 107 S.Ct., at 1993-1994. Thus, since any attorney error that lead to the default of those claims cannot constitute "cause," and since Coleman does not argue in this Court that federal review of the claims is necessary to prevent a fundamental miscarriage of justice, he is barred from bringing the claims in federal habeas. Pp. 755-757.

895 F.2d 139 (CA4 1990), affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined. WHITE, J., filed an opinion concurring and concurring in the judgment. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined.

John H. Hall, New York City, for petitioner.

Donald R. Curry, Richmond, Va., for respondent.

Justice O'CONNOR delivered the opinion of the Court.

This is a case about federalism. It concerns the respect that federal courts owe the States and the States' procedural rules when reviewing the claims of state prisoners in federal habeas corpus.

* A Buchanan County, Virginia, jury convicted Roger Keith Coleman of rape and capital murder and fixed the sentence at death for the murder. The trial court imposed the death sentence, and the Virginia Supreme Court affirmed both the convictions and the sentence. *Coleman v. Commonwealth,* 226 Va. 31, 307 S.E.2d 864 (1983). This Court denied certiorari. 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 145 (1984).

Coleman then filed a petition for a writ of habeas corpus in the Circuit Court for Buchanan County, raising numerous federal constitutional claims that he had not raised on direct appeal. After a two-day evidentiary hearing, the Circuit Court ruled against Coleman on all claims. App. 3-19. The court entered its final judgment on September 4, 1986.

Coleman filed his notice of appeal with the Circuit Court on October 7, 1986, 33 days after the entry of final judgment. Coleman subsequently filed a petition for appeal in the Virginia Supreme Court. The Commonwealth of Virginia, as appellant, filed a motion to dismiss the appeal. The sole ground for dismissal urged in the motion was that Coleman's notice of appeal had been filed late. Virginia Supreme Court Rule 5:9(a) provides that no appeal shall be allowed unless a notice of appeal is filed with the trial court within 30 days of final judgment.

The Virginia Supreme Court did not act immediately on the Commonwealth's motion, and both parties filed several briefs on the subject of the motion to dismiss and on the merits of the claims in Coleman's petition. On May 19, 1987, the Virginia Supreme Court issued the following order, dismissing Coleman's appeal:

"On December 4, 1986 came the appellant, by counsel, and

filed a petition for appeal in the above-styled case.

"Thereupon came the appellee, by the Attorney General of Virginia, and filed a motion to dismiss the petition for appeal; on December 19, 1986 the appellant filed a memorandum in opposition to the motion to dismiss; on December 19, 1986 the appellee filed a reply to the appellant's memorandum; on December 23, 1986 the appellee filed a brief in opposition to the petition for appeal; on December 23, 1986 the appellant filed a surreply in opposition to the appellee's motion to dismiss; and on January 6, 1987 the appellant filed a reply brief.

"Upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." App. 25-26.

This Court again denied certiorari. *Coleman v. Bass,* 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 227 (1987).

Coleman next filed a petition for writ of habeas corpus in the United States District Court for the Western District of Virginia. In his petition, Coleman presented four federal constitutional claims he had raised on direct appeal in the Virginia Supreme Court and seven claims he had raised for the first time in state habeas. The District Court concluded that, by virtue of the dismissal of his appeal by the Virginia Supreme Court in state habeas, Coleman had procedurally defaulted the seven claims. App. 38-39. The District Court nonetheless went on to address the merits of all 11 of Coleman's claims. The court ruled against Coleman on all of the claims and denied the petition. *Id.,* at 40-52.

The United States Court of Appeals for the Fourth Circuit affirmed. 895 F.2d 139 (1990). The court held that Coleman had defaulted all of the claims that he had presented for the first time in state habeas. Coleman argued that the Virginia Supreme Court had not "clearly and expressly" stated that its decision in state habeas was based on a procedural default, and therefore the federal courts could not treat it as such under the rule of *Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). The Fourth Circuit disagreed. It concluded that the Virginia Supreme Court had met the "plain statement" requirement of *Harris* by granting a motion to dismiss that was based solely on procedural grounds. 895 F.2d, at 143. The Fourth Circuit held that the Virginia Supreme Court's decision rested on independent and adequate state grounds and that Coleman had not shown cause to excuse the default. *Id.,* at 143-144. As a consequence, federal review of the claims Coleman presented only in the state habeas proceeding was barred. *Id.,* at 144. We granted certiorari, 498 U.S. ----, 111 S.Ct. 340, 112 L.Ed.2d 305 (1990), to resolve several issues concerning the relationship between state procedural defaults and federal habeas review, and now affirm.

II

A.

This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. See, *e.g., Fox Film Corp. v. Muller,* 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935); *Klinger v. Missouri,* 13 Wall. 257, 263, 20 L.Ed. 635 (1872). This rule applies whether the state law ground is substantive or procedural. See, *e.g., Fox Film, supra; Herndon v. Georgia,* 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. See *Herb v. Pitcairn,* 324 U.S. 117, 125-126, 65 S.Ct. 459, 462-464, 89 L.Ed. 789 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after

we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion").

We have applied the independent and adequate state ground doctrine not only in our own review of state court judgments, but in deciding whether federal district courts should address the claims of state prisoners in habeas corpus actions. The doctrine applies also to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement. In these cases, the state judgment rests on independent and adequate state procedural grounds. See *Wainwright v. Sykes,* 433 U.S. 72, 81, 87, 97 S.Ct. 2497, 2503-2504, 2506-2507, 53 L.Ed.2d 594 (1977); *Ulster County Court v. Allen,*442 U.S. 140, 148, 99 S.Ct. 2213, 2220, 60 L.Ed.2d 777 (1979). See generally *Harris, supra,* 489 U.S., at 262, 109 S.Ct., at 1042-1043.

The basis for application of the independent and adequate state ground doctrine in federal habeas is somewhat different than on direct review by this Court. When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. § 1257 it is reviewing the *judgment;* if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do. This is not the case in habeas. When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254 it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." *Ibid.* The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter.* See *Fay v. Noia,* 372 U.S. 391, 430, 83 S.Ct. 822, 844, 9 L.Ed.2d 837 (1963).

Nonetheless, a state prisoner is in custody *pursuant* to a judgment. When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. See*Fay, supra,* at 469, 83 S.Ct., at 864-865 (Harlan, J., dissenting). In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.

In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism. Without the rule, a federal district court would be able to do in habeas what this Court could not do on direct review; habeas would offer state prisoners whose custody was supported by independent and adequate state grounds an end run around the limits of this Court's jurisdiction and a means to undermine the State's interest in enforcing its laws.

When the independent and adequate state ground supporting a habeas petitioner's custody is a state procedural default, an additional concern comes into play. This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims. See *Ex parte Royall,* 117 U.S. 241, 6 S.Ct. 734, 29 L.Ed. 868 (1886). See also *Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982); *Castille v. Peoples,* 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989); 28 U.S.C. § 2254(b) (codifying the rule). This exhaustion requirement is also grounded in principles of comity; in a federal system, the States

should have the first opportunity to address and correct alleged violations of state prisoner's federal rights. As we explained in*Rose, supra:*

"The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. See *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 490-491 [93 S.Ct. 1123, 1127-1128, 35 L.Ed.2d 443] (1973). Under our federal system, the federal and state 'courts [are] equally bound to guard and protect rights secured by the Constitution.' *Ex parte Royall,* 117 U.S., at 251 [6 S.Ct., at 740]. Because 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' *Darr v. Burford,* 339 U.S. 200, 204 [70 S.Ct. 587, 590, 94 L.Ed. 761] (1950)." *Id.,* 455 U.S., at 518, 102 S.Ct., at 1203.

These same concerns apply to federal claims that have been procedurally defaulted in state court. Just as in those cases in which a state prisoner fails to exhaust state remedies, a habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance. A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer "available" to him. See 28 U.S.C. § 2254(b); *Engle v. Isaac,* 456 U.S. 107, 125-126, n. 28, 102 S.Ct. 1558, 1570, n. 28, 71 L.Ed.2d 783 (1982). In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by defaulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

B

It is not always easy for a federal court to apply the independent and adequate state ground doctrine. State court opinions will, at times, discuss federal questions at length and mention a state law basis for decision only briefly. In such cases, it is often difficult to determine if the state law discussion is truly an independent basis for decision, or merely a passing reference. In other cases, state opinions purporting to apply state constitutional law will derive principles by reference to federal constitutional decisions from this Court. Again, it is unclear from such opinions whether the state law decision is independent of federal law.

In *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) we provided a partial solution to this problem in the form of a conclusive presumption. Prior to *Long,* when faced with ambiguous state court decisions, this Court had adopted various inconsistent and unsatisfactory solutions including dismissal of the case, remand to the state court for clarification, or an independent investigation of state law. *Id.,* at 1038-

1040, 103 S.Ct., at 3474-3476. These solutions were burdensome both to this Court and to the state courts. They were also largely unnecessary in those cases where it fairly appeared that the state court decision rested primarily on federal law. The most reasonable conclusion in such cases is that there is not an independent and adequate state ground for the decision. Therefore, in order to minimize the costs associated with resolving ambiguities in state court decisions while still fulfilling our obligation to determine if there was an independent and adequate state ground for the decision, we established a conclusive presumption of jurisdiction in these cases:

"[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S., at 1040-1041, 103 S.Ct., at 3476.

After *Long,* a state court that wishes to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground can avoid the presumption by stating "clearly and expressly that [it's decision] is . . . based on bona fide separate, adequate, and independent grounds." *Id.,* at 1041, 103 S.Ct., at 3476.

In *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), we applied the *Long* presumption in the context of an alleged independent and adequate state procedural ground. Caldwell, a criminal defendant, challenged at trial part of the prosecutor's closing argument to the jury, but he did not raise the issue on appeal to the Mississippi Supreme Court. That Court raised the issue *sua sponte,* discussing this federal question at length in its opinion and deciding it against Caldwell. The Court also made reference to its general rule that issues not raised on appeal are deemed waived. The State argued to this Court that the procedural default constituted an independent and adequate state ground for the Mississippi Court's decision. We rejected this argument, noting that the state decision " 'fairly appears to rest primarily on federal law,' " and there was no clear and express statement that the Mississippi Supreme Court was relying on procedural default as an independent ground. *Id.,* at 327, 105 S.Ct., at 2638-2639, quoting *Long, supra,* 463 U.S., at 1040, 103 S.Ct., at 3476.

Long and *Caldwell* were direct review cases. We first considered the problem of ambiguous state court decisions in the application of the independent and adequate state ground doctrine in a federal habeas case in *Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). Harris, a state prisoner, filed a petition for state postconviction relief, alleging that his trial counsel had rendered ineffective assistance. The state trial court dismissed the petition, and the Appellate Court of Illinois affirmed. In its order, the Appellate Court referred to the Illinois rule that " 'those [issues] which could have been presented [on direct appeal], but were not, are considered waived.' " *Id.,* at 258, 109 S.Ct., at 1040. The court concluded that Harris could have raised his ineffective assistance claims on direct review. Nonetheless, the court considered and rejected Harris' claims on the merits. Harris then petitioned for federal habeas.

The situation presented to this Court was nearly identical to that in *Long* and *Caldwell:* a state court decision that fairly appeared to rest primarily on federal law in a context in which a federal court has an obligation to determine if the state court decision rested on an independent and adequate state ground. "Faced with a common problem, we adopt[ed] a common solution." *Harris, supra,* at 263, 109 S.Ct., at 1043. *Harris* applied in federal habeas the presumption this Court adopted in *Long* for direct review cases. Because the Illinois Appellate Court did not "clearly and expressly" rely on waiver as a ground for rejecting Harris' ineffective assistance of counsel claims, the *Long* presumption applied and Harris was not barred from federal habeas. *Harris, supra,* at 266, 109 S.Ct., at 1045.

After *Harris,* federal courts on habeas corpus review of state prisoner claims, like this Court on direct review of state court judgments, will presume that there is no independent and adequate state ground for a state court decision when the decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Long, supra,* 463 U.S., at 1040-1041, 103 S.Ct., at 3476-3477. In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.[1]

III

A.

Coleman contends that the presumption of *Long* and *Harris* applies in this case, and precludes a bar to habeas, because the Virginia Supreme Court's order dismissing Coleman's appeal did not "clearly and expressly" state that it was based on state procedural grounds. Coleman reads *Harris* too broadly. A predicate to the application of the *Harris* presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law.

Coleman relies on other language in *Harris.* That opinion announces that: "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Harris, supra,* 489 U.S., at 263, 109 S.Ct., at 1043 (internal quotations omitted). Coleman contends that this rule, by its terms, applies to all state court judgments, not just those that fairly appear to rest primarily on federal law.

Coleman has read the rule out of context. It is unmistakably clear that *Harris* applies the same presumption in habeas that *Long* and *Caldwell* adopted in direct review cases in this Court. See *Harris,* 489 U.S., at 263, 109 S.Ct., at 1043 ("Faced with a common problem we adopt a common solution"); see also *id.,* at 264, 109 S.Ct., at 1044 ("Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review"). Indeed, the quoted passage purports to state the

rule "on either direct or habeas review." *Harris,* being a federal habeas case, could not change the rule for direct review; the reference to both direct and habeas review makes plain that *Harris* applies precisely the same rule as *Long. Harris* describes the *Long* presumption, and hence its own, as applying only in those cases in which " 'it fairly appears that the state court rested its decision primarily on federal law.' " *Harris, supra,* at 261, 109 S.Ct., at 1042, quoting *Long, supra,* 463 U.S., at 1042, 103 S.Ct., at 3477. That in one particular exposition of its rule *Harris* does not mention the predicate to application of the presumption does not change the holding of the opinion.

Coleman urges a broader rule: that the presumption applies in all cases in which a habeas petitioner presented his federal claims to the state court. This rule makes little sense. In direct review cases, "[i]t is . . . 'incumbent upon this Court . . . to ascertain for itself . . . whether the asserted non-federal ground independently and adequately supports the [state court] judgment.' " *Long, supra,* at 1038, 103 S.Ct., at 3475, quoting *Abie State Bank v. Bryan,* 282 U.S. 765, 773, 51 S.Ct. 252, 256, 75 L.Ed. 690 (1931). Similarly, federal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds. In cases in which the *Long* and *Harris* presumption applies, federal courts will conclude that the relevant state court judgment does not rest on an independent and adequate state ground. The presumption, like all conclusive presumptions, is designed to avoid the costs of excessive inquiry where a *per se* rule will achieve the correct result in almost all cases. As we explained in a different context:

"*Per se* rules . . . require the Court to make broad generalizations. . . . Cases that do not fit the generalization may arise, but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them." *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 50, n. 16, 97 S.Ct. 2549, 2557, n. 16, 53 L.Ed.2d 568 (1977).

Per se rules should not be applied, however, in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time. The *Long* and *Harris* presumption works because in the majority of cases in which a state court decision fairly appears to rest primarily on federal law or to be interwoven with such law, and the state court does not plainly state that it is relying on an independent and adequate state ground, the state court decision did not in fact rest on an independent and adequate state ground. We accept errors in those small number of cases where there was nonetheless an independent and adequate state ground in exchange for a significant reduction in the costs of inquiry.

The tradeoff is very different when the factual predicate does not exist. In those cases in which it does not fairly appear that the state court rested its decision primarily on federal grounds, it is simply not true that the "most reasonable explanation" is that the state judgment rested on federal grounds. Cf. *Long, supra,* 463 U.S., at 1041, 103 S.Ct., at 3476-77. Yet Coleman would have the federal courts apply a conclusive presumption of no independent and adequate state grounds in every case in which a state prisoner presented his federal claims to a state court, regardless of whether it fairly appears that

the state court addressed those claims. We cannot accept such a rule, for it would greatly and unacceptably expand the risk that federal courts will review the federal claims of prisoners in custody pursuant to judgments resting on independent and adequate state grounds. Any efficiency gained by applying a conclusive presumption, and thereby avoiding inquiry into state law, is simply not worth the cost in the loss of respect for the State that such a rule would entail.

It may be argued that a broadly applicable presumption is not counterfactual after it is announced: once state courts know that their decisions resting on independent and adequate state procedural grounds will be honored in federal habeas only if there is a clear and express statement of the default, these courts will provide such a statement in all relevant cases. This argument does not help Coleman. Even assuming that *Harris* can be read as establishing a presumption in all cases, the Virginia Supreme Court issued its order dismissing Coleman's appeal *before* this Court decided *Harris.* As to this state court order, the absence of an express statement of procedural default is not very informative.

In any event, we decline to establish such a rule here, for it would place burdens on the States and state courts in exchange for very little benefit to the federal courts. We are, as an initial matter, far from confident that the empirical assumption of the argument for such a rule is correct. It is not necessarily the case that state courts will take pains to provide a clear and express statement of procedural default in all cases, even after announcement of the rule. State courts presumably have a dignitary interest in seeing that their state law decisions are not ignored by a federal habeas court, but most of the price paid for federal review of state prisoner claims is paid by the State. When a federal habeas court considers the federal claims of a prisoner in state custody for independent and adequate state law reasons, it is the State that must respond. It is the State that pays the price in terms of the uncertainty and delay added to the enforcement of its criminal laws. It is the State that must retry the petitioner if the federal courts reverse his conviction. If a state court, in the course of disposing of cases on its overcrowded docket, neglects to provide a clear and express statement of procedural default, or is insufficiently motivated to do so, there is little the State can do about it. Yet it is primarily respect for the State's interests that underlies the application of the independent and adequate state ground doctrine in federal habeas.

A broad presumption would also put too great a burden on the state courts. It remains the duty of the federal courts, whether this Court on direct review, or lower federal courts in habeas, to determine the scope of the relevant state court judgment. We can establish a *per se* rule that eases the burden of inquiry on the federal courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly, in every decision potentially subject to federal review, the grounds upon which its judgment rests, but we will not impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim—every state appeal, every denial of state collateral review—in order that federal courts might not be bothered with reviewing state law and the record in the case.

Nor do we believe that the federal courts will save much work by applying the *Harris* presumption in all cases. The presumption at present applies only when it fairly appears that a state court judgment rested primarily on federal law or was interwoven with federal law, that is, in those cases where a federal court has good reason to question whether there is an independent and adequate state ground for the decision. In the rest of the cases, there is little need for a conclusive presumption. In the absence of a clear indication that a state court rested its decision on federal law, a federal court's task will not be difficult.

There is, in sum, little that the federal courts will gain by applying a presumption of federal review in those cases where the relevant state court decision does not fairly appear to rest primarily on federal law or to be interwoven with such law, and much that the States and state courts will lose. We decline to so expand the *Harris*presumption.

B

The *Harris* presumption does not apply here. Coleman does not argue, nor could he, that it "fairly appears" that the Virginia Supreme Court's decision rested primarily on federal law or was interwoven with such law. The Virginia Supreme Court stated plainly that it was granting the Commonwealth's motion to dismiss the petition for appeal. That motion was based solely on Coleman's failure to meet the Supreme Court's time requirements. There is no mention of federal law in the Virginia Supreme Court's three-sentence dismissal order. It "fairly appears" to rest primarily on state law.

Coleman concedes that the Virginia Supreme Court dismissed his state habeas appeal as untimely, applying a state procedural rule. Brief for Petitioner 9. He argues instead that the court's application of this procedural rule was not independent of federal law.

Virginia Supreme Court Rule 5:5(a) declares that the 30-day requirement for filing a notice of appeal is "mandatory." The Virginia Supreme Court has reiterated the unwaivable nature of this requirement. See *School Bd. of Lynchburg v. Scott,* 237 Va. 550, 556, 379 S.E.2d 319, 323 (1989); *Vaughn v. Vaughn,* 215 Va. 328, 329, 210 S.E.2d 140, 142 (1974); *Mears v. Mears,* 206 Va. 444, 445, 143 S.E.2d 889, 890 (1965). Despite these forthright pronouncements, Coleman contends that in this case the Virginia Supreme Court did not automatically apply its time requirement. Rather, Coleman asserts, the Court first considered the merits of his federal claims, and applied the procedural bar only after determining that doing so would not abridge one of Coleman's constitutional rights. In *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), this Court held that a similar Oklahoma rule, excusing procedural default in cases of "fundamental trial error," was not independent of federal law so as to bar direct review because "the State ha[d] made application of the procedural bar depend on an antecedent ruling on federal law." *Id.,* at 75, 105 S.Ct., at 1092. For the same reason, Coleman argues, the Virginia Supreme Court's time requirement is not independent of federal law.

Ake was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas. But even if *Ake* applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule.

Coleman cites *Tharp v. Commonwealth,* 211 Va. 1, 175 S.E.2d 277 (1970). In that case, the Virginia Supreme Court announced that it was ending its practice of allowing extensions of time for petitions of writs of error in criminal and state habeas cases:

"Henceforth we will extend the time for filing a petition for a writ of error only if it is found that to deny the extension would abridge a constitutional right." *Id.,* at 3, 175 S.E.2d, at 278.

Coleman contends that the Virginia Supreme Court's exception for constitutional claims demonstrates that the court will conduct at least a cursory review of a petitioner's constitutional claims on the merits before dismissing an appeal.

We are not convinced that *Tharp* stands for the rule that Coleman believes it does. Coleman reads that case as establishing a practice in the Virginia Supreme Court of examining the merits of all underlying constitutional claims before denying a petition for appeal or writ of error as time barred. A more natural reading is that the Virginia Supreme Court will only grant an extension of time if *the denial itself* would abridge a constitutional right. That is, the Virginia Supreme Court will extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard.

This was the case, for example, in *Cabaniss v. Cunningham,* 206 Va. 330, 143 S.E.2d 911 (1965). Cabaniss had defaulted the direct appeal of his criminal conviction because the trial court had failed to honor his request for appointed counsel on appeal, a request the court was required to honor under the Constitution. See *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). The Virginia Supreme Court, on state collateral review, ordered that Cabaniss be given counsel and allowed to file a new appeal, although grossly out of time. 206 Va., at 335, 143 S.E.2d, at 914. Enforcing the time requirements for appeal in that case would have abridged Cabaniss' constitutional right to counsel on appeal. See also *Thacker v. Peyton,* 206 Va. 771, 146 S.E.2d 176 (1966) (same); *Stokes v. Peyton,* 207 Va. 1, 147 S.E.2d 773 (1966) (same). Such a rule would be of no help to Coleman. He does not contend that the failure of the Virginia Supreme Court to hear his untimely state habeas appeal violated one of his constitutional rights.

Even if we accept Coleman's reading of *Tharp,* however, it is clear that the Virginia Supreme Court did not apply the *Tharp* rule here. *Tharp* concerns the filing requirement for *petitions.* Here, it was not Coleman's petition for appeal that was late, but his *notice* of appeal. A petition for appeal to the Virginia Supreme Court is a document filed with that court in which the petitioner describes the alleged errors in the decision below. Va.Sup.Ct. Rule 5:17(c). It need only be filed within three months of the final judgment of a trial court. Rule 5:17(a)(1). By contrast, the notice of appeal is a document filed *with the trial court* that notifies that court and the Virginia Supreme Court, as well as the parties, that there will be an appeal; it is a purely ministerial document. Rule 5:9. The notice of the appeal must be filed within 30 days of the final judgment of the trial court. *Ibid.* Coleman has cited no authority indicating that the Virginia Supreme Court has recognized an exception to the time requirement for filing a notice of appeal.

Coleman cites also *O'Brien v. Socony Mobil Oil Co.,* 207 Va. 707, 152 S.E.2d 278 (1967). In that case, O'Brien, a civil litigant making a constitutional property rights claim, filed her notice of appeal several years late. She relied on three recent Virginia Supreme Court cases for the proposition that the Court would waive the time requirement for notice of appeal where constitutional rights were at stake. See *Cabaniss, supra; Thacker, supra; Stokes, supra.* As noted, those were state habeas cases in which the Virginia Supreme Court determined that the petitioner had been denied direct appeal because of a constitutional error in failure to appoint counsel.

In *O'Brien,* the Virginia Supreme Court expressly reserved the "question whether the precedent of the *Cabaniss, Thacker* and *Stokes* cases should be followed in cases involving denial of constitutional property rights." 207 Va., at 715, 152 S.E.2d, at 284. The Court then addressed O'Brien's constitutional claim on the merits and ruled against her. As a result, there was no need to decide if she should be allowed an exception to the "mandatory" time requirement, *id.,* at 709, 152 S.E.2d, at 280, and her appeal was dismissed as untimely.

Coleman argues that *O'Brien* demonstrates that the Virginia Supreme Court will review the merits of constitutional claims before deciding whether to dismiss an appeal as untimely. The court in *O'Brien* did conduct such a review, but the court also explicitly declined to announce a rule that there is a constitutional exception to the time requirement for filing a notice of appeal. There is no evidence other than *O'Brien* that the Virginia Supreme Court has ever conducted such a review and *O'Brien* explicitly declined to announce such a practice. We decline Coleman's invitation to announce such a practice for that court.

Finally, Coleman argues that the Virginia Supreme Court's dismissal order in this case is at least ambiguous because it was issued "[u]pon consideration" of all the filed papers, including Coleman's petition for appeal and the Commonwealth's brief in opposition, both of which discussed the merits of Coleman's federal claims. There is no doubt that the Virginia Supreme Court's "consideration" of all filed papers adds some ambiguity, but we simply cannot read it as overriding the court's explicit grant of a dismissal motion based solely on procedural grounds. Those grounds are independent of federal law.

Coleman contends also that the procedural bar was not adequate to support the judgment. Coleman did not petition for certiorari on this question, and we therefore accept the Court of Appeals conclusion that the bar was adequate. See 895 F.2d, at 143.

IV

In *Daniels v. Allen,* the companion case to *Brown v. Allen,* 344 U.S. 443, 73 S.Ct. 437, 97 L.Ed. 469 (1953), we confronted a situation nearly identical to that here. Petitioners were convicted in a North Carolina trial court, and then were one day late in filing their appeal as of right in the North Carolina Supreme Court. That court rejected the appeals as procedurally barred. We held that federal habeas was also barred unless petitioners could prove that they were "detained without opportunity to appeal because of lack of counsel, incapacity, or some interference by officials." *Id.,* at 485-486, 73 S.Ct., at 422.

Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), overruled this holding. Noia failed to appeal at all in state court his state conviction, and then sought federal habeas review of his claim that his confession had been coerced. This Court held that such a procedural default in state court does not bar federal habeas review unless the petitioner has deliberately bypassed state procedures by intentionally forgoing an opportunity for state review. *Id.,* at 438-439, 83 S.Ct., at 848-849. *Fay* thus created a presumption in favor of federal habeas review of claims procedurally defaulted in state court. The Court based this holding on its conclusion that a State's interest in orderly procedure are sufficiently vindicated by the prisoner's forfeiture of his state remedies. "Whatever residuum of state interest there may be under such circumstances is manifestly insufficient in the face of the federal policy . . . of affording an effective remedy for restraints contrary to the Constitution." *Id.,* at 433-434, 83 S.Ct., at 846.

Our cases after *Fay* that have considered the effect of state procedural default on federal habeas review have taken a markedly different view of the important interests served by state procedural rules. *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), involved a Louisiana prisoner challenging in federal habeas the composition of the grand jury that had indicted him. Louisiana law provided that any such challenge must be made in advance of trial or it would be deemed waived. Because Francis had not raised a timely objection, the Louisiana courts refused to hear his claim. In deciding whether this state procedural default would also bar review in federal habeas, we looked to our decision in *Davis v. United States,* 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). Davis, a federal prisoner, had defaulted an identical federal claim pursuant to Federal Rule of Criminal Procedure 12(b)(2). We held that a federal court on collateral review could not hear the claim unless Davis could show "cause" for his failure to challenge the composition of the grand jury before trial and actual prejudice as a result of the alleged constitutional violations. *Id.,* at 242-245, 93 S.Ct., at 1582-1584.

The *Francis* Court noted the important interests served by the pretrial objection requirement of Rule 12(b)(2) and the parallel state rule: the possible avoidance of an unnecessary trial or of a retrial, the difficulty of making factual determinations concerning grand juries long after the indictment has been handed down and the grand jury disbanded, and the potential disruption to numerous convictions of finding a defect in a grand jury only after the jury has handed down indictments in many cases.*Francis, supra,* 425 U.S., at 540-541, 96 S.Ct., at 1710-1711. These concerns led us in *Davis* to enforce Rule 12(b)(2) in collateral review. We concluded in *Francis* that a proper respect for the States required that federal courts give to the state procedural rule the same effect they give to the federal rule:

"If, as *Davis* held, the federal courts must give effect to these important and legitimate concerns in § 2255 proceedings, then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions. These considerations require that recognition be given 'to the legitimate interests of both State and National Governments, and . . . [that] the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always [endeavor] to do so in ways that will not unduly interfere with

the legitimate activities of the States.' *Younger v. Harris,* 401 U.S. 37, 44 [91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971)]. 'Plainly the interest in finality is the same with regard to both federal and state prisoners. . . . There is no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants. To hold otherwise would reflect an anomalous and erroneous view of federal-state relations.' *Kaufman v. United States,* 394 U.S. 217, 228 [89 S.Ct. 1068, 1075, 22 L.Ed.2d 227 (1969)]." *Francis, supra,*425 U.S. at 541-542, 96 S.Ct., at 1711.

We held that Francis' claim was barred in federal habeas unless he could establish cause and prejudice. *Id.,* at 542, 96 S.Ct., at 1711-1712.

Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), applied the cause and prejudice standard more broadly. Sykes did not object at trial to the introduction of certain inculpatory statements he had earlier made to the police. Under Florida law, this failure barred state courts from hearing the claim on either direct appeal or state collateral review. We recognized that this contemporaneous objection rule served strong state interests in the finality of its criminal litigation. *Id.,* at 88-90, 97 S.Ct., at 2507-2508. To protect these interests, we adopted the same presumption against federal habeas review of claims defaulted in state court for failure to object at trial that *Francis* had adopted in the grand jury context: the cause and prejudice standard. "We believe the adoption of the *Francis* rule in this situation will have the salutary effect of making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be the determinative federal habeas hearing." *Id.,* at 90, 97 S.Ct., at 2508.

In so holding, *Wainwright* limited *Fay* to its facts. The cause and prejudice standard in federal habeas evinces far greater respect for state procedural rules than does the deliberate bypass standard of *Fay.* These incompatible rules are based on very different conceptions of comity and of the importance of finality in state criminal litigation. See Hill, The Forfeiture of Constitutional Rights in Criminal Cases, 78 Colum.L.Rev. 1050, 1053-1059 (1978). In *Wainwright,* we left open the question whether the deliberate bypass standard still applied to a situation like that in *Fay,* where a petitioner has surrendered entirely his right to appeal his state conviction.*Wainwright,* 433 U.S., at 88, n. 12, 97 S.Ct., at 2507, n. 12. We rejected explicitly, however, "the sweeping language of *Fay v. Noia,* going far beyond the facts of the case eliciting it." *Id.,* at 87-88, 97 S.Ct., at 2507.

Our cases since *Sykes* have been unanimous in applying the cause and prejudice standard. *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), held that the standard applies even in cases in which the alleged constitutional error impaired the truthfinding function of the trial. Respondents had failed to object at trial to jury instructions that placed on them the burden of proving self defense. Ohio's contemporaneous objection rule barred respondents' claim on appeal that the burden should have been on the State. We held that this independent and adequate state ground barred federal habeas as well, absent a showing of cause and prejudice.

Recognizing that the writ of habeas corpus "is a bulwark against convictions that violate fundamental fairness," we also acknowledged that "the Great Writ entails significant costs." *Id.,* at 126, 102 S.Ct., at 1571 (internal quotations omitted). The most significant of these is the cost to finality in criminal litigation that federal collateral review of state convictions entails:

"As Justice Harlan once observed, '[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.' *Sanders v. United States,* 373 U.S. 1, 24-25 [83 S.Ct. 1068, 1081-1082, 10 L.Ed.2d 148] (1963) (dissenting opinion)." *Id.,*456 U.S., at 127, 102 S.Ct., at 1571-1572.

Moreover, "[f]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.,* at 128, 102 S.Ct., at 1572. These costs are particularly high, we explained, when a state prisoner, through a procedural default, prevents adjudication of his constitutional claims in state court. Because these costs do not depend on the type of claim the prisoner raised, we reaffirmed that a state procedural default of any federal claim will bar federal habeas unless the petitioner demonstrates cause and actual prejudice. *Id.,* at 129, 102 S.Ct., at 1572-1573. We also explained in*Engle* that the cause and prejudice standard will be met in those cases where review of a state prisoner's claim is necessary to correct "a fundamental miscarriage of justice." *Id.,* at 135, 102 S.Ct., at 1576. See also *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 2649-2650, 91 L.Ed.2d 397 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default").

In *Carrier,* we applied the cause and prejudice standard to a petitioner's failure to raise a particular claim in his state court appeal. Again, we emphasized the important interests served by state procedural rules at every stage of the judicial process, and the harm to the States that results when federal courts ignore these rules:

"A State's procedural rules serve vital purposes at trial, on appeal, and on state collateral attack. . . .

". . . 'Each State's complement of procedural rules . . . channel[s], to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently.' [*Reed v. Ross,* 468 U.S. 1, 10, 104 S.Ct. 2901, 2907, 82 L.Ed.2d 1 (1984).] . . . Failure to raise a claim on appeal reduces the finality of appellate proceedings, deprives the appellate court of an opportunity to review trial error, and 'undercut[s] the State's ability to enforce its procedural rules.' *Engle,* 456 U.S., at 129 [102 S.Ct., at 1572]." *Id.,* 477 U.S., at 490-491, 106 S.Ct., at 2647.

In *Carrier,* as in *Sykes,* we left open the question whether *Fay*'s deliberate bypass standard continued to apply under the facts of that case, where a state prisoner has defaulted his entire appeal. See *Carrier, supra,* at 492, 106 S.Ct., at 2647-2648; *Sykes,* 433

U.S., at 88, n. 12, 97 S.Ct., at 2507, n. 12. We are now required to answer this question. By filing late, Coleman defaulted his entire state collateral appeal. This was no doubt an inadvertent error, and respondent concedes that Coleman did not "understandingly and knowingly" forgo the privilege of state collateral appeal. See *Fay,* 372 U.S., at 439, 83 S.Ct., at 849. Therefore, if the *Fay* deliberate bypass standard still applies, Coleman's state procedural default will not bar federal habeas.

In *Harris,* we described in broad terms the application of the cause and prejudice standard, hinting strongly that *Fay* had been superseded:

"Under *Sykes* and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show 'cause' for the default and 'prejudice attributable thereto,' *Murray v. Carrier,* 477 U.S. 478, 485 [106 S.Ct. 2639, 2644, 91 L.Ed.2d 397] (1986), or demonstrate that failure to consider the federal claim will result in a ' " 'fundamental miscarriage of justice.' " ' *Id.,* at 495 [106 S.Ct., at 2649], quoting *Engle v. Isaac,* 456 U.S. 107, 135 (1982). See also *Smith v. Murray,* 477 U.S. 527, 537 [106 S.Ct. 2661, 2667-2668, 91 L.Ed.2d 434] (1986)." *Harris,* 489 U.S., at 262, 109 S.Ct., at 1043.

We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Fay* was based on a conception of federal/state relations that undervalued the importance of state procedural rules. The several cases after *Fay* that applied the cause and prejudice standard to a variety of state procedural defaults represent a different view. We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them. Cf. *McCleskey v. Zant,* 499 U.S. ----, ----, 111 S.Ct. 1454, 1468, 113 L.Ed.2d 517 (1991) ("Though *Fay v. Noia, supra,* may have cast doubt upon these propositions, since *Fay* we have taken care in our habeas corpus decisions to reconfirm the importance of finality").

Carrier applied the cause and prejudice standard to the failure to raise a particular claim on appeal. There is no reason that the same standard should not apply to a failure to appeal at all. All of the State's interests—in channeling the resolution of claims to the most appropriate forum, in finality, and in having an opportunity to correct its own errors—are implicated whether a prisoner defaults one claim or all of them. A federal court generally should not interfere in either case. By applying the cause and prejudice standard uniformly to all independent and adequate state procedural defaults, we eliminate the irrational distinction between *Fay* and the rule of cases like *Francis, Sykes, Engle,* and *Carrier.*

We also eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own. This Court has long understood the vital interest served by *federal* procedural rules, even when they serve

to bar federal review of constitutional claims. In *Yakus v. United States,* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), for example, the Court explained:

"No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Id.,* at 444, 64 S.Ct., at 677.

In *Browder v. Director, Illinois Dept. of Corrections,* 434 U.S. 257, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978), we held that the appeal of a state prisoner in federal habeas was barred because untimely under Federal Rule Appellate Procedure 4(a). In describing the "mandatory and jurisdictional" nature of the rule and its justification, we might as well have been describing Virginia Supreme Court Rule 5:5(a):

"This 30-day time limit is 'mandatory and jurisdictional.' . . . The purpose of the rule is clear: It is 'to set a definite point of time when litigation should be at an end, unless within that time the prescribed application has been made; and if it has not been, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose.' *Matton Steamboat* [*Co. v. Murphy,* 319 U.S. 412, 415 [63 S.Ct. 1126, 1128, 87 L.Ed. 1483] (1943)]." *Browder, supra,* at 264, 98 S.Ct., at 561 (citations omitted).

No less respect should be given to state rules of procedure. See *Francis,* 425 U.S., at 541-542, 96 S.Ct., at 1711-1712.

V

A.

Coleman maintains that there was cause for his default. The late filing was, he contends, the result of attorney error of sufficient magnitude to excuse the default in federal habeas.

Murray v. Carrier considered the circumstances under which attorney error constitutes cause. Carrier argued that his attorney's inadvertence in failing to raise certain claims in his state appeal constituted cause for the default sufficient to allow federal habeas review. We rejected this claim, explaining that the costs associated with an ignorant or inadvertent procedural default are no less than where the failure to raise a claim is a deliberate strategy: it deprives the state courts of the opportunity to review trial errors. When a federal habeas court hears such a claim, it undercuts the State's ability to enforce its procedural rules just as surely as when the default was deliberate. 477 U.S., at 487, 106 S.Ct., at 2644-2645. We concluded: "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington,* [466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." *Id.,* 477 U.S., at 488, 106 S.Ct., at 2645.

Applying the *Carrier* rule as stated, this case is at an end. There is no constitutional right to an attorney in state post-conviction proceedings. *Pennsylvania v. Finley,*481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Murray v. Giarratano,* 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. See *Wainwright v. Torna,* 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective, therefore Coleman must " bear the risk of attorney error that results in a procedural default."

Coleman attempts to avoid this reasoning by arguing that *Carrier* does not stand for such a broad proposition. He contends that *Carrier* applies by its terms only in those situations where it is possible to state a claim for ineffective assistance of counsel. Where there is no constitutional right to counsel, Coleman argues, it is enough that a petitioner demonstrate that his attorney's conduct would meet the *Strickland* standard, even though no independent Sixth Amendment claim is possible.

This argument is inconsistent not only with the language of *Carrier,* but the logic of that opinion as well. We explained clearly that "cause" under the cause and prejudice test must be something *external* to the petitioner, something that cannot fairly be attributed to him: "[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S., at 488, 106 S.Ct., at 2645. For example, "a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . or that 'some interference by officials' . . . made compliance impracticable, would constitute cause under this standard." *Ibid.* See also *id.,* at 492, 106 S.Ct., at 2647-2648 ("[C]ause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim").

Attorney ignorance or inadvertence is not "cause" because the attorney is the petitioner's agent when acting, or failing to act, in furtherance of the litigation, and the petitioner must "bear the risk of attorney error." *Id.,* at 488, 106 S.Ct., at 2645. See *Link v. Wabash Railroad Co.,* 370 U.S. 626, 634, 82 S.Ct. 1386, 1390-1391, 8 L.Ed.2d 734 (1962) (in "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent"); *Irwin v. Veterans Administration,* 498 U.S. ----, ----, 111 S.Ct. 453, 456, 112 L.Ed.2d 435 (1990) (same). Attorney error that constitutes ineffective assistance of counsel is cause, however. This is not because, as Coleman contends, the error is so bad that "the lawyer ceases to be an agent of the petitioner." Brief for Petitioner 29. In a case such as this, where the alleged attorney error is inadvertence in failing to file a timely notice, such a rule would be contrary to well-settled principles of agency law. See, *e.g.,* Restatement (Second) of Agency § 242 (1958) (master is subject to liability for harm caused by negligent conduct of servant within the scope of employment). Rather, as *Carrier* explains, "if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State." 477 U.S., at 488, 106 S.Ct., at 2646. In other words, it is not the

gravity of the attorney's error that matters, but that it constitutes a violation of petitioner's right to counsel, so that the error must be seen as an external factor, *i.e.,* "imputed to the State." See also *Evitts v. Lucey,* 469 U.S. 387, 396, 105 S.Ct. 830, 836, 83 L.Ed.2d 821 (1985) ("The constitutional mandate [guaranteeing effective assistance of counsel] is addressed to the action of the State in obtaining a criminal conviction through a procedure that fails to meet the standard of due process of law").

Where a petitioner defaults a claim as a result of the denial of the right to effective assistance of counsel, the State, which is responsible for the denial as a constitutional matter, must bear the cost of any resulting default and the harm to state interests that federal habeas review entails. A different allocation of costs is appropriate in those circumstances where the State has no responsibility to ensure that the petitioner was represented by competent counsel. As between the State and the petitioner, it is the petitioner who must bear the burden of a failure to follow state procedural rules. In the absence of a constitutional violation, the petitioner bears the risk in federal habeas for all attorney errors made in the course of the representation, as *Carrier* says explicitly.

B

Among the claims Coleman brought in state habeas, and then again in federal habeas, is ineffective assistance of counsel during trial, sentencing, and appeal. Coleman contends that, at least as to these claims, attorney error in state habeas must constitute cause. This is because, under Virginia law at the time of Coleman's trial and direct appeal, ineffective assistance of counsel claims related to counsel's conduct during trial or appeal could be brought only in state habeas. See *Walker v. Mitchell,* 224 Va. 568, 571, 299 S.E.2d 698, 699-700 (1983); *Dowell v. Commonwealth,* 3 Va.App. 555, 562, 351 S.E.2d 915, 919 (1987). Coleman argues that attorney error in failing to file timely in the first forum in which a federal claim can be raised is cause.

We reiterate that counsel's ineffectiveness will constitute cause only if it is an independent constitutional violation. *Finley* and *Giarratano* established that there is no right to counsel in state collateral proceedings. For Coleman to prevail, therefore, there must be an exception to the rule of *Finley* and *Giarratano* in those cases where state collateral review is the first place a prisoner can present a challenge to his conviction. We need not answer this question broadly, however, for one state court has addressed Coleman's claims: the state habeas trial court. The effectiveness of Coleman's counsel before that court is not at issue here. Coleman contends that it was the ineffectiveness of his counsel during the appeal from that determination that constitutes cause to excuse his default. We thus need to decide only whether Coleman had a constitutional right to counsel on appeal from the state habeas trial court judgment. We conclude that he did not.

Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), established that an indigent criminal defendant has a right to appointed counsel in his first appeal as of right in state court. *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985), held that this right encompasses a right to effective assistance of counsel for all criminal defendants in their first appeal as of right. We based our holding in *Douglas* on that

"equality demanded by the Fourteenth Amendment." 372 U.S., at 358, 83 S.Ct., at 817. Recognizing that "[a]bsolute equality is not required," we nonetheless held that "where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." *Id.,* at 357, 83 S.Ct., at 816 (emphasis original).

Coleman has had his "one and only appeal," if that is what a state collateral proceeding may be considered; the Buchanan County Circuit Court, after a two-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims. What Coleman requires here is a right to counsel on appeal from *that* determination. Our case law will not support it.

In *Ross v. Moffitt,* 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), and *Pennsylvania v. Finley,* 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), we declined to extend the right to counsel beyond the first appeal of a criminal conviction. We held in *Ross* that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right. "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." 417 U.S., at 616, 94 S.Ct., at 2447. Similarly, in *Finley* we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review. 481 U.S., at 556, 107 S.Ct., at 1993-1994 (citing *Ross, supra*).

These cases dictate the answer here. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that Coleman had a right to counsel to appeal a state collateral determination of his claims of trial error.

Because Coleman had no right to counsel to pursue his appeal in state habeas, any attorney error that led to the default of Coleman's claims in state court cannot constitute cause to excuse the default in federal habeas. As Coleman does not argue in this Court that federal review of his claims is necessary to prevent a fundamental miscarriage of justice, he is barred from bringing these claims in federal habeas. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice WHITE, concurring and concurring in the judgment.

I concur in the judgment of the Court and I join in its opinion, but add a few words concerning what occurred below. *Harris v. Reed* stated that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ' "clearly and expressly" ' states that its judgment rests on a state procedural bar." 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), quoting *Caldwell v. Mississippi,* 472 U.S. 320, 327, 105 S.Ct. 2633,

2638-2639, 86 L.Ed.2d 231 (1985), and *Michigan v. Long,* 463 U.S. 1032, 1041, 103 S.Ct. 3469, 3477, 77 L.Ed.2d 1201 (1983). If there were nothing before us but the order granting the State's motion to dismiss for untimeliness, it would be clear enough that the dismissal was based on a procedural default.

But the state court did not grant the State's explicit request for an early ruling on the motion. Instead, the court delayed ruling on the motion to dismiss, and hence briefs on both the motion and the merits were filed. Six months later, the court "upon consideration whereof" granted the State's motion to dismiss the appeal. Hence petitioner's argument that the court studied the merits of the federal claims to determine whether to waive the procedural default, found those claims lacking, and only then granted the motion to dismiss; it is as though the court had said that it was granting the motion to dismiss the appeal as untimely because the federal claims were untenable and provided the court no reason to waive the default.

The predicate for this argument is that on occasion the Virginia Supreme Court waives the untimeliness rule. If that were true, the rule would not be an adequate and independent state ground barring direct or habeas review. Cf. *Ake v. Oklahoma,* 470 U.S. 68, 75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53 (1985). The filing of briefs and their consideration would do no more than buttress the claim that the rule is not strictly enforced.

Petitioner argues that the Virginia court does in fact waive the rule on occasion, but I am not now convinced that there is a practice of waiving the rule when constitutional issues are at stake, even fundamental ones. The evidence is too scanty to permit a conclusion that the rule is no longer an adequate and independent state ground barring federal review. The fact that merits briefs were filed and were considered by the court, without more, does not justify a different conclusion.

Justice BLACKMUN, with whom Justice MARSHALL and Justice STEVENS join, dissenting.

Federalism; comity; state sovereignty; preservation of state resources; certainty: the majority methodically inventories these multifarious state interests before concluding that the plain-statement rule of *Michigan v. Long,* 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), does not apply to a summary order. One searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect or his interest in finding a forum for his constitutional challenge to his conviction and sentence of death. Nor does the majority even allude to the "important need for uniformity in federal law," *id.,*at 1040, 103 S.Ct., at 3476, which justified this Court's adoption of the plain-statement rule in the first place. Rather, displaying obvious exasperation with the breadth of substantive federal habeas doctrine and the expansive protection afforded by the Fourteenth Amendment's guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. Because I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights, I dissent.

* The Court cavalierly claims that "[t]his is a case about federalism," *ante,* at 726, and proceeds without explanation to assume that the purposes of federalism are advanced whenever a federal court refrains from reviewing an ambiguous state court judgment. Federalism, however, has no inherent normative value: it does not, as the majority appears to assume, blindly protect the interests of States from any incursion by the federal courts. Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power. "Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions." Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L.Rev. 423, 442 (1961). See also The Federalist No. 51, p. 324 (C. Rossiter ed. 1961) (J. Madison) ("Justice is the end of government. It is the end of civil society"). In this context, it cannot lightly be assumed that the interests of federalism are fostered by a rule that impedes federal review of federal constitutional claims.

Moreover, the form of federalism embraced by today's majority bears little resemblance to that adopted by the Framers of the Constitution and ratified by the original States. The majority proceeds as if the sovereign interests of the States and the Federal Government were co-equal. Ours, however, is a federal republic, conceived on the principle of a supreme federal power and constituted first and foremost of citizens, not of sovereign States. The citizens expressly declared: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. Art. VI., cl. 2. James Madison felt that a constitution without this clause "would have been evidently and radically defective." The Federalist No. 44, p. 286 (C. Rossiter ed. 1961). The ratification of the Fourteenth Amendment by the citizens of the several States expanded federal powers even further, with a corresponding diminution of state sovereignty. See *Fitzpatrick v. Bitzer,* 427 U.S. 445, 453-456, 96 S.Ct. 2666, 2670-2671, 49 L.Ed.2d 614 (1976); *Ex parte Virginia,* 100 U.S. 339, 344-348, 25 L.Ed. 676 (1879). Thus, "the sovereignty of the States is limited by the Constitution itself." *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 548, 105 S.Ct. 1005, 1016, 83 L.Ed.2d 1016 (1985).

Federal habeas review of state court judgments, respectfully employed to safeguard federal rights, is no invasion of State sovereignty. Cf. *Ex parte Virginia,* 100 U.S., at 346. Since 1867, Congress has acted within its constitutional authority to " 'interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action.' " *Reed v. Ross,* 468 U.S. 1, 10, 104 S.Ct. 2901, 2907, 82 L.Ed.2d 1 (1984), quoting *Mitchum v. Foster,*407 U.S. 225, 242, 92 S.Ct. 2151, 2162, 32 L.Ed.2d 705 (1972). See 28 U.S.C. § 2254. Justice Frankfurter, in his separate opinion in *Brown v. Allen,* 344 U.S. 443, 510, 73 S.Ct. 397, 448, 97 L.Ed. 469 (1953), recognized this:

"Insofar as [federal habeas] jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law."

Thus, the considered exercise by federal courts—in vindication of fundamental constitutional rights—of the habeas jurisdiction conferred on them by Congress exemplifies the full expression of this Nation's federalism.

That the majority has lost sight of the animating principles of federalism is well illustrated by its discussion of the duty of a federal court to determine whether a state court judgment rests on an adequate and independent state ground. According to the majority's formulation, establishing this duty in the federal court serves to diminish the risk that a federal habeas court will review the federal claims of a prisoner in custody pursuant to a judgment that rests upon an adequate and independent state ground. In reality, however, this duty of a federal court to determine its jurisdiction originally was articulated to ensure that federal rights were not improperly denied a federal forum. Thus, the quote artfully reconstituted by the majority, *ante,* at 736, originally read: "[I]t is incumbent upon this Court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, *in order that constitutional guarantees may appropriately be enforced,* whether the asserted non-federal ground independently and adequately supports the judgment" (emphasis added). *Abie State Bank v. Bryan,* 282 U.S. 765, 773, 51 S.Ct. 252, 255-256, 75 L.Ed. 690 (1931). Similarly, the Court has stated that the duty "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by the law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." *Ward v. Board of County Comm'rs,* 253 U.S. 17, 23, 40 S.Ct. 419, 421, 64 L.Ed. 751 (1920). Indeed, the duty arose out of a distinct distrust of state courts, which this Court perceived as attempting to evade federal review. See *Broad River Power Co. v. South Carolina ex rel. Daniel,* 281 U.S. 537, 540, 50 S.Ct. 401, 402-403, 74 L.Ed. 1023 (1930) ("Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair and substantial basis. If unsubstantial, constitutional obligations may not thus be evaded").

From these noble beginnings, the Court has managed to transform the duty to protect federal rights into a self-fashioned abdication. Defying the constitutional allocation of sovereign authority, the Court now requires a federal court to scrutinize the state court judgment with an eye to denying a litigant review of his federal claims rather than enforcing those provisions of the federal Bill of Rights that secure individual autonomy.

II

Even if one acquiesced in the majority's unjustifiable elevation of abstract federalism over fundamental precepts of liberty and fairness, the Court's conclusion that the plain-statement rule of *Michigan v. Long* does not apply to a summary order defies both settled understandings and compassionate reason.

A.

As an initial matter, it cannot seriously be disputed that the Court's opinion in *Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), expressly considered this issue and resolved the question quite contrary to the Court's holding today. Both *Long* and *Harris* involved a federal review of a state court opinion that, on its face, addressed

the merits of the underlying claims and resolved those claims with express reference to both state and federal law. See *Long,* 463 U.S., at 1037, and n. 3, 103 S.Ct., at 3474, and n. 3; *Harris,* 489 U.S., at 257-258, 109 S.Ct., at 1040-1041. In each case, it was not disputed that the alleged state ground had been invoked: the Court was faced with the question whether that state ground was adequate to support the judgment and independent of federal law. Accordingly, the *Long* and *Harris*Courts spoke of state court judgments that "fairly appea[r] to rest primarily on federal law, or to be interwoven with federal law," *Long,* 463 U.S., at 1040, 103 S.Ct., at 3476, or that contained "ambiguous . . . references to state law." *Harris,* 489 U.S., at 263, 109 S.Ct., at 1043.

The majority asserts that these statements establish a factual predicate for the application of the plain-statement rule. *Ante,* at 735-736. Neither opinion, however, purported to limit the application of the plain-statement rule to the narrow circumstances presented in the case under review. In fact, the several opinions in *Harris* make plain that for purposes of federal habeas, the Court was adopting the *Long* presumption for all cases where federal claims are presented to state courts.

The *Harris* Court expressed its understanding of *Long* unequivocally: "We held in *Long* that unless the state court clearly expressed its reliance on an adequate and independent state-law ground, this Court may address a federal issue considered by the state court." *Harris,* 489 U.S., at 262-263, 109 S.Ct., at 1042-1043. Armed with that understanding, the Court concluded that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ' "clearly and expressly" ' states that its judgment rests on a state procedural bar." *Id.,* at 263, 109 S.Ct., at 1043, quoting *Caldwell v. Mississippi* 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985), in turn quoting *Long,* 463 U.S., at 1041, 103 S.Ct., at 3476.

Justice O'CONNOR, in a concurring opinion joined by THE CHIEF JUSTICE and Justice SCALIA, echoed the majority's indication that the *Long* presumption applied to all cases where a federal claim is presented to the state courts. She wrote separately to emphasize that the Court's opinion did not alter the well-settled rule that federal courts may look to state procedural-default rules in determining whether a federal claim has been properly exhausted in the state courts. See 489 U.S., at 268-270, 109 S.Ct., at 1046-1047. "[I]t is simply impossible," according to the concurrence, "to '[r]equir[e] a state court to be explicit in its reliance on a procedural default' . . . where a claim raised on federal habeas has never been presented to the state courts at all." *Id.,* at 270, 109 S.Ct., at 1047. Certainly, if the Court's opinion had been limited to cases where the state court's judgment fairly appeared to rest on federal law or was interwoven with federal law, the point painstakingly made in this concurrence would have been unnecessary.

That *Harris'* adoption of the plain-statement rule for federal habeas cases was intended to apply to all cases where federal claims were presented to the state courts is confirmed by the exchange there between the majority and the dissent. In his dissenting opinion, Justice KENNEDY maintained that the Court's formulation of the plain-statement rule would encourage habeas prisoners whose claims would otherwise be procedurally barred to file "a never-ending stream of petitions for post-conviction

relief" in hope of being "rewarded with a suitably ambiguous rebuff, *perhaps a one-line order finding that a prisoner's claim 'lacks merit' or stating that relief is 'denied'* " (emphasis added). *Id.,* at 282, 109 S.Ct., at 1053-1054. The Court responded that "the dissent's fear . . . that our holding will submerge courts in a flood of improper prisoner petitions is unrealistic: a state court that wishes to rely on a procedural bar rule in a one-line *pro forma* order easily can write that 'relief is denied for reasons of procedural default.' " *Id.,* at 265, n. 12, 109 S.Ct., at 1044-1045, n. 12. The *Harris* Court's holding that the plain-statement rule applies to a summary order could not itself have been more plain. Because the majority acknowledges that the Virginia Supreme Court's dismissal order "adds some ambiguity," *ante,* at 744, *Harris* compels a federal habeas court to provide a forum for the consideration of Coleman's federal claims.

B

Notwithstanding the clarity of the Court's holding in *Harris,* the majority asserts that Coleman has read the rule announced therein "out of context." *Ante,* at 736. I submit, however, that it is the majority that has wrested *Harris* out of the context of a preference for the vindication of fundamental constitutional rights and that has set it down in a vacuum of rhetoric about federalism. In its attempt to justify a blind abdication of responsibility by the federal courts, the majority's opinion marks the nadir of the Court's recent habeas jurisprudence, where the discourse of rights is routinely replaced with the functional dialect of interests. The Court's habeas jurisprudence now routinely, and without evident reflection, subordinates fundamental constitutional rights to mere utilitarian interests. See, *e.g., McCleskey v. Zant,* --- U.S. ----, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). Such unreflective cost-benefit analysis is inconsistent with the very idea of rights. See generally R. Cover and T. Aleinikoff, Dialectic Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1092 (1977). The Bill of Rights is not, after all, a collection of technical interests, and "surely it is an abuse to deal too casually and too lightly with rights guaranteed" therein. *Brown v. Allen,* 344 U.S., at 498, 73 S.Ct., at 441-442 (opinion of Frankfurter, J.).

It is well settled that the existence of a state procedural default does not divest a federal court of jurisdiction on collateral review. See *Wainwright v. Sykes,* 433 U.S. 72, 82-84, 97 S.Ct. 2497, 2504-2505, 53 L.Ed.2d 594 (1977). Rather, the important office of the federal courts in vindicating federal rights gives way to the States' enforcement of their procedural rules to protect the States' interest in being an equal partner in safeguarding federal rights. This accommodation furthers the values underlying federalism in two ways. First, encouraging a defendant to assert his federal rights in the appropriate state forum makes it possible for transgressions to be arrested sooner and before they influence an erroneous deprivation of liberty. Second, thorough examination of a prisoner's federal claims in state court permits more effective review of those claims in federal court, honing the accuracy of the writ as an implement to eradicate unlawful detention. See *Rose v. Lundy,* 455 U.S. 509, 519, 102 S.Ct. 1198, 1203-1204, 71 L.Ed.2d 379 (1982); *Brown v. Allen,* 344 U.S., at 500-501, 73 S.Ct., at 442-443 (opinion of Frankfurter, J.). The majority ignores these purposes in concluding that a State need not bear the burden of making clear its intent to rely on such a rule. When it is uncertain whether a state court judgment denying relief from federal claims rests on a procedural

bar, it is inconsistent with federalism principles for a federal court to exercise discretion to decline to review those federal claims.

In justifying its new rule, the majority first announces that, as a practical matter, the application of the *Long* presumption to a summary order entered in a case where a state prisoner presented federal constitutional claims to a state court is unwarranted, because "it is simply not true that the 'most reasonable explanation' is that the state judgment rested on federal grounds." *Ante,* at 737, quoting *Long,* 463 U.S., at 1041, 103 S.Ct., at 3477. The majority provides no support for this flat assertion. In fact, the assertion finds no support in reality. "Under our federal system, the federal and state 'courts [are] equally bound to guard and protect the rights secured by the Constitution.' " *Rose v. Lundy,* 455 U.S., at 518, 102 S.Ct., at 1203, quoting, *Ex parte Royall,* 117 U.S. 241, 251, 6 S.Ct. 734, 740, 29 L.Ed. 868 (1886). Accordingly, state prisoners are required to present their federal claims to state tribunals before proceeding to federal habeas, "to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings." 455 U.S., at 518, 102 S.Ct., at 1203. See 28 U.S.C. § 2254. Respect for the States' responsible assumption of this solemn trust compels the conclusion that state courts presented with federal constitutional claims actually resolve those claims unless they indicate to the contrary. Cf.*Brown v. Allen,* 344 U.S., at 512, 73 S.Ct., at 448-449 (opinion of Frankfurter, J.) ("[The availability of the writ of habeas corpus] does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed").

The majority claims that applying the plain-statement rule to summary orders "would place burdens on the States and state courts," *ante,* at 738, suggesting that these burdens are borne independently by the States and their courts. The State, according to the majority, "pays the price" for federal review of state prisoner claims "in terms of uncertainty and delay" as well as in the cost of a retrial. *Ibid.* The majority is less clear about the precise contours of the burden this rule is said to place on state courts, merely asserting that it "would also put too great a burden on the state courts." *Ante,* at 739.

The majority's attempt to distinguish between the interests of state courts and the interests of the States in this context is inexplicable. States do not exist independent of their officers, agents, and citizens. Rather, "[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft,* --- U.S. ----, ----, 111 S.Ct. 2395, 2400, --- L.Ed.2d ---- (1991) (slip op. 6) See also *Ex parte Virginia,* 100 U.S., at 347 ("A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way"). The majority's novel conception of dichotomous interests is entirely unprecedented. See *ibid.* ("[H]e [who] acts in the name and for the State, and is clothed with the State's power, his act is that of the State"). Moreover, it admits of no readily apparent limiting principle. For instance, should a federal habeas court decline to review claims that the state judge committed constitutional error at trial simply because the costs of a retrial will be borne by the State? After all, as the majority asserts, "there is little the State can do about" constitutional errors made by its trial judges. *Ante,* at 739.

Even if the majority correctly attributed the relevant state interests, they are, nonetheless, misconceived. The majority appears most concerned with the financial burden that a retrial places on the States. Of course, if the initial trial conformed to the mandate of the Federal Constitution, not even the most probing federal review would necessitate a retrial. Thus, to the extent the State must "pay the price" of retrying a state prisoner, that price is incurred as a direct result of the State's failure scrupulously to honor his federal rights, not as a consequence of unwelcome federal review. See *Teague v. Lane,* 489 U.S. 288, 306, 109 S.Ct. 1060, 1072-1073, 103 L.Ed.2d 334 (opinion of O'CONNOR, J., joined by THE CHIEF JUSTICE, Justice SCALIA, and Justice KENNEDY, quoting *Desist v. United States,* 394 U.S. 244, 262-263, 89 S.Ct. 1030, 1041, 22 L.Ed.2d 248 (1969) (Harlan, J., dissenting)) (" '[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards' ").

The majority also contends without elaboration that a "broad presumption [of federal jurisdiction] would . . . put too great a burden on the state courts." *Ante,* at 739. This assertion not only finds no support in *Long,* where the burden of the presumption on state courts is not even mentioned, but also is premised on the misconception that the plain-statement rule serves only to relieve the federal court of the "bother" of determining the basis of the relevant state-court judgment. Viewed responsibly, the plain-statement rule provides a simple mechanism by which a state court may invoke the discretionary deference of the federal habeas court and virtually insulate its judgment from federal review. While state courts may choose to draw their orders as they wish, the right of a state prisoner, particularly one sentenced to death, to have his federal claim heard by a federal habeas court is simply too fundamental to yield to the State's incidental interest in issuing ambiguous summary orders.

C

Not only is the majority's abandonment of the plain-statement rule for purposes of summary orders unjustified, it is also misguided. In *Long,* the Court adopted the plain-statement rule because we had "announced a number of principles in order to help us determine" whether ambiguous state court judgments rested on adequate and independent state grounds, but had "not developed a satisfying and consistent approach for resolving this vexing issue." 463 U.S., at 1038, 103 S.Ct., at 3475. Recognizing that "[t]his ad hoc method of dealing with cases that involve possible adequate and independent state grounds is antithetical to the doctrinal consistency that is *required* when sensitive issues of federal-state relations are involved," *id.,* at 1039, 103 S.Ct., at 3475 (emphasis added), the Court determined that a broad presumption of federal jurisdiction combined with a simple mechanism by which state courts could clarify their intent to rely on state grounds would best "provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law." *Id.,* at 1041, 103 S.Ct., at 3476. Today's decision needlessly resurrects the piecemeal approach eschewed by *Long,* and, as a consequence, invites the intrusive and unsatisfactory federal inquiry into unfamiliar state law that *Long* sought to avoid.

The Court's decisions in this case and in *Ylst v. Nunnemaker,* --- U.S. ----, 111 S.Ct. 2590, --- L.Ed.2d ----, well reveal the illogic of the ad hoc approach. In this case, to determine whether the admittedly ambiguous state-court judgment rests on an adequate and independent state ground, the Court looks to the "nature of the disposition" and the "surrounding circumstances" that "indicat[e]" that the basis of the decision was procedural default. *Ylst,* --- U.S., at ----, 111 S.Ct., at 2594. This method of searching for "clues" to the meaning of a facially ambiguous order is inherently indeterminate. Tellingly, both the majority and concurring opinions in this case concede that it remains uncertain whether the state court relied on a procedural default. See *ante,* at 744 ("There is no doubt that the Virginia Supreme Court's 'consideration' of all filed papers adds some ambiguity"); *ante,* at 757-758 (WHITE, J., concurring) ("[I]t is as though the court had said that it was granting the motion to dismiss the appeal as untimely because the federal claims were untenable and provided the court no reason to waive the default"). The plain statement rule effectively and equitably eliminates this unacceptable uncertainty. I cannot condone the abandonment of such a rule when the result is to foreclose federal habeas review of federal claims based on conjecture as to the "meaning" of an unexplained order.

The Court's decision in *Ylst* demonstrates that we are destined to relive the period where we struggled to develop principles to guide the interpretation of ambiguous state court orders. In *Ylst,* the last state court to render a judgment on Nunnemaker's federal claims was the California Supreme Court. Nunnemaker had filed a petition for habeas corpus in that court, invoking its original jurisdiction. Accordingly, the court was not sitting to review the judgment of another state court, but to entertain, as an original matter, Nunnemaker's collateral challenge to his conviction. The court's order denying relief was rendered without explanation or citation. Rejecting the methodology employed just today by the *Coleman* majority, the *Ylst* Court does not look to the pleadings filed in the original action to determine the "meaning" of the unexplained order. Rather, the Court adopts a broad *per se* presumption that "where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst,* --- U.S., at ----, 111 S.Ct., at 2594. This presumption does not purport to distinguish between unexplained judgments that are entered on review of the reasoned opinion and those that are independent thereof.

The *Ylst* Court demonstrates the employment of the presumption by simply ignoring the judgment of the highest court of California, and by looking back to an intermediate court judgment rendered 12 years earlier to conclude that Nunnemaker's federal claims have been procedurally defaulted. In so concluding, the Court determines that an intervening order by the California Supreme Court, which, with citations to two state-court decisions, denied Nunnemaker's earlier petition invoking the court's original jurisdiction, is not "informative with respect to the question," --- U.S., at ----, 111 S.Ct., at 2596, whether a state court has considered the merits of Nunnemaker's claims since the procedural default was recognized. Thus, the Court dismisses two determinations of the California Supreme Court, rendered not in review of an earlier state-court judgment but as an exercise of its original jurisdiction, because it finds those determinations not "informative." While the Court may comfort itself by labelling this exercise "looking

through," see --- U.S., at ----, 111 S.Ct., at 2595, it cannot be disputed that the practice represents disrespect for the State's determination of how best to structure its mechanisms for seeking postconviction relief.

Moreover, the presumption adopted by the *Ylst* Court further complicates the efforts of state courts to understand and accommodate this Court's federal habeas jurisprudence. Under *Long,* a state court need only recognize that it must clearly express its intent to rely on a state procedural default in order to preclude federal habeas review in most cases. After today, however, a state court that does not intend to rely on a procedural default but wishes to deny a meritless petition in a summary order must now remember that its unexplained order will be ignored by the federal habeas court. Thus, the state court must review the procedural history of the petitioner's claim and determine which state-court judgment a federal habeas court is likely to recognize. It then must determine whether that judgment expresses the substance that the court wishes to convey in its summary order, and react accordingly. If the previous reasoned judgment rests on a procedural default, and the subsequent court wishes to forgive that default, it now must clearly and expressly indicate that its judgment *does not* rest on a state procedural default. I see no benefit in abandoning a clear rule to create chaos.

III

Having abandoned the plain-statement rule with respect to a summary order, the majority must consider Coleman's argument that the untimely filing of his notice of appeal was the result of attorney error of sufficient magnitude as to constitute cause for his procedural default. In a sleight of logic that would be ironic if not for its tragic consequences, the majority concludes that a state prisoner pursuing state collateral relief must bear the risk of his attorney's grave errors—even if the result of those errors is that the prisoner will be executed without having presented his federal claims to a federal court—because this attribution of risk represents the appropriate "allocation of costs." *Ante,* at 754. Whether unprofessional attorney conduct in a state postconviction proceeding should bar federal habeas review of a state prisoner's conviction and sentence of death is not a question of *costs* to be allocated most efficiently. It is, rather, another circumstance where this Court must determine whether federal rights should yield to state interests. In my view, the obligation of a federal habeas court to correct fundamental constitutional violations, particularly in capital cases, should not accede to the State's "discretion to develop and implement programs to aid prisoners seeking to secure postconviction review." *Pennsylvania v. Finley,*481 U.S. 551, 559, 107 S.Ct. 1990, 1995, 95 L.Ed.2d 539 (1987).

The majority first contends that this Court's decision in *Murray v. Carrier,* 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), expressly resolves this issue. Of course, that cannot be so, as the procedural default at issue in *Murray* occurred on direct review, not collateral attack, and this Court has no authority to resolve issues not before it. Moreover, notwithstanding the majority's protestations to the contrary, the language of *Murray* strongly suggests that the Court's resolution of the issue would have been the same regardless of when the procedural default occurred. The Court in *Murray* explained: "A State's procedural rules serve vital purposes at trial, on appeal, and *on*

state collateral attack " (emphasis added). 477 U.S., at 490, 106 S.Ct., at 2646. Rejecting Carrier's argument that, with respect to the standard for cause, procedural defaults on appeal should be treated differently from those that occur during the trial, the Court stated that "the standard for cause should not vary depending on the timing of a procedural default or on the strength of an uncertain and difficult assessment of the relative magnitude of the benefits attributable to the state procedural rules that attach at *each successive stage of the judicial process* " (emphasis added). *Id.,* at 491, 106 S.Ct., at 2647.

The rule foreshadowed by this language, which the majority today evades, most faithfully adheres to a principled view of the role of federal habeas jurisdiction. As noted above, federal courts forgo the exercise of their habeas jurisprudence over claims that are procedurally barred out of respect for the state interests served by those rules. Recognition of state procedural forfeitures discourages petitioners from attempting to avoid state proceedings, and accommodates the State's interest in finality. No rule, however, can deter gross incompetence. To permit a procedural default caused by attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner's federal claims in no way serves the State's interest in preserving the integrity of its rules and proceedings. The interest in finality, standing alone, cannot provide a sufficient reason for a federal habeas court to compromise its protection of constitutional rights.

The majority's conclusion that Coleman's allegations of ineffective assistance of counsel, if true, would not excuse a procedural default that occurred in the state post-conviction proceeding is particularly disturbing because, at the time of Coleman's appeal, state law precluded defendants from raising certain claims on direct appeal. As the majority acknowledges, under state law as it existed at the time of Coleman's trial and appeal, Coleman could raise his ineffective assistance of counsel claim with respect to counsel's conduct during trial and appeal only in state habeas. *Ante,* at 755. This Court has made clear that the Fourteenth Amendment obligates a State " 'to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process,' " *Pennsylvania v. Finley,* 481 U.S. 551, 556, 107 S.Ct. 1990, 1994, 95 L.Ed.2d 539 (1986), quoting *Ross v. Moffitt,* 417 U.S. 600, 616, 94 S.Ct. 2437, 2447, 41 L.Ed.2d 341 (1974), and "require[s] that the state appellate system be free from unreasoned distinctions." *Id.,* at 612, 94 S.Ct., at 2444. While the State may have wide latitude to structure its appellate process as it deems most effective, it cannot, consistent with the Fourteenth Amendment, structure it in such a way as to deny indigent defendants meaningful access. Accordingly, if a State desires to remove from the process of direct appellate review a claim or category of claims, the Fourteenth Amendment binds the State to ensure that the defendant has effective assistance of counsel for the entirety of the procedure where the removed claims may be raised. Similarly, fundamental fairness dictates that the State, having removed certain claims from the process of direct review, bear the burden of ineffective assistance of counsel in the proceeding to which the claim has been removed.

Ultimately, the Court's determination that ineffective assistance of counsel cannot constitute cause of a procedural default in a state postconviction proceeding is patently

unfair. In concluding that it was not inequitable to apply the cause and prejudice standard to procedural defaults that occur on appeal, the *Murray* Court took comfort in the "additional safeguard against miscarriages of justice in criminal cases": the right to effective assistance of counsel. 477 U.S., at 496, 106 S.Ct., at 2650. The Court reasoned: "The presence of such a safeguard may properly inform this Court's judgment in determining '[w]hat standards should govern the exercise of the habeas court's equitable discretion' with respect to procedurally defaulted claims." *Ibid.,* quoting *Reed v. Ross,* 468 U.S. 1, 9, 104 S.Ct. 2901, 2906, 82 L.Ed.2d 1 (1984). "[F]undamental fairness is the central concern of the writ of habeas corpus." *Strickland v. Washington* 466 U.S. 668, 697, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674 (1984). It is the quintessence of inequity that the Court today abandons that safeguard while continuing to embrace the cause and prejudice standard.

I dissent.

This rule does not apply if the petitioner failed to exhaust state remedies and the court to which petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred. In such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims. See *Harris,* 489 U.S., at 269-270, 109 S.Ct., at 1046-1047 (O'CONNOR, J., concurring); *Teague v. Lane,* 489 U.S. 288, 297-298, 109 S.Ct. 1060, 1067-1068, 103 L.Ed.2d 334 (1989).

Const 1963, art 1, § 17

STATE CONSTITUTION (EXCERPT)

CONSTITUTION OF MICHIGAN OF 1963

§ 17 Self-incrimination; due process of law; fair treatment at investigations.

Sec. 17.

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

History: Const. 1963, Art. I, § 17, Eff. Jan. 1, 1964

Former Constitution: See Const. 1908, Art. II, § 16.

Const 1963, art 1, § 20

STATE CONSTITUTION (EXCERPT)

CONSTITUTION OF MICHIGAN OF 1963

§ 20 Rights of accused in criminal proceedings.

Sec. 20.

In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; to be confronted with the witnesses against him or her; to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

History: Const. 1963, Art. I, § 20, Eff. Jan. 1, 1964 ;-- Am. H.J.R. M, approved Aug. 8, 1972, Eff. Sept. 23, 1972 ;-- Am. S.J.R. D, approved Nov. 8, 1994, Eff. Dec. 24, 1994

Former Constitution: See Const. 1908, Art. II, § 19.

Crane v Kentucky

476 U.S. 683 (1986)

CRANE

v.

KENTUCKY

No. 85-5238.

Supreme Court of United States.

Argued April 23, 1986

Decided June 9, 1986

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Frank W. Heft, Jr., argued the cause for petitioner. With him on the briefs were *J. David Niehaus* and *Daniel T. Goyette.*

John S. Gillig, Assistant Attorney General of Kentucky, argued the cause for respondent. With him on the brief 684*684 were *David L. Armstrong,* Attorney General, and *Virgil W. Webb III,*Assistant Attorney General.

JUSTICE O'CONNOR delivered the opinion of the Court.

Prior to his trial for murder, petitioner moved to suppress his confession. The trial judge conducted a hearing, determined that the confession was voluntary, and denied the motion. At trial, petitioner sought to introduce testimony about the physical and psychological environment in which the confession was obtained. His objective in so doing was to suggest that the statement was unworthy of belief. The trial court ruled that the testimony pertained solely to the issue of voluntariness and was therefore inadmissible. The question presented is whether this ruling deprived petitioner of his rights under the Sixth and Fourteenth Amendments to the Federal Constitution.

I

On August 7, 1981, a clerk at the Keg Liquor Store in Louisville, Kentucky, was shot to death, apparently during the course of a robbery. A complete absence of identifying physical evidence hampered the initial investigation of the crime. A week later, however, the police arrested petitioner, then 16 years old, for his suspected participation in an unrelated service station holdup. According to police testimony at the suppression hearing, "just out of the clear blue sky," petitioner began to confess to a host of local crimes, including shooting a police officer, robbing a hardware store, and robbing several individuals at a bowling alley. App. 4. Their curiosity understandably aroused, the police transferred petitioner to a juvenile detention center to continue the interrogation. After initially denying any involvement in the Keg Liquors shooting, petitioner eventually confessed to that crime as well.

Subsequent to his indictment for murder, petitioner moved to suppress the confession on the grounds that it had been impermissibly coerced in violation of the Fifth and Fourteenth 685*685Amendments to the Federal Constitution. At the ensuing hearing, he testified that he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession. Several police officers offered a different version of the relevant events. Concluding that there had been "no sweating or coercion of the defendant" and "no overreaching" by the police, the court denied the motion. *Id.,* at 21.

The case proceeded to trial. In his opening statement, the prosecutor stressed that the Commonwealth's case rested almost entirely on petitioner's confession and on the statement of his uncle, who had told the police that he was also present during the holdup and murder. Tr. 10-14. In response, defense counsel outlined what would prove to be the principal avenue of defense advanced at trial — that, for a number of reasons, the story petitioner had told the police should not be believed. The confession was rife with inconsistencies, counsel argued. For example, petitioner had told the police that the crime was committed during daylight hours and that he had stolen a sum of money from the cash register. In fact, counsel told the jury, the evidence would show that the crime occurred at 10:40 p.m. and that no money at all was missing from the store. Beyond these inconsistencies, counsel suggested, "[t]he very circumstances surrounding the giving of the [confession] are enough to cast doubt on its credibility." *Id.,* at 16. In particular, she continued, evidence bearing on the length of the interrogation and the manner in which it was conducted would show that the statement was unworthy of belief.

In response to defense counsel's opening statement, and before any evidence was presented to the jury, the prosecutor moved *in limine* to prevent the defense from introducing any testimony bearing on the circumstances under which the 686*686 confession was obtained. Such testimony bore only on the "voluntariness" of the confession, the prosecutor urged, a "legal matter" that had already been resolved by the court in its earlier ruling. App. 27. Defense counsel responded that she had no intention of relitigating the issue of voluntariness, but was seeking only to demonstrate that the circumstances of the confession "cas[t] doubt on its validity and its credibility." *Ibid.* Rejecting this reasoning, the court granted the prosecutor's motion. Although the precise contours of the ruling are somewhat ambiguous, the court expressly held that the defense could inquire into the inconsistencies contained in the confession, but would not be permitted to "develop in front of the jury" any evidence about the duration of the interrogation or the individuals who were in attendance. *Id.,* at 28.

After registering a continuing objection, petitioner invoked a Kentucky procedure under which he was permitted to develop a record of the evidence he would have put before the jury were it not for the court's evidentiary ruling. That evidence included testimony from two police officers about the size and other physical characteristics of the interrogation room, the length of the interview, and various other details about the taking of the confession. *Id.,* at 45-53.

The jury returned a verdict of guilty, and petitioner was sentenced to 40 years in prison. The sole issue in the ensuing appeal to the Kentucky Supreme Court was whether the exclusion of testimony about the circumstances of the confession violated petitioner's rights under the Sixth and Fourteenth Amendments to the Federal Constitution. Over one dissent, the court rejected the claim and affirmed the conviction and sentence. 690 S. W. 2d 753 (1985). The excluded testimony "related solely to voluntariness," the court reasoned. *Id.,* at 754. Although evidence bearing on the credibility of the confession would have been admissible, under established Kentucky procedure a trial court's pretrial voluntariness determination is conclusive and may not be 687*687 relitigated at trial. Because the proposed testimony about the circumstances of petitioner's confession pertained only to the voluntariness question, the court held, there was no error in keeping that testimony from the jury.

Because the reasoning of the Kentucky Supreme Court is directly at odds with language in several of this Court's opinions, see, *e. g., Lego* v. *Twomey,* 404 U. S. 477, 485-486 (1972), and because it conflicts with the decisions of every other state court to have confronted the issue, see, *e. g., Beaver* v. *State,* 455 So. 2d 253, 256 (Ala. Crim. App. 1984); *Palmes* v. *State,* 397 So. 2d 648, 653 (Fla. 1981), we granted the petition for certiorari. 474 U. S. 1019 (1985). We now reverse and remand.

II

The holding below rests on the apparent assumption that evidence bearing on the voluntariness of a confession and evidence bearing on its credibility fall in conceptually distinct and mutually exclusive categories. Once a confession has been found voluntary, the Supreme Court of Kentucky believed, the evidence that supported that finding may not be presented to the jury for any other purpose. This analysis finds no support in our cases, is premised on a misconception about the role of confessions in a criminal trial, and, under the circumstances of this case, contributed to an evidentiary ruling that deprived petitioner of his fundamental constitutional right to a fair opportunity to present a defense. *California* v. *Trombetta,* 467 U. S. 479, 485 (1984).

It is by now well established that "certain interrogation techniques, either in isolation, or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment." *Miller* v. *Fenton,* 474 U. S. 104, 109 (1985). To assure that the fruits of such techniques are never used to secure a conviction, due process also requires "that a jury [not] hear a confession unless and until the trial judge [or some 688*688 other independent decisionmaker] has determined that it was freely and voluntarily given." *Sims* v. *Georgia,* 385 U. S. 538, 543-544 (1967). See generally *Jackson* v. *Denno,* 378 U. S. 368 (1964).

In laying down these rules the Court has never questioned that "evidence surrounding the making of a confession bears on its credibility" as well as its voluntariness. *Id.,* at 386, n. 13. As the Court noted in *Jackson,* because "questions of credibility, whether of a witness or of a confession, are for the jury," the requirement that the court make a pretrial *voluntariness*determination does not undercut the defendant's traditional prerogative to challenge the confession's *reliability* during the course of the trial. *Ibid.* To the same effect was *Lego* v.*Twomey, supra,* where the Court stated,

> *"Nothing in Jackson [v. Denno] questioned the province or capacity of juries to assess the truthfulness of confessions. Nothing in that opinion took from the jury any evidence relating to the accuracy or weight of confessions admitted into evidence. A defendant has been as free since Jackson as he was before to familiarize a jury with circumstances that attend the taking of his confession, including facts bearing upon its weight and voluntariness." Id., at 485-486.*

Thus, as *Lego* and *Jackson* make clear, to the extent the Court has addressed the question at all, it has expressly assumed that evidence about the manner in which a confession was secured will often be germane to its probative weight, a matter that is exclusively for the jury to assess.

The decisions in both *Jackson* and *Lego,* while not framed in the language of constitutional command, reflect the common-sense understanding that the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, a question most, but not all, States assign to the trial judge alone to resolve. 689*689 See *Jackson* v. *Denno, supra,* at 378. But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be "insufficiently corroborated or otherwise . . . unworthy of belief." *Lego* v. *Twomey, supra,* at 485-486. Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility.

This simple insight is reflected in a federal statute, 18 U. S. C. § 3501(a), the Federal Rules of Evidence, Fed. Rule Evid. 104(e), and the statutory and decisional law of virtually every State in the Nation. See, *e. g.,* Mont. Code Ann. § 46-13-301(5) (1983); *Palmes* v. *State, supra,* at 653. We recognize, of course, that under our federal system even a consensus as broad as this one is not inevitably congruent with the dictates of the Constitution. We acknowledge also our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given criminal case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence. As we reaffirmed earlier this Term, the Constitution leaves to the judges who must make these decisions "wide latitude" to exclude evidence that is "repetitive. . . , only marginally relevant" or poses an undue risk of 690*690 "harassment, prejudice, [or] confusion of the issues." *Delaware* v. *Van Arsdall,* 475 U. S. 673, 679 (1986). Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability — even if the defendant would prefer to see that evidence admitted.*Chambers* v. *Mississippi,* 410 U. S. 284, 302 (1973). Nonetheless, without "signal[ing] any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures," we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial. *Id.,* at 302-303.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers*v. *Mississippi, supra,* or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, *Washington* v. *Texas,* 388 U. S. 14, 23 (1967); *Davis* v. *Alaska,* 415 U. S. 308 (1974), the Constitution guarantees criminal defendants "a meaningful

opportunity to present a complete defense." *California* v. *Trombetta,* 467 U. S., at 485; cf. *Strickland* v. *Washington,*466 U. S. 668, 684-685 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment"). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver,* 333 U. S. 257, 273 (1948); *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible691*691 of meaningful adversarial testing." *United States* v. *Cronic,* 466 U. S. 648, 656 (1984). See also *Washington* v. *Texas, supra,* at 22-23.

Under these principles, the Kentucky courts erred in foreclosing petitioner's efforts to introduce testimony about the environment in which the police secured his confession. As both *Lego* and*Jackson* make clear, evidence about the manner in which a confession was obtained is often highly relevant to its reliability and credibility. Such evidence was especially relevant in the rather peculiar circumstances of this case. Petitioner's entire defense was that there was no physical evidence to link him to the crime and that, for a variety of reasons, his earlier admission of guilt was not to be believed. To support that defense, he sought to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a protracted period of time until he confessed to every unsolved crime in the county, including the one for which he now stands convicted. We do not, of course, pass on the strength or merits of that defense. We do, however, think it plain that introducing evidence of the physical circumstances that yielded the confession was all but indispensable to any chance of its succeeding. Especially since neither the Supreme Court of Kentucky in its opinion, nor respondent in its argument to this Court, has advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence, the decision below must be reversed.

Respondent contends that any error was harmless since the very evidence excluded by the trial court's ruling ultimately came in through other witnesses. Petitioner concedes, and we agree, that the erroneous ruling of the trial court is subject to harmless error analysis. Tr. of Oral Arg. 7; cf. *Delaware* v. *Van Arsdall, supra.* We believe, however, that respondent's harmless error argument should be directed in the first instance to the state court.

692*692 Accordingly, the judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

So ordered.

Davis v Alaska

415 U.S. 308

94 S.Ct. 1105

39 L.Ed.2d 347

Joshaway DAVIS, Petitioner,

v.

State of ALASKA.

No. 72—5794.

Argued Dec. 12, 1973.

Decided Feb. 27, 1974.

Syllabus

Petitioner was convicted of grand larceny and burglary following a trial in which the trial court on motion of the prosecution issued a protective order prohibiting questioning Green, a key prosecution witness, concerning Green's adjudication as a juvenile delinquent relating to a burglary and his probation status at the time of the events as to which he was to testify. The trial court's order was based on state provisions protecting the anonymity of juvenile offenders. The Alaska Supreme Court affirmed. Held: Petitioner was denied his right of confrontation of witnesses under the Sixth and Fourteenth Amendments, Pp. 315 321.

(a) The defense was entitled to attempt to show that Green was biased because of his vulnerable status as a probationer and his concern that he might be a suspect in the burglary charged against petitioner, and limiting the cross-examination of Green precluded the defense from showing his possible bias. Pp. 315—318.

(b) Petitioner's right of confrontation is paramount to the State's policy of protecting juvenile offenders and any temporary embarrassment to Green by disclosure of his juvenile court record and probation status is outweighed by petitioner's right effectively to cross-examine a witness. Pp. 319—320.

499 P.2d 1025, reversed and remanded.

Robert H. Wagstaff, Anchorage, Alaska, for the petitioner.

Charles M. Merriner, Anchorage, Alaska, for the respondent.

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari in this case to consider whether the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness' probationary status as juvenile delinquent when such an impeachment would conflict with a State's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency.

(1)

When the Polar Bar in Anchorage closed in the early morning hours of February 16, 1970, well over a thousand dollars in cash and checks was in the bar's Mosler safe. About midday, February 16, it was discovered that the bar had been broken into and the safe, about two feet square and weighing several hundred pounds, had been removed from the premises.

Later that afternoon the Alaska State Troopers received word that a safe had been discovered about 26 miles outside Anchorage near the home of Jess Straight and his family. The safe, which was subsequently determined to be the one stolen from the Polar Bar, had been pried open and the contents removed. Richard Green, Jess Straight's stepson, told investigating troopers on the scene that at about noon on February 16 he had seen and spoken with two Negro men standing alongside a late-model metallic blue Chevrolet sedan near where the safe was later discovered. The next day Anchorage police investigators brought him to the police station where Green was given six photographs of adult Negro males. After examining the photographs for 30 seconds to a minute, Green identified the photograph of petitioner as that of one of the men he had encountered the day before and described to the police. Petitioner was arrested the next day, February 18. On February 19, Green picked petitioner out of a lineup of seven Negro males.

At trial, evidence was introduced to the effect that paint chips found in the trunk of petitioner's rented blue Chevrolet could have originated from the surface of the stolen safe. Fourther, the of the stolen safe. Further, the which were identified as safe insulation characteristic of that found in Mosler safes. The insulation found in the trunk matched that of the stolen safe.

Richard Green was a crucial witness for the prosecution. He testified at trial that while on an errand for his mother he confronted two men standing beside a late-model metallic blue Chevrolet, parked on a road near his family's house. The man standing at the rear of the car spoke to Green asking if Green lived nearby and if his father was home. Green offered the men help, but his offer was rejected. On his return from the errand Green again passed the two men and he saw the man with whom he had had the conversation standing at the rear of the car with 'something like a crowbar' in his hands. Green identified petitioner at the trial as the man with the 'crowbar.' The safe was discovered later that afternoon at the point, according to Green, where the Chevrolet had been parked.

Before testimony was taken at the trial of petitioner, the prosecutor moved for a protective order to prevent any reference to Green's juvenile record by the defense in

the course of cross-examination. At the time of the trial and at the time of the events Green testified to, Green was on probation by order of a juvenile court after having been adjudicated a delinquent for burglarizing two cabins. Green was 16 years of age at the time of the Polar Bar burglary but had turned 17 prior to trial.

In opposing the protective order, petitioner's counsel made it clear that he would not introduce Green's juvenile adjudication as a general impeachment of Green's character as a truthful person but, rather, to show specifically that at the same time Green was assisting the police in identifying petitioner he was on probation for burglary. From this petitioner would seek to show—or at least argue—that Green acted out of fear or concern of possible jeopardy to his probation. Not only might Green have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation. Green's record would be revealed only as necessary to probe Green for bias and prejudice and not generally to call Green's good character into question.

The trial court granted the motion for a protective order, relying on Alaska Rule of Children's Procedure 23,[1] and Alaska Stat. § 47.10.080(g) (1971).[2]

Although prevented from revealing that Green had been on probation for the juvenile delinquency adjudication for burglary at the same time that he originally identified petitioner, counsel for petitioner did his best to expose Green's state of mind at the time Green discovered that a stolen safe had been discovered near his home. Green denied that he was upset or uncomfortable about the discovery of the safe. He claimed not to have been worried about any suspicions the police might have been expected to harbor against him, though Green did admit that it crossed his mind that the police might have thought he had something to do with the crime.

Defense counsel cross-examined Green in part as follows:

'Q. Were you upset at all by the fact that this safe was found on your property?

'A. No, sir.

'Q. Did you feel that they might in some way suspect you of this?

'A. No.

'Q. Did you feel uncomfortable about this though?

'A. No, not really.

'Q. The fact that a safe was found on your property?

'A. No.

'Q. Did you suspect for a moment that the police might somehow think that you were involved in this?

'A. I thought they might ask a few questions is all.

'Q. Did that thought ever enter your mind that you—that the police might think that you were somehow connected with this? 'A. No, it didn't really bother me, no.

'Q. Well, but . . ..

'A. I mean, you know, it didn't—it didn't come into my mind as worrying me, you know.

'Q. That really wasn't—wasn't my question, Mr. Green. Did you think that—not whether it worried you so much or not, but did you feel that there was a possibility that the police might somehow think that you had something to do with this, that they might have that in their mind, and that you . . ..

'A. That came across my mind, yes, sir.

'Q. That did cross your mind?

'A. Yes.

'Q. So as I understand it you went down to the—you drove in with the police in—in their car from mile 25, Glenn Highway down to the city police station?

'A. Yes, sir.

'Q. And then went into the investigators' room with Investigator Gray and Investigator Weaver?

'A. Yeah.

'Q. And they started asking you questions about—about the incident, is that correct?

'A. Yeah.

'Q. Had you ever been questioned like that before by any law enforcement officers?

'A. No.

'MR. RIPLEY: I'm going to object to this, Your Honor, it's a carry-on with rehash of the same thing. He's attempting to raise in the jury's mind . . ..

'THE COURT: I'll sustain the objection.'

Since defense counsel was prohibited from making inquiry as to the witness' being on probation under a juvenile court adjudication, Green's protestations of unconcern over possible police suspicion that he might have had a part in the Polar Bar burglary and his categorical denial of ever having been the subject of any similar law-enforcement interrogation went unchallenged. The tension between the right of confrontation and the State's policy of protecting the witness with a juvenile record is particularly evident in the final answer given by the witness. Since it is probable that Green underwent some questioning by police when he was arrested for the burglaries on which his

juvenile adjudication of delinquency rested, the answer can be regarded as highly suspect at the very least. The witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold 'No' answer would have been given by Green absent a belief that he was shielded from traditional cross-examination. It would be difficult to conceive of a situation more clearly illustrating the need for cross- examination. The remainder of the cross-examination was devoted to an attempt to prove that Green was making his identification at trial on the basis of what he remembered from his earlier identifications at the photographic display and lineup, and not on the basis of his February 16 confrontation with the two men on the road.

The Alaska Supreme Court affirmed petitioner's conviction,3 concluding that it did not have to resolve the potential conflict in this case between a defendant's right to a meaningful confrontation with adverse witnesses and the State's interest in protecting the anonymity of a juvenile offender since 'our reading of the trial transcript convinces us that counsel for the defendant was able adequately to question the youth in considerable detail concerning the possibility of bias or motive.' 499 P.2d 1025, 1036 (1972). Although the court admitted that Green's denials of any sense of anxiety or apprehension upon the safe's being found close to his home were possibly self-serving, 'the suggestion was nonetheless brought to the attention of the jury, and that body was afforded the opportunity to observe the demeanor of the youth and pass on his credibility.' Ibid. The court concluded that, in light of the indirect references permitted, there was no error.

Since we granted certiorari limited to the question of whether petitioner was denied his right under the Confrontation Clause to adequately cross-examine Green, 410 U.S. 925, 93 S.Ct. 1392, 35 L.Ed.2d 586 (1973), the essential question turns on the correctness of the Alaska court's evaluation of the 'adequacy' of the scope of cross-examination permitted. We disagree with that court's interpretation of the Confrontation Clause and we reverse.

(2)

The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' This right is secured for defendants in state as well as federal criminal proceedings under Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). Confrontation means more than being allowed to confront the witness physically. 'Our cases construing the (confrontation) clause hold that a primary interest secured by it is the right of cross-examination.' Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). Professor Wigmore stated:

'The main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal

putting of questions and obtaining immediate answers.' (Emphasis in original.) 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940).

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence § 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of crossexamination. Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959).[4]

In the instant case, defense counsel sought to show the existence of possible bias and projudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner.[5]

We cannot speculate as to whether the jury, as sole judge of the credibility of a witness, would have accepted this line of reasoning had counsel been permitted to fully present it. But we do conclude that the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided 'a crucial link in the proof . . . of petitioner's act.' Douglas v. Alabama, 380 U.S., at 419, 85 S.Ct., at 1077. The accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner. The claim of bias which the defense sought to develop was admissible to afford a basis for an inference of undue pressure because of Green's vulnerable status as a probationer, cf. Alford v. United States, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931),[6] as well as of Green's possible concern that he might be a suspect in the investigation.

We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack

on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314.' Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 750, 19 L.Ed.2d 956 (1968).

(3)

The claim is made that the State has an important interest in protecting the anonymity of juvenile offenders and that this interest outweighs any competing interest this petitioner might have in cross-examining Green about his being on probation. The State argues that exposure of a juvenile's record of delinquency would likely cause impairment of rehabilitative goals of the juvenile correctional procedures. This exposure, it is argued, might encourage the juvenile offender to commit further acts of delinquency, or cause the juvenile offender to lose employment opportunities or otherwise suffer unnecessarily for his youthful transgression.

We do not and need not challenge the State's interest as a matter of its own policy in the administration of criminal justice to seek to preserve the anonymity of a juvenile offender. Cf. In re Gault, 387 U.S. 1, 25, 87 S.Ct. 1428, 1442, 18 L.Ed.2d 527 (1967). Here, however, petitioner sought to introduce evidence of Green's probation for the purpose of suggesting that Green was biased and, therefore, that his testimony was either not to be believed in his identification of petitioner or at least very carefully considered in that light. Serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry. In this setting we conclude that the right of confrontation is paramount to the State's policy of protecting a juvenile offender. Whatever temporary embarrassment might result to Green or his family by disclosure of his juvenile record—if the prosecution insisted on using him to make its case—is outweighed by petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness.

In Alford v. United States, supra, we upheld the right of defense counsel to impeach a witness by showing that because of the witness' incarceration in federal prison at the time of trial, the witness' testimony was biased as 'given under promise or expectation of immunity, or under the coercive effect of his detention by officers of the United States.' 282 U.S., at 693, 51 S.Ct., at 220. In response to the argument that the witness had a right to be protected from exposure of his criminal record, the Court stated:

'(N)o obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him.' Id., at 694, 51 S.Ct., at 220.

As in Alford, we conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself.

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. The judgment affirming petitioner's convictions of burglary and grand larceny is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Reversed and remanded.

Mr. Justice STEWART, concurring.

The Court holds that, in the circumstances of this case, the Sixth and Fourteenth Amendments conferred the right to cross-examine a particular prosecution witness about his delinquency adjudication for burglary and his status as a probationer. Such cross-examination was necessary in this case in order 'to show the existence of possible bias and prejudice . . .,' ante, at 317. In joining the Court's opinion, I would emphasize that the Court neither holds nor suggests that the Constitution confers a right in every case to impeach the general credibility of a witness through cross-examination about his past delinquency adjudications or criminal convictions.

Mr. Justice WHITE, with whom Mr. Justice REHNQUIST joins, dissenting.

As I see it, there is no constitutional principle at stake here. This is nothing more than a typical instance of a trial court exercising its discretion to control or limit cross-examination, followed by a typical decision of a state appellate court refusing to disturb the judgment of the trial court and itself concluding that limiting cross-examination had done no substantial harm to the defense. Yet the Court insists on second-guessing the state courts and in effect inviting federal review of every ruling of a state trial judge who believes cross-examination has gone for enough. I would not undertake this task, if for no other reason than that I have little faith in our ability, in fact-bound cases and on a cold record, to improve on the judgment of trial judges and of the state appellate courts who agree with them. I would affirm the judgment.

Rule 23 provides:

'No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate.'

Section 47.10.080(g) provides in pertinent part:

'The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court . . ..'

In the same opinion the Alaska Supreme Court also affirmed petitioner's conviction, following a separate trial, for being a felon in possession of a concealable firearm. That conviction is not in issue before this Court.

In Greene we stated:

'Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . .' 360 U.S., at 496, 79 S.Ct., at 1413.

'(A) partiality of mind at some former time may be used as the basis of an argument to the same state at the time of testifying; though the ultimate object is to establish partiality at the time of testifying.' 3A J. Wigmore, Evidence § 940, p. 776 (Chadbourn rev. 1970). (Emphasis in original; footnotes omitted.)

Although Alford involved a federal criminal trial and we reversed because of abuse of discretion and prejudicial error, the constitutional dimension of our holding in Alford is not in doubt. In Smith v. Illinois, 390 U.S. 129, 132—133, 88 S.Ct. 748, 750 751, 19 L.Ed.2d 956 (1968), we relied, in part, on Alford to reverse a state criminal conviction on confrontation grounds.

Driscoll v Delo

71 F.3d 701 (1995)

Robert DRISCOLL, Appellee,

v.

Paul DELO, Appellant.

Robert DRISCOLL, Appellant,

v.

Paul DELO, Appellee.

Nos. 94-2993, 94-3266.

United States Court of Appeals, Eighth Circuit.

Submitted September 11, 1995.

Decided December 4, 1995.

Rehearing and Suggestion for Rehearing Denied February 1, 1996.

702*702 703*703 Stephen David Hawke, Assistant Attorney General, Jefferson City, Missouri, argued, for appellant.

Bruce Dayton Livingston, St. Louis, Missouri, argued, for appellee.

Before HANSEN, HEANEY, and MURPHY, Circuit Judges.

Rehearing and Suggestion for Rehearing En Banc Denied February 1, 1996.

HEANEY, Circuit Judge.

The State of Missouri appeals and petitioner Robert Driscoll, a/k/a Albert Eugene Johnson, cross-appeals from the district court's order granting Driscoll's 28 U.S.C. § 2254 petition for writ of habeas corpus. For the reasons stated below, we agree that a writ of habeas corpus should issue on three independent bases: (1) Driscoll was denied the effective counsel guaranteed by the Sixth Amendment because his lawyer allowed the jury to retire with the factually inaccurate impression that the victim's blood was possibly on Driscoll's knife; (2) his trial counsel was also ineffective for failing to impeach a state eyewitness using his prior inconsistent statements; and (3) Driscoll's sentence violates the Eighth Amendment because the prosecutor made repeated statements to the jury that diminished the jury's sense of responsibility for its sentence of death.

I. PROCEDURAL BACKGROUND

Driscoll is a state prisoner currently incarcerated at the Potosi Correctional Center in Mineral Point, Missouri. On December 5, 1984, a jury found Driscoll guilty of capital murder in violation of Mo.Rev.Stat. § 565.001 (1978) (repealed effective October 1, 1984) in connection with the stabbing death of a corrections officer, Thomas Jackson, during a prison disturbance.[1] On December 6, 1984, the jury recommended that Driscoll be sentenced to death; thereafter, on February 7, 1985, the state court sentenced him to death by lethal gas. The Missouri State Supreme Court affirmed Driscoll's conviction and sentence on direct appeal. *State v. Driscoll,*711 S.W.2d 512 (Mo.), *cert. denied,* 479 U.S. 922, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986). Driscoll 704*704 subsequently filed a motion for post-conviction relief in state court pursuant to Missouri Supreme Court Rule 27.26 (repealed effective January 1, 1988), which the trial court denied after an evidentiary hearing. The Missouri Supreme Court affirmed the denial of the motion. *Driscoll v. State,* 767 S.W.2d 5 (Mo.), *cert. denied,* 493 U.S. 874, 110 S.Ct. 210, 107 L.Ed.2d 163 (1989).

On October 6, 1989, Driscoll filed this petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The court appointed counsel to assist Driscoll and on October 22, 1990, Driscoll filed an amended petition asserting the following general claims for relief: (1) he was denied effective assistance of counsel in violation of the Sixth Amendment because of multiple alleged errors on the part of his trial counsel; (2) he was denied due process of law in violation of the Fifth Amendment as a result of multiple trial court errors; (3) Driscoll's grand and petit jury pools did not

represent fair cross sections of the community in violation of due process; (4) the Missouri death penalty statute is unconstitutional because it affords the prosecuting attorney unbridled discretion to seek the death penalty in a discriminatory manner; and (5) numerous other claims under the First, Fourth, Fifth, Sixth, Eighth, Ninth and Fourteenth Amendments.

The district court referred all pretrial matters to the magistrate judge. After conducting a de novo review of the record, including consideration of the parties' objections to the magistrate judge's report and recommendation, the district court adopted the report of the magistrate judge and granted Driscoll's habeas corpus petition on July 8, 1994.

The district court found seven distinct bases on which it granted petitioner habeas corpus relief: four instances of ineffective assistance of counsel and three instances of due process violations.[2] The court determined that Driscoll received ineffective assistance of counsel because his trial counsel (1) did not adequately prepare for the introduction of blood identification evidence at trial and failed to adequately cross-examine the state's serology expert on the crucial issue of blood identification testing methodology, (2) failed to adequately cross-examine a state eyewitness regarding prior inconsistent statements, (3) failed to object to repeated statements by the prosecutor to the jury that minimized the jury's sense of responsibility in recommending a sentence of death, and (4) did not request a jury instruction on the lesser-included offense of second degree felony murder. In addition, the court determined that a writ of habeas corpus was warranted because Driscoll's trial was tainted by the following due process violations: (1) the court's failure to curtail, sua sponte, the prosecutor's repeated statements to the jury that minimized the jury's sense of responsibility for recommending a sentence of death; (2) the court's failure to instruct the jury, sua sponte, on the lesser-included offense of second degree felony murder; and (3) allowing the state to offer improper rebuttal testimony.

We will consider each of these grounds in turn after a recitation of the factual background necessary to reach our determination.

II. FACTUAL BACKGROUND

Driscoll was convicted of capital murder and sentenced to death for his role in the stabbing death of Officer Tom Jackson at the Missouri Training Center for Men (MTCM) in Moberly, Missouri on July 3, 1983. Driscoll was one of the 459 prisoners housed in Unit 2, an X-shaped building consisting of four cell wings (designated "A" through "D") branching from a central rotunda where guards monitored security from a circular desk called the control center. Reinforced glass doors secured the rotunda from the housing wings and provided the only entrance to and from each cell wing. Because MTCM is a

medium-security institution, each inmate is permitted to keep a key to his cell and can generally move freely within his wing.

705*705 Beginning during the day of July 3, 1983 and continuing into the night, inmates in Unit 2B were drinking homemade alcohol and smuggled, store-bought whisky. The center of this activity, cell 2B-410, housed Driscoll and his cellmate, Jimmie Jenkins. Officer Jackson was one of three guards assigned to monitor security in Unit 2 that night. By regulation, Jackson was unarmed. By nighttime, Jenkins had become exceedingly disruptive. At approximately 9:45 p.m., Officer Jackson entered Unit 2B to remove Jenkins from the wing. Jenkins refused to comply with Jackson's instructions to follow him out of the wing. Officer Jackson returned to the control center and requested help. While Officer Jackson waited for assistance, Driscoll assembled a homemade knife from parts he had collected and hidden in his cell.[3]

Officer Jackson and two additional guards returned to the housing unit to remove Jenkins. The two other guards escorted Jenkins from the wing to the control center — one guard on each side of the prisoner — while Jackson trailed some distance behind. At that point, a group of twenty to thirty inmates from the wing, including Driscoll, charged the guards. The two guards escorting Jenkins made it to the rotunda where more guards were assembling to help control the situation; a crowd of prisoners, however, stopped Officer Jackson several feet short of the door. Jackson was restrained, beaten, and stabbed four times. At trial, the state advanced the theory that Driscoll stabbed Jackson three times, fatally penetrating his heart and lungs, and then stabbed another officer, Harold Maupin, in the shoulder as Maupin tried to rescue Jackson.

For a brief period, uncontrolled fighting between prisoners and guards raged both in the control center and just outside. After several thwarted attempts to rescue Jackson, guards successfully pulled him through the door into the rotunda. Jackson's shirt was covered in blood. The guards managed to control the worst of the fighting within a few minutes. Reinforcement guards herded inmates back to their cells by firing sixty to eighty shotgun blasts into the floor and ceiling of the housing wings. At some point, Driscoll returned to his cell and changed his clothes.

At the end of the fighting, Officer Jackson was dead and five other guards had been stabbed or otherwise injured. At least thirty inmates required treatment for their injuries; one prisoner was seriously wounded by a shotgun pellet. At trial, Driscoll presented substantial evidence that during the night of July 3rd and into the following day guards subjected the inmates of Unit 2B to brutal beatings in response to the incident. Driscoll's injuries, for example, required him to spend forty days in the prison hospital.

On July 4, 1983, just prior to his transfer to the Missouri State Penitentiary in Jefferson City, Missouri, Driscoll made an incriminating statement to investigating officers from MTCM and the Highway Patrol. In the statement, Driscoll admits that he "stabbed at" an officer after he was hit by someone. He stated that he did not know at which officer he stabbed or if he stabbed at the officer more than once. The trial court admitted the statement into evidence over Driscoll's objection that it was coerced and involuntary.

Other evidence against Driscoll included the eyewitness testimony of two inmates and incriminating statements Driscoll reportedly made to other inmates right after the fighting. Three guards testifying for the prosecution, however, identified another inmate, Rodney Carr, as the person they saw stab Officer Jackson. No guard saw Driscoll stab Jackson.

706*706 III. DISCUSSION

A. Ineffective Assistance of Counsel: Defense Handling of Serology Evidence

The Sixth Amendment guarantees a criminal defendant charged with a serious crime the right not merely to counsel, but to the effective assistance of counsel. *United States v. Cronic,* 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984). Any other interpretation of that right would permit a serious risk of injustice to infect criminal trials. *Cuyler v. Sullivan,* 446 U.S. 335, 343, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980). "Absent competent counsel, ready and able to subject the prosecution's case to the `crucible of meaningful adversarial testing,' there can be no guarantee that the adversarial system will function properly to produce just and reliable results." *Lockhart v. Fretwell,* 506 U.S. 364, 377, 113 S.Ct. 838, 847, 122 L.Ed.2d 180 (1993) (Stevens, J., dissenting) (quoting *United States v. Cronic,* 466 U.S. 648, 654, 104 S.Ct. 2039, 2044, 80 L.Ed.2d 657 (1984)).

The United States Supreme Court set out the standard for our review of claims of ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The analysis is two-fold:

> *First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.*

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064.

With respect to the performance aspect of the test, the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* at 688, 104 S.Ct. at 2064-65. Our review of counsel's performance must be highly deferential; we indulge a strong presumption that counsel's conduct falls within the wide range of professionally reasonable assistance and sound trial strategy. *Id.* at 689, 104 S.Ct. at 2065. For that reason,

> *strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.*

Id. at 690, 104 S.Ct. at 2066. Moreover, as instructed by the Supreme Court, we must "make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time [of trial]." *Id.* at 689, 104 S.Ct. at 2065.

Professionally unreasonable trial errors, however, do not satisfy the burden of proving ineffectiveness absent a showing of prejudice to the defendant. We will set aside the judgment of conviction only when the defendant demonstrates that there is a reasonable probability that, but for counsel's unprofessional conduct, the result of the proceeding would have been different.*Id.* at 694, 104 S.Ct. at 2068. In other words, a defendant who challenges his or her conviction is prejudiced by counsel's unprofessional conduct when "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695, 104 S.Ct. at 2068-69. In determining prejudice, we consider all the evidence presented to the jury; we are mindful that some trial errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, whereas other errors will have produced only a trivial, isolated effect. *Id.* at 695-96, 104 S.Ct. at 2068-69.

The question of whether Driscoll's Sixth Amendment rights were violated because he received ineffective assistance of counsel is a legal one subject to our de novo review. *Starr v. Lockhart,*23 F.3d 1280, 1284 (8th Cir.1994). The state court's underlying factual findings related to counsel's performance 707*707 and prejudice to the defendant are entitled to the presumption of correctness as set forth in 28 U.S.C. § 2254(d). *Miller v. Fenton,* 474 U.S. 104, 112, 106 S.Ct. 445, 450-51, 88 L.Ed.2d 405 (1985).

The district court granted Driscoll habeas corpus relief and ordered that he receive a new trial because his counsel was ineffective in allowing the jury to retire with the factually inaccurate impression that the victim's blood could have been present on Driscoll's knife. On appeal, the state argues that Driscoll failed to establish that defense counsel's handling of the serology evidence either constituted unreasonable performance or caused Driscoll prejudice. The state contends that the district court did not engage in the required two-part *Strickland* analysis; specifically, that the court failed to consider whether the asserted errors by counsel prejudiced the defendant. While we acknowledge the shortcomings of the district court's consideration of prejudice, we

reject the state's basic argument after engaging in the full, two-part *Strickland*review de novo.

Kwei Lee Su, Ph.D., Chief Forensic Serologist with the Missouri Highway Patrol Crime Laboratory, testified for the state at Driscoll's trial. Dr. Su conducted all the serological examinations on the state's evidence, which included a homemade knife belonging to Driscoll, thirteen additional home-made knives discovered during the investigation of the riot, the clothes worn by Officer Jackson at the time he was killed, and the clothes worn by various inmates, including Driscoll, on the night of the riot.

Before trial, the state provided Driscoll's lawyer with a three-page laboratory report that summarized the latent fingerprint, serological, and chemical examinations performed on the state's evidence. The first page of the report lists the specimens submitted to the laboratory for examination. The second page provides a brief, narrative summary of the results. The final page of the report contains a more comprehensive table that summarizes the results of the serology tests performed on the state's evidence. According to the laboratory report, the blood found on Driscoll's clothing—type O—matched Officer Jackson's blood type. All of the home-made knives except for Driscoll's tested negative for blood traces. The blood traces found on Driscoll's knife were of type A — the same blood type of Officer Maupin, but not of the victim, Officer Jackson. The table also indicates that Jackson's dress boots tested positive for both "A & O" type blood.

At trial, the state advanced two alternative theories to explain the lack of the victim's blood on the alleged murder weapon: either that the type O blood on Driscoll's knife got wiped off when Driscoll subsequently stabbed Officer Maupin or that type O blood was present on the knife, but "masked" from detection because of the additional presence of type A blood.

With respect to the masking theory, Dr. Su testified that blood can be type A, type B, type AB, or type O. Using a "thread" or "antigen" test, Dr. Su explained, a reagent called anti-A is added to the blood and agglutination (clumping) occurs if the blood is type A. Similar reagents signal the presence of type B and of type AB. Using this methodology, however, the presence of type O blood is signaled only by the absence of a reaction to anti-A and anti-B reagents. Thus, when type A blood and type O blood are mixed, the antigen test will not reveal the presence of the type O blood because the agglutination showing type A will occur. Dr. Su testified that with the antigen test type A blood "masks" the presence of type O blood.

Neither the prosecution nor the defense on cross-examination ever asked Dr. Su whether she used any other blood identification methods or whether she could have employed any other tests to establish with certainty the presence or absence of type O blood on Driscoll's knife. Driscoll's trial counsel asked Dr. Su only two questions on cross-examination: whether the only thing Dr. Su could say with any degree of medical certainty was that Driscoll's knife had blood type A on it and whether "anything else would just be speculation." Dr. Su answered affirmatively to both.

In fact, Dr. Su had performed another test on the knife, called the "lattes" antibody test. Like the thread test, the lattes test can determine the presence of each type of blood; 708*708 unlike the thread test, however, no masking can occur with the lattes test. Using the lattes test, Dr. Su discovered no type O blood on Driscoll's knife. The jury was never informed that the lattes test was performed or that no type O blood was on the knife. At Driscoll's Rule 27.26 state post-conviction hearing, Dr. Su was asked: "If you had been asked at trial regarding the antibody test, you could have testified that there was no O blood on the knife," to which she answered "yes." Hr'g Tr. at 32. She was also asked whether, if asked at trial, she could have testified that there had not been type O blood on the knife "at some time." Dr. Su responded: "It was not detected if it was there." *Id.*

In addition, at the Rule 27.26 hearing, Driscoll's trial lawyer testified that he did not interview Dr. Su prior to the time she gave her testimony. He admitted that he did not take any steps to adequately inform himself about the specific serology tests performed or the conclusions one could logically draw from the laboratory results. The record indicates that trial counsel simply reviewed the three-page summary of the serology evidence, noted that the tests did not demonstrate the existence of the victim's blood on Driscoll's knife, and "didn't see how it was going to hurt [him]." Hr'g Tr. at 91. He testified later that at the time of trial he was not aware of any scientific evidence that could have rebutted the state's serology evidence.

The combination of the prosecution's presentation of serology evidence and the defense's total lack of rebuttal left the jury with the impression that Driscoll's knife likely had been exposed to both type A blood and type O blood. In its closing argument, the state made much of the masking theory, turning unfavorable serology evidence into neutral evidence at worst:

> *The issue of the knife on the blood [sic] doesn't really prove anything. What it is is a neutral issue.... [W]hen you mix O and A together ... it's going to react with the A part in the smudge and it's going to tell you that there is A there, but the O is undetectable.*
>
> *And in this situation, what we have is we have this magic combination. Tom Jackson had O-type blood. Harold Maupin had A-type blood.... [Y]ou're going to get the A-type reaction.*
>
> *Now, I think, as you analyze the blood on the knife, you're going to understand that the blood on the knife is a neutral issue. Obviously the defense is going to make — you know — big work of that. But that's not significant at all. Chemically — the manner in which they test antigens in the A-type blood, it explains why you can't detect whether O is present when A and O are mixed.*
>
> *....*
>
> *Also, the other reason why is the in and out. The stabbing [Jackson] in the chest, the pulling it out and the stabbing [Maupin] in the arm. Because it's a chemical fact of life. If you mix O and A together, you drop the dropper of stuff on it, and the presence of A mixed with O will cause a reaction under the microscope, which leads you to the logical conclusion that A is present. Now, that's just the way God made us.*

Trial Tr. at 1929-30. In his closing argument, Driscoll's counsel merely reminded the jury that he had elicited the statement from Dr. Su on cross-examination that the only thing beyond speculation was that blood type A was on Driscoll's knife. He then deduced that the prosecutor "didn't get all the evidence out of her he wanted" because the state later brought another witness, Chief of Police James Simmerman, who essentially testified to the same possibility of wiping that Dr. Su did.

The questions now before us are (1) whether defense counsel's performance in failing to investigate and to adequately cross-examine Dr. Su about the serology tests performed on the state's evidence fell below an objectively reasonable standard of representation; and (2) if so, whether Driscoll was prejudiced by these failures. We answer both questions in the affirmative.

Although our scrutiny of defense counsel's performance is deferential and we presume his conduct to fall within the wide range of competence demanded of attorneys under 709*709 like circumstances, *Strickland,* 466 U.S. at 687-89, 104 S.Ct. at 2064-65, "when the appellant shows that defense counsel `failed to exercise the customary skills and diligence that a reasonably competent attorney would exhibit under similar circumstances,' that presumption must fail." *Starr v. Lockhart,* 23 F.3d 1280, 1284 (8th Cir.1994) (quoting *Hayes v. Lockhart,* 766 F.2d 1247, 1251 (8th Cir.), *cert. denied,* 474 U.S. 922, 106 S.Ct. 256, 88 L.Ed.2d 263 (1985)),*cert. denied,* ___ U.S. ___, 115 S.Ct. 499, 130 L.Ed.2d 409 (1994). Driscoll faced a charge of capital murder and the possibility of the death sentence if convicted. Whether or not the alleged murder weapon — which was unquestionably linked to the defendant — had blood matching the victim's constituted an issue of the utmost importance. Under these circumstances, a reasonable defense lawyer would take some measures to understand the laboratory tests performed and the inferences that one could logically draw from the results. At the very least, any reasonable attorney under the circumstances would study the state's laboratory report with sufficient care so that if the prosecution advanced a theory at trial that was at odds with the serology evidence, the defense would be in a position to expose it on cross-examination.

Here, the state explained the lack of the victim's blood on the defendant's knife by telling the jury, in essence, that although both type A and type O blood were on the knife, the serology test could only detect type A. In fact, another test had been performed that conclusively disproved that theory. A reasonable defense lawyer would have been alerted to the possibility of conclusively detecting *both* A and O on the same item of evidence by the laboratory report itself. Whereas the report indicates that only type A was found on Driscoll's knife and that only type O was found on Jackson's clothes and on Driscoll's pants, the report indicates that both type A and type O blood were detected on Jackson's dress boots.[4] Considering the circumstances as a whole, defense counsel's failures to prepare for the introduction of the serology evidence, to subject the state's theories to the rigors of adversarial testing, and to prevent the jury from retiring with an inaccurate impression that the victim's blood might have been present on the defendant's knife fall short of reasonableness under the prevailing professional norms.

Applying the second prong of the *Strickland* analysis, we conclude that the inadequate performance of his lawyer prejudiced Driscoll. There is a reasonable probability that, absent these errors, the jury would have found reasonable doubt with respect to Driscoll's guilt. In addition to the serology evidence in question, the state's case against Driscoll rested primarily on the presence of the victim's blood on Driscoll's pants, the suspect eyewitness testimony of prisoners involved in the riot, and the incriminating statement Driscoll gave to investigators in which he admitted "stabbing at an officer." Given that the trial evidence established that Driscoll stabbed Officer Maupin — who has blood type A — and that the guards who actually saw an inmate stab officer Jackson identified Carr as the assailant, we cannot say that had the jury been made aware that the victim's blood was conclusively absent from Driscoll's knife it still would have found him guilty of Jackson's murder. Thus, we agree with the district court that defense counsel was ineffective.

B. Ineffective Assistance of Counsel: Failure to Impeach State's Eyewitness with Prior Inconsistent Statements

The district court also found that Driscoll's trial counsel provided ineffective assistance by failing to impeach the testimony of one of the state's witnesses using evidence of prior inconsistent statements. We agree with the district court's decision.

At Driscoll's trial, the state offered the eyewitness testimony of two inmates, Joseph Vogelpohl and Edward Ruegg. First, Vogelpohl took the stand and told the jury that he saw Driscoll stab Officer Jackson in the upper left part of his chest. Trial Tr. at 909. 710*710 Vogelpohl also testified that after witnessing Driscoll stab Jackson, he returned to Driscoll's cell to continue watching television as he had been before the disturbance began. According to Vogelpohl, Driscoll returned to his cell a while later and, before changing his clothes, said to Vogelpohl: "Did I take him out, JoJo, or did I take him out." Trial Tr. at 922. On cross-examination, Driscoll's lawyer questioned Vogelpohl about his prior convictions, Trial Tr. at 926-27, about his intoxication level on the night in question, Trial Tr. at 945-46, about the beatings he and other inmates received from corrections officers after the riot, Trial Tr. at 935-38, and about whether he had discussed the case with other inmates, Trial Tr. at 931-33. Driscoll's lawyer also raised some question as to whether Vogelpohl also possessed a knife. Trial Tr. at 948-52.

In his petition, Driscoll asserts that his counsel was ineffective, however, because he failed to impeach Vogelpohl's testimony with evidence that Vogelpohl had made prior inconsistent statements to investigators. Shortly after the incident at MTCM, Vogelpohl

had given a statement to two investigating officers. According to one of the officer's notes, Vogelpohl told them that when Driscoll returned to his cell he told Vogelpohl that one of the officers "had been stuck." Hr'g Tr. at 21. Shortly thereafter, Vogelpohl had given a second statement to a different investigator. According to that investigator's interpretation of Vogelpohl's statement, Driscoll told Vogelpohl "that [Driscoll] or someone took out a guard." Hr'g Tr. at 47. In his statements prior to trial, Vogelpohl did not say that Driscoll admitted to stabbing Officer Jackson, much less that Vogelpohl witnessed Driscoll stab Jackson.

Driscoll's lawyer, who knew about Vogelpohl's statements to investigators, never questioned him about the inconsistencies between those prior statements and his testimony at trial.[5] In fact, counsel never made the jury aware of Vogelpohl's prior statements. Driscoll's trial counsel subsequently testified that this omission was not a matter of trial strategy.[6] Moreover, we conclude that there is no objectively reasonable basis on which competent defense counsel could justify a decision not to impeach a state's eyewitness whose testimony, as the district court points out, took on such remarkable detail and clarity over time.

The question, therefore, becomes whether Driscoll was prejudiced by his counsel's deficient performance. The state offered the testimony of another witness, Edward Ruegg, who, like Driscoll, admitted to taking part in the fighting that night. Ruegg testified 711*711 that he saw Driscoll stab Officer Jackson three or four times and that he saw the knife penetrate Jackson's chest once. Trial Tr. at 1042-43. On cross-examination, Ruegg testified that he was badly beaten during and after the riot and that he was afraid for his life when he gave a statement to investigators. Ruegg admitted:

> *... I told [the investigators] anything they wanted to hear — I just wanted to tell them something. So they — I mean, virtually I told them anything they wanted to hear just so they would leave me alone and because I knew I had to go back to population with regular inmates.*

Trial Tr. at 1058-59. Driscoll later presented the testimony of another inmate who said that Ruegg admitted to him that he did not see who stabbed Jackson. Trial Tr. at 1593 (Lassen testimony).

As the Supreme Court recognized in *Strickland,* "[s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture...."*Strickland,* 466 U.S. at 695-96, 104 S.Ct. at 2069. Vogelpohl testified before Ruegg did. The apparent strength of Vogelpohl's claim to have seen the same events that Ruegg later testified to seeing must have offset, in the minds of the jurors, Ruegg's admission that he was scared enough to say anything that he thought the investigators wanted to hear.[7] We agree with the district court that counsel's failure to impeach Vogelpohl was a breach with so much potential to infect other evidence that, without it, there is a reasonable probability that the jury would find reasonable doubt of Driscoll's guilt. Therefore, his trial counsel's omission amounted to a deprivation of Driscoll's Sixth Amendment right to counsel.

C. Prosecutor's Misleading Statements to the Jury Regarding Its Sentencing Responsibility

1. Eighth Amendment

The district court accepted Driscoll's claim that the trial court denied Driscoll his Fifth Amendment right to due process of law because it failed, sua sponte, to curtail the repeated efforts by the prosecution to minimize the jury's sense of responsibility for sentencing Driscoll to death. We need not decide whether the district court correctly determined that the trial court's failure to admonish the prosecutor violated Driscoll's due process rights. *Rupp v. Omaha Indian Tribe,* 45 F.3d 1241, 1244 (8th Cir.1995) ("We may affirm the judgment of the district court on any ground supported by the record, even if the district court did not rely on it.") (citing*Monterey Dev. v. Lawyer's Title Ins.,* 4 F.3d 605, 608 (8th Cir.1993). Instead, we conclude that Driscoll was sentenced to death in violation the Eighth Amendment because the sentencing jury was misled by the prosecutor to believe that the ultimate responsibility for its decision rested elsewhere.

Throughout the trial, the prosecution made statements to the jury that were calculated to diminish the degree of responsibility the jury would feel in recommending a sentence of death. The prosecutor repeatedly referred to the judge as the "thirteenth juror" and explained that the jury's sentence of death would be a mere recommendation to the judge; in his most egregious statements, the prosecutor announced that "juries do not sentence people to death in Missouri," and, at one point, even told jurors it did not matter whether they returned a recommendation for the death penalty because the judge can simply overrule their decision.[8]Driscoll's 712*712 counsel never objected to any of these statements at trial.

Our analysis is controlled by *Caldwell v. Mississippi,* 472 U.S. 320, 329, 105 S.Ct. 2633, 2639-40, 86 L.Ed.2d 231 (1985), in which the Supreme Court held it constitutionally impermissible to rest a death sentence on a determination made by a jury that has been led to believe that the responsibility for determining the appropriateness of the death sentence rests elsewhere. The Court decided *Caldwell* on June 11, 1985, before Driscoll's conviction became final.[9] Driscoll is thus entitled to the benefit of the Supreme Court's decision. *Cf. Sawyer v. Smith,* 497 U.S. 227, 110 S.Ct. 2822, 111 L.Ed.2d 193 (1990) (holding that *Caldwell* announced a new rule as defined by *Teague v. Lane,* 489 U.S. 288,

109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)). Driscoll raised his substantive claim under *Caldwell* in the Missouri Supreme Court on both direct and collateral appeal, and the state court fully considered these claims on their merits. *State v. Driscoll,* 711 S.W.2d 512, 515-16 (Mo.), *cert. denied,* 479 U.S. 922, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986)(direct appeal); *Driscoll v. State,* 767 S.W.2d 5, 9-10 (Mo.), *cert. denied,* 493 U.S. 874, 110 S.Ct. 210, 107 L.Ed.2d 163 (1989) (collateral appeal). Under 28 U.S.C. § 2254, however, we are not bound by the Missouri court's interpretation of the United States Constitution.

In *Caldwell,* the prosecutor minimized the importance of the jury's sentencing decision by telling the jury that the sentence it imposed would be reviewed for correctness on appeal. The Court concluded that the prosecutor's statements were impermissible because they gave the jury the false sense that the responsibility for sentencing the defendant to death rested not with the jury, but with the state court of appeals. The Court explained:

> *The "delegation" of sentencing responsibility that the prosecutor here encouraged would thus not simply postpone the defendant's right to a fair determination of the appropriateness of his death; rather it would deprive him of that right, for an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance.*

Caldwell, 472 U.S. at 330, 105 S.Ct. at 2640. Our circuit recognized that *Caldwell* "condemns state-induced comments that `mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.'" *Gilmore v. Armontrout,* 861 F.2d 1061, 1066 (8th Cir.1988) (quoting 713*713 *Darden v. Wainwright,* 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 2472 n. 15, 91 L.Ed.2d 144 (1986)).

In this case, the prosecutor's statements impermissibly misled the jury to minimize its role in the sentencing process under Missouri law. Missouri's capital murder statute, under which Driscoll was convicted and sentenced to death, permitted imposition of a death sentence only if the jury unanimously voted for death, Mo.Rev.Stat. § 565.006 (Supp.1982) (repealed effective October 1, 1984), after considering all relevant mitigating and aggravating factors, Mo.Rev.Stat. § 565.012.4 (1979) (repealed effective October 1, 1984). Further, Missouri Supreme Court Rule 29.05 provides: "The court shall have power to reduce the punishment within the statutory limits prescribed for the offense if it finds that the punishment is excessive."

Despite their technical accuracy under Missouri law, the prosecutor's statements were impermissible because they misled the jury as to its role in the sentencing process in a way that allowed the jury to feel less responsibility than it should for its sentencing decision. For example, the prosecutor told the jury that (1) juries do not sentence defendants to death, and (2) it did not matter whether the jury sentenced Driscoll to death because the judge could simply overrule their decision. Far from a decision that does not matter, a jury's determination to recommend a sentence of death is a matter of almost unparalleled importance. The judge could not have sentenced Driscoll to death absent the jury's recommendation to do so. Mo. Rev.Stat. § 565.006(2)

(Supp.1982) (repealed effective October 1, 1984). Moreover, for all practical purposes, a jury's recommendation of death is final.[10]

When we consider the prosecutor's statements as a whole, we conclude that they implicate the exact concerns that are at the heart of *Caldwell:* They fundamentally misrepresented the significance of the jury's role and responsibility as a capital sentencer and misled the jury as to the nature of the judge's review of its sentencing determination. *See Caldwell,* 472 U.S. at 336, 105 S.Ct. at 2643; *see also id.* at 342-43, 105 S.Ct. at 2646-47 (O'Connor, J., concurring) ("[T]here can be no `valid state penological interest' in imparting inaccurate or misleading information that minimizes the importance of the jury's deliberations in a capital sentencing case."). The prosecutor essentially told the jury that it could defer the extremely difficult decision of whether or not Driscoll should be sentenced to death. As a consequence, the jury made the decision that Driscoll would be killed without full recognition of the importance and finality of doing so and, therefore, without affording the decision the full consideration it required. Driscoll's death sentence does not meet the standard of reliability that the Eighth Amendment requires. Thus, Driscoll's capital sentence is vacated and he is entitled to a new sentencing hearing.

2. Ineffective Assistance of Counsel

The district court also granted Driscoll habeas relief because it concluded that his counsel was ineffective for failing to object to the repeated efforts by the prosecution to diminish the degree of responsibility the jury would feel in recommending a sentence of death as discussed above. The district court, however, applied the wrong analysis to the claim of ineffectiveness, and instead treated it as if it were a substantive claim under *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Although handed down before Driscoll's conviction became final, *Caldwell* was not the law at the time of Driscoll's trial; moreover, the Court's decision in *Caldwell* was not dictated by the precedent existing at the time of Driscoll's trial.*Sawyer v. Smith,* 497 U.S. 227, 235, 110 S.Ct. 2822, 2827-28, 111 L.Ed.2d 193 (1990). Therefore, his lawyer's effectiveness cannot be assessed in light of *Caldwell*'s mandate. We cannot require trial counsel to be clairvoyant of future Supreme Court decisions in order to provide 714*714 effective assistance. *Horne v. Trickey,* 895 F.2d 497, 500 (8th Cir.1990). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time." *Strickland,*466 U.S. at 689, 104 S.Ct. at 2065. Thus, we evaluate trial performance in light of the law and circumstances as they existed at the time of trial. *Blackmon v. White,* 825 F.2d 1263, 1265 (8th Cir.1987).

Although misleading, the majority of the statements to which defense counsel failed to object constituted technically correct statements under Missouri's capital statute and Rule 29.05. At the Rule 27.26 hearing in state court, Driscoll's trial counsel testified that, although he considered the prosecutor's comments "offensive," he believed them to accurately reflect the law and he felt he had no basis on which to object.[11] We have no reason to believe that the trial court would have sustained counsel's objections had he advanced them at trial. Moreover, Driscoll's trial lawyer admitted to a general trial strategy that included minimizing the number of objections he made during the other side's closing argument.[12] We must conclude that counsel's strategic decision not to object under the circumstances was objectively reasonable. Because we conclude that Driscoll makes an insufficient showing that his trial lawyer's failure to object under the circumstances constituted inadequate performance, we need not discuss prejudice. *Strickland,* 466 U.S. at 699, 104 S.Ct. at 2070-71.

D. Ineffective Assistance of Counsel: Failure to Request a Jury Instruction on the Lesser-Included Offense of Second Degree Felony Murder

The district court also determined that Driscoll's trial counsel was constitutionally ineffective because he failed to request a jury instruction on the lesser-included, non-capital offense of second degree felony murder. At Driscoll's trial, the jury retired with instructions on capital murder, as well as on the non-capital offenses of conventional second degree murder (intentional murder without deliberation) and manslaughter. In his petition, Driscoll asserts that his counsel's failure to request the additional instruction constituted ineffectiveness in light of*Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (holding that the death penalty may not be imposed when the jury is prohibited from considering a verdict of guilt of a lesser-included, non-capital offense). The state argues that *Beck* and its progeny require only that the jury be allowed to consider a "third option" besides finding the defendant guilty or not guilty of capital murder. We agree with the state's interpretation of the law under *Beck.*

In *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), the Supreme Court held unconstitutional an Alabama statute that prohibited lesser-included offense instructions in capital cases. As the Court later explained:

> *Our fundamental concern in [Beck] was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime*

> *might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all.... We repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented.*

Schad v. Arizona, 501 U.S. 624, 645, 111 S.Ct. 2491, 2504, 115 L.Ed.2d 555 (1991) (internal quotation and citations omitted). As 715*715 long as it considers a "third option," the reliability of the jury's capital murder conviction will not be diminished the way it is when the jury is forced into an all-or-nothing choice. *Id.*

This case, like *Schad,* does not implicate the central concern of *Beck* because the jury did not face an all-or-nothing choice. In addition to capital murder, the jury considered the lesser-included, non-capital offenses of second degree murder and manslaughter. The record indicates that Driscoll sought an acquittal, not a conviction of a lesser offense.[13] This fact explains his lawyer's strategic choice not to request an instruction on the additional lesser-included offense of second degree felony murder which would have necessarily emphasized Driscoll's admitted role in the riot. We conclude that his counsel acted reasonably; as a consequence, Driscoll was not denied effective counsel by the omission. Because Driscoll received effective assistance with respect to the challenged instructions, we reverse the district court.

E. Remaining Claims

The district court found two additional bases to support Driscoll's claim that he was denied due process: (1) the trial court failed to instruct the jury, sua sponte, on the lesser-included offense of second degree felony murder; and (2) the trial court allowed the state to offer improper rebuttal testimony. We reverse the district court on both grounds. The first of these claims is disposed of by our discussion of Driscoll's trial counsel's performance with respect to the jury instructions, *supra,* Section III(D). The court had no due process obligation to submit a particular lesser-included offense instruction to the jury. With respect to the second contention, Missouri law provides that the scope of rebuttal testimony is left to the sound discretion of the trial court. *State v. Leisure,* 749 S.W.2d 366, 380 (Mo.1988). Further, Driscoll raised this claim on direct appeal and the Missouri Supreme Court dismissed it as meritless. *Driscoll,* 711 S.W.2d at 518. In no event does the trial court's determination of this evidentiary issue rise to the level of a constitutional violation.

Finally, by affirming the district court's order in all other respects, *supra* n. 2, we reject the claims raised by Driscoll in his cross-appeal.

IV. CONCLUSION

We affirm the district court's order, in part, concluding that a writ of habeas corpus should issue on three independent bases: (1) Driscoll was denied the effective counsel guaranteed by the Sixth Amendment because his lawyer allowed the jury to retire with the factually inaccurate impression that the victim's blood was possibly on Driscoll's knife; (2) his trial counsel was also ineffective for failing to impeach a state eyewitness using his prior inconsistent statements; and (3) the prosecutor's repeated statements to the jury impermissibly diminished the jury's sense of responsibility for its sentence of death and rendered Driscoll's death sentence infirm under the Eighth Amendment. The district court shall vacate Driscoll's conviction and sentence and order him released unless the state commences proceedings to retry him within 120 days.

We reverse the district court's order, in part, because we conclude that the following challenges to Driscoll's conviction do not warrant habeas corpus relief: (1) Driscoll's trial counsel was ineffective for failing to object to the prosecutor's misleading statements to the jury; (2) Driscoll received ineffective assistance of counsel as a result of his lawyer's failure to request a jury instruction on the lesser-included offense of second degree felony murder; (3) the trial court denied Driscoll due process of law by failing to, sua sponte, instruct the jury on second degree felony murder; and (4) the trial court denied Driscoll 716*716 due process of law by allowing the state to introduce rebuttal testimony.

HANSEN, Circuit Judge, concurring.

I concur in Parts I, II, III(A), III(C)(2), III(D), and III(E) of the court's opinion and in its judgment. I agree that Driscoll's defense counsel's performance at trial with respect to the serology evidence meets the first part of the *Strickland* test. It was of fundamental importance that the defense show conclusively (and with reasonable investigation and pretrial preparation it could have done so) that none of Officer Jackson's blood was on the knife the state claimed was used by Driscoll to murder the officer. I am also of the view that there is a reasonable probability that but for counsel's deficient performance, the result in the guilt phase of Driscoll's case would have been different. Moreover, and after considering the totality of the evidence, because of the crucial nature of this exculpatory evidence, my confidence in the outcome of the case is seriously undermined to the extent that I believe the result reached is unreliable. *Lockhart v. Fretwell,* 506 U.S. 364, 371-73, 113 S.Ct. 838, 844, 122 L.Ed.2d 180 (1993); *Strickland v. Washington,* 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

Because I agree that Driscoll is entitled to a new trial, my respectful disagreements with the court's analysis and opinion with regard to Driscoll's *Caldwell* claim and with his claim concerning the cross-examination of the witness Joseph Vogelpohl (contained in

Parts III(B) and III(C)(1) of the opinion) do not require explication except to say that I do not believe Driscoll has ever asserted the stand-alone Eighth Amendment *Caldwell* claim upon which the court today grants him relief. The *Caldwell* claim has always been made as a part of Driscoll's ineffective assistance of counsel claim, and as a claim that the state trial court denied him due process by not admonishing the prosecutor *sua sponte* concerning the complained-of comments. As indicated, I agree with the court's conclusion that Driscoll's trial counsel could not be constitutionally ineffective for not making a *Caldwell* objection before *Caldwell* was decided.

[1] Two other inmates, Rodney Carr and Roy Roberts, were also charged and separately convicted of capital murder in connection with the stabbing death of Officer Jackson. Roberts was sentenced to death for his role in restraining officer Jackson while he was fatally stabbed. *State v. Roberts,* 709 S.W.2d 857 (Mo.), *cert. denied,*479 U.S. 946, 107 S.Ct. 427, 93 L.Ed.2d 378 (1986). Carr was sentenced to life in prison without consideration of parole for fifty years. *State v. Carr,* 708 S.W.2d 313 (Mo.Ct.App.1986).

[2] The district court either dismissed or rejected the rest of Driscoll's claims. Many claims in Driscoll's petition had been extinguished due to procedural default unexcused for cause. The district court denied the remainder of his claims on their merits. After carefully reviewing the full record on appeal, we affirm the district court's judgment with respect to these claims. In so doing, we thereby reject the claims raised by Driscoll in his cross-appeal.

[3] Later, after quieting the ensuing disturbance, investigators retrieved at least thirteen similar homemade knives from the wing. Authorities were still discovering knives possibly associated with the July 3, 1983 incident as late as the weeks immediately preceding Driscoll's trial. Officer Darnell testified that he discovered fifteen to twenty knives and other weapons during the shakedown of the cells after the disturbance. He further testified that three of the knives appeared to have blood on them. A total of fourteen knives (and other types of weapons) were submitted to the forensic laboratory for testing. Of those, only the knife connected to Driscoll tested positive for blood. Therefore, either Darnell made a mistake in his recollection or one or more of the bloody knives were lost.

[4] We also note that with respect to some of the items of evidence the blood detection and typing table indicates "IC," meaning inconclusive, under the column indicating the blood type. Thus, the logical inference is that where a specific blood type (or types) was determined, it had been determined conclusively.

[5] On appeal, the state argues that we are bound, under 28 U.S.C. § 2254(d), by the Missouri Supreme Court's factual determination that Vogelpohl's prior statements were consistent with his trial testimony. *See Driscoll v. State,* 767 S.W.2d 5, 14 (Mo.), *cert. denied,* 493 U.S. 874, 110 S.Ct. 210, 107 L.Ed.2d 163 (1989). We note that the Missouri Supreme Court merely concluded that the trial court did not commit plain error by determining that the statements were not directly inconsistent with Vogelpohl's trial testimony. Assuming that the consistency of Vogelpohl's statements constitutes a

factual finding, it is unprotected by the presumption of correctness because it is not fairly supported by the record. 28 U.S.C. § 2254(d)(8).

[6] At Driscoll's Rule 27.26 hearing in state court, his trial counsel explained: "[Vogelpohl] was about as hostile as a witness could be. He was the State's witness and he was completely uncooperative and fairly well, what I would assume, was coached as to what he was going to say." Hr'g Tr. at 61. With respect to Vogelpohl's prior inconsistent statements, trial counsel gave the following answers to questions:

Q: Okay. Now, you were asked about these statements of Mr. Vogelpohl to both [Investigator] Schreiber and [Investigator] Wilkinson. If Mr. Schreiber testified that Vogelpohl — Vogelpohl said to Schreiber that Mr. Driscoll had said to him, quote, "One of the officers, which was Officer Jackson, had been stuck," end quote. And then Vogelpohl testified at trial that Mr. Driscoll had said to him, "Did I take him out, JoJo, or did I take him out." Do you agree that those two statements can be construed as being inconsistent?

....

A: Okay. Yes, that's inconsistent.

....

Q: Okay. Would it have been consistent with your trial strategy to bring up that statement of —

A: Yes, it would have.

Q: Was there any matter of trial strategy involved in not bringing up that prior inconsistent statement to Mr. Schreiber?

A: No, there was not.

Hr'g Tr. at 77-78.

[7] Besides Vogelpohl and Ruegg, the only inmate to actively implicate Driscoll in Jackson's murder was Jimmie Jenkins, Driscoll's cellmate and the person whose removal from the wing provoked the disturbance. Although he did not claim to have witnessed the stabbing, Jenkins testified that Driscoll ran up to him immediately after the fighting and said, "I killed the freak." On cross-examination, defense counsel impeached Jenkins — in the very way he failed to impeach Vogelpohl — by eliciting from him the fact that in two prior statements Jenkins gave investigators immediately following the riot, he never mentioned Driscoll's supposed statement to him.

[8] The following references, although certainly not exhaustive, provide a representative sample of the prosecutor's remarks:

Now, is there any question about the fact that a jury who returns a verdict of a recommendation of death, that it's only a recommendation to the Court, who later

sentences the defendant? *Does everybody understand that? Okay. Because juries don't sentence people to death in Missouri.* Trial Tr. at 540 (voir dire) (emphasis added).

....

Now, lest you get another misconception — you're not the only ones voting as jurors. The Judge has a vote. It's really thirteen votes. But the Judge's vote is a veto vote. *It doesn't matter whether you return a recommendation for the death penalty.* The judge can overrule you and still give the defendant fifty years in prison without parole — after looking more in the defendant's background, et cetera — and those kinds of things. Trial Tr. at 555 (voir dire) (emphasis added).

....

Well, I'll tell you. What's going to happen to Bobby Driscoll is it's going to depend on what the judge does. And it's — in a way, it's certainly going to depend on what you do. Trial Tr. at 2103 (closing argument).

....

But when you've returned a verdict of — say a recommendation of death, you each have an individual vote. But also, the judge has a vote. Do you understand that? In other words, it takes thirteen. Trial Tr. at 481 (voir dire).

....

The recommendation which you will make will be no more than a recommendation so that the Judge can consider when he is determining in his mind whether or not to sentence Driscoll to death — he'll have that option. Trial Tr. at 2004 (closing argument).

....

And you understand when I say "imposing" [the death penalty], what you're doing is recommending to Judge Long to consider it? Trial Tr. at 580 (voir dire).

[9] Driscoll's trial commenced in state court on November 26, 1984; the court sentenced him to death on February 7, 1985. The Supreme Court granted certiorari in *Caldwell* on October 9, 1984, just before Driscoll's trial began. 469 U.S. 879, 105 S.Ct. 243, 83 L.Ed.2d 182 (1984). The Court decided *Caldwell,* however, on June 11, 1985, more than four months *before* Driscoll's case became final on October 20, 1986 when the Supreme Court denied Driscoll's petition for certiorari, *Driscoll v. Missouri,* 479 U.S. 922, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986).

[10] Although Missouri Supreme Court Rule 29.05 technically vests the trial court with the power to reduce a jury-imposed sentence which it deems "excessive," since Missouri reenacted the death penalty in the late 1970's, "[n]o judge has ever spared a murderer the death penalty when a jury has recommended it." William C. Lhotka, *Judges Back Juries on Death Penalty,* St. Louis Post-Dispatch, December 6, 1992, at 9C. As one trial

judge explains: "I can't imagine myself going against the cumulative wisdom of the jury. That's why we rely on the jury system." *Id.*

[11] For example, when asked whether, at the time of trial, he believed that the prosecutor's statement that the judge imposes sentence on the defendant was a correct one he replied: "What I believe was a correct statement of the law was that the Judge had the ability to override the jury sentence if — which, in fact, was the law." Hr'g Tr. at 65. He elaborated: "Use of the term `thirteenth juror' was offensive to me; but I thought his statement of the law was correct. And I did not know that the statement was objectionable." Hr'g Tr. at 82.

[12] At the Rule 27.26 hearing trial counsel stated: "[I]t's my personal policy, in closing arguments, not to interrupt or make objections unless it's what I consider to be seriously damming [sic] to my case or something that's a flagrant misstatement of the facts as they were revealed at trial." Hr'g Tr. at 84.

[13] As Driscoll's counsel later testified, his strategy at trial was "to put evidence on to the effect that other individuals stabbed Tom Jackson." Hr'g Tr. at 63. During his closing argument, Driscoll's lawyer argued that the state had failed to meet its burden of proof and that Driscoll was being used as a scapegoat for the murder of a corrections officer. At one point he explained to the jury: "Ordinarily, at this stage of the closing argument, the defense attorney is supposed to talk about reasonable doubt. I'm not going to go into that because there's mounds and mounds and mounds of doubt." Trial Tr. at 1963.

Gagne v Booker

LEWIS RODNEY GAGNE, PETITIONER-APPELLEE,

v.

RAYMOND BOOKER, WARDEN, RESPONDENT-APPELLANT.

No. 07-1970.

United States Court of Appeals, Sixth Circuit.

Argued: June 9, 2009.

Decided and Filed: May 25, 2010.

Pursuant to Sixth Circuit Rule 206

ARGUED: Janet A. Van Cleve, MICHIGAN ATTORNEY GENERAL'S OFFICE, Lansing, Michigan, for Appellant.

Paul L. Nelson, FEDERAL PUBLIC DEFENDER'S OFFICE, Grand Rapids, Michigan, for Appellee.

ON BRIEF: William C. Campbell, MICHIGAN ATTORNEY GENERAL'S OFFICE, Lansing, Michigan, for Appellant.

Paul L. Nelson, FEDERAL PUBLIC DEFENDER'S OFFICE, Grand Rapids, Michigan, for Appellee.

Benjamin C. Mizer, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Amici Curiae. Lewis Gagne, Detroit, Michigan, pro se.

Before: BATCHELDER, Chief Judge; NORRIS and KETHLEDGE, Circuit Judges.

NORRIS, J., delivered the opinion of the court, in which KETHLEDGE, J., joined, with Judge KETHLEDGE (pp. 18-23), also delivering a separate concurring opinion. BATCHELDER, C.J. (pp. 24-36), delivered a separate dissenting opinion.

AMENDED OPINION

ALAN E. NORRIS, Circuit Judge.

Petitioner Lewis Gagne and his co-defendant, Donald Swathwood, were each charged with three counts of criminal sexual misconduct for forcibly and simultaneously engaging in sexual activities with Gagne's ex-girlfriend, Pamela Clark. All of the charges arose out of events occurring over the course of one night. The key question at trial was one of consent. The jury convicted Gagne of two counts, and Swathwood of three. Gagne filed a petition for a writ of habeas corpus, 28 U.S.C. § 2254, and the district court granted him relief on the basis that the state trial court's decision to exclude certain evidence had violated Gagne's due process right to present a meaningful defense. Respondent, Warden Raymond Booker, represented by the Michigan Attorney General ("the State"), appealed. We now affirm.

I.

A.

Gagne and Swathwood were each charged with three counts of first-degree criminal sexual conduct. Mich. Comp. Laws § 750.520b(1)(f).[1] Gagne's three charges included two counts of forcible penis to mouth penetration and one count of forcible penis to vagina penetration, charges for which consent is a full defense. *See People v. Waltonen,* 7238 N.W. 2d 881, 887 (Mich. Ct. App. 2006), *appeal denied,* 731 N.W. 2d 178 (Mich. 2007); see *also People v. Hearn,* 300 N.W.2d 396, 398 (Mich. Ct. App. 1980). A jury convicted Gagne of forcible vaginal penetration and of one count of forcible oral penetration.

The parties do not dispute the background facts that set the stage for what occurred on the night of July 3, 2000. The complainant, Clark, and Gagne dated from some time in January until early June of that year. Gagne moved in with Clark in late January or early February, and the two lived together until their relationship ended. Throughout this time, Clark worked, but Gagne did not, and Gagne would frequently use her work phone and her personal ATM card, sometimes without her knowledge.

Also undisputed were the events that took place around midnight on July 3, 2000. After spending most of that day doing yardwork, during which time she consumed most of a pint of vodka, Clark retired to her house to watch television. Gagne arrived uninvited at about 10:45 p.m. He informed Clark that he and his friend Swathwood, whom Clark also knew, were going to move to California. Shortly thereafter Swathwood and a third man, Michael Stout, arrived. The group began drinking beer and possibly smoking marijuana. By Clark's own estimate she consumed nine or ten beers during this time.

This point in the story marks the beginning of the facts contested at trial. We begin with the version urged by the prosecution, which was presented almost entirely through Clark's testimony. At some point after midnight, Clark and Gagne took a shower together. Afterwards, Clark, who believed that Swathwood and Stout had left, participated in oral sex with Gagne in the living room. Swathwood entered the room and began engaging in intercourse with her while Gagne forcibly held her head down. A few minutes later, Gagne released Clark and the two went into the bedroom where Clark told Gagne she did not want to have sex with Swathwood. Clark then began performing oral sex with Gagne. Swathwood again entered the room and began engaging in intercourse with her. The men held Clark down, and each had intercourse

and oral sex with her, at various points slapping her buttocks and using sexual devices that Clark kept in her room.

At approximately five a.m. the men tired of this activity and left the room. Clark went into the bathroom, vomited, took a shower, and returned to bed where she slept until approximately noon the next day. At that time she discovered her ATM card was missing, and upon further investigation learned that at 5:28 that morning someone had withdrawn $300 from her account, and had tried to withdraw more money twice in the following fifteen minutes.

The defense's version of events differed primarily on the issue of consent. According to Gagne and Swathwood, the group purchased and smoked some crack cocaine at around midnight. Clark then began talking with the men about engaging in group sex, and in large part instigated the group sexual activity, first in the living room and then later in the bedroom. Their description of the sexual activities differed only in that Clark consented to them. They concede for instance, that they spanked Clark. At about five a.m. Gagne and Clark agreed that Gagne should leave and purchase more crack with money withdrawn using her ATM card. All three men left in Clark's car. Gagne dropped Stout off at home, withdrew $300 from an ATM using Clark's card, and then drove to a street corner and purchased crack. The defendants became nervous when they saw police cars in the area, so instead of returning home, they drove to a cemetery and smoked the crack. The defendants testified that they returned to Clark's house later that morning and Gagne returned her ATM card. Clark was angry and told Gagne to leave, so he did.

Clark testified that, two days later, she told her adult son that she had been raped. She also told the police, and saw several doctors. The doctors noted that she had some bruising but no trauma to her wrists or shoulders, which are typically present after a sexual assault. Nor did any of the doctors find any internal or external tears to Clark's vagina or rectum.

B.

As noted above, at the heart of Gagne's petition for habeas corpus is the trial judge's exclusion of certain evidence from the trial. As required by the Michigan rape shield law, Mich. Comp. Laws § 750.520j(1) & (2),[2] Gagne filed a motion *in limine* seeking to introduce evidence regarding several aspects of Clark's prior sexual experiences and tastes. The trial judge denied the motion in part, excluding evidence regarding two subjects that are relevant here: an incident of group sexual activity involving Gagne, Clark, and a man named Ruben Bermudez; and Clark's solicitation of Gagne's father to join her and Gagne in group sex. The court's exclusion of this evidence gives rise to this appeal.

The court also granted Gagne's motion in part, and, because it is especially relevant to our analysis, we recount in some detail the evidence the court decided to admit regarding sexual activity that occurred one night involving Gagne, Swathwood, Clark, and two other females they met at a bar called Tony's Lounge ("the Tony's Lounge incident"). In the spring of 2000, Clark, Swathwood, and Gagne went to Tony's Lounge, where they drank for some time. At the bar Swathwood met two women. All five of them departed together and went to a house belonging to one of the women. There were people at the house when they arrived. Clark and Gagne began to engage in some sort of "sexual behavior" in the living room while Swathwood had intercourse nearby with the other two women. Clark testified that she did not "engage in sex of whatever kind with Donny Swathwood" while they were in the living room. When someone knocked at the door, Clark and Gagne relocated to the bedroom where they began alternately having intercourse and arguing. Swathwood brought the other women into the bedroom. Gagne and Clark's argument escalated, and finally Clark left and went home.

Clark was extremely intoxicated during these events; she testified that she drove home that night but did not remember doing so. The next day, Gagne informed her that there was more from the previous night that she did not remember, including that she had engaged in oral sex with Swathwood. Clark testified that she had no memory of this. Nonetheless, she believed Gagne and told others what had happened with Swathwood, including Swathwood's girlfriend at the time.

Finally, Clark testified that, at some later date, she and Gagne "were talking about being with other men or being with other women" sexually, and discussed the Tony's Lounge incident:

> *And I told him that, you know, I honestly have not been with any other man except what you told me about [Swathwood] and I don't remember that. And he said to me, I was just lying `cause I wanted to go to bed with the same — the girl that [Swathwood] was having sex with. And I — and then he told me that he did have sex with her that night. And she — the girl had told me something different.*

For his part, Swathwood testified that Clark engaged in oral sex with him that night in the presence of Gagne and the other two women. Swathwood answered "yes" when asked, "Fair assessment to say this was kind of a group-sex, orgy-type situation?"

In her closing argument, the prosecutor repeatedly emphasized the unlikeliness of the defendants' version of the story, which, in her words, was "more consistent with the pornographic movie than real life." The defense responded by attacking Clark's credibility and arguing that she had consented by pointing to the Tony's Lounge incident as evidence of this theory. During rebuttal, the prosecution argued to the jury, that, insofar as the Tony's Lounge incident was concerned, "Even if you believe, contrary to. . . what Ms. Clark told you, that she did engage in consen[s]ual sexual contact with Mr. Swathwood, the nature of the contact and relations here were 190 degrees [sic] different. That situation did not involve, ladies and gentlemen, two men."

On direct appeal, Gagne raised a number of claims, only one of which is relevant here: that the trial court violated his due process right to present a defense when it excluded the evidence regarding the group sexual activity with Bermudez, and Clark's solicitation of Gagne's father to participate in group sex with her and Gagne.

The state appellate court acknowledged that rape shield statutes can occasionally abridge a defendant's constitutional rights, but concluded that the evidence of the group sexual activity with Bermudez and the invitation to Gagne's father were irrelevant because they involved third parties, not Swathwood. *People v. Swathwood,* Nos. 235540 and 235541, 2003 WL 1880143, at *1-2 (Mich. Ct. App. Apr. 15, 2003). Additionally, the Bermudez incident was said to be even less relevant because it had occurred while Clark and Gagne were dating; by July 3, the couple had been separated for three weeks. *Id.* at *2. The court of appeals also determined that Gagne's constitutional rights were not violated because he was allowed to present evidence regarding the Tony's Lounge incident, which the court felt sufficiently demonstrated that Clark "was not averse to group sexual activity." *Id.* at *3.

The court of appeals affirmed Gagne and Swathwood's convictions and remanded for sentencing determinations that are irrelevant to this appeal. The state court proceedings ended when the Michigan Supreme Court denied Gagne leave to appeal.[3] *People v. Gagne,* 673 N.W.2d 755 (Mich. 2003) (unpublished table decision).

Gagne filed a *pro se* petition for a writ of habeas corpus, asserting four claims. The district court granted relief on the due process claim arising from the trial court's exclusion of evidence. The court determined that relief was warranted because the excluded evidence was highly relevant since it involved occurrences remarkable in their similarity to the events on the night of July 3. This evidence was crucial to the defense because this case was essentially a "credibility contest" between Clark on the one hand, and Gagne and Swathwood on the other. The court granted Gagne a conditional writ of habeas corpus, and the State timely appealed.

II.

We review a district court's decision to grant habeas relief *de novo. Hereford v. Warren,* 536 F.3d 523, 527 (6th Cir. 2008). Because Gagne filed his habeas petition after the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, we review the last reasoned state court decision on the issue to determine whether that decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d). A state court's determination is contrary to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme

Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams v. Taylor,* 529 U.S. 362, 412-13 (2000). A state-court decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413.

III.

The Supreme Court has repeatedly recognized that the right to present a complete defense in a criminal proceeding is one of the foundational principles of our adversarial truth-finding process: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense.'"*Holmes v. South Carolina,* 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)) (internal quotation marks omitted). But a "meaningful opportunity" is not "every opportunity," and relevant evidence is frequently excluded from trial. Trial judges must make "dozens, sometimes hundreds" of evidentiary decisions throughout the course of a typical case, and rarely are these of constitutional significance: "the Constitution leaves to the judges who must make these decisions `wide latitude' to exclude evidence that is `repetitive . . ., only marginally relevant' or poses an undue risk of `harassment, prejudice, [or] confusion of the issues.'" *Crane,* 476 U.S. at 689-90 (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679 (1986)) (alterations and omissions in original). But while the Constitution leaves much in the hands of the trial judge, "an essential component of procedural fairness is an opportunity to be heard." *Id.* at 690.

The Supreme Court in *Crane* made clear that whether a defendant has a constitutional right to present evidence turns on the extent to which that evidence is so "highly relevant" that it becomes "indispensable" to the success of the defense. 476 U.S. at 691. In that case, the trial court excluded evidence of the circumstances surrounding the defendant's confession, which the defense argued would have cast doubt on the credibility of that confession. *Id.* at 684-86. The Supreme Court, in determining that this exclusion violated the defendant's right to present a meaningful defense, explained that the "opportunity [to be heard] would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690. The evidence, which related to the physical circumstances of the confession, was so "highly relevant to [the] reliability and credibility" of the confession, and the confession was so integral to

the defense, that the excluded evidence was "all but indispensable to any chance of [that defense] succeeding." *Id.* at 691.

In *Crane,* the Court's inquiry did not end with consideration of the defendant's interests. Rather, the Court sought to balance those interests against the state's interests in the evidentiary exclusion at issue; simplifying the Court's task was the fact that the state did not attempt to come forward with a justification for the questioned exclusion. *Crane,* 476 U.S. at 691.

Thus, *Crane* makes clear that a proper inquiry into the constitutionality of a court's decision to exclude evidence begins with considering the relevancy and cumulative nature of the excluded evidence, and the extent to which it was "central" or "indispensable" to the defense. Against this courts must balance the state's interests in enforcing the evidentiary rule on which the exclusion was based, in this case Michigan's rape shield statute.

When applying this delicate balance to the Michigan rape shield statute, we do not write on a blank slate. The Supreme Court has already considered that statute and, in doing so, reiterated these competing considerations. *Michigan v. Lucas,* 500 U.S. 145 (1991). In that case, the Court reviewed a holding of the Michigan Court of Appeals that the rape shield statute's "notice-and-hearing requirement is unconstitutional in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant." *Id.* at 148. Among other provisions, the statute requires the accused to file "a written motion and offer of proof" within ten days of his arraignment if he plans to introduce evidence of the victim's past sexual conduct. Mich. Comp. Laws § 750.20j(2). In *Lucas,* the defendant failed to file the motion in a timely manner and the trial court excluded the evidence on that basis. The Supreme Court recognized that "the [rape shield] statute unquestionably implicates the Sixth Amendment" but also noted that placing limits on the ability to present a defense "does not necessarily render the statute unconstitutional." *Lucas,* 500 U.S. at 149. Quoting the same passage from *Van Arsdall,* 475 U.S. at 679, that it relied upon in *Crane, supra,* the Court recognized the wide latitude enjoyed by trial judges to limit the introduction of evidence. *Id.* In the Court's view, the Michigan rape shield law "represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Id.*at 150. Given these competing considerations, the Court framed the question posed to it as follows: "[W]hether the legitimate interests served by a notice requirement can ever justify precluding evidence of a prior sexual relationship between a rape victim and a criminal defendant." *Id.* at 151.

The Court answered in the affirmative and reversed the *per se* rule of the Michigan Court of Appeals. *Id.* at 152-53. Significantly in our view, it did not hold that preclusion of evidence for failure to comply with a notice provision is *always* appropriate. As in all of its cases balancing evidentiary considerations with the right to present a complete defense, the Court made clear that a case by case evaluation is required. Accordingly, it remanded for the Michigan courts to perform such a balancing and, in doing so, the Court "express[ed] no opinion as to whether or not preclusion was justified in this case." *Id.* at 153.

IV.

With these precepts in mind, we turn to the facts before us. The writ may issue only when petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). And, as we stressed earlier in this opinion, our task is not to reach our own independent conclusion regarding the constitutional validity of the evidentiary decision to exclude evidence; rather, we must determine if the last reasoned state court opinion was either contrary to or involved an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).[4]

The Michigan Court of Appeals affirmed the trial court's judgment. It acknowledged that evidentiary laws, including rape shield statutes, must give way when constitutional rights of the accused, specifically the Sixth Amendment right to confrontation, are implicated. *People v. Swathwood,* 2003 WL 1880143, at *1 (citing *People v. Hackett,* 365 N.W.2d 120, 124 (Mich. 1984) ("in certain limited situations, such evidence [of prior sexual conduct] may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation")). Balanced against these constitutional considerations, the court of appeals observed that the Michigan Supreme Court has instructed trial courts to be "mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id.* (quoting *People v. Adair,*550 N.W.2d 505, 511 (Mich. 1996) (quoting *Hackett,* 365 N.W.2d at 125)) (quotation marks omitted). The balance struck by the court of appeals in this case is entirely consistent with the approach taken by the United States Supreme Court in *Lucas.* While the Michigan Court of Appeals did not cite federal constitutional law in its decision, its rendition of the appropriate legal analysis was not "contrary to" the "clearly established" federal law reflected in either*Crane* or *Lucas.*

That being the case, the writ may issue only if the court of appeals unreasonably applied that law. 28 U.S.C. § 2254(d)(1). We conclude that it did. With respect to the evidence regarding a "threesome" that included petitioner, Clark, and Bermudez, it reasoned as follows:

> *[T]he complainant's willing participation in a threesome with Gagne and Bermudez is not probative of whether she consented to a threesome with Gagne and Swathwood on the night of the alleged offense. Notably, the threesome involving Bermudez occurred while the complainant and Gagne were still dating. The instant offense occurred after they had ended their relationship, and it involved Swathwood, not Bermudez. In light of the lack of similarity between the Bermudez threesome and the instant offense, we conclude that the trial court did not abuse its discretion in excluding the evidence.*

Swathwood, at *2. The court of appeals also observed that the jury heard at length about the group sexual activity that followed the visit to Tony's Lounge, which included Clark and multiple partners. *Id.* at *3. Thus, "defendants presented evidence that the complainant was not averse to group sexual activity" and "the trial court did not abuse its discretion in excluding the evidence." *Id.* at *2-3. The court employed similar reasoning before reaching the same conclusion with respect to the invitation to Gagne's father to join in group sex. *Id.* at *3.

In our view, the court of appeals underestimated the vital nature of the disputed material, which we believe to be highly relevant, primarily as substantive evidence on the issue of whether Clark consented to the sexual activity the night of July 3, 2000.[5] The State argues otherwise in its brief to this court; inferring Clark's consent from these past incidents is

> *the very inference that rape-shield laws are meant to avoid; that somehow consent to unrelated sexual activity is relevant to whether the victim consented to the charged offense. Like evidence of a defendant's prior criminal acts, governed by MRE and FRE 404(b), propensity evidence carries a significant danger of unfair inference and prejudice.*

The State is correct that evidentiary rules generally disfavor showing a person's propensity for certain actions by introducing evidence of past similar acts, and it is further correct that in rape cases evidence regarding "unrelated sexual activity" is generally accepted as only minimally relevant to the question of consent. But rape shield laws, including Michigan's, almost universally except from this rule evidence regarding prior sexual activity *between the complainant and the defendant,* precisely because that evidence carries heightened relevancy due to its increased similarity to the instance of the alleged rape. *See* Mich. Comp. Laws § 750.520j(1)(a); *see also* Fed. R. Evid. 412(b)(1)(B). In this case, these prior incidents have significant relevance not only because Gagne and Clark were involved in them, but also because they are both remarkably similar to the events that occurred the night of July 3.

Nor do we agree with the State that the excluded evidence was cumulative to the testimony already introduced regarding the Tony's Lounge incident. There are, of course, similarities between this evidence and the excluded evidence: if Swathwood's version of the Tony's Lounge incident is believed, then it demonstrates that Clark had, on at least one occasion, engaged in sexual activities of some variety with multiple partners over the course of one night; it also shows that she did so with Gagne and Swathwood. But we find the differences, which the prosecution took pains to highlight in closing argument, to be more significant. First, the evidence that Clark engaged in group sex during the Tony's Lounge incident is at best equivocal because Clark testified that she did not remember engaging in any sexual activities with Swathwood that night. She further testified that Gagne later told her that he had made up that part of the story. And although Swathwood testified that this had, in fact, occurred, it would have been obvious to the jury that he had reason to lie about this incident in order to show that Clark had engaged in these similar activities in the past. The prosecution realized that the jury might not believe Swathwood and argued in closing that Clark had not engaged in oral sex with Swathwood during the Tony's Lounge incident.

Second, even if the jury did believe that Clark and Swathwood had engaged in some sexual activity that night, there is no evidence at all that Clark engaged in that activity with multiple partners at once. At most the evidence shows only that, at some point during that night, she engaged in sexual intercourse with Gagne, and, at another point during the night, she engaged in oral sex with Swathwood, and did so in the presence of other people. This kind of activity differs substantially from the activity that occurred the night of July 3, in which three people engaged in simultaneous group sex. The prosecution, in discussing the Tony's Lounge incident, pointed out this difference to the jury in closing: "Even if you believe, contrary to . . . what Ms. Clark told you, that she did engage in consen[s]ual sexual contact with Mr. Swathwood, the nature of the contact and relations here were 190 degrees [sic] different. That situation did not involve, ladies and gentlemen, two men."

Finally, even if the excluded evidence merely points to the same predilections shown by the Tony's Lounge incident, the entire trial hinged upon consent, so the *weight* of the evidence on this question is extremely important. This is evident from the closing arguments, in which the prosecutor repeatedly stressed the unlikeliness of Gagne's story, and told the the jury that his story was "much more consistent with the pornographic movie than real life." The defense's theory was that Clark consented to the activities of July 3, but it had only the Tony's Lounge incident as evidence that she may have done so. In our view, the exclusion of the evidence of the group sexual activity with Bermudez and the invitation to Gagne's father were indispensable to the jury's ability to assess the likelihood of this theory.

We cannot accurately portray the extent of Gagne's interest in presenting this evidence without reference to the lack of other evidence in this case. Other than the two defendants and the complainant, there were no eyewitnesses at all.[6] Nor did the physical evidence tend weigh in favor of one side or the other. In short, the excluded evidence was not just *relevant* to this case, it was in all likelihood the most relevant evidence regarding the sole contested issue at trial — an issue about which there was not much evidence in the first place. We believe it was indispensable to the defense's theory, a conclusion amply demonstrated by the consistent focus during closing arguments on what little evidence the court did admit regarding the likelihood (or unlikelihood) that Clark would have consented to the activity the night of July 3, 2000.

With this in mind, we turn to the Michigan Supreme Court for an indication of the State's interests in enforcing the rape shield statute. As the court of appeals recognized, the Michigan Supreme Court has explained that those interests are two-fold: to encourage victims to report criminal activity and testify at trial; and to further the truth-finding process by preventing the admission of minimally relevant evidence that creates a significant risk of prejudice or confusion. *See Adair,* 550 N.W.2d at 509. We have acknowledged that there is always a real risk that allowing evidence concerning a complainant's sexual history will turn the case into a trial of the victim instead of the defendant. *Lewis v. Wilkinson,* 307 F.3d 413, 422 (6th Cir. 2002).

Nonetheless, we do not believe that admitting the evidence at issue in this case would overly frustrate the legitimate purposes of the rape shield statute. After all, the statute

itself contains exceptions that demonstrate that the interests it usually serves must also accommodate the defendant's interest in the admission of evidence that is highly relevant, such as prior sexual conduct between the complainant and the defendant. While we are not reviewing the manner in which the Michigan courts applied the rape shield statute, which is a matter of state law, the fact that it contains this exception illustrates that the Michigan legislature recognized that the defendant has a heightened claim to the introduction of evidence of previous sexual contact with his accuser. This is not a case involving sex a decade before the subject incident. And what made the evidence even more central to petitioner's defense was the extraordinary nature of the events giving rise to the charge. The idea that someone could have consented to this sort of thing seems incredible absent proof that the person *had* consented to it before. Therein lies another similarity to *Crane.* In the underlying trial in *Crane* and in this case, the evidence that was admitted gave rise to a "question every rational juror needs answered[.]" 469 U.S. at 689. In *Crane,* that question was, "[i]f the defendant is innocent, why did he previously admit his guilt?" *Id.* Here the question jurors would need to have answered if Gagne was to be acquitted was, "how is it possible for anyone to consent to three-way sex of the kind described here?" In each case the exclusion of evidence "effectively disabled" the defendant from answering the question. *Id.* Moreover, in this case, the excluded evidence would not have been unfairly prejudicial given the sexually graphic testimony that had already been admitted as well as the testimony involving the use of crack cocaine and other narcotics. And as we pointed out in*Lewis,* "the court could minimize any danger of undue prejudice by admitting the evidence with a cautionary instruction and strictly limiting the scope of cross-examination." *Id.*

Finally, we stress that our holding is fact-bound in the extreme: under the circumstances present here, the exclusion of evidence of the complainant's consensual three-way sex with the defendant only a month before the subject incident, in a three-way rape case in which extensive evidence of the victim's sexual conduct had already been admitted at trial, and where the question of guilt or innocence turned almost entirely on the credibility of the victim's testimony regarding consent, was an unreasonable application of the principles set forth by the Supreme Court in *Crane.* That case made clear that a defendant's constitutional right to present a defense, arising from the Due Process Clause of the Fourteenth Amendment, entails the right to put before the jury evidence which is highly relevant, non-cumulative, and indispensable to the central dispute in a criminal trial. This conclusion is also consistent with *Lucas,* a case in which the Court recognized that the Michigan rape shield statute implicates the Sixth Amendment rights of the accused and therefore its application must be carefully balanced against the legitimate interests served by the statute on a case by case basis. *Lucas,* 550 U.S. at 149. Reliance upon those legitimate interests in this case to exclude the incidents at issue runs contrary to the statute's exception that would allow a defendant — in this case petitioner — to present evidence of the victim's past sexual conduct with the actor. Mich. Comp. Laws § 750.520j. While the trial judge may exclude such evidence if its inflammatory or prejudicial nature outweighs its probative value, that discretion cannot trump the constitutional right of the accused to present evidence that is so "highly relevant" that its introduction, as in this case, is "indispensable" to the defense. *Crane,* 476 U.S. at 691. For these reasons, we hold that the Michigan Court of

Appeals opinion constitutes an "unreasonable application of[] clearly established Federal law," 28 U.S.C. § 2254(d)(1), that deprived petitioner of his constitutional right to "a meaningful opportunity to present a complete defense" as articulated by the Supreme Court in *Crane.* The writ shall issue.

V.

The judgment of the district court is affirmed.

CONCURRENCE

KETHLEDGE, Circuit Judge, concurring.

It is hard for a court to invalidate a provision that does not even apply to the case at hand. It is harder still to invalidate a whole gaggle of provisions that actually support the result reached in the case. Yet that, according to the rhetoric in support of the State's petition for rehearing, is the feat we have managed here. I think the rhetoric is seriously overblown.

We are told, in support of rehearing, that our decision effectively invalidates every rape-shield law in this circuit. That argument cannot be squared with the text of those laws. The core of any rape-shield law is its proscription against evidence of past sexual activity by the victim. But every one of those laws—or at least every one we are said to have vaporized here—contains an exception for evidence of the victim's prior sexual activity *with the defendant.* And that is exactly the kind of evidence that we hold should have been admitted in this case. Michigan's statute excepts from its proscription "[e]vidence of the victim's past sexual conduct with the actor." Mich. Comp. Laws § 750.520j(1)(a). Ohio's statute does the same. *See* Ohio Rev. Code § 2907.02(D) (excepting evidence of "the victim's past sexual activity with the offender"). So does the Tennessee rule. *See* Tenn. R. Evid. 412(c)(3) (allowing admission of evidence of "sexual behavior . . . with the accused, on the issue of consent"). The federal rule affirmatively provides that "evidence of specific instances of sexual behavior" between the alleged victim and defendant "*is* admissible," if offered to prove consent and otherwise admissible under the rules. Fed. R. Evid. 412(b)(1)(B) (emphasis added). Kentucky's rule is identical to the federal one.*See* Ky. R. Evid. 412(b)(1)(B). I am of course mindful that we apply only constitutional rules, not statutory ones, on habeas review. But rhetorically speaking, our decision applies these laws, rather than abrogates them.

Equally misdirected is the claim that we have trampled upon the policies that animate these laws. As Judge Norris's opinion carefully explains, we hold that, under the rather extraordinary facts presented here, certain evidence of the complainant's prior consensual sex with the defendant was indispensable to his ability to present a complete defense at trial. The argument now is that, in deeming that evidence indispensable, we have indulged in outdated inferences whose eradication was a principal aim of these laws. But the argument again is let down by the laws. Every one of these laws is supported by significant state interests. (The extent to which those interests are implicated in a particular case, as discussed below, is another matter.) And yet, notwithstanding those important interests, every one of these laws contains an exception for evidence of consensual sex with the defendant. These laws must infer something very important about such evidence; and they do so especially in cases—like this one—where consent itself is the issue. The inference is that, in some (and perhaps most) cases, evidence of past consensual sex with the defendant is highly relevant to the issue of consent in the incident giving rise to the charge. We merely conclude that this is such a case.

Notable as well is that the caselaw in Michigan, and the terms of the federal and Tennessee rules, expressly wave off the rape-shield proscription as to "evidence the exclusion of which would violate the constitutional rights of the defendant." Fed. R. Evid. 412(b)(1)(C); *see also People v. Hackett,* 365 N.W.2d 120, 124 (Mich. 1984) (recognizing that, in some situations, admission of evidence relating to the victim's sexual conduct "may be required to preserve a defendant's constitutional right to confrontation"); *People v. Adair,* 550 N.W.2d 505, 511 (Mich. 1996) (rejecting a construction of Michigan's rape-shield statute that would have "run[] the risk of violating a defendant's Sixth Amendment constitutional right to confrontation"); Tenn. R. Evid. 412(c)(1). We do not, of course, look to these rules in determining whether there was a violation of clearly established federal constitutional law. But these provisions do show that the rules' drafters knew very well that they were operating close to the constitutional line. That the rules' application might cross it, on occasion, should surprise no one.

I also think the rehearing petition overstates the breadth of our holding in this case. We do not hold that the Supreme Court's decision in *Crane v. Kentucky,* 476 U.S. 683 (1986), clearly establishes a rape defendant's constitutional right to admit evidence of the victim's prior consensual activity with the defendant (much less with persons other than the defendant). What we do say, as a starting point for the analysis, is that *Crane* clearly establishes that "the Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense.'" *Id.* at 690 (quoting *California v. Trombetta,* 467 U.S. 479, 485 (1984)). The State of Ohio, as amicus, says this rule is stated at too high a level of generality to support habeas relief here. That point is a serious one; the more general a rule, the more difficult it is to say that the state court unreasonably applied the rule to a particular set of facts. With generality often comes discretion. But I think the facts of *Crane* and those of this case converge at a level closer to the ground than the State realizes.

Crane requires consideration of two factors in determining whether the exclusion of evidence denies the defendant a meaningful right to present a complete defense. The

first is the extent to which the evidence was "central to the defendant's claim of innocence." *Id.* The second is the extent to which its exclusion was supported by a "valid state justification[.]" *Id.* In *Crane,* the defendant was convicted of murder. He was 16 years old at the time of the crime. There was "no physical evidence to link him" to the murder. *Id. a*t 691. The State's evidence of guilt was primarily Crane's own confession. Crane sought to discredit the confession with testimony that "he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession." *Id.* at 685. That evidence, the Supreme Court said, was "highly relevant" to the reliability and credibility of the confession, which again was the State's primary evidence of guilt. *Id.* at 691. And the Court saw no justification for excluding the evidence under the circumstances presented there. The Court did not "pass on the strength or merits" of Crane's defense. *Id.* But it held, unanimously, that the exclusion of Crane's testimony violated his right to present a complete defense.

The analysis flows in the same channels here. First, the excluded evidence was "central to the defendant's claim of innocence." *Id.* at 690. Gagne was convicted of forcing Clark to engage in an outlandish sexual encounter with himself and another man. The events making up that encounter were largely undisputed; what was disputed was whether Clark consented. There was little if any physical evidence of non-consent. The State's primary evidence of guilt, rather, was Clark's own testimony that she did not consent. Gagne sought to discredit that testimony with evidence that—only one month before the subject incident—Clark had voluntarily engaged in three-way sex with Gagne and another man, and that she had suggested the same thing on another occasion. That evidence would have included testimony not only from Gagne, but also from Ruben Bermudez, the other participant in the three-way the month before, who according to Gagne's lawyer was prepared to testify at trial. *See* 1/2/01 Hearing Tr. 18-19. But the trial court excluded all of that testimony. That exclusion was affirmed by the state court of appeals, which held—remarkably—that the excluded testimony was not even relevant to the case.

That the excluded evidence was highly relevant can be inferred, as discussed above, from the rape-shield statutes themselves. Moreover, as Judge Norris explains, in both this case and*Crane* the excluded evidence, if credited, answers a question that, if left unanswered, leads directly to conviction. *See* Maj. Op. at 15-16.

The State says the trial court's admission of evidence of another sexual encounter—the so-called Tony's Lounge incident, which involved five people—made the three-way evidence only marginal, rather than central, to Gagne's defense. But the prosecution itself did a credible job of explaining, in closing argument, why the Tony's Lounge evidence did very little to answer the question described above. I think that Judge Norris's opinion convincingly finishes the job.

What *is* significant is the effect of the Tony's Lounge evidence upon the State's interest in excluding the Gagne and Bermudez three-way testimony. This, in my view, is where the bottom falls out of the State's argument on appeal. As an initial matter, this case

only weakly implicates the interests protected by Michigan's rape-shield statute, since the statute's terms did not even bar the excluded testimony, but instead left its admission to the discretion of the Ingham County Circuit Judge. *See* Mich. Comp. Laws § 750.520j(1)(a). And it is hard to see what was left of those interests, such as they were in this case, given the evidence that *was*admitted at trial. That evidence included that, during the Tony's Lounge incident, Clark had engaged in oral sex with Swathwood shortly after intercourse with Gagne, and that she had engaged in consensual oral sex with Gagne minutes before the very incident for which he was convicted (and moreover that she had drunk a pint of vodka and nine or so beers and smoked crack in the hours before the incident). I entirely agree that Michigan's rape-shield law protects important state interests in the vast majority of cases in which it is implicated. But I submit that, under the circumstances of this trial, there was virtually nothing left of those interests to protect.

So here, as in *Crane,* the prosecution's case hinged on a single account of what happened during the underlying incident. In each case, the nature of that account—a confession there, and the outlandish conduct alleged to have been coerced here—tended to make the account especially persuasive to a jury. In each case, the trial court excluded highly relevant evidence that, if credited, could have undermined the account upon which the State relied. And in each case the State's interest in excluding that evidence was negligible.

These parallels emerge, admittedly, only after close analysis. But I think they are clear enough to render the state court's decision unreasonable within the meaning of the habeas statute. (It bears mention that two Justices of the Michigan Supreme Court voted to reverse the decision summarily, and that Justice Markman voted to hear the case. *See* 673 N.W.2d 755 (Mich. 2003) (unpublished table disposition).) The exclusion of the three-way evidence clearly violated Gagne's Sixth Amendment and procedural due process rights. He should have been able to present that evidence to a jury before ultimately being sentenced to a prison term of up to 45 years.

My purpose in reciting this evidence, however, is not to explain what Judge Norris has already explained in his nuanced opinion. And I readily admit that reasonable people, including the respected Chief Judge of our court, can disagree with my conclusion in this case. Nor do I mean to "pass on the strength or merits" of Gagne's defense. *Crane,* 476 U.S. at 691. I think those merits should have been left to the jury; and otherwise I do not hold a torch for anyone involved in the underlying events of this case.

My purpose, instead, is to emphasize the limited nature of our holding in this case. *See also*Maj. Op. at 16-17. With respect, I do not think that holding has nearly the jurisprudential consequences that Michigan and the amici States seem to think it has.

For these reasons, I continue to concur fully in Judge Norris's opinion.

DISSENT

ALICE M. BATCHELDER, Chief Judge, dissenting.

Some 35 years ago, the Michigan state legislature determined that a criminal defendant accused of rape may not introduce evidence about the victim's past sexual behavior, because the victim's past willingness is not relevant to the question of present consent. The majority here disagrees with that legislative determination and concludes that evidence of the victim's promiscuity or previous willingness to engage in somewhat similar sex acts was not only relevant but was "indispensable" and "the most relevant evidence." Moreover, because this appeal arises in the context of a habeas proceeding, the majority ultimately holds that the rape defendant has a "constitutionally protected" and "clearly established" right to introduce this evidence. In so holding, the majority effectively abrogates every rape-shield statute in this circuit.[1] I do not believe that there is any such constitutional right to present evidence of a rape victim's promiscuity or past willingness to engage in sex acts, nor do I believe that the majority is justified in its condemnation of the rape-shield concept. I dissent.

A.

In concluding its analysis, and justifying its grant of habeas relief, the majority cites *Crane v. Kentucky,* 476 U.S. 683 (1986), as the "clearly established law" that the Michigan Court of Appeals "unreasonably applied." *See* Maj. Op. at 17 ("We therefore conclude that the state appellate court's determination on this issue was an unreasonable application of the principles set forth by the Supreme Court in *Crane.*"). The majority offers the following exposition of those "principles":

> *Crane makes clear that a proper inquiry into the constitutionality of a court's decision to exclude evidence begins with considering the relevancy and cumulative nature of the excluded evidence, and the extent to which it was `central' or `indispensable' to the defense. Against this courts must balance the state's interests in enforcing the evidentiary rule on which the exclusion was based, in this case Michigan's rape shield statute.*

Maj. Op. at 9 (underlining added) (citing *Crane,* 476 U.S. at 691). So, according to the majority,*Crane* stands for the clear proposition that if a defendant accused of rape can show that evidence of the rape victim's promiscuity or prior willingness to perform sex acts is "highly relevant, non-cumulative, and indispensable to the central dispute in a

criminal trial," then that defendant has a *constitutional right* to "put [that evidence] before the jury." Maj. Op. at 16.

I cannot accept this proposition. Foremost, I do not agree with its constitutional premise. That is, in light of *Michigan v. Lucas,* 500 U.S. 145 (1991), I do not believe that there is any such constitutional right. But, even if I am mistaken in my reading of *Lucas,* I cannot agree that this proposition was — or, indeed, is now — "clearly established" as Supreme Court precedent, and I do not agree that such a liberal extension of *Crane* is justified (or justifiable). Moreover, I cannot agree that the Michigan Court of Appeals's application of these governing principles (such as they are) was "objectively unreasonable." Finally, I am simply unwilling to sanction the inevitable, albeit unacknowledged, consequence of this decision — that rape-shield statutes are *ipso facto* unconstitutional, inasmuch as their very purpose is to exclude, on policy grounds, evidence that is almost always "highly relevant, non-cumulative, and indispensable to the central dispute in a criminal trial."

1.

In *Lucas,* 500 U.S. at 147, the Michigan prosecutor charged Nolan Lucas with criminal sexual conduct based on his ex-girlfriend's accusation that he forced her to his apartment at knife point and forced her to perform various sex acts against her will. *Id.* at 147. Lucas and the ex-girlfriend had ended a six-to-seven month relationship just two weeks earlier and Lucas insisted that the entire episode was consensual, that he had not used a knife or any other force. *See Michigan v. Lucas,* 408 N.W.2d 431, 431-32 (Mich. App. 1987). At trial, the ex-girlfriend claimed rape and Lucas claimed consent. *See Michigan v. Lucas,* 469 N.W.2d 435, 436 (Mich. App. 1991) ("Virtually all of the evidence in this case consisted of complainant's word against the word of defendant.").

At trial, Lucas's counsel sought to introduce testimony regarding the couple's relationship — specifically, their sexual history — as evidence of consent, but the state objected on the basis that defense counsel had not given prior notice of its intent to use that evidence, as was required by the Michigan rape-shield statute, M.C.L. §750.520j. *See Lucas,* 500 U.S. at 147. The trial court agreed that Lucas's counsel had failed to comply with the notice provision of the rape-shield statute and refused to admit the evidence. *Id.* at 148.

After being convicted and sentenced, Lucas appealed. *Id.* The Michigan Court of Appeals vacated the conviction, holding "that the [Michigan rape-shield statute]'s notice-and-hearing requirement is unconstitutional in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant." *Id.* The United State Supreme Court granted certiorari to decide this constitutional question and ultimately concluded:

> *[T]he Michigan Court of Appeals erred in adopting a per se rule that Michigan's notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a defendant. The Sixth Amendment is not so rigid. The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion.*

Id. at 152-53. The Supreme Court vacated the judgment and remanded the case, stating:

> *We leave it to the Michigan courts to address in the first instance whether Michigan's rape-shield statute authorizes preclusion and whether, on the facts of this case, preclusion violated Lucas' rights under the Sixth Amendment.*

Id. at 153. So, the Supreme Court expressly did not decide the preclusion question, which is the question before us here. And, the inescapable consequence of this *non*-decision — the avoidance of this particular question — is that the Court has not articulated any "clearly established" law on this issue.

In the present case, however, the Michigan courts did consider whether Michigan's rape-shield statute authorizes preclusion and determined, on the facts of *this* case, that preclusion of certain testimony concerning Ms. Clark's alleged prior sexual activities did not violate defendant Gagne's rights under the Sixth Amendment. Because the *Lucas* Court had left this issue unresolved, *Lucas* offers little direct guidance on this issue (i.e., *Lucas* did not "clearly establish" any law on this particular issue), but it certainly offers some guidance, the most telling of which comes from what it did not hold.

The *Lucas* Court did not hold what the majority holds today — that a defendant has a constitutional right to put evidence before the jury because the evidence was highly relevant, non-cumulative, and indispensable to the central dispute. If the evidence at issue in the present case was highly relevant, non-cumulative, and indispensable to the central dispute, then the evidence in *Lucas* was equally or more so. In the present case, the evidence concerned the victim's alleged willingness to participate in a particular sexual practice on at least two prior occasions; in *Lucas,* the evidence concerned the victim's six-to-seven month relationship with the defendant, the emotional, physical, and sexual nature of their relationship, and the patterns and practices incident thereto. If the former is "highly relevant," then so must be the latter. In the present case, the court excluded two incidents of prior sexual activities, but admitted testimony about three others; in *Lucas,* the court excluded any reference whatsoever to the prior sexual relationship. If the former is "non-cumulative," so must be the latter. And, finally, the central issue in the present case was the defendant's asserted defense of consent, which was also the central issue in *Lucas.* If evidence concerning consent in the former is "indispensable to the central dispute," so it must be in the latter.

So, it bears emphasizing that even though the evidence in *Lucas* was clearly "highly relevant, non-cumulative, and indispensable to the central dispute in a criminal trial," *see* Maj. Op. at 16, the *Lucas* Court did not hold — and did not even suggest — that the defendant therefore had some over-arching *constitutional right* to "put [that evidence]

before the jury," *see* Maj. Op. at 16. In fact, the *Lucas* Court implicitly rejected any such right, holding instead that the defendant's "[f]ailure to comply with [the notice] requirement may in some cases justify even the severe sanction of preclu[ding]" such highly relevant, non-cumulative, and indispensable evidence. *See Lucas,* 500 U.S. at 153. It is perhaps just as important that the *Lucas* Court expressly left it to the Michigan courts to decide "whether, on the facts of this case, preclusion [of the propensity evidence] violated Lucas' rights under the Sixth Amendment." *See id.* The majority notes that "rape shield laws, including Michigan's, almost universally except from this rule evidence regarding prior sexual activity *between the complainant and the defendant,* precisely because that evidence carries heightened relevancy due to its increased similarity to the instance of the alleged rape." Maj. Op. at 13 (emphasis in original). But in *Lucas,* it was exactly that type of sexual-history evidence that had been precluded.

So, the clear implication of *Lucas* is that the trial court can, without running afoul of the Constitution, exclude highly relevant, non-cumulative, and indispensable evidence from a criminal defendant's trial. That is, *Lucas* clearly demonstrates that a court *can* constitutionally exclude such evidence on the basis that the defendant's attorney failed to comply with the statute's notice requirement. Therefore, the right (such as it is) to put that evidence before the jury is not grounded in the Constitution, but is instead grounded in state law or the state's proper application of that law. *Cf. Dist. Atty.'s Office for the Third Judicial Dist. v. Osborne,* 557 U.S. —, 129 S. Ct. 2308, 2320 (2009) (holding that there is no stand-alone constitutional right to access evidence for purposes of DNA testing, there is at most a constitutional right to the proper application of a state-created right).

The majority's proposition cannot survive *Lucas.* While the Supreme Court has left its Sixth Amendment analysis unarticulated post-*Lucas,* it is evident from the foregoing that whatever the proper analysis may be, the majority's (unprecedented) proposition does not conform to it.

2.

The majority's holding is premised on *Crane v. Kentucky,* 476 U.S. 683, 684 (1986), a case in which a 16-year-old defendant was implicated in the murder of a liquor store clerk and signed a confession at the police station. At the boy's trial, the court refused to admit evidence about the circumstances surrounding his confession — "that he had been detained in a windowless room for a protracted period of time . . . surrounded by as many as six police officers. . ., that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession." *Id.* at 685. The jury convicted him of the murder and the court sentenced

him to 40 years in prison. *Id.* On appeal to the Supreme Court, the Court reversed the conviction on constitutional grounds. *Id.* at 687.

The Court explained that, while a pre-trial confession is "not conclusive of guilt," it certainly changes the complexion of the defense and invariably raises "the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" *Id.* at 689. Thus, the Court explained, such "a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." *Id.*

> *This simple insight is reflected in a federal statute, 18 U.S.C. § 3501(a), the Federal Rules of Evidence, Fed. Rule Evid. 104(e), and the statutory and decisional law of virtually every State in the Nation [citations omitted]. We recognize, of course, that under our federal system even a consensus as broad as this one is not inevitably congruent with the dictates of the Constitution. We acknowledge also our traditional reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts. In any given criminal case the trial judge is called upon to make dozens, sometimes hundreds, of decisions concerning the admissibility of evidence. As we reaffirmed earlier this Term, the Constitution leaves to the judges who must make these decisions wide latitude to exclude evidence that is repetitive, only marginally relevant[,] or poses an undue risk of harassment, prejudice, or confusion of the issues. Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability — even if the defendant would prefer to see that evidence admitted. Nonetheless, without signaling any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures, we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial.*

Id. at 689-90 (citations, quotation and editorial marks omitted; emphasis added).

Thus, the clear proposition for which *Crane* stands is that when a criminal defendant, having signed a confession, nonetheless proceeds to trial, the Constitution guarantees that defendant the right to present evidence (i.e., the right to be heard) about the circumstances surrounding the confession, so that he may present a complete defense by challenging the credibility of that pre-trial confession. A broader application is not evident (or inevitable) from the text of the*Crane* opinion.

In *Holmes v. South Carolina,* 547 U.S. 319 (2006) — a case the majority cites in support of*Crane* — the Supreme Court characterized *Crane* as a case about an "arbitrary" rule:

> *Another arbitrary rule was held unconstitutional in Crane v. Kentucky, [476 U.S. 683 (1986)]. There, the defendant was prevented from attempting to show at trial that his confession was unreliable because of the circumstances under which it was obtained, and neither the [Kentucky] State Supreme Court nor the prosecution `advanced any rational justification for the wholesale exclusion of this body of potentially exculpatory evidence.' Id. at 691.*

Holmes, 547 U.S. at 326. It is noteworthy that, although it cited *Holmes,* the majority here did not hold that the Michigan rape-shield statute is "arbitrary" or that the Michigan Court of Appeals failed to "advance[] any rational justification" for its exclusion of the sexual propensity evidence.

The majority cites *Crane* as the "clearly established law" that the Michigan Court of Appeals "unreasonably applied" in this case. *See* Maj. Op. at 17 ("We therefore conclude that the state appellate court's determination on this issue was an unreasonable application of the principles set forth by the Supreme Court in *Crane.*"). That is, the majority views *Crane* — a decision that upheld a criminal defendant's constitutional right to introduce evidence about the circumstances surrounding *his own* (allegedly coerced) pre-trial confession — as the "clearly established" or governing law on the constitutionality of a criminal defendant's right to introduce evidence about the *victim*'s prior willingness to participate in certain private, potentially humiliating, sex acts, based on the defendant's theory that her previous willingness would be indicative of her current willingness.

I do not agree that the majority's rendition of *Crane* is or was "clearly established." In my view, the majority has extended *Crane* well beyond any reading or application justified by the language of the opinion or any subsequent case. It is unfair to fault the Michigan Court of Appeals, as the majority does, for failing to anticipate this novel extension of *Crane.*

3.

The majority's approach does not comply with the limitations of AEDPA. Under AEDPA, the phrase "unreasonable application of" Supreme Court precedent means that the state court "identifie[d] the correct governing legal principle from [Supreme Court] decisions but unreasonably applie[d] that principle to the facts" of the case. *Williams v. Taylor,* 529 U.S. 362, 413 (2000). But, "a federal habeas court may not issue the writ simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Lockyer v. Andrade,* 538 U.S. 63, 75-76 (2003) (quoting*Williams,* 529 U.S. at 411). Even "a *firm conviction* that the state court was erroneous" is not enough. *Id.* at 75 (quotation marks omitted; emphasis added). Rather, "[t]he state court's application of clearly established law must be *objectively unreasonable.*" *Id.* at 76 (emphasis added); *see also Wright v. Van Patten,* 552 U.S. 120, 128 S. Ct. 743, 747 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [petitioner]'s favor, it cannot be said that the state court unreasonably applied clearly established Federal law." (quotation marks and citations omitted)).

A review of the Michigan Court of Appeals' decision reveals that its application, far from being "objectively unreasonable," was eminently reasonable. The court explained its approach:

> *Evidence of specific instances of a victim's past sexual conduct with others is generally legally irrelevant and inadmissible under the rape-shield statute, M.C.L. § 750.520j. In certain limited situations, evidence that does not come within the specific exceptions of the statute may be relevant and its admission required to preserve a criminal defendant's Sixth Amendment right of confrontation. . . .*
>
> *Inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. Application of the rape-shield statute must be done on a case-by-case basis, and the balance between the rights of the victim and the defendant must be weighed anew in each case. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.*

Michigan v. Swathwood, No. 235540 & 235541, 2003 WL 1880143, *1 (Mich. App. Apr. 15, 2003) (citations and quotations marks omitted). The court considered the evidence and, concluding that evidence of Ms. Clark's propensity to participate in certain sex acts was not probative of whether she consented to the acts complained of in the present case, affirmed the trial court. *Id.* at *2-4.

I cannot agree that the Michigan Court of Appeals's application of the governing principles was "objectively unreasonable." It appears to me that the majority does not dispute the state court's application of the law so much as it simply disagrees with either the Michigan legislature's policy determination about the relevance of this propensity evidence or with the state court's measure of the probity or relevance of this evidence. Neither is a proper basis for habeas relief.

4.

It is commonly understood that the uncorroborated testimony of a rape victim is sufficient to support a conviction. *See Tibbs v. Florida,* 457 U.S. 31, 45 n.21 (1982); *Brown v. Davis,* 752 F.2d 1142, 1144 (6th Cir. 1985) (holding that the testimony of a single, uncorroborated rape victim is sufficient to support conviction); *Michigan v. Whittaker,* 2007 WL 914342, *5 (Mich. App. Mar. 27, 2007) ("Indeed, in cases of sexual assault, a conviction may `be based upon the uncorroborated testimony of the woman assaulted.'") (quoting *Michigan v. Miller,* 55 NW 675, 676 (Mich. 1893)); M.C.L. §750.520h ("The testimony of a victim need not be corroborated in [rape and sexual assault]

prosecutions under sections 520b to 520g."). But, the majority is not so easily persuaded.

> *The defense's theory was that Clark consented to the activities of July 3, but it had only the Tony's Lounge incident as evidence that she may have done so. In our view, the exclusion of the evidence of the group sexual activity with Bermudez and the invitation to Gagne's father were indispensable to the jury's ability to assess the likelihood of this theory. We cannot accurately portray the extent of Gagne's interest in presenting this evidence without reference to the lack of other evidence in this case. Other than the two defendants and the complainant, there were no eyewitnesses at all. Nor did the physical evidence tend weigh in favor of one side or the other. In short, the excluded evidence was not just relevant to this case, it was in all likelihood the most relevant evidence regarding the sole contested issue at trial — an issue about which there was not much evidence in the first place. We believe it was indispensable to the defense's theory . . . .*

Maj. Op. at 14-15 (paragraph break and footnote omitted).

First, let's be very clear about what the majority means when it says "evidence of the group sexual activity with Bermudez and the invitation to Gagne's father." This "evidence" is simply Gagne's uncorroborated testimony about these alleged incidents. No one contends that either Bermudez or Gagne's father was prepared to testify about these incidents, or that there was any other "proof." And Clark was prepared to refute these accusations, had Gagne been allowed to raise them.

And, it bears emphasizing that the defense did *not* have "only the Tony's Lounge incident as evidence" that "Clark consented to the activities of July 3"; the defense had testimony by both Gagne and Swathwood — which is twice as much testimony as a rape defendant would typically have — and an opportunity to cross-examine the sole complainant, Pamela Clark. Moreover, the "lack of other evidence" did not hinder Gagne's defense; if anything it hindered the prosecution, whose burden it was to prove the offense beyond a reasonable doubt.

So, the majority is really saying that despite the absence of physical evidence, and despite Gagne's and Swathwood's consistent testimony that Clark consented, and despite their consistent testimony about the Tony's Lounge incident, and despite defense counsel's opportunity to cross-examine Clark at length — Gagne's self-serving and unverifiable testimony about those two other past, unrelated incidents of sexual debauchery on the part of his accuser, Pamela Clark, was "*indispensable* to the jury's ability to assess the likelihood" that she had consented to the far more violent and humiliating form of sexual debauchery with Gagne and Swathwood on the night in question. The majority contends: "the excluded evidence was not just *relevant* to this case, it was in all likelihood the most relevant evidence regarding the sole contested issue at trial," consent.

So, the majority's position is that "the most relevant evidence" in a rape trial, the "indispensable" evidence, is the perpetrator's testimony about the victim's promiscuity or prior sex acts. And this, according to the majority, is because a rape defendant has a constitutional right to prove present consent by producing evidence of past willingness,

at least insofar as the defendant can characterize that evidence as highly relevant, non-cumulative, and central to the dispute.

I disagree and find that I am not alone. In *Sandoval v. Acevedo,* 996 F.2d 145, 147-48 (7th Cir. 1993), the Seventh Circuit decided a case in which the defendant — accused of forcibly sodomizing his ex-girlfriend — sought to introduce testimony by other men that she had enjoyed anal intercourse with them in the past, thus demonstrating her propensity for it. The court explained:

> *The essential insight behind the rape shield statute is that in an age of post-Victorian sexual practice, in which most unmarried young women are sexually active, the fact that a woman has voluntarily engaged in a particular sexual activity on previous occasions does not provide appreciable support for an inference that she consented to engage in this activity with the defendant on the occasion on which she claims that she was raped. And allowing defense counsel to spread the details of a woman's sex life on the public record not only causes embarrassment to the woman but by doing so makes it less likely that victims of rape will press charges.*

Id. at 149. The Seventh Circuit continued:

> *The fact that [she] had had pleasurable anal intercourse with another man on another occasion would not show that she would have enjoyed having it with Sandoval on an occasion when he was enraged and wanted by penetrating her anally to humiliate and, quite possibly, physically hurt her. Indeed, by that logic rape shield laws would be unconstitutional to the core because their central aim is to prevent the drawing of an inference of consent from previous consensual intercourse with other men.*

Id. at 151.

> *[E]ven without a rape shield law it is doubtful that testimony that she had enjoyed it with another man would be admissible, for it doesn't, or at least shouldn't, require a rape shield law to show that consent to sex with X on one occasion is not good evidence of consent to sex with Y on another.*

Id. To extend this basic reasoning to the present case: it shouldn't require a rape shield law to show that consent to sex with X and Y on one occasion is not good evidence of consent to sex with X and Z on another. But, as so many states have discovered, it *does* require a rape-shield law, because too many people — like the majority here — succumb to the "propensity evidence" problem.

There is, to be sure, a commonplace assumption behind propensity evidence: *If she did it before, she's more likely to have done it again. Cf., e.g., Old Chief v. United States,* 519 U.S. 172, 181 (1997); Fed. R. Evid. 404(b). And there is a peculiar aspect to propensity evidence in rape cases, in which evidence of the *victim's* sexual predilections — e.g., a propensity for sexual willingness — has historically been considered indicative of whether the victim consented to the incident in question. *See* Fed. R. Evid. 412. And this is an assumption that the Michigan legislature (like many others across the country) was attempting to overcome by enacting its rape shield statute.

The Michigan legislature has declared such evidence generally inadmissible as a matter of public policy: that rape victims should be encouraged to report and prosecute rapes without fear that private, potentially embarrassing, incidents from their past will become the centerpiece of the ensuing trial. The majority disagrees and holds that the rape-shield statute is no bar to evidence of a rape victim's promiscuity or prior willingness to engage in sexual debauchery, if that evidence is "highly relevant, non-cumulative, and indispensable to the central dispute in a criminal trial."

But, as the Seventh Circuit stated so cogently, "by that logic rape shield laws would be unconstitutional to the core," *see Sandoval,* 996 F.2d at 151, inasmuch as the very purpose of a rape-shield statute is to exclude, on policy grounds, evidence that is almost always highly relevant, non-cumulative, and indispensable to the central dispute in a criminal trial. If the majority wants to hold that rape-shield statutes are unconstitutional, it should do so forthrightly. At least, that way, we would have the issue front and center, with an opportunity for debate and dissent.

B.

I cannot agree that the Michigan Court of Appeals unreasonably applied any clearly established law, and I cannot join the majority opinion which, in effect, invalidates all rape shield laws as violative of the Sixth Amendment. Therefore, I respectfully dissent. I would reverse the district court's judgment and deny the petitioner's request for habeas relief.

[1] That statute provides as follows:

Sec. 520b. (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . .

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration.

Mich. Comp. Laws § 750.520b(1)(f).

[2] The substantive portion of that law provides:

Sec. 520j (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

Mich. Comp. Laws § 750.520j (1) (a).

[3] At this point Gagne and Swathwood's legal proceedings parted ways. Swathwood missed the deadline to apply for leave to appeal in the Michigan Supreme Court, so his application was denied. *See Swathwood v. Lafler,*No. 04-CV-72251, 2009 WL 322041, at *3 (E.D. Mich. Feb, 10, 2009). He also filed a habeas petition, but the court denied relief because his claims were procedurally defaulted due to his missing the deadline in the Michigan Supreme Court. *Id.* at *8.

[4] The parties do not argue that the Michigan courts violated AEDPA by basing their decision "on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

[5] It may also have impeachment purposes, but in our view, this purpose is less relevant than the substantive role this evidence would play, so we focus our analysis on the latter.

[6] Stout was present for at least some of the activity, but he testified that he was so intoxicated that he remembers nothing, a claim that is in line with Gagne, Swathwood, and Clark's accounts of Stout's general state of intoxication that night.

[1] *See* Fed. R. Evid. 412 (108 Stat. 1919, eff. Sept. 13, 1994); Tenn. R. Evid. 412 (adopted July 1, 1991, to replace T.C.A. § 40-17-119); Ky. R. Evid. (1990 c 88 § 22, eff. Mar. 16, 1990); Ohio Rev. Code § 2907.02(D) (1975 S 144, eff. Aug. 27, 1975); Mich. Comp. L. § 750.520j (P.A. 1974, No. 266 § 1, eff. Apr. 1, 1975).

Gordon v United States

383 F.2d 936 (1967)

Morris W. GORDON, Appellant,

v.

UNITED STATES of America, Appellee.

No. 20126.

United States Court of Appeals District of Columbia Circuit.

Argued December 22, 1966.

Decided September 18, 1967.

As Amended October 12, 1967.

Petition for Rehearing Denied October 27, 1967.

937*937 938*938 Mrs. Zora F. Hostetler, Washington, D. C. (appointed by this court), for appellant.

Miss Carol Garfiel, Asst. U. S. Atty., with whom Messrs. David G. Bress, U. S. Atty., and Frank Q. Nebeker, Asst. U. S. Atty., were on the brief, for appellee. Mr. Robert Kenly Webster, Asst. U. S. Atty., also entered an appearance for appellee.

Before BASTIAN, Senior Circuit Judge, and BURGER and WRIGHT, Circuit Judges.

Petition for Rehearing En Banc Denied October 27, 1967.

BURGER, Circuit Judge:

Appellant was convicted of robbery and assault with a dangerous weapon. On appeal this Court remanded the case to the District Court without considering the merits when it appeared that the District Court had indicated willingness to grant a new trial[1] because of newly discovered evidence. The new evidence was that the complaining witness, the sole government witness at the first trial, had been convicted of larceny,[2] a factor relevant to his credibility and which was unknown at the time of trial. A new trial followed our remand, and the second trial also resulted in conviction.

On this appeal only one issue raised by Appellant bears comment. Appellant claims that the District Court Judge abused the discretion vested in him by Luck v. United States, 121 U.S. App.D.C. 151, 348 F.2d 763 (1965), when he permitted the government to impeach Appellant's testimony by showing prior convictions. However, the record reveals that Appellant did not present the issue to the trial judge in the manner contemplated by *Luck,* although on the whole record we are satisfied that the trial judge did consider the point and exercise his discretion concerning the prior convictions which Appellant now argues should be excluded; as we have said before, absent plain error we will not find an abuse of discretion where there has been no meaningful invocation of that discretion. *See* Hood v. United States, 125 U.S.App.D.C. 16, 365 F.2d 949 (1966).[2a] Nonetheless, we are moved by the arguments of counsel here as well as by the need for clarification relating to the problem of prior-crimes impeachment, *see, e. g.,*Stevens v. United States, 125 U.S.App.D.C. 239, 370 F.2d 485 (1966) (Fahy, J., dissenting), to set forth some observations about our decision in *Luck.*

Because of the direct conflict in the evidence the verdict necessarily turned on how the jury resolved the credibility contest between the complainant and the defendant. Appellant's argument now is that while it was appropriate for him to impeach the complaining witness with a prior criminal record, it was improper 939*939 to allow impeachment of his own credibility by asking him about his criminal convictions, notwithstanding his failure to raise the issue.

The rationale of our *Luck* opinion is important; it recognized that a showing of prior convictions can have genuine probative value on the issue of credibility, but that because of the potential for prejudice, the receiving of such convictions as impeachment was discretionary. The defendant who has a criminal record may ask the court to weigh the probative value of the convictions as to the credibility against the degree of prejudice which the revelation of his past crimes would cause; and he may ask the court to consider whether it is more important for the jury to hear his story than to know about prior convictions in relation to his credibility. We contemplated the possibility of allowing some convictions to be shown and some excluded; examples are to be found in those which are remote and those which have no direct bearing on veracity, and those which because of the peculiar circumstances at hand might better be excluded. The *Luck*opinion contemplated an on-the-record consideration by the trial judge whose action would be reviewable only for abuse of discretion, and that once the exercise of discretion appeared, the trial court's action be "accorded a respect appropriately reflective of the inescapable remoteness of appellate review."[3] This is a recognition that the cold record on appeal cannot present all facets and elements which the trial judge must weigh in striking the balance.[4]

Luck also contemplated that it was for the defendant to present to the trial court sufficient reasons for withholding past convictions from the jury in the face of a statute which makes such convictions admissible. *See* Hood v. United States, *supra.* The underlying assumption was that prior convictions would ordinarily be admissible unless this burden is met. "The trial court is not*required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense."[5]

The standard to be applied by the District Judge was stated in terms of whether he "believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility."[6] The impact of criminal convictions will often be damaging to an accused and it is admittedly difficult to restrict its impact, by cautionary instructions, to the issue of credibility. The test of *Luck,* however, is that to bar them as impeachment the court must find that the prejudice must "far outweigh" the probative relevance to credibility, or that even if relevant the "cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction."[7]

The burden of persuasion in this regard is on the accused; and, once the issue is raised, the District Court should make an inquiry, allowing the accused an opportunity to show why judicial discretion should be exercised in favor of exclusion of the criminal record.[8] 940*940 This, admittedly, places a very difficult burden on trial judges and some added guidelines are needed even at risk of adding to the burdens of the trial courts.

In considering how the District Court is to exercise the discretionary power we granted, we must look to the legitimate purpose of impeachment which is, of course, not to show that the accused who takes the stand is a "bad" person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses. In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity.[9] Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category. The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been followed by a legally blameless life, should generally be excluded on the ground of remoteness.

A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial.[10] Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity.

Of course, there are many other factors that may be relevant in deciding whether or not to exclude prior convictions in a particular case. *See Luck, supra* at 157, 348 F.2d at 769. One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. Even

though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment. 941*941 *Ibid.; see also Brown, supra.*[11]

We recognize the undesirability of prolonging the trial unduly when the court is already confronted with requirements which work to that end, but in many cases the best way for the District Judge to evaluate the situation is to have the accused take the stand in a non-jury hearing and elicit his testimony and allow cross examination before resolving the *Luck* issue. Not only the trial judge, but both counsel, would then be in a better position to make decisions concerning the impeachment issue. Of course, the defendant could not be compelled to give testimony in the non-jury hearing and his testimony taken at the non-jury hearing would not be admissible in evidence except for impeachment. See Woody v. United States, 126 U.S.App.D.C. ___, 379 F.2d 130 (1967); compare Walder v. United States, 347 U.S. 62, 65, 74 S.Ct. 354, 98 L.Ed. 503 (1954).

We are well aware that these are not firm guidelines which can be applied readily as though they were part of the structure of the Federal Rules of Criminal Procedure; the very nature of judicial discretion precludes rigid standards for its exercise; we seek to give some assistance to the trial judge to whom we have assigned the extremely difficult task of weighing and balancing these elusive concepts. Surely, it would be much simpler if prior convictions of an accused were totally admissible or totally excludable as impeachment; but in the face of an explicit, unambiguous statute[12] allowing use of prior convictions and the holding in *Luck* we have little choice. The lesser step has been taken in *Luck* saying that the statute is to be read as permitting a discretion in the trial judge.

Even though we need not go beyond Appellant's failure to raise the issue he now relies on, we note that the admission of Appellant's criminal record here, along with the criminal record of the complaining witness, was not in a vindictive or "eye for an eye" sense, as Appellant argues. Rather it was received because the case had narrowed to the credibility of two persons — the accused and his accuser — and in those circumstances there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed. The jurors saw and heard both and we are able to see and hear neither. None of the other contentions urged by Appellant affords a basis for disturbing the judgment.

Affirmed.

[1] See FED.R.CRIM.P. 33; Smith v. Pollin, 90 U.S.App.D.C. 178, 194 F.2d 349 (1952).

[2] Such a discovery would not normally constitute newly discovered evidence, but the circumstances in this case were unusual. Newly discovered evidence which is only of impeaching value does not ordinarily warrant a new trial, Mesarosh v. United States, 352 U.S. 1, 9, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956); Thompson v. United States, 88 U.S.App.D.C. 235, 188 F.2d 652 (1951), but the District Judge granted a new trial to ensure that the jury had before it the same type of available impeachment evidence about the

complaining witness as it had about Appellant so that it could make a fair evaluation of credibility. United States v. Gordon, 246 F.Supp. 522 (D.D.C.1965).

[2a] Although no objection was raised as to the three impeaching crimes of fugitivity, robbery, and carrying a dangerous weapon, trial counsel moved to exclude the offenses of taking property without right and malicious destruction of property on the ground that they were not "crimes" within the meaning of the statute. While this objection perhaps did not fully articulate the *Luck* issue, the subject was fully explored and the District Judge denied the motion. Assuming that *Luck* was properly raised in view of the peculiar facts of this case, which was, as we noted, a "credibility" contest based in large part on the conflicting testimony of the victim and the accused, both having prior records, we find no abuse of discretion.

[3] 121 U.S.App.D.C. at 157, 348 F.2d at 769.

[4] *See* Brooke v. United States, 128 U.S. App.D.C. —, 385 F.2d 279 (decided April 19, 1967).

[5] *Luck, supra* at 156, 348 F.2d at 768 (emphasis in original). Since *Luck* we have reiterated this view:

[Luck] establishes only that Congress, in legislating to the effect that prior convictions may be used to impeach, left some room for the play of judicial discretion over the unfolding circumstances of the immediate trial.

Hood, supra at 18, 365 F.2d at 951.

[6] *Luck, supra* at 156, 348 F.2d at 768.

[7] *Id.* at 156, 348 F.2d at 768. *See* Brown v. United States, 125 U.S.App.D.C. 220, 370 F.2d 242 (1966).

[8] It must be remembered that the prior conviction involved in *Luck* was a guilty plea. The relevance of prior convictions to credibility may well be different as between a case where the conviction of the accused was by admission of guilt by a plea and on the other hand a case where the accused affirmatively contested the charge and testified, for example, that he was not present and did not commit the acts charged. In the latter situation the accused affirmatively puts his own veracity in issue when he testifies so that the jury's verdict amounted to rejection of his testimony; the verdict is in a sense a *de facto* finding that the accused did not tell the truth when sworn to do so. Exploration of this area risks a diversion which may well be time consuming; hence use of this inquiry should be limited.

[9] "The reason for exposing the defendant's prior record is to attack his *character,* to call into question his reliability for truth-telling * * *." Brown v. United States, *supra* at 222, 370 F.2d at 244 (per Wright, J.).

[10] Neither *Luck* nor this opinion places any limitations on established rules which permit evidence of prior criminality to show a "pattern" of offenses. *See, e. g.,* Drew v. United States, 118 U.S.App.D.C. 11, 16, 331 F.2d 85, 90 (1964).

[11] This weighing process would occur only where it has been determined that the prior convictions are otherwise admissible. Having made that determination, the judge would then consider whether the defendant's testimony is so important that he should not be forced to elect between staying silent — risking prejudice due to the jury's going without one version of the facts — and testifying — risking prejudice through exposure of his criminal past. In this regard, the judge may want to evaluate just how relevant to credibility the prior convictions are; for example, a recent perjury conviction would be difficult to ignore even where the defendant's testimony would be of great importance. This could well be true as to a multiplicity of convictions for crimes of dishonesty referred to earlier. On the other hand, where an instruction relative to inferences arising from unexplained possession of recently stolen property is permissible, the importance of the defendant's testimony becomes more acute. *See* Smith v. United States, 123 U.S.App.D.C. 259, 359 F.2d 243 (1966).

[12] In relevant part, D.C.Code § 14-305 (1967) provides:

A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters.

Cf. Spencer v. State of Texas, 385 U.S. 554, 561, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967).

Greer v Mitchell

264 F.3d 663 (2001)

Paul W. GREER, Petitioner-Appellant,

v.

Betty MITCHELL, Warden, Respondent-Appellee.

No. 98-4330.

United States Court of Appeals, Sixth Circuit.

Argued October 23, 2000.

Decided and Filed September 4, 2001.

664*664 665*665 666*666 667*667 668*668 669*669 Roger M. Synenberg (argued and briefed), Synenberg & Marein, Michael J. Benza (argued and briefed), Cleveland, OH, for Petitioner-Appellant.

Michael L. Collyer (argued and briefed), Office of the Attorney General of Ohio, Cleveland, OH, for Respondent-Appellee.

Before KENNEDY, NORRIS, and MOORE, Circuit Judges.

OPINION

ALAN E. NORRIS, Circuit Judge.

Paul W. Greer appeals from the denial of his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. After careful consideration of the numerous issues raised by petitioner, we affirm the orders of the district court denying relief with one exception. Petitioner contends that appellate counsel rendered constitutionally ineffective assistance in presenting his direct appeals to the Ohio courts. Because the

record has not been sufficiently developed for us to make a final determination concerning the merits of this claim, we shall remand to the district court with instructions that it conduct an evidentiary hearing on this one issue.

I.

The facts that gave rise to this case can be summarized briefly by quoting, as did the district court, the synopsis preceding the opinion of the Ohio Supreme Court:

> *On Tuesday afternoon, January 29, 1985, the body of Louis A. Roth was discovered on his kitchen floor. It was determined that he had been stabbed or otherwise wounded twenty-two times, several of which stab wounds punctured the left lung and right ventricle of the heart. The time of death was established as approximately between 11:00 p.m. Sunday night and 1:00 a.m. Monday morning. There was no sign of any struggle and it was apparent that Roth 670*670 had been stabbed while he sat at his kitchen table. Roth's home had been thoroughly searched. Bloodstains were also found throughout the home.*
>
> *Police officers began to question Roth's neighbors, including appellant, Paul W. Greer. Eventually their canvassing efforts led back to appellant. This was because a neighbor had observed two cuts on appellant's fingers on Monday afternoon. Since the murder had been committed by means of a knife, investigators began to question appellant more closely concerning his wounds and his relationship to the victim. It was established that Roth had rented a home to appellant, who was unemployed, and allowed him to make repairs in lieu of paying rent. Also, Roth had, during the time of appellant's tenancy, provided, inter alia, food, money and a hot plate for appellant and his girlfriend. It was established that Roth was contemplating eviction of appellant. After hearing about cuts on appellant's fingers, police requested appellant to accompany them to the police station, which he did.*
>
> *Police, with the permission of appellant's girlfriend, performed a search of the couple's residence. Therein police discovered various articles of bloody clothing and a wristwatch belonging to the victim. Eventually appellant confessed to having gone through the victim's home in search of valuables, but he insisted that he had not done so until Monday morning when Roth was already dead. Neighbors established that appellant had gone to see Roth at approximately 10:00 p.m. the night of the murder.*
>
> *On February 6, 1985, appellant was indicted on the following charges: one count of aggravated murder in violation of R.C. 2903.01(A); one count of aggravated murder in violation of R.C. 2903.01(B), and one count of aggravated robbery in violation of R.C. 291101(A)(1). The state included an aggravated robbery specification to the second murder charge pursuant to R.C. 2929.04(A)(7), thus seeking the death penalty for the crime. Appellant pled not guilty and gave notice of his alibi defense. Following a trial on*

the merits, appellant was convicted of all counts, including the specification on the second count. At the sentencing phase, appellant presented evidence in mitigation. The jury thereupon recommended that a sentence of death be imposed. The trial court then sentenced appellant to death. By its opinion dated March 4, 1987, wherein it conducted its independent analysis and review, the court of appeals affirmed both the trial court's judgment of conviction and the sentence of death.

State v. Greer, 39 Ohio St.3d 236, 236-37, 530 N.E.2d 382, 387-88 (Ohio 1988).

Represented by new counsel, petitioner appealed to Ohio's Ninth District Court of Appeals, raising twenty-four assignments of error. On March 4, 1987, the Court of Appeals upheld petitioner's conviction and sentence. *State v. Greer,* No. 12258, 1987 WL 7769 (Ohio Ct.App. Mar. 4, 1987). The Ohio Supreme Court affirmed. *State v. Greer,* 39 Ohio St.3d 236, 530 N.E.2d 382 (Ohio 1988), *reh'g denied,* 40 Ohio St.3d 711, 534 N.E.2d 851 (Ohio 1988), *cert. denied,* 490 U.S. 1028, 109 S.Ct. 1766, 104 L.Ed.2d 201 (1989).

On November 15, 1989, petitioner filed a petition for post-conviction relief pursuant to Ohio Rev.Code § 2953.21. The trial court denied the petition in a one-page journal entry based upon the doctrine of res judicata. Journal Entry, June 22, 1990 (J.A. at 2408). The Court of Appeals reversed and remanded, however, in order to afford the trial court the opportunity to 671*671 issue a more detailed opinion. *State v. Greer,* No. 14696, 1991 WL 21548 (Ohio Ct.App. Feb. 20, 1991). The Ohio Supreme Court subsequently declined to accept jurisdiction. *State v. Greer,*61 Ohio St.3d 1422, 574 N.E.2d 1093 (Ohio 1991) (unpublished table decision).

On June 11, 1991, the court of common pleas complied with the directive of the Court of Appeals, once again denying relief on all grounds largely based upon its finding of res judicata. Findings and Order, June 11, 1991 (J.A. at 2939). The Court of Appeals affirmed. *State v. Greer,* No. 15217, 1992 WL 316350 (Ohio Ct.App. Oct 28, 1992). The Ohio Supreme Court declined to accept jurisdiction. *State v. Greer,* 66 Ohio St.3d 1446, 609 N.E.2d 172 (Ohio 1993) (unpublished table decision).

Petitioner then filed an application for delayed consideration pursuant to *State v. Murnahan,* 63 Ohio St.3d 60, 584 N.E.2d 1204 (Ohio 1992), which alleged, *inter alia,* that appellate counsel had rendered ineffective assistance by failing to raise thirty-four assignments of error on direct appeal. The Court of Appeals denied the application, concluding that petitioner had failed to meet the high standard required by *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for claims of ineffective assistance. *State v. Greer,* 1993 WL 34558, No. 12258 (Ohio Ct.App. Feb. 5, 1993) (unreported), Journal Entry (J.A. at 3802). The Ohio Supreme Court affirmed. *State v. Greer,* 67 Ohio St.3d 1485, 621 N.E.2d 407 (Ohio 1993) (unpublished table decision), and the United States Supreme Court denied certiorari.*Montgomery v. Ohio,* 511 U.S. 1078, 114 S.Ct. 1665, 128 L.Ed.2d 381 (1994).

After exhausting his state-court avenues of redress, petitioner initiated the habeas corpus proceeding now before us on December 2, 1996, raising twenty-eight grounds for relief. The district court denied the petition on August 7, 1998 and thereafter denied a motion to alter or amend the judgment.

II.

A. Standard of Review

This court reviews a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *See Lucas v. O'Dea,* 179 F.3d 412, 416 (6th Cir.1999). Because petitioner filed his habeas petition on December 2, 1996, review of the state court's decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). *See Lindh v. Murphy,* 521 U.S. 320, 336, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); *Harpster v. Ohio,* 128 F.3d 322, 326 (6th Cir.1997). As amended, 28 U.S.C. § 2254(d) provides as follows:

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

28 U.S.C. § 2254(d). In *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the Court explained the effect of this section in these terms:

> *672*672 In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied — the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set*

of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

529 U.S. at 412-13, 120 S.Ct. 1495. (O'Connor, J.); *see also Machacek v. Hofbauer,* 213 F.3d 947, 952-53 (6th Cir.2000), *cert. denied,* 531 U.S. 1089, 121 S.Ct. 808, 148 L.Ed.2d 694 (2001).

Furthermore, under the AEDPA, the district court may only hold an evidentiary hearing under the following circumstances:

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on —

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e). With these precepts in mind, we turn to the vexing doctrine of procedural default.

B. Procedural Default

As with virtually all capital cases, petitioner challenges the district court's conclusion that many of his claims have been procedurally defaulted due to his failure to raise them at the appropriate juncture of his state-court proceedings.

As the district court noted, even constitutional errors will not be noticed if an adequate and independent state-law ground exists for upholding the conviction or sentence. *See*

Coleman v. Thompson, 501 U.S. 722, 729-32, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Maupin v. Smith,*785 F.2d 135, 138 (6th Cir.1986). This court's *Maupin* decision sets out four inquiries that a district court should make when the state argues that a habeas claim has been defaulted by petitioner's failure to observe 673*673 a state procedural rule. First, the court must determine whether there is such a procedural rule that is applicable to the claim at issue and whether the petitioner did, in fact, fail to follow it. *Maupin,* 785 F.2d at 138. Second, the court must decide whether the state courts actually enforced its procedural sanction. *Id.* Third, the court must decide whether the state's procedural forfeiture is an "adequate and independent" ground on which the state can rely to foreclose review of a federal constitutional claim. "This question will usually involve an examination of the legitimate state interests behind the procedural rule in light of the federal interest in considering federal claims." *Id.* And, fourth, the petitioner must demonstrate, consistent with *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), that there was "cause" for him to neglect the procedural rule and that he was actually prejudiced by the alleged constitutional error. *Id.; see also Scott v. Mitchell,* 209 F.3d 854, 864 (6th Cir.), *cert. denied,* 531 U.S. 1021, 121 S.Ct. 588, 148 L.Ed.2d 503 (2000).

Furthermore, even when a petitioner fails to show cause and prejudice, a court must still consider whether special circumstances require that that showing be waived. Specifically, a court may notice an otherwise defaulted claim if it concludes that petitioner has shown by clear and convincing evidence that but for constitutional error no reasonable juror would have found him guilty of the crime, or, if the constitutional error occurred during the penalty phase of the trial, that no reasonable juror would have sentenced petitioner to death. *See Sawyer v. Whitley,*505 U.S. 333, 339-40, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

For its part, Ohio has the following long-standing rule:

> *Constitutional issues cannot be considered in postconviction proceedings under Section 2953.21 et seq., Revised Code, where they have already been or could have been fully litigated by the prisoner while represented by counsel, either before his judgment of conviction or on direct appeal from that judgment, and thus have been adjudicated against him.*

State v. Perry, 10 Ohio St.2d 175, 226 N.E.2d 104 (Ohio 1967) (syllabus). Moreover, this court has rejected contentions that Ohio has failed to apply its *Perry* rule consistently. *Mapes v. Coyle,* 171 F.3d 408, 421 (6th Cir.1999).

Of course, "[w]hether a state court rested its holding on procedural default so as to bar federal habeas review is a question of law that we review de novo." *Combs v. Coyle,* 205 F.3d 269, 275 (6th Cir.), *cert. denied,* 531 U.S. 1035, 121 S.Ct. 623, 148 L.Ed.2d 533 (2000). We look to the last explained state-court judgment when answering this question. *Id.* (citing *Ylst v. Nunnemaker,* 501 U.S. 797, 805, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991)).

III.

With this general understanding of procedural default by way of background, we now turn to the individual claims raised by petitioner.

A. Ineffective Assistance of Trial Counsel

The most troublesome aspect of capital cases often involves claims of ineffective assistance of counsel. This case is no different. The question, of course, is not whether counsel was topnotch, but whether he or she functioned at the level required by the Sixth Amendment:

> *We apply a two-part test to determine whether a criminal defendant was denied effective assistance of counsel. First, we ascertain whether counsel's 674*674performance was professionally deficient; second, we determine whether the deficient performance prejudiced the defendant's constitutional interests. SeeStrickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Rickman v. Bell, 131 F.3d 1150, 1154 (6th Cir.1997); Gravley v. Mills, 87 F.3d 779, 785 (6th Cir.1996).*
>
> *In assessing counsel's performance, we inquire whether "counsel's representation fell below an objective standard of reasonableness," as measured by "prevailing professional norms." Rickman, 131 F.3d at 1154 (quoting Strickland, 466 U.S. at 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674). This objective reasonableness standard encompasses strategic litigation choices that simply fail to bear fruit. SeeStrickland, 466 U.S. at 689, 104 S.Ct. 2052, 80 L.Ed.2d 674. To establish prejudice, a defendant must demonstrate a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Rickman, 131 F.3d at 1155 (quoting Strickland, 466 U.S. at 693-94, 104 S.Ct. 2052, 80 L.Ed.2d 674).*

Olden v. United States, 224 F.3d 561, 565 (6th Cir.2000).

Before looking at the merits of petitioner's ineffective assistance claim, however, we must first determine whether the issue has been procedurally defaulted. Unlike the federal system, Ohio courts generally require defendants to raise ineffective assistance of trial counsel on direct appeal:

> *Where a defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined*

> *without resort to evidence dehors the record, res judicata is a proper basis for dismissing defendant's petition for postconviction relief.*

State v. Cole, 2 Ohio St.3d 112, 443 N.E.2d 169 (1982) (syllabus). In the present case appellate counsel failed to raise the ineffective assistance of trial counsel on direct appeal. The issue was first raised by counsel in a petition for post-conviction relief.[1] The trial court and Court of Appeals each held that the claim was barred by the doctrine of res judicata because petitioner had not raised his claim on direct appeal. *See* Decision and Entry, Ohio Ct.App., No. 15217, at 11-12 (J.A. at 3414-15). The district court agreed with this reasoning. Memorandum of Opinion, August 7, 1998, at 48-49 (J.A. at 192-93).

The district court's decision on this issue gives rise to the following reservation. *Cole* makes an exception for cases in which the competence of trial counsel can only be resolved by resorting to evidence outside the record. The petition for post-conviction relief includes forty-six exhibits, the majority of which were affidavits from individuals who allegedly had information favorable to petitioner but who were not contacted by trial counsel. They include family members who attest that they could have placed petitioner's personal history and character in a favorable context; Larry Dehus, an expert who would have disputed the state's evidence regarding bloody footprints found near the victim's body; James Eisenberg, a psychologist who would have testified concerning the shortcomings of trial counsels' preparation for mitigation; trial counsel, who indicate that their notes reveal that certain jurors excused by the prosecution 675*675 were black; and a juror who states that evidence of petitioner's background would have "been helpful and may have affected the jury's decision."

While the probative value of this evidence is difficult to assess in retrospect, it seems clear that this material and the arguments that logically flow from it are outside the trial record. Nonetheless, the Ohio Court of Appeals reached a contrary conclusion:

> *The gist of Greer's claim is that his representation was ineffective in failing to raise these issues and/or bring forth this evidence at trial. By claiming that this evidence is dehors the record, Greer attempts to circumvent the application of res judicata. But he fails to understand that evidence is not outside the record simply because it was not raised in the original proceedings. The matters Greer raises were capable of being raised and reviewed in his direct appeal.*

State v. Greer, No. 15217, 1992 WL 316350 (Ohio Ct.App. Oct. 28, 1992) (J.A. at 3414-15) (citations omitted). Although counsel could certainly have raised an ineffective assistance of counsel claim on direct appeal, the precise arguments advanced in his petition for post-conviction relief require significant supplementation of the trial court record. The Ohio Court of Appeals relies on a single, unreported case, *State v. Wayne,* 1991 WL 172914 (Ohio Ct.App. Sept. 4, 1991), to support its statement that "evidence is not outside the record simply because it was not raised in the original proceeding." Yet, in *Wayne,* the appellant neglected to take a direct appeal and instead raised the claim that his plea agreement did not conform to the indictment in a petition for postconviction relief. Certainly, procedural default under those circumstances is warranted because the documents in question — the plea agreement and indictment —

were in the record. In this case, however, potential evidence from witnesses who never appeared at trial, as well as the testimony of trial counsel respecting trial tactics, is by definition *dehors* the record. For that reason, it seems that the Ohio Court of Appeals may have mistakenly relied upon procedural default in denying petitioner's ineffective assistance of trial counsel claim.

Despite these reservations, the procedural default rule delineated by *Perry* and *Cole* is a matter of state law. Generally, a federal habeas court sitting in review of a state-court judgment should not second guess a state court's decision concerning matters of state law. *Gall v. Parker,* 231 F.3d 265, 303 (6th Cir.2000) ("Principles of comity and finality equally command that a habeas court can not revisit a state court's interpretation of state law, and in particular, instruct that a habeas court accept the interpretation of state law by the highest state court on a petitioner's direct appeal."). Nevertheless, when the record reveals that the state court's reliance upon its own rule of procedural default is misplaced, we are reluctant to conclude categorically that federal habeas review of the purportedly defaulted claim is precluded. As explained below, however, we need not decide the extent to which, if any, federal courts may reach the merits of constitutional claims that a state court improperly found to be procedurally defaulted because petitioner's ineffective assistance of appellate counsel claim necessarily forces us to review the performance of trial counsel.

B. Ineffective Assistance of Appellate Counsel

As the district court recognized, however, petitioner's claim regarding ineffective assistance of trial counsel is inextricably connected to his claim of ineffective assistance of appellate counsel, a claim that was 676*676 not procedurally defaulted. In *Mapes, supra,* this court faced a similar claim of ineffective assistance of both trial and appellate counsel in an Ohio capital case. There, too, we held that any claim of ineffective assistance of trial counsel had been procedurally defaulted. Despite this default, we observed that an examination of trial counsel's performance was required in order to determine whether appellate counsel had been constitutionally ineffective. *Mapes,* 171 F.3d at 419.

For that limited reason, we now turn to petitioner's allegations that his trial counsel rendered constitutionally ineffective assistance. If trial counsel performed adequately, our inquiry is at an end; by definition, appellate counsel cannot be ineffective for a failure to raise an issue that lacks merit.[2]

Given the exigencies and complexity of capital cases, it is likely that even experienced trial counsel will commit oversights. Of course, errors of tactics or omission do not necessarily mean that counsel has functioned in a constitutionally deficient manner. "[I]t is all too easy for a court, examining counsel's defense after it has proved

unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052. Instead, this Court must determine whether counsel made a "reasonable decision that makes particular investigation unnecessary." *Id.* at 690, 104 S.Ct. 2052.

Petitioner alleges that trial counsel committed serious errors during the guilt phase of his trial. These alleged errors include failure to 1) contact prospective prosecution witnesses; 2) investigate allegations that the victim was afraid of a man named "Rick"; 3) obtain an expert to challenge the conclusions of the coroner; 4) determine whether petitioner's alibi — that he was watching the movie, "Children of the Corn," on television — was credible; 5) communicate adequately with petitioner; 6) object to the conduct of voir dire; 7) object to prosecutorial misconduct; 8) request an instruction for the lesser included offense of theft; 9) object to various jury instructions; and 10) object to the introduction of gruesome photographs.

These arguments need not detain us long because, even assuming that trial counsel was not reasonably effective, petitioner cannot establish prejudice. There is almost no chance that the verdict would have been different but for counsel's allegedly defective performance since evidence of guilt was overwhelming. In light of the facts introduced during trial, we conclude that there is no reasonable probability that different actions or a different strategy by counsel could have altered the verdict.

That said, counsel's performance during the penalty phase presents a much closer question that will require remand to the district court for further proceedings. First, it appears that trial counsel did not begin preparing for the mitigation phase of the trial until after 677*677 conviction, as reflected in attorney billing notations. Under circumstances where a finding of guilty cannot come as a surprise, failure to anticipate such a finding so as to adequately prepare for the sentencing phase is constitutionally impermissible. *See Glenn v. Tate,* 71 F.3d 1204 (6th Cir.1995). In *Glenn,* another Ohio capital case, this court vacated the death sentence based upon ineffective assistance of counsel during the penalty phase:

> *Although both of Glenn's court-appointed lawyers were experienced criminal defense attorneys, and although they had some eight months to get ready for sentencing proceedings necessitated by a verdict that could hardly have come as a surprise to them, evidence presented to the state trial court at a post-sentence hearing showed that the lawyers made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty. It was obvious, or should have been, that the sentencing phase was likely to be "the stage of the proceedings where counsel can do his or her client the most good,"Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir.), cert. denied, 493 U.S. 874, 110 S.Ct. 206, 107 L.Ed.2d 159 (1989) — yet Glenn's counsel failed to make any significant preparations for the sentencing phase until after the conclusion of the guilt phase. This inaction was objectively unreasonable. "To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available."Blanco v. Singletary, 943 F.2d 1477, 1501-02 (11th Cir.1991), cert. denied, 504 U.S. 943, 112 S.Ct. 2282, 119 L.Ed.2d 207 (1992).*

....

> *The reason for the paucity of mitigation evidence, as we have said, was lack of preparation on the part of Glenn's lawyers. The lawyers made no systematic effort to acquaint themselves with their client's social history. They never spoke to any of his numerous brothers and sisters. They never examined his school records. They never examined his medical records (including an emergency room record prepared after he collapsed in court one day) or records of mental health counseling they knew he had received. They never talked to his probation officer or examined the probation officer's records. And although they arranged for tests, some months before the start of the trial, to determine whether he was competent to stand trial, they waited until after he had been found guilty before taking their first step — or misstep, as we shall explain presently — toward arranging for expert witnesses who might have presented mitigating evidence on John Glenn's impaired brain function.*

Id. at 1207-08. As already noted, this court has vacated a number of death sentences in recent years based upon inadequate penalty phase preparation by trial counsel. *See, e.g., Carter v. Bell,* 218 F.3d 581, 595-96 (6th Cir.2000) ("While we understand the great burdens on appointed counsel in capital cases and the often limited financial support they receive for investigation and discovery, justice requires that counsel must do more than appear in court or argue to the jury."); *Groseclose v. Bell,* 130 F.3d 1161, 1166 (6th Cir.1997) (failure to prepare adequately for mitigation — four witnesses); *Austin v. Bell,* 126 F.3d 843, 848 (6th Cir.1997)(vacating sentence because defense counsel did not reasonably investigate the facts of the case or reasonably determine that an investigation was not necessary). Furthermore, last term, the Supreme Court found counsel constitutionally ineffective for failing to look into defendant's "nightmarish childhood" 678*678 and mental limitations in preparation for mitigation. *Williams,* 529 U.S. at 395, 120 S.Ct. 1495.

Attached to the petition for post-conviction relief was an affidavit by James Eisenberg, a psychologist who has consulted in numerous criminal cases, including some forty capital cases. He reviewed petitioner's file and identified several areas of inadequate preparation: failure to interview family members; failure to review school records that would reflect petitioner's intellectual development; and failure to call any mental health experts.

Furthermore, in his deposition, trial counsel, Robert Baker, conceded that preparation for the mitigation phase began after the jury returned a verdict. With regard to contacting relatives, he recalled:

> *Let me put it to you this way: If someone would have called, I would have talked to them. And if they would have had something favorable to say or been willing to get involved, we certainly would have done it. I've heard that everybody's now saying they called, but I just don't think that's the case.*

As for defense counsel's theory of mitigation, it was "to try and save Paul's life.... He had a tough life and was disadvantaged." Nonetheless, defense counsel did not consider requesting appointment of a psychologist, but instead relied upon the doctor who was

helping to prepare the probation report. As his testimony reveals, Baker had little grasp of the details of petitioner's life. Instead, he relied upon the pre-sentence investigation, which he hoped "would be helpful in sentencing. Most of it turned out to be detrimental." Moreover, this reliance on the state's psychologist was misplaced. As Dr. Kathleen P. Stafford testified, "I let the Judge know that I would have to take a very limited role and be able to address only the one mitigating factor, which was similar to the sanity standard, and that that would have to be the role that I would take in the matter." She went on to testify that defense counsel was aware of her limited role.

During his deposition, Baker also stated, "We had been after Paul for some time to provide us with family, relatives, people that would be of some benefit to him, and he never gave us any information about people." However, he went on to indicate that he knew several things that merited further investigation: that, as a youngster, petitioner had seen his father murdered before his own eyes; that he had many brothers and sisters; that he had been incarcerated as a youth; that he had been in foster care; that he shot a cousin at age 13; and that he was alcoholic. None of these leads appears to have been pursued with anything approaching vigor. As this court has observed,

> *Certainly, trial counsel must commit a serious error to be judged unconstitutionally ineffective. However, when a client faces the prospect of being put to death unless counsel obtains and presents something in mitigation, minimal standards require some investigation.*

Mapes, 171 F.3d at 426.

Defense counsel did put on a case in mitigation, however, which the Ohio Supreme Court summarized it this way:

> *Factors introduced by appellant for mitigation purposes were that appellant was raised in an environment of poverty, his parents died when he was quite young, his father was killed in front of him, he has a relatively low I.Q. and is uneducated, he has a history of alcoholism and unemployment, his conviction was based on circumstantial evidence, and appellant testified that he is innocent. Obviously, such evidence is relevant under factor number seven and is also part of the history, character and background of 679*679 the offender. Thus, none of the first six mitigating factors has any relevance. We find such evidence completely overshadowed by the demonstrated aggravating circumstance. Moreover, we note that nothing in appellant's history or background indicates that the sentences are other than appropriate.*

Greer, 39 Ohio St.3d at 255, 530 N.E.2d at 404. Furthermore, Dr. Stafford's report contains much of the background information that petitioner alleges should have been investigated, hence the state argues that it was reasonable for defense counsel to rely upon it.

As we indicated earlier, petitioner has procedurally defaulted his ineffective assistance of trial counsel claim. The preceding discussion, therefore, is relevant "only insofar as it bears on the question whether appellate counsel was unconstitutionally ineffective in

failing to raise it."*Mapes,* 171 F.3d at 427. *Mapes* provides us with the following guidance concerning our approach to this issue:

> *The cases decided by this court on the issue of ineffective assistance of appellate counsel suggest the following considerations that ought to be taken into account in determining whether an attorney on direct appeal performed reasonably competently.*
>
> *(1) Were the omitted issues "significant and obvious"?*
>
> *(2) Was there arguably contrary authority on the omitted issues?*
>
> *(3) Were the omitted issues clearly stronger than those presented?*
>
> *(4) Were the omitted issues objected to at trial?*
>
> *(5) Were the trial court's rulings subject to deference on appeal?*
>
> *(6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?*
>
> *(7) What was appellate counsel's level of experience and expertise?*
>
> *(8) Did the petitioner and appellate counsel meet and go over possible issues?*
>
> *(9) Is there evidence that counsel reviewed all the facts?*
>
> *(10) Were the omitted issues dealt with in other assignments of error?*
>
> *(11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?*
>
> *Manifestly, this list is not exhaustive, and neither must it produce a correct "score"; we offer these inquiries merely as matters to be considered.*

Mapes, 171 F.3d at 427-28 (citations omitted). In our view, given the record, the ineffective assistance of trial counsel presented a "significant and obvious" claim that a competent attorney in a capital case would almost certainly present on appeal. While appellate attorneys should always attempt to winnow out their best issues for presentation to the courts, in a capital case, which by definition involves the ultimate societal sanction, appellate attorneys must err on the side of inclusion, particularly when, as here, there appear to exist a significant number of facts to support the claim.

In addition to the relative strength of the ineffective assistance claim, several other of the factors suggested by *Mapes* favor petitioner's position. First, the legal viability of an ineffective assistance claim had been firmly established by *Strickland.* Second, at the time of the direct appeal trial counsel had not testified in a collateral proceeding concerning trial strategy. Third, neither of petitioner's appellate attorneys had ever prepared a death penalty appeal. And, fourth, the omitted issues 680*680 were not dealt with in the context of other assignments of error.

In the case before us, appellate counsels' failure to raise ineffective assistance on direct appeal is further complicated by petitioner's allegation of conflict. Robert Baker and Robert Lowery acted as court-appointed trial counsel. After the verdict, Baker and Lowery were replaced by two other attorneys: Peter Cahoon and Richard Kasay. New counsel filed their appellate brief on March 31, 1987. One month later, while the appeal was still pending, Peter Cahoon joined Baker's firm. In petitioner's eyes, this violated his right to unconflicted counsel.

While the courts below found that these circumstances did not give rise to a conflict, this court has recently issued a decision, *Combs v. Coyle,* 205 F.3d 269 (6th Cir.), *cert. denied,* 531 U.S. 1035, 121 S.Ct. 623, 148 L.Ed.2d 533 (2000) that involves a similar claim. In that capital case, petitioner had two attorneys on appeal, one of whom had represented him at trial. As here, appellate counsel failed to raise certain ineffective assistance of trial counsel claims on direct appeal. He sought to avoid procedural default by arguing that, because he was not represented by "unconflicted" counsel on direct appeal, the rule enunciated in *Cole* did not apply to him. We agreed and explained our decision in these terms:

> *Because there is ambiguity surrounding the issue and because the State cannot point to a case firmly establishing as of the time of Combs's appeal that ineffectiveness claims must be brought on direct appeal when trial counsel also serves as co-counsel on appeal, we are unable to conclude that a firmly established state procedural rule existed. Indeed, at the time of Combs's appeal was filed it would have been entirely reasonable to conclude that Combs's new counsel did not meet the Cole standard of being "in no way enjoined from asserting the ineffectiveness of appellant's trial counsel," Cole, 443 N.E.2d at 171, and thus that res judicata would not apply.*

Combs, 205 F.3d at 277. Obviously, *Combs* is factually distinguishable from our case because neither of petitioner's two appellate attorneys represented him at trial. We therefore decline to extend *Combs* to the situation before us so as to excuse the procedural default of his ineffective assistance of trial counsel claim. Nevertheless, the remote possibility that appellate counsel might have felt constrained in raising that claim, coupled with the concerns already discussed, counsel caution with respect to petitioner's ineffective assistance of appellate counsel claim.

The Ohio Court of Appeals' opinion denying petitioner's ineffective assistance of appellate counsel claim provides scant substantive reasoning:

> *Appellant has not met the standard set forth in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) to establish ineffective assistance of counsel. From the record we cannot find that the appellant was in any way prejudiced by appellate counsel's performance, that is, that his conviction would have been set aside by this Court.*

State v. Greer, 1993 WL 34558, No. 12258, (Ohio Ct.App. Feb. 5, 1993) (unreported), Journal Entry at 2-3 (J.A. at 3803-04). Furthermore, petitioner was not afforded an evidentiary hearing to develop his ineffective assistance of counsel claim by either state courts or the district court. We are, of course, mindful that the AEDPA, 28 U.S.C. § 2254(e), permits a district court to hold an evidentiary hearing only in limited

circumstances. *See* 28 U.S.C. § 2254(e)(2). However, in *Williams* the Supreme Court explained these limitations 681*681 in a manner that we read to favor an evidentiary hearing in this case. Concerning the statute's command that no evidentiary hearing shall occur when a petitioner has "failed to develop the factual basis of a claim," the Court offered the following interpretation:

> *Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel.*

Williams, 529 U.S. at 432, 120 S.Ct. 1479. Furthermore, "[t]he question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts."*Id.* at 435, 120 S.Ct. 1479.

In the case before us, petitioner pursued his ineffective assistance of appellate counsel claim with proper diligence, raising it first — albeit prematurely — in his petition for post-conviction relief and then in his motion for delayed reconsideration. Both of these pleadings requested an evidentiary hearing, which was never afforded by the Ohio courts. Consistent with *Williams v. Taylor,* therefore, we conclude that petitioner is not precluded from an evidentiary hearing as he exercised the necessary diligence in attempting to establish the factual record in state court.

Accordingly, we remand this matter to the district court with instructions to accord petitioner an evidentiary hearing in which to establish whether appellate counsel rendered constitutionally ineffective assistance with respect to the penalty phase of petitioner's trial.

C. Ohio's Post-Conviction Scheme

Petitioner contends that Ohio's post-conviction scheme fails to provide defendants an adequate corrective process for reviewing claims of constitutional violations.

The district court concluded that habeas corpus cannot be used to mount challenges to a state's scheme of post-conviction relief, relying upon *Kirby v. Dutton,* 794 F.2d 245, 246 (6th Cir.1986) (habeas corpus is not the proper means by which prisoners should challenge errors or deficiencies in state post-conviction proceedings). Moreover, the Supreme Court has held that states have no constitutional obligation to provide post-conviction remedies. *See**Pennsylvania v. Finley,* 481 U.S. 551, 557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) (there is no constitutional right to counsel when mounting collateral attacks upon convictions in state court).

We affirm that issue, based upon the reasoning of the district court.

D. Prosecutorial Misconduct

Petitioner raises a number of issues under the rubric of prosecutorial misconduct.

1. Batson challenge

Although not prosecutorial misconduct in the traditional sense, petitioner contends that the decision of the prosecutor to use peremptory challenges to excuse three potential black jurors ran afoul of *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). There are weaknesses in this argument, however. First, defense counsel made no contemporaneous objection to the strikes.[3] Second, 682*682 defense counsel testified at a subsequent deposition that he did not perceive that the strikes were based on racial animus.[4] Third, counsel did not raise this issue on direct appeal, resulting in procedural default under the *Perry* rule discussed earlier. And, fourth, there is nothing in the record to suggest that the alleged inappropriate prosecutorial conduct rendered the trial fundamentally unfair to a degree tantamount to a due process violation. *See Gall v. Parker,* 231 F.3d 265, 311 (6th Cir.2000).

In order to establish improper use of peremptory challenges, a defendant must first make out a prima facie case, which involves showing that he is a member of a cognizable racial group and that the prosecutor has used peremptory challenges to remove members of defendant's race from the venire. Once this showing has been made, the prosecutor must offer a race-neutral explanation for challenging the jurors: "the government's proffered reason need not be particularly persuasive, or even plausible, so long as it is neutral." *Harris,* 192 F.3d at 586. The court then decides whether defendant has proven that racial animus motivated the use of the peremptory challenge. In this case, the prosecutor was never afforded the opportunity to provide a race-neutral explanation because defense counsel did not object to specific strikes.

We affirm the district court's conclusion that this issue has been procedurally defaulted because it was not raised upon direct appeal. While petitioner seeks to evade this result by raising the issue in the context of ineffective assistance of appellate counsel, we decline his invitation. The trial record would not cause competent appellate counsel to consider raising a*Batson* challenge and, even if counsel had the benefit of the information developed during subsequent proceedings, our review of those materials convinces us that appellate counsel's decision not to raise the *Batson* issue fell well within the range of effective assistance as defined by *Strickland.*

2. use of peremptories to strike jurors who expressed hesitation about death penalty

The next alleged instance of "prosecutorial misconduct" is the state's decision to use peremptory challenges to excuse two jurors who expressed hesitation about imposing the death penalty. Both men indicated during voir dire that they could follow the court's instructions but that they felt the death penalty should be used sparingly. This issue was not raised on direct appeal and the district court concluded, as had the courts of Ohio, that it had been procedurally defaulted.

We affirm based upon procedural default.

3. improper closing argument in guilt phase

During her closing argument in the guilt phase of the trial, the prosecutor made several remarks that petitioner contends deprived him of a fair trial. The district court denied relief because petitioner failed to raise them on direct appeal and thus they are procedurally barred. We agree that this claim has been procedurally defaulted.

Even were we to reach the merits of the claim, however, our decision would not be altered. Among other things, the prosecutor told the jury:

> *683*683 Defendant varies his stories and his ability to shade the evidence, if you want, like a chameleon....*
>
> *....*
>
> *I was thinking last night when I was working on my argument that of all the witnesses that have testified and how he had changed what he had told previously to meet or to mesh in with what these people were saying....*

Petitioner contends this argument was improper. He also finds fault with the following commentary on the coroner's testimony:

> *Dr. Cox testified in this case. He is an expert witness, and in this case an exceptional expert witness. His testimony was — and you saw him here on the witness stand say it and demonstrate it — that the cuts, first of all, were caused by a knife, not by glass.*

....

And I guarantee you, ladies and gentlemen, if that was incorrect, if that was a disputable opinion, these defense attorneys would have had another expert or two or three or four testify in this case and tell you that, and there is not one that came forward.

According to petitioner, this commentary unlawfully attempted to shift the burden of proof to him.

This circuit has explicitly held that, "If a defendant testifies ..., a prosecutor may attack his credibility to the same extent as any other witness." *United States v. Francis,* 170 F.3d 546, 551 (6th Cir.1999) (citing cases). Of course, such commentary must be supported by reasonable inferences from the record and not simply represent the prosecutor's own opinion.*Id.* Here, there is no dispute that petitioner's testimony changed. Hence, the "chameleon" comment fell within the bounds of permissible comment.

While the prosecutor's remark concerning petitioner's lack of an expert to refute the coroner's testimony may have been ill-advised, one cannot say that "the impropriety was so flagrant that it require[s] reversal because only a new trial could correct the error." *Id.* at 552.

4. improper remarks during sentencing phase

Petitioner objects to several of the comments made by the prosecution during the sentencing phase.

a. consideration of the heinous nature of the crime and decision to seek death penalty

During closing arguments, the prosecutor made the following comments:

The aggravating circumstances in this case are heinous. The death of Louis Roth, the robbery that occurred, are heinous aggravating circumstances.

As [the other prosecutor] told you, we do not seek the death penalty lightly. We don't frivolously come into a courtroom asking for that penalty.

The Ohio Supreme Court considered petitioner's arguments and concluded, "[W]hatever residual error inheres in the making of the statements at issue, it would appear that such error was harmless." *Greer,* 39 Ohio St.3d at 252, 530 N.E.2d at 401. The district court likewise concluded, "Given the largely undisputed evidence supporting Greer's conviction, this Court cannot find that the cumulative effect of the two issues so infected Greer's trial with unfairness as to result in a denial of his due process rights." Memorandum of Opinion, Aug. 7, 1998, at 70 (J.A. at 214).

We affirm the district court.

684*684 b. comment that jury's decision on death only a recommendation

During closing arguments, the prosecutor stated, "Your result then, if you should find that the aggravating circumstances outweigh the mitigating factors, is to recommend to Judge Spicer that the death penalty be imposed in this case." Petitioner contends that this comment runs afoul of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which stands for the proposition that the State cannot seek to minimize the jury's sense of responsibility for determining the appropriateness of death. *Id.* at 341, 105 S.Ct. 2633.

Caldwell is distinguishable from the instant case. In *Caldwell,* the jury was told, "Your job [*i.e.,*decision on death] is reviewable ... the decision you render is automatically reviewable by the Supreme Court." *Id.* at 325-26, 105 S.Ct. 2633. However, in the case before us, the prosecutor's comment represents a correct statement of Ohio law. *See* Ohio Rev.Code § 2929.03(D)(2). On direct appeal, the Ohio Supreme Court held that this distinction correctly disposed of the *Caldwell* claim. *Greer,* 39 Ohio St.3d at 253, 530 N.E.2d at 402. Moreover, this court recently rejected a similar claim in *Mapes,* 171 F.3d at 414-415, albeit in the context of a challenged jury instruction.

The district court is affirmed.

c. sympathy

The prosecutor also asked the jury to set aside sympathy in reaching a decision:

> *What you have to be careful of, ladies and gentlemen, and Judge Spicer will instruct you on this, that you do not decide this case based on bias, sympathy or prejudice....*
>
> *In other words, if you go into the jury room and you feel sorry for Paul Greer because he has an alcohol problem, you feel sorry for Paul Greer because ... he has borderline intelligence, or you feel sorry for Paul Greer because he had so many children in his family, or that he only went to a certain level of education, if you feel sorry for him, that isn't mitigation.*

Of course, it is axiomatic that a jury cannot be precluded from considering virtually any aspect of defendant's character in mitigation. *See Eddings v. Oklahoma,* 455 U.S. 104, 110, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (the sentencer in capital cases must be permitted to consider any relevant mitigating factor) (citing *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)).

Once again, our recent decision in *Mapes* comes close to presenting this issue. In that case, defendant had asked for a "merciful discretion" instruction. We noted, however, that the Supreme Court had upheld an instruction to the effect that the jury should not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."*Mapes,* 171 F.3d at 416 (citing *California v. Brown,* 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987)).

The Ohio Supreme Court rejected petitioner's claim because "sympathy *alone* is not a mitigating factor." *Greer,* 39 Ohio St.3d at 250, 530 N.E.2d at 399. Just because petitioner was allowed to introduce personal characteristics in mitigation does not mean that the prosecution may not "strongly and forcefully argue that such mercy need not be extended, and that the jury should not be roused to a sympathetic reaction." *Id.*

In our view, the Ohio Supreme Court correctly resolved this issue. We affirm the denial of relief.

685*685 d. improper characterization of mitigating factors

During trial, defense counsel introduced evidence of three mitigating factors listed in Ohio Rev.Code § 2929.04(B). However, the prosecution discussed all seven mitigating factors included in the statute. According to petitioner, the jury quite possibly interpreted the lack of a mitigating factor to be aggravating, or at least to have diminished the mitigating factors that did exist. No case law is cited in support other than for the general proposition that courts must minimize the risk that death will be imposed in an arbitrary and capricious manner.

This contention is without merit.

E. Jury Selection

Petitioner contends the trial court made numerous errors in conducting voir dire.

1. excusing two black jurors for cause

He first argues that the court improperly excused two black, female prospective jurors for cause.

> *The first juror, Sarah Reynolds, was excused after she presented a letter from the executive director of the YWCA to the court stating, "Sarah Reynolds is assuming a new assignment with the Central YWCA as of June 10, 1985. The assignment is extremely essential to the YWCA's approaching downtown relocation." The court first made sure that there was no one else to handle her responsibilities. Defense counsel asked for the court to reserve ruling until the juror could ascertain whether someone could replace her. The court declined, however, and excused the juror for cause.*

The second juror, Beverly Peoples, presented a note from a doctor stating, "She is suffering with hypertension and should not be asked to serve as a special juror at this time because of her physical condition." (Mrs. People's worked for the doctor who provided the letter.) The trial court noted on the record that the doctor called the court and "was concerned that the office is not running as smoothly as he would prefer it in Ms. People's absence."

Defense counsel questioned Mrs. Peoples, who conceded that she was under a lot of stress at work. She also admitted that she would prefer not to serve for both health and religious reasons: "I just don't feel that I should be in judgment of someone else regardless of the crime."

The prosecutor noted that the court had already excused two other jurors for hypertension. Over defense counsel's objection, the court excused the juror for medical reasons.

In petitioner's view, "Given the treatment of white jurors, the only logical explanation for the excusal of Mrs. Reynolds and Mrs. Peoples is their race or gender."

The district court noted that this issue was not raised on direct appeal even though it was based on the record and was therefore procedurally defaulted pursuant to the *Perry* rule. We agree with that assessment. Moreover, the trial court had ample, race-neutral reasons to excuse both jurors for cause.

2. juror excused before questioning

Petitioner objects to the fact that the jury commissioner excused a potential juror before the court or counsel had an opportunity to question him based upon a letter from an employer. Even though this prospective juror's race is unknown, petitioner contends that "the trial court's failure to intercede in this situation deprived Mr. Greer of a fair jury trial."

This claim was likewise procedurally defaulted.

686*686 3. questioning of jurors about death penalty

In explaining the duty of the jury in a capital case to a prospective juror, the trial court posed this question:

> *[I]f the jury finds the State did prove beyond a reasonable doubt the aggravating factors outweigh the mitigating factors, you will then be required to recommend to the Court that the Defendant receive the death sentence.*
>
> *If you find yourself in that situation, could you make such a recommendation to the Court? That recommendation being, could you make the recommendation that the Defendant receive the death penalty?*

Petitioner contends that the court misstates the standard, which should be whether a juror would *consider* imposing the death penalty. Other jurors were likewise excused for cause after they expressed reservations about the death penalty.

The Supreme Court has provided the following guidance on this point:

> *We ... take this opportunity to clarify our decision in Witherspoon, and to reaffirm the ... standard from Adams [v. Texas] as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing withWitherspoon's reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.*

Wainwright v. Witt, 469 U.S. at 424-26, 105 S.Ct. 844 (footnotes omitted). Nothing in *Witt*supports petitioner's position that the court must precisely phrase its instructions to a potential juror to include the word "consider." In our view, the court followed the correct standard: it attempted to discern during voir dire whether a prospective juror could follow the law with respect to the death penalty.

F. Jury Instructions

Petitioner raises numerous challenges to jury instructions.

1. Guilt Phase Instructions

a. murder instruction

According to petitioner, the district court erred in giving this instruction: "In the event you find the Defendant not guilty of aggravated murder, you will further continue and consider the lesser included offense of murder." No contemporaneous objection was made, nor was the issue raised on direct appeal. It was, however, included in the post-conviction petition.

687*687 This claim has been procedurally defaulted.

b. instruction on theft

Petitioner feels that the trial court should have instructed the jury on theft as an alternative to aggravated robbery. The record reveals that no request for this instruction was made by counsel and the Ohio Supreme Court therefore reviewed for plain error and found none. *Greer,* 39 Ohio St.3d at 246-47, 530 N.E.2d at 396.

We affirm based upon the reasoning of the Ohio Supreme Court.

2. Penalty Phase Instructions

a. burden of proof instruction

The court instructed the jury as follows:

> *The burden of proof. The State of Ohio has the burden of proving beyond a reasonable doubt that the aggravating circumstances which the Defendant, Paul W. Greer, was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.*
>
> *The Defendant shall have the burden of going forward with evidence of any factors in mitigation of the imposition of the sentence of death.*

No objection was made by counsel. Not only do we find no error with this instruction, it has been procedurally defaulted.

b. non-binding nature of jury recommendation

Petitioner objects to this instruction: "A jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and it is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the Defendant rests upon the Court." Petitioner contends that this instruction runs afoul of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), which stands for the proposition that the State cannot seek to minimize the jury's sense of responsibility for determining the appropriateness of death. However, as discussed earlier, the trial court's instruction represents a correct statement of Ohio law.

c. reasonable doubt

Petitioner contends that, by instructing the jurors on reasonable doubt in the penalty phase, the trial court "established an unconstitutional presumption of the propriety of the death sentence" because the jury had already found petitioner guilty beyond a reasonable doubt at the guilt phase. Once again, no objection was made at trial.

This issue has been procedurally defaulted.

d. outweigh

The court also instructed the jury on how to "weigh" aggravating and mitigating factors:

> *Outweigh. To outweigh means to weigh more than, to be more important than. The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstances outweigh the mitigating factors.*
>
> *It is the quality of the evidence that must be given primary consideration by you. The quality of the evidence may or may not be compensurate [sic] with the quantity of the evidence; that is, the number of witnesses or exhibits presented in this case.*

Once again, no objection was made at trial, nor was the issue raised on direct appeal.

This issue has been procedurally defaulted.

688*688 e. sympathy instruction

The court also told the jury, "You must not be influenced by any consideration of sympathy or prejudice." Petitioner contends that sympathy is a legitimate consideration in capital cases. As already discussed, this court has previously noted "an instruction that the jury should not be swayed by `mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'" is constitutional. *Mapes,* 171 F.3d at 416.

f. quantity of aggravating circumstances

As already quoted, the court told the jury, "It is not only the quantity of aggravating circumstances versus the quantity of the mitigating factors which is to be the basis of your decision. The quality or importance of the mitigating factors and the aggravating circumstances must also be considered." In petitioner's view, because the state only proved one aggravating circumstance, this instruction worked to his disadvantage.

This issue has been procedurally defaulted.

g. unanimity instruction

Petitioner argues that the trial court implied that the jury must be unanimous when imposing a life sentence when, in fact, unanimity is required only for a death verdict.

This issue has been procedurally defaulted.

h. unanimity before considering life

Petitioner next argues that the jury instructions led the jury to believe that it must unanimously reject a death sentence before it could consider life.

This issue has been procedurally defaulted.

i. instructions that the trial court should have given

Petitioner concludes by arguing that the trial court failed to give certain instructions. These instructions were not requested by trial counsel, however, nor were they raised on direct appeal.

Accordingly, we find that they were procedurally defaulted.

G. Victim Impact Statement

Petitioner contends that the trial court received a victim impact statement in violation of the Eighth Amendment. *But see Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (overruling earlier precedent and holding that victim impact statements can play a role in the sentencing phase of a capital trial). This statement was never shown to the jury and nowhere does the trial court refer to it as playing a role in the imposition of petitioner's sentence.

Petitioner first raised this issue in his direct appeal to the Ohio Supreme Court, which rejected the claim for these reasons:

> *Appellant also asserts in proposition of law number fifteen that a victim impact statement was utilized in the trial court's sentencing considerations in violation of the recent pronouncement contained in Booth v. Maryland (1987), 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440.*[5] *This proposition of law was neither briefed nor argued before the court of appeals. It is accordingly waived and our consideration thereof is barred by the doctrine of res judicata.*
>
> *689*689 By way of commentary only, we note that the report at issue was prepared. However, at no time was it ever entered into evidence. It was not given to the jury or specifically commented upon in their presence. The opinion of the trial court is completely devoid of any reference to such report. Accordingly, there has been no showing that the prepared victim impact statement played any part in the sentencing deliberations of either judge or jury. State v. Post (1987), 32 Ohio St.3d 380, 383, 513 N.E.2d 754, 758. Thus, the trial court presumably considered only that evidence which was relevant, probative and competent on the issue. Id.,at 384, 513 N.E.2d at 759.*

Greer, 39 Ohio St.3d at 248, 530 N.E.2d at 398 (footnote added). The district court observed that, because the Ohio Supreme Court found that res judicata barred consideration of the issue, its consideration was outside the scope of federal habeas review.

We affirm the district court.

H. Hearsay

Petitioner claims that certain of the trial court's rulings on hearsay objections were significant enough to implicate the Confrontation Clause. These objections occurred during the testimony of Mrs. Malone, a neighbor with whom Mr. Roth had dined on the evening of his murder.

The prosecution elicited from Mrs. Malone that Mr. Roth intended to evict petitioner. However, a review of the relevant portion of the transcript reveals that, although the trial court overruled the objection, Mrs. Malone was instructed that her testimony must "be of your own personal knowledge."

Second, during a conference in chambers, defense counsel indicated that they wished to pursue the following line of inquiry:

> *We know that Rita Malone made a statement to an investigating officer wherein she stated that she knew on the 27th — she had a conversation with Roth, and Roth told her quote, words to this effect, "Rick is back in town. Lock your doors tonight, and if Rick comes over I'm going to have to kill him."*
>
> *....*
>
> *Our position is that that testimony, if elicited from this witness, goes to show that Roth was afraid of someone other than Paul Greer; he was specifically afraid of Rick, whoever Rick was, and he was so concerned about the presence of Rick that he expressed that in terms of telling a neighbor to be weary [sic] of Rick being back in town.*

The prosecution contended that admission of the statement constituted hearsay. The court agreed, telling defense counsel "If you know there are people [who were in debt to Roth], bring them in."

Before the Ohio Supreme Court, petitioner had contended that the statement, "Rick is back in town," fell under Ohio Rule of Evidence 803(3), which provides a hearsay exception for statements that show an "existing, mental, emotional, or physical condition." The Court rejected this argument:

> *The decedent simply does not state that he was afraid of anyone. Insofar as there may be derivative inferences favorable to appellant, it must be admitted that they would require the jury to speculate and not merely infer. Since appellant did not present his defense upon the basis that Rick McMillan killed the decedent, it cannot be contended that the statements were anything other than irrelevant, possessing a potential for misleading the jury.*

Greer, 39 Ohio St.3d at 244, 530 N.E.2d at 394.

690*690 The district court likewise rejected petitioner's claim, although on somewhat different grounds given the habeas context:

> *It is a long-standing principle that federal courts are to give deference to state trial court decisions regarding the application of state law. Specifically, claims based upon the state trial court's evidentiary rulings are not cognizable in a federal habeas except when the violation of a state's evidentiary rule has resulted in the denial of fundamental fairness, thereby violating due process.*
>
> ....
>
> *Greer asserts that the exclusion denied him his right of due process, yet, he has not convinced this Court that the exclusion was in violation of Ohio's evidentiary rules nor has he articulated how the exclusion of the statement was prejudicial to him by showing how the outcome of his trial or sentencing would have been affected by the inclusion of the statement.*

Memorandum of Opinion, Aug. 7, 1998, at 66-67 (J.A. at 210-11).

Petitioner contends that the admissibility of hearsay testimony "is an issue of constitutional dimension." In support, he cites an unpublished order of this court that only incidentally involves a hearsay issue and certainly does not stand for the proposition advanced by petitioner. *Paris v. Turner,* No. 97-4129, 1999 WL 357815 (6th Cir. May 26, 1999) (order holding that defendant had established cause and prejudice for failure to comply with an Ohio rule of procedure).

Petitioner also argues that "[t]he trial court's disparate treatment of Mr. Roth's statements was so unfair and biased as to deny Mr. Greer his right of due process as guaranteed by the Fifth and Fourteenth Amendments." However, as already noted, his only examples of this bias are culled from the testimony of Mrs. Malone.

We affirm the district court.

I. Constitutionality of Ohio Death Penalty Statute

Petitioner challenges the constitutionality of the Ohio death penalty on a number of fronts.

a. cruel and unusual punishment

He first argues in a general way that the death penalty is cruel and unusual because it is excessive. The Supreme Court has rejected this challenge. *See Gregg v. Georgia,* 428 U.S. 153, 179-82, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

b. arbitrary application

Petitioner next attacks the arbitrary manner in which the death penalty is applied. Among other things, he notes that race seems to play a part in its application, pointing to the disproportionate number of African-Americans on death row.

We deny petitioner habeas relief on this claim because he has failed to demonstrate a constitutionally significant risk of racial bias affecting the Ohio capital sentencing process.

c. not least restrictive punishment

Petitioner contends that the death penalty "is neither the least restrictive nor an effective means of deterrence."

The imposition of the death penalty has been consistently upheld by the Supreme Court. Until the Court holds to the contrary, we are bound by its decisions.

d. failure to require intent to kill

Petitioner argues that Ohio's death penalty scheme is defective because it does not require proof that a defendant 691*691 had a "conscious desire to kill." The Supreme Court has held that such a conscious desire to kill is not required in order to impose the death penalty. *See Tison v. Arizona,* 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987) (major participation in the felony committed, combined with reckless indifference to human life, enough to justify death even though defendant did not have intent to kill).

e. proof of mitigation

Petitioner next objects to the manner in which the Ohio statute allows weighing of the aggravating and mitigating circumstances because it does "not require the state to prove the absence of any mitigating factors or that death is the only appropriate penalty."

The Supreme Court only requires that the statutory scheme requires that the aggravating circumstances outweigh the mitigating ones. *See Blystone v. Pennsylvania,* 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (scheme mandating death penalty if jury finds one aggravating circumstance and no mitigating circumstances satisfies the Eighth Amendment).

f. proportionality review

Although proportionality review is not constitutionally required, once a state adopts such a scheme, it must comport with due process. Ohio law provides that the Supreme

Court shall "consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." Ohio Rev.Code § 2929.05.

We note that petitioner has no Eighth Amendment right to proportionality review. *Coe v. Bell,*161 F.3d 320, 352 (6th Cir.1998). Furthermore, the record fails to support petitioner's contention.

g. international law

Petitioner believes that the death penalty violates the Supremacy Clause because the United States has signed numerous international agreements that prohibit the death penalty.

Until the United States Supreme Court holds to the contrary, we are compelled to deny relief on this ground.

h. insufficient narrowing

Petitioner asserts that the use of the underlying crime, in this case aggravated robbery, as an aggravating circumstance does not "act to narrow the class of murders eligible for the death penalty." In his view, it is wrong to allow the death penalty for felony murder without requiring at least one additional aggravating factor.

Such schemes have been upheld, however. *See Tison, supra.*

i. electrocution cruel and unusual

Finally, petitioner contends that electrocution constitutes cruel and unusual punishment. Not only has the constitutionality of electrocution been consistently upheld, *In re Kemmler,* 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890), but Ohio allows for the choice of lethal injection.

IV.

We conclude that petitioner may not have received, on direct appeal, the assistance of counsel guaranteed by the Sixth Amendment. We therefore reverse in part and remand this cause for an evidentiary hearing so that the district court may evaluate appellate counsels' performance with respect to the penalty phase of the trial in light of the factors we have discussed. 692*692 The district court's judgment in all other respects is affirmed.

[1] The post-conviction petition was filed by Scott Jelen, an assistant state public defender, who had assumed the representation of petitioner from court-appointed appellate counsel.

[2] Although current counsel for petitioner points to a number of errors allegedly committed by state appellate counsel, his brief properly focuses upon the failure to raise ineffective assistance of trial counsel. This position is understandable given the record in this case and also in light of this court's many recent decisions vacating death sentences due to ineffective assistance. *See, e.g., Skaggs v. Parker,* 235 F.3d 261 (6th Cir.2000); *Abdur'Rahman v. Bell,* 226 F.3d 696, 719 (6th Cir.2000) (dissent); *Carter v. Bell,* 218 F.3d 581 (6th Cir.2000); *Byrd v.. Collins,* 209 F.3d 486, 542 (6th Cir.2000) (dissent), *cert. denied,* 531 U.S. 1082, 121 S.Ct. 786, 148 L.Ed.2d 682 (2001);*Mapes, supra; Rickman v. Bell,* 131 F.3d 1150 (6th Cir.1997); *Groseclose v. Bell,* 130 F.3d 1161 (6th Cir.1997);*Austin v. Bell,* 126 F.3d 843 (6th Cir.1997); *Glenn v. Tate,* 71 F.3d 1204 (6th Cir.1995).

[3] He did, however, make a motion prior to voir dire asking the court to require the state to provide a reason each time it used a peremptory to strike a black juror. The prosecutor replied that the Ohio code imposed no such requirement and to do so "would wholly blur the distinction between a challenge for cause and a peremptory challenge." The trial court overruled defense counsel's motion based upon Ohio Rev.Code § 2945.21 and Ohio Criminal Rule 24. The trial occurred one year before the *Batson* decision.

[4] The jury was comprised of ten whites and two blacks. However, simply because blacks are ultimately seated on a jury does not preclude a *Batson* challenge. *United States v. Harris,* 192 F.3d 580, 587 (6th Cir.1999).

[5] The Supreme Court explicitly overruled *Booth* in *Payne, supra.*

Harris v New York

401 U.S. 222

91 S.Ct. 643

28 L.Ed.2d 1

Viven HARRIS

v.

NEW YORK.

No. 206.

Argued Dec. 17, 1970.

Decided Feb. 24, 1971.

Syllabus

Statement inadmissible against a defendant in the prosecution's case in chief because of lack of the procedural safeguards required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, may, if its trustworthiness satisfies legal standards, be used for impeachment purposes to attack the credibility of defendant's trial testimony. See Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503. Pp. 223—226.

25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349, affirmed.

Joel Martin Aurou, White Plains, N.Y., for petitioner.

James J. Duggan, White Plains, N.Y., for respondent.

Sybil H. Landau, New York City, for District Attorney of New York County, amicus curiae.

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted the writ in this case to consider petitioner's claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution's case in chief under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), may not be used to impeach his credibility.

The State of New York charged petitioner in a two-count indictment with twice selling heroin to an undercover police officer. At a subsequent jury trial the officer was the State's chief witness, and he testified as to details of the two sales. A second officer verified collateral details of the sales, and a third offered testimony about the chemical analysis of the heroin.

Petitioner took the stand in his own defense. He admitted knowing the undercover police officer but denied a sale on January 4, 1966. He admitted making a sale of contents of a glassine bag to the officer on January 6 but claimed it was baking powder and part of a scheme to defraud the purchaser.

On cross-examination petitioner was asked seriatim whether he had made specified statements to the police immediately following his arrest on January 7—statements that partially contradicted petitioner's direct testimony at trial. In response to the cross-examination, petitioner testified that he could not remember virtually any of the questions or answers recited by the prosecutor. At the request of petitioner's counsel the written statement from which the prosecutor had read questions and answers in his impeaching process was placed in the record for possible use on appeal; the statement was not shown to the jury.

The trial judge instructed the jury that the statements attributted to petitioner by the prosecution could be considered only in passing on petitioner's credibility and not as evidence of guilt. In closing summations both counsel argued the substance of the impeaching statements. The jury then found petitioner guilty on the second count of the indictment.1 The New York Court of Appeals affirmed in a per curiam opinion, 25 N.Y.2d 175, 303 N.Y.S.2d 71, 250 N.E.2d 349 (1969).

At trial the prosecution made no effort in its case in chief to use the statements allegedly made by petitioner, conceding that they were inadmissible under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The transcript of the interrogation used in the impeachment, but not given to the jury, shows that no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. Petitioner makes no claim that the statements made to the police were coerced or involuntary.

Some comments in the Miranda opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. Miranda barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from Miranda that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

In Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), the Court permitted physical evidence, inadmissible in the case in chief, to be used for impeachment purposes.

'It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine (Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652) would be a perversion of the Fourth Amendment.

'(T)here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government's disability to challenge his credibility.' 347 U.S., at 65, 74 S.Ct., at 356.

It is true that Walder was impeached as to collateral matters included in his direct examination, whereas petitioner here was impeached as to testimony bearing more directly on the crimes charged. We are not persuaded that there is a difference in principle that warrants a result different from that reached by the Court in Walder. Petitioner's testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. See United States v. Knox, 396 U.S. 77, 90 S.Ct. 363, 24 L.Ed.2d 275 (1969); cf. Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973 (1966). Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process.2 Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.

Affirmed.

Mr. Justice BLACK dissents.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL, join, dissenting.

It is conceded that the question-and-answer statement used to impeach petitioner's direct testimony was, under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), constitutionally inadmissible as part of the State's direct case against petitioner. I think that the Constitutional also denied the State the use of the statement on cross-examination to impeach the credibility of petitioner's testimony given in his own defense. The decision in Walder v. United States, 347 U.S. 62, 74 S.Ct. 354, 98 L.Ed. 503 (1954), is not, as the Court today holds, dispositive to the contrary. Rather, that case supports my conclusion.

The State's case against Harris depended upon the jury's belief of the testimony of the undercover agent that petitioner 'sold' the officer heroin on January 4 and again on January 6. Petitioner took the stand and flatly denied having sold anything to the officer on January 4. He countered the officer's testimony as to the January 6 sale with testimony that he had sold the officer two glassine bags containing what appeared to be heroin, but that actually the bags contained only baking powder intended to deceive the officer in order to obtain $12. The statement contradicted petitioner's direct testimony as to the events of both days. The statement's version of the events on January 4 was that the officer had used petitioner as a middleman to buy some heroin from a third person with money furnished by the officer. The version of the events on January 6 was that petitioner had again acted for the officer in buying two bags of heroin from a third person for which petitioner received $12 and a part of the heroin. Thus, it is clear that the statement was used to impeach petitioner's direct testimony not on collateral matters but on matters directly related to the crimes for which he was on trial.1

Walder v. United States was not a case where tainted evidence was used to impeach an accused's direct testimony on matters directly related to the case against him. In Walder the evidence was used to impeach the accused's testimony on matters collateral to the crime charged. Walder had been indicted in 1950 for purchasing and possessing heroin. When his motion to suppress use of the narcotics as illegally seized was granted, the Government dismissed the prosecution. Two years later Walder was indicted for another narcotics violation completely unrelated to the 1950 one. Testifying in his own defense, he said on direct examination that he had never in his life possessed narcotics. On cross-examination he denied that law enforcement officers had seized narcotics from his home two years earlier. The Government was then permitted to introduce the testimony of one of the officers involved in the 1950 seizure, that when he had raided Walder's home at that time he had seized narcotics there. The Court held that on facts where 'the defendant went beyond a mere denial of complicity in the crimes of which he was charged and made the sweeping claim that he had never dealt in or possessed any narcotics,' 347 U.S., at 65, 74 S.Ct., at 356, the exclusionary rule of Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), would not extend to bar the Government from rebutting this testimony with evidence, although tainted, that petitioner had in fact possessed narcotics two years before. The Court was careful, however, to distinguish the situation of an accused whose testimony, as in the instant case, was a 'denial of complicity in the crimes of which he was charged,' that is, where illegally obtained evidence was used to impeach the accused's direct testimony on matters directly related to the case against him. As to that situation, the Court said:

'Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief.' 347 U.S., at 65, 74 S.Ct., at 356.

From this recital of facts it is clear that the evidence used for impeachment in Walder was related to the earlier 1950 prosecution and had no direct bearing on 'the elements

of the case' being tried in 1952. The evidence tended solely to impeach the credibility of the defendant's direct testimony that he had never in his life possessed heroin. But that evidence was completely unrelated to the indictment on trial and did not in any way interfere with his freedom to deny all elements of that case against him. In contrast, here, the evidence used for impeachment, a statement concerning the details of the very sales alleged in the indictment, was directly related to the case against petitioner.

While Walder did not identify the constitutional specifics that guarantee 'a defendant the fullest opportunity to meet the accusation against him * * * (and permit him to) be free to deny all the elements of the case against him,' in my view Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), identified the Fifth Amendment's privilege against self-incrimination as one of those specifics.2 That privilege has been extended against the States. Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). It is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will,' id., at 8, 84 S.Ct., at 1493 (emphasis added). The choice of whether to testify in one's own defense must therefore be 'unfettered,' since that choice is an exercise of the constitutional privilege, Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Griffin held that comment by the prosecution upon the accused's failure to take the stand or a court instruction that such silence is evidence of guilt is impermissible because it 'fetters' that choice—'(i)t cuts down on the privilege by making its assertion costly.' Id., at 614, 85 S.Ct., at 1233. For precisely the same reason the constitutional guarantee forbids the prosecution to use a tainted statement to impeach the accused who takes the stand: The prosecution's use of the tainted statement 'cuts down on the privilege by making its assertion costly.' Ibid. Thus, the accused is denied an 'unfettered' choice when the decision whether to take the stand is burdened by the risk that an illegally obtained prior statement may be introduced to impeach his direct testimony denying complicity in the crime charged against him.3 We settled this proposition in Miranda where we said:

'The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner * * *. (S)tatements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial * * *. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement.' 384 U.S., at 476—477, 86 S.Ct., at 1629 (emphasis added).

This language completely disposes of any distinction between statements used on direct as opposed to cross-examination.4 'An incriminating statement is as incriminating when used to impeach credibility as it is when used as direct proof of guilt and no constitutional distinction can legitimately be drawn.' People v. Kulis, 18 N.Y.2d 318, 324, 274 N.Y.S.2d 873, 876, 221 N.E.2d 541, 543 (1966) (dissenting opinion).

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The 'essential mainstay' of that system, Miranda v. Arizona, 384 U.S., at 460, 86 S.Ct. 1602, is the privilege against self-incrimination, which for that reason has occupied a central place in our jurisprudence

since before the Nation's birth. Moreover, 'we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. * * * All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government * * * must accord to the dignity and integrity of its citizens.' Ibid. These values are plainly jeopardized if an exception against admission of tainted statements is made for those used for impeachment purposes. Moreover, it is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that '(n)othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.' Mapp v. Ohio, 367 U.S. 643, 659, 81 S.Ct. 1684, 1694, 6 L.Ed.2d 1081 (1961). Thus even to the extent that Miranda was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of Miranda cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution. I dissent.

No agreement was reached as to the first count. That count was later dropped by the State.

If, for example, an accused confessed fully to a homicide and led the police to the body of the victim under circumstances making his confession inadmissible, the petitioner would have us allow that accused to take the stand and blandly deny every fact disclosed to the police or discovered as a 'fruit' of his confession, free from confrontation with his prior statements and acts. The voluntariness of the confession would, on this thesis, be totally irrelevant. We reject such an extravagant extension of the Constitution. Compare Killough v. United States, 114 U.S.App.D.C. 305, 315 F.2d 241 (1962).

The trial transcript shows that petitioner testified that he remembered making a statement on January 7; that he remembered a few of the questions and answers; but that he did not 'remember giving too many answers.' When asked about his bad memory, petitioner, who had testified that he was a heroin addict, stated that 'my joints was down and I needed drugs.'

Three of the five judges of the Appellate Division in this case agreed that the State's use of petitioner's illegally obtained statement was an error of constitutional dimension. People v. Harris, 31 A.D.2d 828, 298 N.Y.S.2d 245 (1969). However, one of the three held that the error did not play a meaningful role in the case and was therefore harmless under our decision in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). He therefore joined in affirming the conviction with the two judges who were of the view that there was no constitutional question involved. 31 A.D.2d, at 830, 298 N.Y.S.2d, at 249. I disagree that the error was harmless and subscribe to the reasoning of the dissenting judges, id., at 831—832, 298 N.Y.S.2d, at 250:

'Under the circumstances outlined above, I cannot agree that this error of constitutional dimension was 'harmless beyond a reasonable doubt' (Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705). An error is not harmless if 'there is a reasonable possibility that the evidence complained of might have contributed to the conviction' (Fahy v. Connecticut, 375 U.S. 85, 86—87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171). The burden of showing that a constitutional error is harmless rests with the People who, in this case, have not even attempted to assume that demonstration (Chapman v. California, supra). Surely it cannot be said with any certainty that the improper use of defendant's statement did not tip the scales against him, especially when his conviction rests on the testimony of the same undercover agent whose testimony was apparently less than convincing on the January 4 charge (cf. Anderson v. Nelson, 390 U.S. 523, 525, 88 S.Ct. 1133, 20 L.Ed.2d 81). On the contrary, it is difficult to see how defendant could not have been damaged severely by use of the inconsistent statement in a case which, in the final analysis, pitted his word against the officer's. The judgment should be reversed and a new trial granted.'

The Court of Appeals affirmed per curiam on the authority of its earlier opinion in People v. Kulis, 18 N.Y.2d 318, 274 N.Y.S.2d 873, 221 N.E.2d 541 (1966). Chief Judge Fuld and Judge Keating dissented in Kulis on the ground that Miranda precluded use of the statement for impeachment purposes, 18 N.Y.2d, at 323, 274 N.Y.S.2d, at 875, 221 N.E.2d, at 542.

It is therefore unnecessary for me to consider petitioner's argument that Miranda has overruled the narrow exception of Walder admitting impeaching evidence on collateral matters.

Six federal courts of appeals and appellate courts of 14 States have reached the same result. United States v. Fox, 403 F.2d 97 (CA 2 1968); United States ex rel. Hill v. Pinto, 394 F.2d 470 (CA 3 1968); Breedlove v. Beto, 404 F.2d 1019 (CA 5 1968); Groshart v. United States, 392 F.2d 172 (CA 9 1968); Blair v. United States, 130 U.S.App.D.C. 322, 401 F.2d 387 (1968); Wheeler v. United States, 382 F.2d 998 (CA 10 1967); People v. Barry, 237 Cal.App.2d 154, 46 Cal.Rptr. 727 (1965), cert. denied, 386 U.S. 1024, 87 S.Ct. 1382, 18 L.Ed.2d 464 (1967); Velarde v. People, 171 Colo. 261, 466 P.2d 919 (1970); State v. Galasso, 217 So.2d 326 (Fla.1968); People v. Luna, 37 Ill.2d 299, 226 N.E.2d 586 (1967); Franklin v. State, 6 Md.App. 572, 252 A.2d 487 (1969); People v. Wilson, 20 Mich.App. 410, 174 N.W.2d 79 (1969); State v. Turnbow, 67 N.M. 241, 354 P.2d 533 (1960); State v. Catrett, 276 N.C. 86, 171 S.E.2d 398 (1970); State v. Brewton, 247 Or. 241, 422 P.2d 581, cert. denied, 387 U.S. 943, 87 S.Ct. 2074, 18 L.Ed.2d 1328 (1967); Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968); Spann v. State, 448 S.W.2d 128 (Tex.Cr.App.1969); Cardwell v. Commonwealth, 209 Va. 412, 164 S.E.2d 699 (1968); Gaertner v. State, 35 Wis.2d 159, 150 N.W.2d 370 (1967); see also Kelly v. King, 196 So.2d 525 (Miss.1967). only three state appellate courts have agreed with New York. State v. Kimbrough, 109 N.J.Super, 57, 262 A.2d 232 (1970); State v. Butler, 19 Ohio St.2d 55, 249 N.E.2d 818 (1969); State v. Grant, 77 Wash.2d 47, 459 P.2d 639 (1969).

Massaro v United States

538 U.S. 500 (2003)

MASSARO

v.

UNITED STATES.

No. 01-1559.

Supreme Court of United States.

Argued February 25, 2003.

Decided April 23, 2003.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

501*501 KENNEDY, J., delivered the opinion for a unanimous Court.

Herald Price Fahringer argued the cause for petitioner. With him on the briefs were *Erica T. Dubno* and *Eugene Gressman.*

Sri Srinivasan argued the cause for the United States. With him on the brief were *Solicitor General Olson, Assistant Attorney General Chertoff, Deputy Solicitor General Dreeben,* and*Steven L. Lane.*[*]

502*502 JUSTICE KENNEDY delivered the opinion of the Court.

Petitioner, Joseph Massaro, was indicted on federal racketeering charges, including murder in aid of racketeering, 18 U. S. C. § 1962(d), in connection with the shooting death of Joseph Fiorito. He was tried in the United States District Court for the Southern District of New York. The day before Massaro's trial was to begin, prosecutors learned of what appeared to be a critical piece of evidence: a bullet allegedly recovered from the

car in which the victim's body was found. They waited for several days, however, to inform defense counsel of this development. Not until the trial was underway and the defense had made its opening statement did they make this disclosure. After the trial court and the defense had been informed of the development but still during the course of trial, defense counsel more than once declined the trial court's offer of a continuance so the bullet could be examined. Massaro was convicted and sentenced to life imprisonment.

On direct appeal new counsel for Massaro argued the District Court had erred in admitting the bullet in evidence, but he did not raise any claim relating to ineffective assistance of trial counsel. The Court of Appeals for the Second Circuit affirmed the conviction. Judgt. order reported at 57 F. 3d 1063 (1995).

Massaro later filed a motion under 28 U. S. C. § 2255, seeking to vacate his conviction. As relevant here, he claimed that his trial counsel had rendered ineffective assistance in failing to accept the trial court's offer to grant a continuance. The United States District Court for the Southern District of New York found this claim procedurally defaulted because Massaro could have raised it on direct appeal.

The Court of Appeals for the Second Circuit affirmed. 27 Fed. Appx. 26 (1995). The court acknowledged that ineffective-assistance claims usually should be excused from procedural-default rules because an attorney who handles both trial and appeal is unlikely to raise an ineffective-assistance 503*503 claim against himself. Nevertheless, it adhered to its decision in*Billy-Eko* v. *United States,* 8 F. 3d 111 (1993). Under *Billy-Eko,* when the defendant is represented by new counsel on appeal and the ineffective-assistance claim is based solely on the record made at trial, the claim must be raised on direct appeal; failure to do so results in procedural default unless the petitioner shows cause and prejudice. Finding that Massaro was represented by new counsel on appeal, that his trial counsel's ineffectiveness was evident from the record, and that he had failed to show cause or prejudice, the Court of Appeals held him procedurally barred from bringing the ineffective-assistance claim on collateral review.

We granted certiorari. 536 U. S. 990 (2002). Petitioner now urges us to hold that claims of ineffective assistance of counsel need not be raised on direct appeal, whether or not there is new counsel and whether or not the basis for the claim is apparent from the trial record. The Federal Courts of Appeals are in conflict on this question, with the Seventh Circuit joining the Second Circuit, see *Guinan* v. *United States,* 6 F. 3d 468 (CA7 1993), and 10 other Federal Courts of Appeals taking the position that there is no procedural default for failure to raise an ineffective-assistance claim on direct appeal, see, *e. g., United States* v. *Cofske,* 157 F. 3d 1, 2 (CA1 1998), cert. denied, 526 U. S. 1059 (1999); *United States* v. *Jake,* 281 F. 3d 123, 132, n. 7 (CA3 2002); *United States* v. *King,* 119 F. 3d 290, 295 (CA4 1997); *United States* v. *Rivas,*157 F. 3d 364, 369 (CA5 1998); *United States* v. *Neuhausser,* 241 F. 3d 460, 474 (CA6), cert. denied, 534 U. S. 879 (2001); *United States* v. *Evans,* 272 F. 3d 1069, 1093 (CA8 2001), cert. denied, 535 U. S. 1029 (2002); *United States* v. *Rewald,* 889 F. 2d 836, 859 (CA9 1989), cert. denied, 498 U. S. 819 (1990); *United States* v. *Galloway,* 56 F. 3d 1239, 1240 (CA10 1995) (en banc); *United States* v. *Griffin,* 699 F. 2d 1102, 1107-1109 (CA11 1983); *United States* v.*Richardson,* 167 F. 3d 621,

626 (CADC), cert. denied, 528 U. S. 895 (1999). 504*504 We agree with the majority of the Courts of Appeals, and we reverse.

The background for our discussion is the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice. See*United States* v. *Frady,* 456 U. S. 152, 167-168 (1982); *Bousley* v. *United States,* 523 U. S. 614, 621-622 (1998). The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. We conclude that requiring a criminal defendant to bring ineffective-assistance-of-counsel claims on direct appeal does not promote these objectives.

As Judge Easterbrook has noted, "[r]ules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time." *Guinan, supra,* at 474(concurring opinion). Applying the usual procedural-default rule to ineffective-assistance claims would have the opposite effect, creating the risk that defendants would feel compelled to raise the issue before there has been an opportunity fully to develop the factual predicate for the claim. Furthermore, the issue would be raised for the first time in a forum not best suited to assess those facts. This is so even if the record contains some indication of deficiencies in counsel's performance. The better-reasoned approach is to permit ineffective-assistance claims to be brought in the first instance in a timely motion in the district court under § 2255. We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.

In light of the way our system has developed, in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance. When an ineffective-assistance claim is brought on direct appeal, appellate 505*505 counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under *Strickland* v.*Washington,* 466 U. S. 668 (1984), a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. See *Guinan, supra,* at 473 (Easterbrook, J., concurring) ("No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did.... Or it may turn out that counsel's overall performance was sufficient despite a glaring omission ..."). The trial record may contain no evidence of alleged errors of omission, much less the reasons underlying them. And evidence of alleged conflicts of interest might be found only in attorney-client correspondence or other documents that, in the typical criminal trial, are not introduced. See, *e. g., Billy-Eko, supra,* at 114.

Without additional factual development, moreover, an appellate court may not be able to ascertain whether the alleged error was prejudicial.

Under the rule we adopt today, ineffective-assistance claims ordinarily will be litigated in the first instance in the district court, the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial. The court may take testimony from witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance. 506*506 See, *e. g., Griffin,* 699 F. 2d, at 1109 (In a § 2255 proceeding, the defendant "has a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created"); *Beaulieu* v. *United States,* 930 F. 2d 805 (CA10 1991) (partially rev'd on other grounds, *United States* v. *Galloway,* 56 F. 3d 1239 (CA10 1995). In addition, the § 2255 motion often will be ruled upon by the same district judge who presided at trial. The judge, having observed the earlier trial, should have an advantageous perspective for determining the effectiveness of counsel's conduct and whether any deficiencies were prejudicial.

The Second Circuit's rule creates inefficiencies for courts and counsel, both on direct appeal and in the collateral proceeding. On direct appeal it puts counsel into an awkward position vis-à-vis trial counsel. Appellate counsel often need trial counsel's assistance in becoming familiar with a lengthy record on a short deadline, but trial counsel will be unwilling to help appellate counsel familiarize himself with a record for the purpose of understanding how it reflects trial counsel's own incompetence.

Subjecting ineffective-assistance claims to the usual cause-and-prejudice rule also would create perverse incentives for counsel on direct appeal. To ensure that a potential ineffective-assistance claim is not waived — and to avoid incurring a claim of ineffective counsel at the appellate stage — counsel would be pressured to bring claims of ineffective trial counsel, regardless of merit.

Even meritorious claims would fail when brought on direct appeal if the trial record were inadequate to support them. Appellate courts would waste time and resources attempting to address some claims that were meritless and other claims that, though colorable, would be handled more efficiently if addressed in the first instance by the district court on collateral 507*507review. See, *e. g., United States* v. *Galloway, supra,* at 1241 ("threat of ... procedural bar has doubtless resulted in many claims being asserted on direct appeal only to protect the record ... unnecessarily burden[ing] both the parties and the court ..."). This concern is far from speculative. The Court of Appeals for the Second Circuit, in light of its rule applying procedural default to ineffective-assistance claims, has urged counsel to "err on the side of inclusion on direct appeal," *Billy-Eko,* 8 F. 3d, at 116.

On collateral review, the Second Circuit's rule would cause additional inefficiencies. Under that rule a court on collateral review must determine whether appellate counsel is "new." Questions may arise, for example, about whether a defendant has retained

new appellate counsel when different lawyers in the same law office handle trial and appeal. The habeas court also must engage in a painstaking review of the trial record solely to determine if it was sufficient to support the ineffectiveness claim and thus whether it should have been brought on direct appeal. A clear rule allowing these claims to be brought in a proceeding under § 2255, by contrast, will eliminate these requirements. Although we could "require the parties and the district judges to search for needles in haystacks — to seek out the rare claim that could have been raised on direct appeal, and deem it waived," *Guinan,* 6 F. 3d, at 475 (Easterbrook, J., concurring) — we do not see the wisdom in requiring a court to spend time on exercises that, in most instances, will produce no benefit. It is a better use of judicial resources to allow the district court on collateral review to turn at once to the merits.

The most to be said for the rule in the Second Circuit is that it will speed resolution of some ineffective-assistance claims. For the reasons discussed, however, we think few such claims will be capable of resolution on direct appeal and thus few will benefit from earlier resolution. And the benefits of the Second Circuit's rule in those rare instances are outweighed by the increased judicial burden the rule would 508*508 impose in many other cases, where a district court on collateral review would be forced to conduct the cause-and-prejudice analysis before turning to the merits. The Second Circuit's rule, moreover, does not produce the benefits of other rules requiring claims to be raised at the earliest opportunity — such as the contemporaneous objection rule — because here, raising the claim on direct appeal does not permit the trial court to avoid the potential error in the first place.

A growing majority of state courts now follow the rule we adopt today. For example, the Supreme Court of Pennsylvania recently changed its position to hold that "a claim raising trial counsel ineffectiveness will no longer be considered waived because new counsel on direct appeal did not raise a claim related to prior counsel's ineffectiveness." *Commonwealth* v. *Grant,*572 Pa. 48, 67, 813 A. 2d 726, 738 (2002); see also *id.,* at 62-67, and n. 13, 813 A. 2d, at 735-738, and n. 13 (cataloging other States' case law adopting this position).

Although the Government now urges us to adopt the rule of the Court of Appeals for the Second Circuit, the Government took the opposite approach in some previous cases, arguing not only that claims of ineffective assistance of counsel could be brought in the first instance in a motion under § 2255, but that they must be brought in such a motion proceeding and not on direct appeal. See, *e. g., United States* v. *Cronic,* 466 U. S. 648, 667, n. 42 (1984). We do not go this far. We do not hold that ineffective-assistance claims must be reserved for collateral review. There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte.* In those cases, certain questions may arise in subsequent proceedings under § 2255 concerning the conclusiveness of determinations made on the ineffective-assistance claims raised on direct appeal; 509*509 but these matters of implementation are not before us. We do hold that failure to raise an ineffective-assistance-of-counsel

claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255.

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

It is so ordered.

[*] *David A. Lewis* and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

MCL 750.520b

750.520b Criminal sexual conduct in the first degree; felony; consecutive terms.

Sec. 520b.

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

(b) That other person is at least 13 but less than 16 years of age and any of the following:

(i) The actor is a member of the same household as the victim.

(ii) The actor is related to the victim by blood or affinity to the fourth degree.

(iii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(iv) The actor is a teacher, substitute teacher, or administrator of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled.

(v) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

(d) The actor is aided or abetted by 1 or more other persons and either of the following circumstances exists:

(i) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(ii) The actor uses force or coercion to accomplish the sexual penetration. Force or coercion includes, but is not limited to, any of the circumstances listed in subdivision (f).

(e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

(g) The actor causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(h) That other person is mentally incapable, mentally disabled, mentally incapacitated, or physically helpless, and any of the following:

(i) The actor is related to the victim by blood or affinity to the fourth degree.

(ii) The actor is in a position of authority over the victim and used this authority to coerce the victim to submit.

(2) Criminal sexual conduct in the first degree is a felony punishable as follows:

(a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.

(b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

(c) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age.

(d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.

(3) The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.

History: Add. 1974, Act 266, Eff. Apr. 1, 1975 ;-- Am. 1983, Act 158, Eff. Mar. 29, 1984 ;-- Am. 2002, Act 714, Eff. Apr. 1, 2003 ;-- Am. 2006, Act 165, Eff. Aug. 28, 2006 ;-- Am. 2006, Act 169, Eff. Aug. 28, 2006 ;-- Am. 2007, Act 163, Eff. July 1, 2008

Constitutionality: The provision in the criminal sexual conduct statute which permits elevation of a criminal sexual conduct offense from a lesser to a higher degree on the basis of proof of personal injury to the victim in the form of mental anguish is not unconstitutionally vague. People v Petrella, 424 Mich 221; 380 NW2d 11 (1985).

Compiler's Notes: Section 2 of Act 266 of 1974 provides:“Saving clause.“All proceedings pending and all rights and liabilities existing, acquired, or incurred at the time this amendatory act takes effect are saved and may be consummated according to the law in force when they are commenced. This amendatory act shall not be construed to affect any prosecution pending or begun before the effective date of this amendatory act.”

MCL 750.520d

750.520d Criminal sexual conduct in the third degree; felony.

Sec. 520d.

(1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:

(a) That other person is at least 13 years of age and under 16 years of age.

(b) Force or coercion is used to accomplish the sexual penetration. Force or coercion includes but is not limited to any of the circumstances listed in section 520b(1)(f)(i) to (v).

(c) The actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless.

(d) That other person is related to the actor by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter. It is an affirmative defense to a prosecution under this subdivision that the other person was in a position of authority over the defendant and used this authority to coerce the defendant to violate this subdivision. The defendant has the burden of proving this defense by a preponderance of the evidence. This subdivision does not apply if both persons are lawfully married to each other at the time of the alleged violation.

(e) That other person is at least 16 years of age but less than 18 years of age and a student at a public school or nonpublic school, and either of the following applies:

(i) The actor is a teacher, substitute teacher, or administrator of that public school, nonpublic school, school district, or intermediate school district. This subparagraph does not apply if the other person is emancipated or if both persons are lawfully married to each other at the time of the alleged violation.

(ii) The actor is an employee or a contractual service provider of the public school, nonpublic school, school district, or intermediate school district in which that other person is enrolled, or is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(f) That other person is at least 16 years old but less than 26 years of age and is receiving special education services, and either of the following applies:

(i) The actor is a teacher, substitute teacher, administrator, employee, or contractual service provider of the public school, nonpublic school, school district, or intermediate school district from which that other person receives the special education services. This subparagraph does not apply if both persons are lawfully married to each other at the time of the alleged violation.

(ii) The actor is a volunteer who is not a student in any public school or nonpublic school, or is an employee of this state or of a local unit of government of this state or of

the United States assigned to provide any service to that public school, nonpublic school, school district, or intermediate school district, and the actor uses his or her employee, contractual, or volunteer status to gain access to, or to establish a relationship with, that other person.

(2) Criminal sexual conduct in the third degree is a felony punishable by imprisonment for not more than 15 years.

History: Add. 1974, Act 266, Eff. Apr. 1, 1975 ;-- Am. 1983, Act 158, Eff. Mar. 29, 1984 ;-- Am. 1996, Act 155, Eff. June 1, 1996 ;-- Am. 2002, Act 714, Eff. Apr. 1, 2003 ;-- Am. 2007, Act 163, Eff. July 1, 2008

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McMeans v Brigano

228 F.3d 674 (6th Cir. 2000)

Jerry McMeans, Petitioner-Appellant,

v.

Anthony J. Brigano, Warden,Respondent-Appellee.

No. 98-4096

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Argued: June 21, 2000

Decided and Filed: October 5, 2000

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 97-00054--Sandra S. Beckwith.[Copyrighted Material Omitted][Copyrighted Material Omitted]

William R. Gallagher, Cincinnati, Ohio, for Appellant.

Stuart W. Harris, Todd R. Marti, OFFICE OF THE ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

Before: RYAN, SILER, and CLAY, Circuit Judges.

RYAN, J., delivered the opinion of the court, in which SILER, J., joined. CLAY, J. (pp. 687-89), delivered a separate opinion concurring in part and dissenting in part.

OPINION

RYAN, Circuit Judge.

Before us is the appeal from the district court's order dismissing the habeas petition of Jerry McMeans, an Ohio prisoner convicted of raping his stepdaughter. McMeans asserts that the district court erred when it held that he had procedurally defaulted on his Confrontation Clause, Brady, and juror bias claims. He also argues that the district court erred when it held that the Ohio court "reasonably applied" federal law in deciding that trial counsel rendered constitutionally adequate assistance. We will affirm.

I.

During the latter half of the 1980s, McMeans lived with his wife, Twila, and her children from a previous marriage, Donald Jr., Jerry, Misty, and Wendy. According to Wendy, one night in the summer of 1987, Wendy's intoxicated mother summoned her upstairs to a bedroom and ordered her to have sexual intercourse with her stepfather, an order Wendy allegedly followed. Wendy also asserted that after this initial encounter McMeans forced her to have sexual intercourse with him or perform fellatio on him several more times, sometimes for money. McMeans denies having had any sexual relationship with Wendy.

At some point during this period, Wendy informed her father, Donald Self, of McMeans's alleged sexual misconduct. Donald contacted Wendy's mother and she allegedly assured him that the problem would not persist. Wendy later informed Donald that McMeans's alleged misbehavior continued and, soon thereafter, Donald sought the assistance of Franklin County Children Services (FCCS). At about the same time, Wendy also informed her fifth grade teacher of McMeans's alleged abuse. Wendy's teacher reported Wendy's allegations to FCCS.

After receiving these reports, FCCS took Wendy into its custody. At approximately the same time, McMeans lost his job and was evicted from his home in Columbus, Ohio. He then moved with his wife and the remainder of his adopted family to Wisconsin.

After a Franklin County grand jury charged McMeans with six counts of rape, Ohio authorities eventually located him in Wisconsin and procured his return to face criminal charges.

McMeans alleges that during voir dire it became apparent that two prospective jurors would be biased. According to McMeans, juror Hunt was the mother of a rape victim and juror Grey's daughter had been murdered. McMeans also asserts that Grey was friends with the "chief county prosecutor." McMeans claims that, despite his personal objections to these jurors, his trial counsel did not employ unused peremptory challenges to remove Hunt and Grey. There is no record support for McMeans's

assertions, however, because his trial counsel waived theright to have voir dire proceedings transcribed.

At trial, Wendy testified that McMeans had raped her several times and McMeans denied those charges. The theory of McMeans's defense was that Wendy had fabricated a story of sexual abuse in order that her father would gain physical custody of her. Aside from the testimony of Wendy and McMeans, several other witnesses testified that Wendy had informed them of McMeans's alleged misbehavior.

The only physical evidence presented at trial was the testimony of a doctor from FCCS who had examined Wendy. That doctor testified that Wendy had scarring and "irregularities" on her hymen, which possibly indicated sexual activity.

On the second day of trial, the prosecution gave the trial judge portions of reports from FCCS for in camera review. The reports noted that Wendy had accused two other men of sexually assaulting her after the petitioner's alleged abuse. After reviewing the file, the trial judge informed McMeans's counsel of Wendy's subsequent rape accusations, but warned counsel that he did not think such evidence was admissible under Ohio law. The following day, when McMeans's counsel attempted to question Wendy and her father about the subsequent rape accusations, the trial judge ruled that such examination was impermissible under the Ohio rape shield law.

After the trial judge dismissed one of the counts against McMeans, the jury found McMeans guilty of the five remaining counts. The trial judge sentenced McMeans to five life sentences.

McMeans timely appealed his conviction with the assistance of appointed counsel. Counsel argued:

[(1)]THE TRIAL COURT ERRED IN ADMITTING . . . EVIDENCE . . . OF PRIOR BAD ACTS . . . .

[(2)]THE TRIAL COURT ERRED BY EXCLUDING EVIDENCE OF PROSECUTRIX'S PRIOR ACCUSATIONS OF RAPE AGAINST OTHERS IN VIOLATION OF APPELLANT'S RIGHT TO A FAIR TRIAL, AND TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

[(3)]THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S MOTION TO DISMISS [THE CHARGES AGAINST HIM WHICH WERE IMPERMISSIBLY VAGUE].

[(4)]APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION.

After submitting those arguments, McMeans filed a supplemental brief, pro se, which asserted, among other claims, that the prosecution failed to comply with the duties recognized by the Supreme Court in Brady v. Maryland, 373 U.S. 83 (1963). On February 21, 1989, the Ohio Court of Appeals struck McMeans's brief, noting that he had the

option of dismissing his appointed counsel and relying upon his pro se brief. McMeans did not dismiss his appointed counsel.

The Ohio Court of Appeals affirmed McMeans's conviction on August 23, 1990. As to McMeans's contention that trial counsel should have been allowed to pursue inquiry into Wendy's prior rape accusations, the appellate court stated:

This court finds that the [Ohio] rape shield law is not applicable to this case since the evidence concerning whether or not Wendy fabricated other rape charges does not address any aspect of her sexual activity. The evidence merely addresses whether or not Wendy is a credible witness. However, before a trialcourt may admit evidence that the victim had made prior accusations of rape against others, the trial court must be satisfied that the prior accusations were, in fact, false. . . .

In this case, there is no evidence in the record that Wendy's prior accusations were false. . . . Had appellant wished to proffer evidence of the falsity of the prior accusations, appellant could have availed himself of an in-camera hearing . . . . Since appellant did not, this court cannot find that the trial court abused its discretion in declining to permit appellant's counsel to cross-examine Wendy on her prior accusations of rape. Accordingly, appellant's second assignment of error is not well-taken.

Regarding McMeans's ineffective assistance claim, the court held that "none of the things appellant asserts as ineffective in and of themselves demonstrates ineffectiveness on the face of the record and, most certainly, do not demonstrate that the result would have been different." McMeans filed a motion for reconsideration of that decision, which the court of appeals denied on November 6, 1990.

McMeans then filed a pro se appeal to the Ohio Supreme Court, claiming four errors in his trial including the claim that his rights guaranteed by the Confrontation Clause had been violated. The Ohio Supreme Court declined to hear the appeal.

While his direct appeal was pending, McMeans filed a pro se motion for a new trial, arguing ineffective assistance of trial counsel and that the prosecution failed to fulfill its Brady obligations. After the Ohio Court of Appeals affirmed his conviction, the trial court rejected McMeans's motion, holding that such motion was untimely and, timing aside, that his arguments had been considered and rejected at the appellate level.

McMeans unsuccessfully appealed the trial court's decision. The Ohio Court of Appeals affirmed, ruling that McMeans's motion was untimely. McMeans then appealed to the Ohio Supreme Court, which declined to exercise its jurisdiction over his appeal.

In November 1991, McMeans filed his first habeas petition in federal court, arguing that the prosecution failed to disclose exculpatory evidence and that his Confrontation Clause rights had been violated. While his petition was pending, the Ohio Supreme Court ruled in State v. Murnahan, 584 N.E.2d 1204 (Ohio 1992), that an ineffective assistance of appellate counsel claim could be raised in a delayed motion for reconsideration of a direct appeal. Given this ruling, McMeans moved to dismiss his

petition without prejudice in order that he might file a Murnahan motion. The district court granted this request.

McMeans then submitted his Murnahan motion and argued that his appellate counsel grossly erred in failing to raise his Confrontation Clause, Brady, and juror bias claims. The Ohio Court of Appeals ruled, first, that the decision not to raise the juror bias claim was likely "appellate strategy" and the court was not prepared to gainsay that tactical decision. As to McMeans's argument that appellate counsel should have presented a Brady claim, that court stated:

The trial court in this case reviewed the childrens' [sic] services file and disclosed the appropriate information to both parties. It was as a result of this in camera inspection that appellant became aware of the information he now asserts was not properly provided to him . . . .

This court has previously addressed the issue of the prior rape reports and found that the trial court did not err in excluding this evidence from the trial. . . . As a result, this court cannot find that appellate counsel was ineffective in failing to raise the issues appellant now raises as assignments of error in his previous appeal.

Finally, the appellate court ruled that appellate counsel had, in fact, raised aConfrontation Clause claim in McMeans's direct appeal and that claim had been rejected. McMeans appealed that decision to the Ohio Supreme Court which, for a third time, declined to hear his case.

In August 1993, McMeans filed his second federal habeas petition. The district court dismissed McMeans's petition without prejudice after the respondent argued that McMeans should be required to seek relief under Ohio's postconviction procedure. When the respondent presented its argument in support of dismissal, it noted that if McMeans chose to file an Ohio postconviction motion, respondent would argue that McMeans had procedurally defaulted on his constitutional claims.

In April 1995, McMeans, acting pro se, requested postconviction relief from the Ohio courts. Ohio Rev. Code Ann. § 2953.21. In that motion, McMeans argued that his appointed trial counsel provided constitutionally ineffective assistance by failing to remove the two allegedly biased jurors. The trial court denied McMeans's motion, stating: "[T]rial counsel's decision not to exclude these jurors could have been based upon other favorable answers that these jurors gave. Even barring that, this claim should have been raised on appeal and is now res judicata." The Ohio Court of Appeals affirmed. The Supreme Court of Ohio declined to hear McMeans's appeal.

In March 1996, McMeans, still acting pro se, filed a "delayed motion for a new trial based on newly discovered evidence," arguing that Ohio denied him his Sixth Amendment right to be tried by an impartial jury. The trial court denied this motion, ruling that the evidence presented by McMeans did not demonstrate the necessity of a new trial. The Ohio Court of Appeals affirmed.

On January 21, 1997, McMeans, now represented by counsel, filed his third federal habeas petition. He argued that juror bias denied him a fair trial, that trial and appellate counsel provided ineffective assistance, that the prosecution failed to turn over exculpatory evidence in a timely manner, and that the limitation on cross-examination of Wendy Self violated rights guaranteed by the Confrontation Clause.

The district court dismissed the petition. That court ruled that McMeans had procedurally defaulted on his Brady and juror bias claims. The court then held that McMeans failed to demonstrate ineffective assistance of appellate counsel, which could serve as "cause" to review those claims. As to McMeans's ineffective assistance of trial counsel claim, the district court ruled that "[t]he state court decision rejecting petitioner's claim of ineffective assistance of trial counsel was neither contrary to nor unreasonable in light of clearly established federal law." Finally, the district court ruled that McMeans had not "fairly presented" the Confrontation Clause issue to the Ohio courts.

McMeans filed a notice of appeal and a petition for certificate of appealability. This court certified his ineffective assistance of trial counsel, biased juror, Brady, and Confrontation Clause claims.

II.

With each issue presented by the petitioner, the critical question is whether he committed procedural default in the Ohio courts on the claims or the particular arguments he presents. If that is the case, the federal courts do not have jurisdiction, absent a showing of "cause" and "prejudice" to consider those claims. Murray v. Carrier, 477 U.S. 478, 485 (1986).

A.

In his first assignment of error, the petitioner claims he was denied his constitutional right to confront his accuser with her subsequent rape accusations. The district court held that it could not consider the merits of this claim because the petitioner failed to "fairly present" it to theOhio courts. We hold that the district court did not err.

The federal courts do not have jurisdiction to consider a claim in a habeas petition that was not "fairly presented" to the state courts. Franklin v. Rose, 811 F.2d 322, 324-25 (6th Cir. 1987). A claim may only be considered "fairly presented" if the petitioner asserted both the factual and legal basis for his claim to the state courts. Id. at 325. This court has noted four actions a defendant can take which are significant to the determination whether a claim has been "fairly presented": (1) reliance upon federal cases employing constitutional analysis; (2) reliance upon state cases employing federal constitutional analysis; (3) phrasing the claim in terms of constitutional law or in terms sufficiently particular to allege a denial of a specific constitutional right; or (4) alleging facts well within the mainstream of constitutional law. See id. at 326. General allegations of the denial of rights to a "fair trial" and "due process" do not "fairly present" claims that specific constitutional rights were violated. Petrucelli v. Coombe, 735 F.2d 684, 688-89 (2d Cir. 1984).

The petitioner argues that the district court erred because the Ohio Court of Appeals stated that "appellate counsel assigned [the confrontation] issue as error [on direct appeal]" when that court rendered its decision on the Murnahan motion. Citing Ylst v. Nunnemaker, 501 U.S. 797 (1991), the petitioner contends that, in deciding whether the Ohio courts reached the merits of his federal claim, the federal courts must "look through to the last state court rendering a judgment" on that claim. He asserts that Ylst requires us to take the statement in the Murnahan-motion opinion literally and hold that the district court erred.

In the alternative, the petitioner argues that, even discounting the Murnahan-motion opinion, his direct appeal "fairly presented" that claim. The petitioner maintains that his appellate counsel took most of the actions this court deemed significant to the "fair presentation" analysis in Franklin. First, he argues that he presented his Confrontation Clause claim by citing the United States Constitution, "due process," and his right to a "fair trial." Second, he notes that some of the state precedent cited in his appellate brief contained analysis of the Confrontation Clause. Third, he maintains that the preclusion of inquiry into the subsequent rape accusations should have, by itself, alerted the Ohio Court of Appeals to a possible violation of the Confrontation Clause.

The petitioner argues finally that, even if his claim is procedurally defaulted, this court may review the claim on the merits because the ineffective assistance of his appellate counsel was the "cause" of the default. Citing unpublished opinions from this court dealing with examination into prior accusations of rape, the petitioner contends that his Confrontation Clause claim was a "dead bang winner" and his appointed counsel, therefore, committed a gross error in failing to assert it.

The respondent argues that the statement from the Murnahan-motion opinion is, at best, ambiguous and, therefore, this court should look to the substance of the petitioner's direct appeal. The respondent contends that on direct appeal the petitioner argued only that the trial judge erroneously applied the Ohio rape shield law when he limited inquiry into the subsequent rape accusations. The respondent also notes that the petitioner's appellate brief did not cite any federal precedent and that most of the state cases cited by the petitioner dealt solely with Ohio evidence law.

As to the petitioner's alternative argument that the ineffective assistance of appellate counsel excuses his procedural default, the respondent contends that appellate counsel made a valid strategic choice in excluding the Confrontation Clause claim.

We are of the opinion that the petitioner did not "fairly present" his claim. In his direct appeal, the petitioner focused entirely on the applicability of Ohio's rape shield law. Ohio Rev. Code Ann. § 2907.02. He did not cite any federal precedent and his appellate brief only alleges that the trial judge's limitation on cross-examination denied him a "fair trial" and "due process." As this court recognized in Franklin, this is not sufficient to alert a state court that an appellant is asserting the violation of a specific constitutional right. While it is true that a few of the state cases cited by the petitioner on direct appeal contain references to the Confrontation Clause, the majority of those cases were concerned with Ohio evidence law. We do not think that a few brief references to the

Confrontation Clause in isolated cases is enough to put state courts on notice that such a claim had been asserted. Thus, we hold that the petitioner failed to "fairly present" his Confrontation Clause claim to the Ohio courts.

We are not persuaded that, pursuant to Ylst, any statements in the Murnahan-motion opinion require a different conclusion. Giving the petitioner the benefit of the doubt, the most we can say is that the Ohio Court of Appeals erred in its Murnahan opinion. While we recognize that, in Ylst, the Supreme Court stated that "[i]f the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available," see Ylst, 501 U.S. at 801, we do not think this statement is an invitation to the federal courts to seize upon mistakes by state courts to review procedurally defaulted claims. We reach this conclusion partly because of the respect federal courts owe to state courts which have a responsibility equivalent to that of the federal courts to guard constitutional rights. See generally Rose v. Lundy, 455 U.S. 509, 522 (1982). Thus, we think it is both prudent and accurate to recognize that the statement relied upon by the petitioner in the Murnahan-motion opinion is a mistake. Consequently, we hold that the Murnahan-motion opinion has no effect on our conclusion that the petitioner did not "fairly present" his claim to the Ohio courts.

We hold next that the alleged error of appellate counsel in failing to raise the petitioner's Confrontation Clause claim does not constitute "cause" to excuse the petitioner's procedural default. In order to succeed on a claim of ineffective assistance of appellate counsel, a petitioner must show errors so serious that counsel was scarcely functioning as counsel at all and that those errors undermine the reliability of the defendant's convictions. Strickland v. Washington, 466 U.S. 668, 687 (1984); Rust v. Zent, 17 F.3d 155, 161-62 (6th Cir. 1994). Strategic choices by counsel, while not necessarily those a federal judge in hindsight might make, do not rise to the level of a Sixth Amendment violation. Jones v. Barnes, 463 U.S. 745, 750-54 (1983). We note that, en route to reversing an opinion from this court, the Supreme Court has recently reemphasized that "[n]ot just any deficiency in counsel's performance" is sufficient to excuse procedural default; "the assistance must have been so ineffective as to violate the Federal Constitution." Edwards v. Carpenter, 120 S. Ct. 1587, 1591 (2000).

Contrary to the petitioner's assertions, his Confrontation Clause claim is not a "dead bang winner." The unpublished cases cited by the petitioner, which of course have limited precedential force, Boggs v. Brigano, No. 94-4000, 1996 WL 160822 (6th Cir. Apr. 4, 1996), and Lemmon v. State of Ohio, No. 92-3284, 1993 WL 15164 (6th Cir. Jan. 22, 1993), do not stand for the proposition that the preclusion of cross-examination into prior rape accusations is a per se violation of the Confrontation Clause. Moreover, even if those caseswere as strong as petitioner maintains, we note that the petitioner's appellate counsel would not have had the benefit of that precedent when he filed the petitioner's appellate brief in 1990. In fact, when the petitioner filed his direct appeal, there was precedent to the effect that precluding inquiry into unrelated rape accusations does not offend the Confrontation Clause. See, e.g., United States v. Bartlett, 856 F.2d 1071, 1087-89 (8th Cir. 1988). The petitioner's appellate counsel may well have examined these cases and decided that there were stronger arguments than

the Confrontation Clause claim. Thus, while a different lawyer might have done otherwise, the decision of the petitioner's appellate counsel not to assert his Confrontation Clause claim was not unreasonable and affords no basis for us to conclude that he was not functioning as "counsel" in the Sixth Amendment sense. See Jones, 463 U.S. at 750-54. Consequently, we are without jurisdiction to review the merits of the petitioner's arguments.

B.

The petitioner argues next that the district court erred when it held that he procedurally defaulted on his Brady claim. The petitioner presents three purported flaws in the district court's procedural default holding. First, he proposes that there exists a constitutional right to submit a pro se appellate brief on direct appeal. It is the petitioner's theory that the denial of this alleged right constitutes "cause" to excuse his procedural default.

Second, the petitioner argues that he implicitly presented his Brady claim in his Murnahan motion. He asserts that, when the Ohio Court of Appeals ruled on the substance of his ineffective assistance of appellate counsel claim, that court had to analyze the merits of his Brady claim.

Third, the petitioner contends that the ineffective assistance of his appellate counsel establishes "cause" and "prejudice" sufficient to overcome his procedural default. With heavy reliance on United States v. Minsky, 963 F.2d 870 (6th Cir. 1992), the petitioner argues that the prosecution is required to disclose exculpatory evidence in a fashion timely enough to allow defense investigation into the substance of those accusations. According to the petitioner, the disclosure of the subsequent rape accusations on the second day of trial was plainly untimely and it was a gross error for his counsel not to assert such an allegedly obvious claim.

The respondent maintains that the presentation of the Brady claim in the pro se appellate brief does not excuse the petitioner's procedural default. According to the respondent, the Ohio Court of Appeals gave the petitioner the option of dismissing his appellate counsel and relying on the claims presented in his brief, an option the petitioner "made the considered decision" not to exercise.

The respondent argues next that McMeans presented only an ineffective assistance of appellate counsel claim in his Murnahan motion. Citing Picard v. Connor, 404 U.S. 270, 275-76 (1971), the respondent argues that asserting one constitutional claim that shares a common factual predicate with another is not a sufficient presentation of the latter to excuse a previous procedural default.

Finally, the respondent contends that in cases such as this a state complies with its duty to disclose exculpatory evidence if the trial judge reviews a confidential file in camera and discloses any exculpatory evidence therein at some point during the trial. According to the respondent, the trial judge did just that at the petitioner's trial and, therefore, the petitioner's appellate counsel made the reasonable choice not to present a "feckless" claim on direct appeal.

In state criminal proceedings, the prosecution is obligated under the Due Process Clause of the Fourteenth Amendment to disclose evidence that is favorableto the accused and "'material . . . to guilt or . . . punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985) (citation omitted). Evidence is "material" if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682. Where a state protects the confidentiality of records prepared by child protection agencies, as does the State of Ohio, the Supreme Court has held that defense counsel has no right to inspect those records. Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987). Instead, it is sufficient for the trial judge to inspect the records in camera and disclose any exculpatory evidence contained therein. Id. at 60. Generally, exculpatory evidence must be produced by the prosecution "in time for effective use at trial." Minsky, 963 F.2d at 875.

The Supreme Court has held that a defendant has no constitutional right to represent himself on direct appeal. Martinez v. Court of Appeal of California, 120 S. Ct. 684, 692 (2000). Clearly, this holding contradicts the petitioner's assertion that there exists a constitutional entitlement to submit a pro se appellate brief on direct appeal in addition to the brief submitted by appointed counsel. Thus, we reject the petitioner's argument that the Ohio Court of Appeals' decision to strike his pro se brief constitutes "cause" to excuse his procedural default.

We are also not persuaded by the petitioner's argument that the Ohio Court of Appeals considered the merits of his Brady claim when it heard his Murnahan motion. It cannot be the case that, by merely asserting several alleged constitutional violations which appellate counsel failed to raise to a state court, the federal courts have habeas jurisdiction to consider the merits of each alleged error. If that were the case, the requirement that a habeas petitioner "fairly present" his constitutional claims to the state courts would be meaningless. See Franklin, 811 F.2d at 325. We, therefore, hold that the petitioner's argument lacks merit and he did procedurally default on his Brady claim.

Regarding the petitioner's contention that ineffective assistance of appellate counsel excuses his procedural default, we must defer to the Ohio Court of Appeals' treatment of that question. Pursuant to 28 U.S.C. § 2254(d)(1), federal habeas review of legal issues decided in state court is limited to deciding whether the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "[A] state-court decision is contrary to [the Supreme] Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law" or if "the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." Williams v. Taylor, 120 S. Ct. 1495, 1519 (2000). "[A] state-court decision involves an unreasonable application of [the Supreme] Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply."

Id. at 1520. The state court's decision cannot be contradicted under the "unreasonable application" prong of section 2254(d)(1) unless that court's decision is "objectively unreasonable." See id. at 1521.

The petitioner does not argue that the prosecution failed to disclose exculpatory evidence. Rather, the petitioner maintainsthat his appellate counsel should have argued that disclosure was untimely. The Ohio Court of Appeals held that appellate counsel's decision not to raise this argument was not an error so gross as to amount to a Sixth Amendment violation. Because this particular case of alleged ineffective assistance of appellate counsel is not "materially indistinguishable from a relevant Supreme Court precedent," we hold that the Ohio appellate court's decision was not "contrary to . . . clearly established Federal law." See id. at 1519 (emphasis omitted). We are also of the opinion that the Ohio court's application of the Strickland standard was not "objectively unreasonable." See id. at 1521. The Ohio trial judge disclosed the evidence of the subsequent rape accusations on the second day of trial after in camera review of the FCCS file. This action was essentially in compliance with what the Supreme Court has held the United States Constitution requires in cases such as this. See Ritchie, 480 U.S. at 59. The petitioner does not direct our attention to any evidence in the record (and we have found none) indicating that he did not have time to use this evidence "effectively." See Minsky, 963 F.2d at 875. The Ohio Court of Appeals noted that, after receiving the information in the FCCS reports, "[the petitioner] could have availed himself of an in-camera hearing" had "[he] wished to proffer evidence of the falsity of the [subsequent] accusations." The petitioner, however, took no action to prove to the trial judge that the subsequent rape accusations were false. Thus, the petitioner's Brady claim has obvious weaknesses and, therefore, we cannot conclude that his appellate counsel's service fell below that which the Sixth Amendment demands. Consequently, the petitioner fails to show "cause" to excuse his procedural default, and we affirm the district court's holding that the federal courts do not have jurisdiction to review the merits of this claim.

C.

The petitioner contends that, contrary to the opinion of the district court, the federal courts have habeas jurisdiction to review his juror bias claim. In support of that contention, the petitioner reasserts the denial of his alleged constitutional entitlement to submit a pro se appellate brief. He also argues again that the Ohio Court of Appeals considered his juror bias claim when it heard his Murnahan motion. For reasons already discussed, we reject those arguments.

The petitioner argues, in the alternative, that his appellate counsel's failure to assert his juror bias claim on direct appeal is yet another instance of constitutionally inadequate representation, allowing this court to exercise jurisdiction over his claim.

Finally, it is the petitioner's theory that the respondent is judicially estopped from arguing procedural default to this court. According to the petitioner, when the respondent moved to dismiss the petitioner's second habeas petition for failure to exhaust his state remedies, the respondent argued that the petitioner had not procedurally defaulted on his juror bias claim. The petitioner contends that, because

the respondent made this alleged argument to support its motion to dismiss, it should not be allowed to argue procedural default now.

As to the petitioner's contention that the ineffective assistance of his appellate counsel excuses his procedural default, the respondent argues that "the state courts correctly held that . . . appellate counsel was constitutionally adequate because there were reasonable grounds for not asserting th[at] claim" and this court should defer to that ruling. The respondent also maintains that, even if judicial estoppel should apply in the situation the petitioner describes, the petitioner did not present a juror bias claim in his second habeas petition. Therefore, according to the respondent, it could not have made any misrepresentation regarding that particular claim.

Under the Sixth Amendment, a state defendant is entitled to be tried by an impartial jury. See, e.g., Dennis v. United States, 339 U.S. 162, 171-72 (1950). A defendant maintaining juror bias must be afforded an opportunity to prove actual bias. Nevers v. Killinger, 169 F.3d 352, 373 (6th Cir.), cert. denied, 527 U.S. 1004 (1999).

We again hold that the Ohio Court of Appeals' decision that appellate counsel did not commit a Strickland error in failing to assert the petitioner's juror bias claim was not "objectively unreasonable." See Williams, 120 S. Ct. at 1521. Through no fault of appellate counsel, no transcript of the voir dire proceedings existed because the petitioner's trial counsel waived transcription of that proceeding. We think that the petitioner could have successfully asserted his right to prove actual juror bias only if there was some credible evidence to support an inference of potential bias. The petitioner's appellate counsel, however, had no such evidence. Consequently, we cannot fault his decision not to assert an unsubstantiated claim or quarrel with the Ohio Court of Appeals' decision that the petitioner received constitutionally adequate assistance of appellate counsel. Thus, the petitioner fails to demonstrate adequate "cause" to excuse his procedural default and, therefore, we cannot review his claim.

The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by that same party in an earlier proceeding. Warda v. Commissioner of Internal Revenue, 15 F.3d 533, 538 (6th Cir. 1994). In Russell v. Rolfs, 893 F.2d 1033 (9th Cir. 1990), the Ninth Circuit applied the doctrine of judicial estoppel to the State of Washington after it had argued that a prisoner needed to pursue an "adequate and available" state postconviction remedy before seeking relief in federal court. Id. at 1037. That court ruled that, because of its earlier assertion as to the "availab[ility]" of postconviction relief, the State of Washington could not subsequently argue procedural default in the federal courts. Id. at 1038.

We hold that the respondent is not judicially estopped from arguing procedural default. Even if we were inclined to follow the Ninth Circuit's methodology in Russell, which we are not, this case is distinguishable. As noted by the respondent, the petitioner did not even raise a juror bias claim in his second habeas petition and, therefore, the respondent did not make any misrepresentation that the Ohio courts could or would

consider the juror bias claim in a state postconviction proceeding. Thus, there is no inconsistent position to which the respondent must now adhere.

D.

The petitioner argues that he is entitled to habeas relief because he was denied the effective assistance of trial counsel. The sole error of trial counsel asserted by the petitioner is counsel's failure to exercise unused peremptory challenges to remove the two allegedly biased jurors. According to the petitioner, this inaction by counsel demonstrates that "counsel's performance fell way below the . . . objective standard of reasonableness." The petitioner also maintains that, because his jury had two allegedly biased members, his conviction cannot be deemed reliable and he has, therefore, established "prejudice" under the Strickland standard.

To establish a claim for ineffective assistance of counsel, a defendant must show that his counsel's performance was constitutionally deficient and that counsel's deficient performance was prejudicial. Strickland, 466 U.S. at 687. If an alleged error was not "prejudic[ial]," a federal court need not determine whether counsel's performance was constitutionally deficient. See id. at 697.

Although the petitioner did raise a claim of ineffective assistance of trial counsel on direct appeal, he did not refer to his trial counsel's decision not to remove the two allegedly biased jurors as an instance of error. He did not refer to this alleged error until he submitted subsequent motions to the Ohio courts. By that time, the Ohio courts held that the issue of the ineffectiveness of trial counsel was res judicata. As with the rest of the petitioner's claims, we, therefore, may not review this argument unless the petitioner can demonstrate "cause" and "prejudice" to overcome his procedural default. See Murray, 477 U.S. at 485.

The petitioner, however, does not present us with any reason why we should not respect the application of res judicata by the Ohio courts. After having thoroughly reviewed the record, we conclude that he cannot establish "prejudice" to excuse his procedural default. The evidence against the petitioner was both substantial and, for the most part, credible. We, therefore, fail to see how the seating of two allegedly biased jurors undermines the reliability of the petitioner's conviction. Consequently, we have no jurisdiction to review the petitioner's narrow argument.

III.

For the foregoing reasons, the order and opinion of the district court are AFFIRMED.

CLAY, Circuit Judge, concurring in part and dissenting in part.

I agree with the majority's conclusion that Petitioner procedurally defaulted his juror bias claim and did not demonstrate cause and prejudice to excuse the procedural default. However, I disagree with the majority's conclusion that Petitioner did not "fairly present" his Sixth Amendment claim to the Ohio state courts, as well as with the majority's disposition of Petitioner's Brady claim.

Petitioner claims that the prosecution's failure to timely produce evidence of the victim's prior rape allegations violated his Sixth Amendment right to confrontation. The majority concluded that Petitioner did not fairly present his Sixth Amendment claim to the Ohio state courts and as a consequence, waived the claim for federal habeas review. A state prisoner seeking federal habeas relief "fairly presents" the substance of each claim to state courts, as required, by citing applicable provisions of the Constitution, federal decisions using constitutional analysis, or state decisions employing constitutional analysis in similar fact patterns. See 28 U.S.C. § 2254(b); Carter v. Bell, 218 F.3d 581, 606-07 (6th Cir. 2000). Because Petitioner cited the Sixth Amendment in his state court appeal, and because the Ohio Court of Appeals understood that Petitioner was asserting his Sixth Amendment right to confront a witness as evidenced by the language used in its opinion, I believe that Petitioner "fairly presented" his confrontation claim to the Ohio state courts. I therefore believe the majority should have reached the merits of Petitioner's Sixth Amendment claim.

Although the majority is correct in concluding that Petitioner procedurally defaulted on his Brady claim, a review of Petitioner's claim is not foreclosed so long as he can "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." Coleman v. Thompson, 501 U.S. 722, 750 (1991). A petitioner can generally demonstrate cause if he can present a substantial reason to excuse the default. See Rust v. Zent, 17 F.3d 155, 161 (6th Cir. 1994). In Murray v. Carrier, the Supreme Court stated that "the existence of cause for procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." 477 U.S. 478, 486-89 (1986). Thus, ineffectiveassistance of counsel can constitute cause[1]. See id.

Petitioner argues that the refusal of his appellate counsel to raise a Brady violation on his direct appeal resulted in ineffective assistance of appellate counsel thereby constituting cause for the procedural default. Although tactical choices regarding issues raised on appeal are properly left to the sound professional judgment of counsel, see United States v. Perry, 908 F.2d 56, 59 (6th Cir. 1990), based upon the factual circumstances of this case, and the lack of overwhelming evidence against Petitioner, it was below the objective standard of reasonableness for appellate counsel not to raise a Brady violation on Petitioner's direct appeal.

As the record indicates, the two prior allegations of rape did not come to light until after the first day of trial. The victim alleged that she had been raped by her girlfriend's boyfriend in April of 1988 and by a thirty-eight year old man in June of 1988. Due to the untimely disclosure of this evidence by the government, Petitioner was unable to determine the veracity of the victim's allegations. As a result, the trial court refused to allow the prior rape allegations into evidence to impeach the credibility of the victim because under the Ohio Rape Shield Law, the prior rape allegations could not be brought out at trial unless they were false. See Ohio Rev. Code Ann. § 2907.02(D). Because Petitioner's appellate counsel was aware of the untimely disclosure by the government and the resulting prejudicial repercussions to Petitioner, it was objectively unreasonable for Petitioner's appellate counsel not to raise a Brady claim on direct

appeal. Petitioner's appellate counsel thus rendered ineffective assistance of counsel constituting cause to excuse the default. See Banks v. Reynolds, 54 F.3d 1508, 1515 (10th Cir. 1995) (holding that appellate counsel who failed to raise a Brady claim rendered petitioner ineffective assistance of appellate counsel); see also Carrier, 477 U.S. at 486-89.

Turning to the actual prejudice prong of the cause and prejudice standard, it is well established that a prosecution's failure to disclose evidence that is favorable and material to the issue of guilt violates a defendant's right to due process. See Brady v. Maryland, 373 U.S. 83, 87 (1963). Here, the record does not allow for a determination of whether Petitioner was actually prejudiced by his counsel's failure to raise the Brady claim because the record is insufficient to determine whether the prior rape allegations were false. Defense counsel did not request an in camera hearing. However, had an in camera hearing been requested and had it yielded a finding that the alleged victim's rape allegations against two other men were false, then a Brady violation occurred because Petitioner was denied the use of "evidence that [could have been] used to impeach the credibility of a witness[,]" see Schledwitz v. United States, 169 F.3d 1003, 1012 (6th Cir. 1999), thus resulting in actual prejudice to Petitioner. Inasmuch as it is not possible to determine the veracity of the victim's prior rape allegations on the record before us, I would remand to the district court with instructions to hold an evidentiary hearing todetermine whether the prior rape allegations were in fact false. If so, Petitioner was prejudiced by his counsel's failure to raise the Brady violation claim, thereby providing a sufficient basis to excuse his procedural default. See Coleman, 501 U.S. at 750.

In addition, if the prior rape allegations were found to have been false, I would find Petitioner's Sixth Amendment right to confront his accuser was violated but for this Court's recent holding in Boggs v. Collins, 226 F.3d 728, 735-40 (6th Cir. Sept. 18, 2000). In a case such as this, where the physical evidence is far from compelling, and the determination of guilt or innocence turns upon the credibility of the victim and the accused, it is all the more important that a defendant have the right to confront his accuser.

For the foregoing reasons, I would conditionally grant the habeas petition by ordering the Petitioner's release unless the State on remand conducts an evidentiary hearing to determine whether the prior rape allegations were actually false. If the rape allegations are proven false, Petitioner's application for the writ should be granted and a new trial ordered.

Notes:

The Supreme Court recently held that when a petitioner relies upon an ineffectiveness of counsel claim as cause to excuse his procedural default, the ineffectiveness of counsel claim must itself have been exhausted before the state courts in order to comply with the commands of Murray v. Carrier, 477 U.S. 478, 489 (1991). See Edwards v. Carpenter, 529 U.S. 446, 120 S. Ct. 1587, 1591-92 (2000). In the case at hand, pursuant to Petitioner's Murnahan motion, he presented his claim that his appellate counsel

grossly erred in failing to raise his Brady claim to the trial court; he appealed that decision to the Ohio Court of Appeals; and filed an application for leave to appeal the court of appeals decision to the Ohio Supreme Court, but his application was denied. Therefore, Carpenter has been satisfied in that Petitioner exhausted his state court remedies before seeking federal habeas relief. See 120 S. Ct. at 1592.

Michigan v Lucas

500 U.S. 145

111 S.Ct. 1743

114 L.Ed.2d 205

MICHIGAN, Petitioner

v.

Nolan K. LUCAS.

No. 90-149.

Argued March 26, 1991.

Decided May 20, 1991.

Syllabus

Michigan's "rape-shield" statute generally prohibits a criminal defendant from introducing at trial evidence of an alleged rape victim's past sexual conduct. However, a statutory exception permits a defendant to introduce evidence of his own past sexual conduct with the victim, provided that he files a written motion and an offer of proof within 10 days after he is arraigned, whereupon the trial court may hold an *in camera* hearing to determine whether the proposed evidence is admissible. Because respondent Lucas failed to give the statutorily required notice and, therefore, no admissibility hearing was held, a state court refused to let him introduce, at his bench trial on charges of criminal sexual assault, evidence of a prior sexual relationship with the victim, his ex-girlfriend. He was convicted and sentenced to prison, but the State Court of Appeals reversed, adopting a*per se* rule that the statutory notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of a past sexual relationship between a rape victim and a criminal defendant.

Held:

1. Assuming, *arguendo,* that the Michigan rape-shield statute authorizes preclusion of the evidence as a remedy for a defendant's failure to comply with the notice-and-hearing requirement, the State Court of Appeals erred in adopting a *per se* rule that such preclusion is unconstitutional in all cases. The Sixth Amendment is not so rigid. The notice-and-hearing requirement serves legitimate state interests: protecting rape victims against surprise, harassment, and unnecessary invasions of privacy and protecting against surprise to the prosecution. This Court's decisions demonstrate that such interests may justify even the severe sanction of preclusion in an appropriate case. *Taylor v. Illinois,*484 U.S. 400, 413-414, 417, 108 S.Ct. 646, 654-655, 656, 98 L.Ed.2d 798; *United States v. Nobles,* 422 U.S. 225, 241, 95 S.Ct. 2160, 2171, 45 L.Ed.2d 141. Pp. 149-153.

2. The Michigan courts must address in the first instance whether the rape-shield statute authorizes preclusion and whether, on the facts of this case, preclusion violated Lucas' Sixth Amendment rights. P. 153.

Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, SCALIA, KENNEDY, and SOUTER, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which MARSHALL, J., joined.

Don W. Atkins, Detroit, Mich., for petitioner.

Sol. Gen. Kenneth W. Starr, Washington, D.C., for U.S., as amicus curiae, supporting petitioner, by special leave of Court.

Mark H. Magidson, Detroit, Mich., for respondent.

Justice O'CONNOR delivered the opinion of the Court.

Because Nolan Lucas failed to give statutorily required notice of his intention to present evidence of an alleged rape victim's past sexual conduct, a Michigan trial court refused to let him present the evidence at trial. The Michigan Court of Appeals reversed, adopting a *per se* rule that preclusion of evidence of a rape victim's prior sexual relationship with a criminal defendant violates the Sixth Amendment. We consider the propriety of this *per se* rule.

* Like most States, Michigan has a "rape-shield" statute designed to protect victims of rape from being exposed at trial to harassing or irrelevant questions concerning their past sexual behavior. See Mich.Comp.Laws § 750.520j (1979).**

The Michigan statute provides:

"(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

"(a) Evidence of the victim's past sexual conduct with the actor.

"(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

"(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)."

In its brief, the State lists analogous statutes in other jurisdictions. See Brief for Petitioner 38, n. 3. This statute prohibits a criminal defendant from introducing at trial evidence of an alleged rape victim's past sexual conduct, subject to two exceptions. One of the exceptions is relevant here. It permits a defendant to introduce evidence of his own past sexual conduct with the victim, provided that he follows certain procedures. Specifically, a defendant who plans to present such evidence must file a written motion and an offer of proof "within 10 days" after he is arraigned. The trial court may hold "an in camera hearing to determine whether the proposed evidence is admissible"—*i.e.,* whether the evidence is material and not more prejudicial than probative.

Lucas was charged with two counts of criminal sexual conduct. The State maintained that Lucas had used a knife to force Wanda Brown, his ex-girlfriend, into his apartment, where he beat her and forced her to engage in several nonconsensual sex acts. At no time did Lucas file a written motion and offer of proof, as required by the statute. At the start of trial, however, Lucas' counsel asked the trial court to permit the defense to present evidence of a prior sexual relationship between Brown and Lucas, "even though I know it goes against the Statute." App. 4.

The trial court reviewed the statute then denied the motion, stating that "[n]one of the requirements set forth in [the statute] have been complied with." *Id.,* at 7-8. The court explained that Lucas' request was not made within the time required by Michigan law and that, as a result, no *in camera* hearing had been held to determine whether the past sexual conduct evidence was admissible. A bench trial then began, in which Lucas' defense was consent. The trial court did not credit his testimony. The court found Lucas guilty on two counts of criminal sexual assault and sentenced him to a prison term of 44 to 180 months.

The Michigan Court of Appeals reversed. Relying on *People v. Williams,* 95 Mich.App. 1, 289 N.W.2d 863 (1980), rev'd on other grounds, 416 Mich. 25, 330 N.W.2d 823 (1982), the Court of Appeals held that the State's notice-and-hearing requirement is unconstitutional in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a criminal defendant. 160 Mich.App. 692, 694-695, 408 N.W.2d 431, 432 (1987). The court quoted language from *Williams* stating that the requirement " 'serve[s] no useful purpose' " in such cases and therefore is insufficient to justify interference with a criminal defendant's Sixth Amendment rights. 160 Mich.App.,

at 695, 408 N.W.2d, at 432, quoting *Williams, supra,* 95 Mich.App., at 10, 289 N.W.2d, at 867. *Williams* surmised that the purpose of the notice-and-hearing requirement is " 'to allow the prosecution to investigate the validity of a defendant's claim so as to better prepare to combat it at trial.' " 160 Mich.App., at 694, 408 N.W.2d, at 432, quoting *Williams, supra,* 95 Mich.App., at 10, 289 N.W.2d, at 866. It concluded, however, that this rationale " 'loses its logical underpinnings' " when applied to evidence of past sexual conduct between the victim and the defendant because " 'the very nature of the evidence . . . is personal between the parties' " and therefore impossible to investigate. 160 Mich.App., at 694, 408 N.W.2d, at 432, quoting *Williams, supra,* 95 Mich.App., at 10, 289 N.W.2d, at 866-867.

The Court of Appeals, relying on *Williams,* thus adopted a *per se* rule that the Michigan rape-shield statute is unconstitutional in a broad class of cases. Under this rule, a trial court would be unable to preclude past sexual conduct evidence even where a defendant's failure to comply with the notice-and-hearing requirement is a deliberate ploy to delay the trial, surprise the prosecution, or harass the victim. We granted certiorari, 498 U.S. ----, 111 S.Ct. 507, 112 L.Ed.2d 520 (1990), to determine whether the Michigan Court of Appeals' *per se* rule is consistent with our Sixth Amendment jurisprudence.

II

Michigan's rape-shield statute is silent as to the consequences of a defendant's failure to comply with the notice-and-hearing requirement. The trial court assumed, without explanation, that preclusion of the evidence was an authorized remedy. Assuming, *arguendo,* that the trial court was correct, the statute unquestionably implicates the Sixth Amendment. To the extent that it operates to prevent a criminal defendant from presenting relevant evidence, the defendant's ability to confront adverse witnesses and present a defense is diminished. This does not necessarily render the statute unconstitutional. "[T]he right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' " *Rock v. Arkansas,* 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987), quoting *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973). We have explained, for example, that "trial judges retain wide latitude" to limit reasonably a criminal defendant's right to cross-examine a witness "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).

Lucas does not deny that legitimate state interests support the notice-and-hearing requirement. The Michigan statute represents a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. The statute also protects against surprise to the prosecution. Contrary to the Michigan Court of Appeals' statement that a notice requirement " 'serve[s] no useful purpose' " when the victim is alleged to have had a prior sexual relationship with the defendant, 160 Mich.App., at 695, 408 N.W.2d, at 432, quoting *Williams, supra,* 95 Mich.App., at 10, 289 N.W.2d, at 867, the notice requirement permits

a prosecutor to interview persons who know the parties and otherwise investigate whether such a prior relationship actually existed. When a prior sexual relationship is conceded, the notice-and-hearing procedure allows a court to determine in advance of trial whether evidence of the relationship "is material to a fact at issue in the case" and whether "its inflammatory or prejudicial nature . . . outweigh[s] its probative value." Mich.Comp.Laws § 750.520j(1) (1979).

We have upheld notice requirements in analogous settings. In *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), for example, this Court upheld a Florida rule that required a criminal defendant to notify the State in advance of trial of any alibi witnesses that he intended to call. The Court observed that the notice requirement "by itself in no way affected [the defendant's] crucial decision to call alibi witnesses. . . . At most, the rule only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that [he] planned to divulge at trial." *Id.,* at 85, 90 S.Ct., at 1898. Accelerating the disclosure of this evidence did not violate the Constitution, the Court explained, because a criminal trial is not "a poker game in which players enjoy an absolute right always to conceal their cards until played." *Id.,* at 82, 90 S.Ct., at 1896. In a subsequent decision, the Court described notice requirements as "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Wardius v. Oregon,* 412 U.S. 470, 474, 93 S.Ct. 2208, 2211, 37 L.Ed.2d 82 (1973).

This does not mean, of course, that all notice requirements pass constitutional muster. Restrictions on a criminal defendant's rights to confront adverse witnesses and to present evidence "may not be arbitrary or disproportionate to the purposes they are designed to serve." *Rock v. Arkansas, supra,* 483 U.S., at 56, 107 S.Ct., at 2711. It is not inconceivable that Michigan's notice requirement, which demands a written motion and an offer of proof to be filed within 10 days after arraignment, is overly restrictive. The State concedes that its notice period is the shortest in the Nation. Brief for Petitioner 38. This case does not require us to decide, however, whether Michigan's brief notice period is "arbitrary or disproportionate" to the State's legitimate interests. The Court of Appeals found the statute to be unconstitutional only insofar as it precluded evidence of a rape victim's prior sexual relationship with a defendant. Because the court expressed no view as to the brevity of the notice period, neither do we.

The sole question presented for our review is whether the legitimate interests served by a notice requirement can ever justify precluding evidence of a prior sexual relationship between a rape victim and a criminal defendant. The answer from the Michigan Court of Appeals was no; it adopted a *per se* rule prohibiting preclusion of this kind of evidence. This ruling cannot be squared with our cases.

We have indicated that probative evidence may, in certain circumstances, be precluded when a criminal defendant fails to comply with a valid discovery rule. In *United States v. Nobles,* 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), for example, the defendant wished to put on the witness stand an investigator to testify about statements made to him during an investigation, but the defendant refused to comply with the District Court's order to submit a copy of the investigator's report to the prosecution. The

District Court therefore precluded the investigator from testifying, and this Court held that the District Court's "preclusion sanction was an entirely proper method of assuring compliance with its order." *Id.,* at 241, 95 S.Ct., at 2171. Rejecting the defendant's Sixth Amendment claim, the Court explained that "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system." *Ibid.*

Even more telling is *Taylor v. Illinois,* 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). There, the defendant violated a state procedural rule by failing to identify a particular defense witness in response to a pretrial discovery request. The trial court sanctioned this violation by refusing to allow the undisclosed witness to testify. This Court rejected the defendant's argument that, under the Compulsory Process Clause of the Sixth Amendment, "preclusion is *never* a permissible sanction for a discovery violation." *Id.,* at 414, 108 S.Ct., at 655 (emphasis in original).

We did not hold in *Taylor* that preclusion is permissible every time a discovery rule is violated. Rather, we acknowledged that alternative sanctions would be "adequate and appropriate in most cases." *Id.,* at 413, 108 S.Ct., at 655. We stated explicitly, however that there could be circumstances in which preclusion was justified because a less severe penalty "would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Ibid. Taylor,* we concluded, was such a case. The trial court found that Taylor's discovery violation amounted to "willful misconduct" and was designed to obtain "a tactical advantage." *Id.,* at 417, 108 S.Ct., at 656. Based on these findings, we determined that, "[r]egardless of whether prejudice to the prosecution could have been avoided" by a lesser penalty, "the severest sanction [wa]s appropriate." *Ibid.*

In light of *Taylor* and *Nobles,* the Michigan Court of Appeals erred in adopting a *per se* rule that Michigan's notice-and-hearing requirement violates the Sixth Amendment in all cases where it is used to preclude evidence of past sexual conduct between a rape victim and a defendant. The Sixth Amendment is not so rigid. The notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue delay. Failure to comply with this requirement may in some cases justify even the severe sanction of preclusion.

Recognizing our prior decisions, Lucas spends little time trying to defend the Court of Appeals' broad ruling. He argues primarily that preclusion was an unconstitutional penalty *in this case* because the circumstances here were not nearly as egregious as those in *Taylor.* He insists that the prosecution was not surprised to learn that the victim had a prior relationship with Lucas—she had admitted this in the preliminary hearing. Additionally, he contends that his failure to comply with the notice requirement was negligent, not willful.

We express no opinion as to whether or not preclusion was justified in this case. The Michigan Court of Appeals, whose decision we review here, did not address whether the trial court abused its discretion on the facts before it. Rather, the Court of Appeals adopted a *per se* rule that preclusion is unconstitutional in all cases where the victim

had a prior sexual relationship with the defendant. That judgment was error. We leave it to the Michigan courts to address in the first instance whether Michigan's rape-shield statute authorizes preclusion and whether, on the facts of this case, preclusion violated Lucas' rights under the Sixth Amendment.

The judgment of the Michigan Court of Appeals is vacated and remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice BLACKMUN, concurring in the judgment.

I concur in the judgment. I write separately because I was among those who dissented in *Taylor v. Illinois,* 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), where the Court's majority rejected the argument that the Sixth Amendment prohibits the preclusion of otherwise admissible evidence as a sanction for the violation of a reciprocal-discovery rule.

In a separate dissent in *Taylor, id.,* at 438, 108 S.Ct., at 667-68, I specifically reserved judgment on the type of question presented in this case—whether preclusion might be a permissible sanction for noncompliance with a rule designed for a specific kind of evidence—based on my belief that the rule may embody legitimate state interests that differ substantially from the truth-seeking interest underlying a reciprocal-discovery rule. In my view, if the sanction of preclusion can be implemented to further those interests without unduly distorting the truth-seeking process, the Sixth Amendment does not prohibit the sanction's use.

The notice-and-hearing requirement adopted by the State of Michigan represents, as respondent Lucas does not deny, "a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy." *Ante,* at 150. In addition, a notice-and-hearing requirement is specifically designed to minimize trial delay by providing the trial court an opportunity to rule on the admissibility of the proffered evidence in advance of trial. Finally, as with a notice-of-alibi rule, the notice requirement in this Michigan statute represents a legislative attempt to identify a kind of evidence—evidence of past sexual conduct—with respect to which credibility determinations are likely to be dispositive, and to permit (or perhaps compel) the defendant and the State to gather and preserve evidence and testimony soon after the alleged offense, when memories of witnesses are fresh and vivid. It seems clear that these interests, unlike the State's interest in truthseeking, may in some cases be advanced by imposition of the sanction of preclusion, and that the sanction therefore would not constitute an arbitrary response to the failure to comply. See *Rock v. Arkansas,* 483 U.S. 44, 56, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987).

Of course, the State's interest in the full and truthful disclosure of critical facts remains of paramount concern in the criminal-trial process, and it may be that, in most cases, preclusion will be "disproportionate to the purposes [the rule is] designed to serve." *Ibid.* Nonetheless, I agree with the Court that failure to comply with the notice-and-

hearing requirement of Michigan's rape-shield statute "may in some cases justify even the severe sanction of preclusion." *Ante,* at 153.

Justice STEVENS, with whom Justice MARSHALL joins, dissenting.

Because the judgment entered by the Michigan Court of Appeals in this case was unquestionably correct, I would affirm. The fact that a state court's opinion could have been written more precisely than it was is not, in my view, a sufficient reason for either granting certiorari or requiring the state court to write another opinion. We sit, not as an editorial board of review, but rather as an appellate court. Our task is limited to reviewing "judgments, not opinions." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); see *Black v. Cutter Laboratories,* 351 U.S. 292, 297-298, 76 S.Ct. 824, 827, 100 L.Ed. 1188 (1956); see also *K Mart Corp. v. Cartier, Inc,* 485 U.S. 176, 185, 108 S.Ct. 950, 957, 99 L.Ed.2d 151 (1988).

In this case, I am not at all sure that the Michigan Court of Appeals adopted the "*per se* " rule that this Court describes in its opinion. See *ante,* at 146, 149, 151, 152. In its *per curiam,* the state court never uses the word "*per se,*" never mentions the Federal Constitution,[1] and indeed, never cites any federal cases. Rather, the Michigan Court of Appeals simply *holds* that the trial court's preclusion of potentially relevant evidence in reliance on an unconstitutional notice provision in a limited class of rape cases requires a new trial.[2] The notice provision at issue here requires a defendant who intends to introduce evidence of a victim's past sexual relations with him to give notice within 10 days after arraignment on the information. Mich.Comp.Laws Ann. § 750.520j (1991). As both petitioner and respondent acknowledge, "Michigan appears to be the only State which requires the notice to be filed 'within 10 days after the arraignment on the information. . . .' " Brief for Petitioner 38. Other States and the Federal Government simply require that notice be filed at various times before the start of the trial. *Ibid.;* see Brief for Respondent 29, and n. 24.

Although the Court of Appeals does not explicitly rely on the unduly strict time period ("10 days after *arraignment* ") provided by the statute, it does hold that "the ten-day notice provision" is unconstitutional when used to preclude testimony of a victim's past sexual relationship with the defendant. 160 Mich.App. 692, 694, 408 N.W.2d 431, 432 (1987); *id.,* at 695, 408 N.W.2d, at 432, quoting *People v. Williams,* 95 Mich.App. 1, 11, 289 N.W.2d 863, 867 (1980), rev'd on other grounds, 416 Mich. 25, 330 N.W.2d 823 (1982). Because the 10-day requirement, in my view, and possibly in the majority's view, see *ante,* at 151, is overly restrictive, the use of that notice requirement to preclude evidence of a prior sexual relationship between the defendant and victim clearly provides adequate support for the Court of Appeals' holding that the statute is unconstitutional. The Court of Appeals, however, discusses the second theory more fully than the first, and therefore, I address it as well.

As I read the Court of Appeals' *per curiam,* as well as its earlier opinion in *People v. Williams,* in the class of rape cases in which the victim and the defendant have had a prior sexual relationship, evidence of this relationship may be relevant when the

defendant raises the defense of consent. The Court of Appeals reasoned that in such a situation, the *in camera* hearing does not play a useful role; rather, it is likely to become a contest of the victim's word against the defendant's word, with the judge reaching his decision based upon his assessment of the credibility of each, and that decision is better left to the jury. 95 Mich.App., at 9, 289 N.W.2d, at 866. As the Court of Appeals explained by quoting extensively from *Williams,* when surprise is not an issue[3] because both victim and defendant have had a prior relationship and do not need to gather additional witnesses to develop that information,[4] then notice " 'in this situation . . . would serve no useful purpose.' " 160 Mich.App., at 695, 408 N.W.2d, at 432 (quoting *Williams,* 95 Mich.App., at 10, 289 N.W.2d, at 867).

The rule that the Michigan Court of Appeals adopts, in which it generally assumes that preclusion is an unnecessarily harsh remedy for violating this statute's particularly strict notice requirement when the defendant and victim have had a past relationship and the defendant is raising the defense of consent, not only is reasonable, but also is consistent with our opinion in *Taylor v. Illinois,* 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988).[5] Although in *Taylor* we held that the preclusion sanction was appropriate, we did so because in *Taylor* it was "plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate." *Id.,* at 417, 108 S.Ct., at 657. Of course, in those cases in which there is strong reason to believe that the violation of a rule was designed to facilitate the fabrication of false testimony, an exception to the general rule can be fashioned. I find nothing in the Michigan Court of Appeals' opinion in this case that would preclude an exceptional response to an exceptional case. See *id.,* at 416-417, 108 S.Ct., at 656-57 (preclusion may be appropriate if the violation was the product of willful misconduct, or was purposely planned to obtain a tactical advantage). Although the Michigan Court of Appeals' opinion may be less precise than it should have been, I do not believe it went so far as to adopt the "*per se* " straw man that the Court has decided to knock down today.

Because I am convinced that the Court of Appeals correctly held that this unique Michigan statute is unconstitutional, I would affirm its judgment.

The Court of Appeals does rely on *People v. Williams,* 95 Mich.App. 1, 289 N.W.2d 863 (1980), rev'd on other grounds, 416 Mich. 25, 330 N.W.2d 823 (1982), and in that case, the Court of Appeals does refer to the defendant's Sixth Amendment right to confrontation and cross-examination. 95 Mich.App., at 5, 289 N.W.2d, at 864. The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const., Amdt. 6. The right of cross-examination is derived from the Sixth Amendment's language guaranteeing the right of the accused to confront the witnesses against him. *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The Sixth Amendment has been held applicable to the States. *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

The Court's holding is summarized in the following portion of its opinion:

"At the start of trial, defendant moved for the introduction of evidence of the prior sexual relationship between defendant and complainant. Based solely upon the failure of defendant to comply with the notice provision of subsection 2 of the rape shield statute, MCL 750.520j; MSA 28.788(10), the trial court, without holding an*in camera* hearing to determine the admissibility of the proposed evidence, denied defendant's motion. This was clear legal error.

"In *People v. Williams,* 95 Mich.App. 1, 9-11; 289 NW2d 863 (1980), *rev'd on other grounds,* 416 Mich. 25 [330 N.W.2d 823] (1982), this Court found the *ten-day*notice provision and any hearing requirement unconstitutional when applied to preclude evidence of specific instances of sexual conduct between a complainant and a defendant." 160 Mich.App. 692, 694, 408 N.W.2d 431, 432 (1987) (emphasis added).

The Court then quoted a lengthy excerpt from its earlier opinion in *People v. Williams,* concluding with this sentence:

"This *ten-day* notice provision loses its constitutional validity when applied to preclude evidence of previous relations between a complainant and a defendant." 160 Mich.App., at 695, 408 N.W.2d, at 432 (emphasis added).

In this case in particular the prosecutor did not claim surprise because most of the excluded evidence had been adduced at the preliminary hearing.

The Court of Appeals was careful to distinguish this situation from the situation in *Williams* in which the four defendants sought to introduce evidence of prior sexual conduct between the victim and one of the defendants as evidence that the victim would consent to sex with all of the defendants. The Court of Appeals noted that the Michigan Supreme Court had found "this premise untenable." 160 Mich.App., at 695, 408 N.W.2d, at 432. The *Williams* court, like the Court of Appeals here, acknowledged the validity of the notice requirement as applied to "sexual conduct between a complainant and third persons." *People v. Williams,* 95 Mich.App., at 10, 289 N.W.2d, at 866; see 160 Mich.App., at 695, 408 N.W.2d, at 432.

"It should be noted that in Illinois, the sanction of preclusion is reserved for only the most extreme cases. In *People v. Rayford,* the Illinois Appellate Court explained:

" 'The exclusion of evidence is a drastic measure; and the rule in civil cases limits its application to flagrant violations, where the uncooperative party demonstrates a "deliberate contumacious or unwarranted disregard of the court's authority." (*Schwartz v. Moats,* 3 Ill.App.3d 596, 599, 277 N.E.2d 529, 531; [1971] *Department of Transportation v. Mainline Center, Inc.,* 38 Ill.App.3d 538, 347 N.E.2d 837 [1976].) The reasons for restricting the use of the exclusion sanction to only the most extreme situations are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense. (*Washington v. Texas,* 388 U.S. 14 [87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)]. . . .) "Few rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers v. Mississippi,* 410 U.S. 284, 302. . . . [93 S.Ct. 1038, 1049, 35 L.Ed.2d

297 (1973)] 43 Ill.App.3d [283], at 286-287 [1 Ill.Dec. 941, at 944], 356 N.E.2d [1274], at 1277 [1976]." *Taylor v. Illinois,* 484 U.S., at 417, n. 23 [108 S.Ct., at 657, n. 23].

MRE 102

Rule 102 Purpose

These rules are intended to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

MRE 401

Rule 401 Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 402

Rule 402 Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court. Evidence which is not relevant is not admissible.

MRE 607

Rule 607 Who May Impeach

The credibility of a witness may be attacked by any party, including the party calling the witness.

MRE 608(b)

Rule 608(b) Evidence of Character and Conduct of Witness

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against selfincrimination when examined with respect to matters which relate only to credibility.

MRE 609

Rule 609 Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) Determining probative value and prejudicial effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

(c) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

(d) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent

procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(e) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule, except in subsequent cases against the same child in the juvenile division of a probate court. The court may, however, in a criminal case or a juvenile proceeding against the child allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission is necessary for a fair determination of the case or proceeding.

(f) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

GRIFFIN, J., states: Because I disagree with the majority opinion in People v Allen, [429 Mich 558 (1988)] I dissent from the adoption of this amendment of MRE 609.

People v Adair

550 N.W.2d 505 (1996)

452 Mich. 473

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

William Dwight ADAIR, Defendant-Appellant.

Docket No. 101286, Calendar No. 12.

Supreme Court of Michigan.

Argued March 6, 1996.

Decided July 16, 1996.

507*507 Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, Christine A. Clancy, Assistant Prosecuting Attorney, and Dennis Hurst, Prosecuting Attorney, Jackson, for the People.

Lorin J. Zaner, Toledo, and Demosthenes Lorandos, Brighton, for defendant.

506*506 MICHAEL F. CAVANAGH, Justice.

The defendant is charged with two counts of sexually assaulting his wife. This is an interlocutory appeal from a trial court order granting in part and denying in part, pursuant to the rape-shield statute, M.C.L. § 750.520j(1)(a); M.S.A. § 28.788(10)(1)(a), the defendant's motion in limine to introduce evidence of specific instances of the complainant's sexual conduct with the defendant both before and after the night of the alleged sexual assault. The trial court's order would allow the defendant to introduce evidence of the complainant's *subsequent*consensual sexual relations with him that had occurred within thirty days of the alleged sexual assault. The Court of Appeals vacated this portion of the order. 207 Mich.App. 287, 293, 524 N.W.2d 256 (1994). We granted the defendant leave to appeal. 450 Mich. 873, 539 N.W.2d 506 (1995). We reverse and remand to the trial court in light of this opinion.

I

The defendant has been bound over for trial on two counts of third-degree criminal sexual conduct[1] on the basis of allegations made by his wife that he sexually assaulted her in the early morning hours of September 27, 1992. On October 28, 1992, the complainant testified at the preliminary examination that she had been served with divorce papers a few days before the alleged sexual assault. The defendant and complainant continued to share the same house at that point, along with their two children and her two children from a previous marriage. They had been married for six years. The complainant was sleeping in the basement on the night of the alleged sexual assault. She testified that she was awakened by the defendant in the early morning hours. The two counts of third-degree criminal sexual conduct are based on her allegations of digital-anal penetration and of digital-oral penetration by the defendant against her will. The defendant denies that the alleged incidents occurred.

508*508 At a pretrial hearing on October 23, 1992, the complainant stated that she had engaged in consensual sexual relations with the defendant after the alleged sexual assault.[2] The complainant has also stated that digital-anal sexual activity was a common practice in the couple's marriage.

The defendant moved in limine to introduce evidence of specific instances of (1) the complainant's subsequent consensual sexual relations with him, (2) the marital common practice of digital-anal sexual activity, and (3) the complainant's alleged sexual relations with a third person. The trial court precluded proposed evidence of particular marital sexual activities, but would allow generalized testimony that a sexual relationship had existed, and would allow evidence of the complainant's subsequent consensual sexual relations with the defendant within thirty days of the alleged sexual assault.[3]

The prosecutor appealed, seeking to exclude evidence of subsequent consensual sexual relations. The defendant answered, again seeking to introduce evidence of the couple's particular marital sexual activity of digital-anal penetration.

The Court of Appeals majority found that evidence of subsequent consensual sexual relations was barred by the rape-shield statute. 207 Mich.App. at 290, 524 N.W.2d 256. The majority further held that exclusion of the evidence would not violate the defendant's constitutional right of confrontation because the evidence had insufficient probative value. In contrast, the dissent believed that the evidence of subsequent consensual sexual relations was admissible under the rape-shield statute. The dissent further believed that it was admissible under the defendant's constitutional right of confrontation because it was probative of the defense theory that the alleged incident "never occurred because, if he had forcibly assaulted her as alleged, she would not have

agreed to have sex with him on two occasions within a relatively short time thereafter." 207 Mich.App. at 297, 524 N.W.2d 256 (Giovan, J., dissenting).

II

The rape-shield statute provides:

> *Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:*
>
> *(a) Evidence of the victim's past sexual conduct with the actor.*
>
> *(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [M.C.L. § 750.520j(1); M.S.A. § 28.788(10)(1) (emphasis added).]*

The defendant seeks to introduce evidence of both prior and subsequent consensual sexual relations with the complainant. Such evidence clearly falls within the statute's general exclusionary rule. "It bars, with two narrow exceptions, evidence of *all* sexual activity by the complainant not incident to the alleged rape." *People v. Stull,* 127 Mich.App. 14, 17, 338 N.W.2d 403 (1983) (emphasis in original).[4]

509*509 We turn first to the proposed evidence of subsequent consensual sexual relations. The defendant contends that this falls within the statutory exception for "[e]vidence of the victim's past sexual conduct with the actor."

Evidence of Past Sexual Conduct

Initially, we must determine to which period of time the term "past" refers: before the alleged sexual assault or before the evidence is offered at trial. The Court of Appeals majority held that "past" limited evidence of sexual conduct to that occurring before the alleged incident. 207 Mich.App. at 291, 524 N.W.2d 256. The prosecutor argues here that this interpretation is correct. Conversely, the panel's dissent believed that "past" encompassed all sexual conduct occurring before the evidence was offered at trial. *Id.*at 293-294, 524 N.W.2d 256. The defendant agrees with the dissent.

As evidenced by this reasonable disagreement over the meaning of the statutory exception, we find that the term "past" is ambiguous. 2A Singer, Sutherland Statutory Construction (5th ed), § 45.02, p 6. The rules of statutory interpretation of ambiguous terms are well established. "The lodestar of statutory construction is legislative purpose or intent." *People v. Gilbert,* 414 Mich. 191, 205, 324 N.W.2d 834 (1982). When faced with two alternative reasonable interpretations of a word in a statute, we should give effect to the interpretation that more faithfully advances the legislative purpose behind the statute. *People v. Rehkopf,* 422 Mich. 198, 207, 370 N.W.2d 296 (1985).

In *People v. Arenda,* 416 Mich. 1, 10-11, 330 N.W.2d 814 (1982), we addressed the legislative purpose behind the rape-shield statute:

> *The rape-shield law, with certain specific exceptions, was designed to exclude evidence of the victim's sexual conduct with persons other than defendant.Although such evidence was admissible at common law in relation to certain issues, this practice has repeatedly been drawn into question. The courts, with increasing frequency, have recognized the minimal relevance of this evidence....*
>
> *The prohibitions contained in the rape-shield law represent a legislative determination that, in most cases, such evidence is irrelevant....*
>
> *The prohibitions in the law are also a reflection of the legislative determination that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. Avoidance of these dangers is a legitimate interest in the criminal trial process, see MRE 403. The prohibition indirectly furthers the same interests by removing unnecessary deterrents to the reporting and prosecution of crimes.*
>
> *At the same time, the prohibitions protect legitimate expectations of privacy....*
>
> *The interests protected and furthered by the rape-shield law are significant ones. Given the minimal relevance of such evidence in most cases, the prohibitions do not deny or significantly diminish defendant's right of confrontation. [Emphasis added; citations omitted.]*

The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity, which discouraged victims from testifying "because they kn[e]w their private lives [would] be cross-examined." House Legislative Analysis, SB 1207, July 18, 1974. A complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant. MRE 401. More importantly, a witness' sexual history is usually irrelevant as impeachment evidence because it has no bearing on character for truthfulness. MRE 608.

Generally, irrelevant evidence is inadmissible as substantive evidence. MRE 402. MRE 403 provides that even relevant evidence may be excluded if its probative value is outweighed by prejudicial considerations. The rape-shield statute reflects this evidentiary postulate, but with a significant modification. MRE 403 calls for the exclusion of probative evidence when "substantially, 510*510 outweighed by prejudicial

considerations. In contrast, the rape-shield statute calls for exclusion when the probative value is merely outweighed by prejudicial considerations. After weighing the minimal probative value of evidence of sexual conduct not incident to the alleged sexual assault against the inherent prejudicial and inflammatory effect on the jurors of parading the complainant's sexual history through the courtroom, the Legislature determined that as a general rule such evidence would be legally irrelevant and inadmissible as a matter of law. *People v. Hackett,* 421 Mich. 338, 347-348, 365 N.W.2d 120 (1984).[5]

However, when the proposed evidence relates to the complainant's consensual sexual relations*with the defendant,* the public policy interests in excluding prejudicial, inflammatory, or misleading bad act character evidence are no longer the primary focus of the statute. *People v. Perkins,* 424 Mich. 302, 307, 379 N.W.2d 390 (1986). Instead, the focus shifts to materiality and balancing probative value against prejudice. *Id.* at 307-308, 379 N.W.2d 390.

With this background in mind, we turn to the statutory exceptions. Again, the touchstone of the rape-shield statute is relevance. In providing two narrow exceptions to the exclusionary rule, the Legislature premised both exceptions on the threshold determination that the proposed evidence is "material to a fact at issue." M.C.L. § 750.520j(1); M.S.A. § 28.788(10)(1). First consider subsection b, which allows the admission of evidence that is *material* to prove that semen recovered from the complainant or her resulting physical condition was the result of someone other than the defendant. Such evidence could be *probative* of a defense theory such as misidentification.[6] Likewise, under subsection a, the complainant's consensual sexual conduct with the defendant must be *material* to an issue in the case. In *Perkins,* we found that evidence of a prior sexual encounter between the complainant and the defendant could be*probative* of the defendant's version that the events on the night in question were consensual.*Id.* at 308, 379 N.W.2d 390.

In the instant case, the trial court considered the meaning of the term "past" and determined that arbitrarily limiting evidence of the complainant's consensual sexual relations with the defendant to that occurring before the alleged sexual assault could exclude relevant evidence.[7] We agree. The rape-shield statute was grounded in the evidentiary principle of balancing probative value against the dangers of unfair prejudice, inflammatory testimony, and misleading the jurors to improper issues. Where the proposed evidence concerns consensual sexual conduct with third parties, the Legislature has determined that, with very limited exceptions, the balance overwhelmingly tips in favor of exclusion as a matter of law. However, where the proposed evidence concerns consensual sexual conduct with the defendant, the Legislature has left the determination of admissibility to a case-by-case evaluation.

It is axiomatic that relevance flows from the circumstances and the issues in the case. It is primarily for this reason that we reject the argument that otherwise relevant evidence becomes legally irrelevant and inadmissible merely because it occurred after an alleged sexual assault and not before. The Legislature did not intend an arbitrary limit on relevant evidence, and we find that imposing such a time limit would not faithfully

further the legislative purposes of the rape-shield statute. Accordingly, we 511*511 hold that "past" sexual conduct refers to conduct that has occurred before the evidence is offered at trial.[8]

The partial dissent would not consider "whether the proffered evidence is relevant and whether its prejudicial nature outweighs its probative value," Op. at 514, if the proffered sexual conduct evidence did not "occur[] before the alleged assault," *id.* at 515. In addition to the reasons explained above, we reject this interpretation of the rape-shield statute because it runs the risk of violating a defendant's Sixth Amendment constitutional right to confrontation.

This Court has stated:

> *The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. [Hackett, 421 Mich. at 348, 365 N.W.2d 120.]*

Conversely, the partial dissent would hold that *as a matter of law* postincident sexual conduct would *never* be admissible___even if relevant. To the contrary, we believe that determinations of relevance, materiality, prejudicial value, and the defendant's constitutional right to use the proffered evidence, depend on the facts of the case. Accordingly, the rape-shield statute should not be interpreted to foreclose consideration of such issues arbitrarily. Further, *Michigan v. Lucas,* 500 U.S. 145, 151, 111 S.Ct. 1743, 1747, 114 L.Ed.2d 205 (1991), suggested that an arbitrary interpretation and application of the rape-shield statute's provisions could violate the right to confrontation.

III

This of course does not end our inquiry regarding the admissibility of the proposed evidence. The statute further provides that such evidence is admissible "*only to the extent* that the judge finds that the ... proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value...." M.C.L. § 750.520j; M.S.A. § 28.788(10) (emphasis added).

> *The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally*

abridge the defendant's right to confrontation. [Hackett, 421 Mich. at 349, 365 N.W.2d 120.]

We generally review the trial court's determinations of evidentiary issues for abuse of discretion.*Perkins,* 424 Mich. at 308, 379 N.W.2d 390.

Subsequent Consensual Sexual Relations

The defendant argues that evidence of subsequent consensual sexual relations between the complainant and the defendant within a relatively short time after the alleged sexual assault would be relevant to whether she was in fact raped. In contrast, the prosecutor argues that evidence of subsequent consensual sexual relations is not relevant in this case because consent is not an issue. The prosecutor further argues that any probative value is minimal because the complainant and the defendant were two married people going through an emotional period after the defendant had filed for divorce. The prosecutor further argues that the marital rape provision, 512*512 M.C.L. § 750.520*l*; M.S.A. § 28.788(12), reveals that the Legislature contemplated cases such as this, where married people who were living together would be involved in rape allegations, and, accordingly, subsequent consensual sexual relations would not be unexpected because of "the complexities of human emotion." The prosecutor emphasizes that this evidence would be highly prejudicial because it would divert the jury's attention from the alleged events of the night in question. Both parties' points are well taken.

The rape-shield statute provides that the trial court should balance these considerations in determining whether the proposed evidence is material and whether its probative value is outweighed by its prejudicial nature. On a common-sense level, a trial court could find that the closer in time to the alleged sexual assault that the complainant engaged in subsequent consensual sexual relations with her alleged assailant, the stronger the argument would be that if indeed she had been sexually assaulted, she would not have consented to sexual relations with him in the immediate aftermath of sexual assault. Accordingly, the evidence may be probative. Conversely, the greater the time interval, the less probative force the evidence may have, depending on the circumstances.

Even so, time should not be the only factor. The trial court should also carefully consider the circumstances and nature of the relationship between the complainant and the defendant. If the two did not have a personal relationship before the alleged sexual assault, then any consensual sexual relations after the alleged sexual assault would likely be more probative than if the two had been living together in a long-term marital relationship. Additionally, the trial court could find that there may be other human emotions intertwined with the relationship that may have interceded, leading to

consensual sexual relations in spite of an earlier sexual assault.[9] Depending on the circumstances, the trial court may find that these other considerations have intensified the inflammatory and prejudicial nature of subsequent consensual sexual conduct evidence and properly conclude that it should be precluded or limited. Moreover, the Legislature, by the use of the term "unless and only to the extent that" in the rape-shield statute, expressly limited admission of such evidence to what is necessary for the defense. Therefore, the trial court appropriately should limit the scope of sexual conduct evidence where constitutionally possible.

Here, the trial court limited the evidence of subsequent consensual sexual relations to that occurring within thirty days of the alleged sexual assault. This complainant, after six years of marriage to her alleged assailant and after having two children with him, consented to sexual relations with him even after she alleged that she was sexually assaulted by him. While such evidence has a fair amount of probative value that the alleged sexual assault never occurred, we also believe that the danger of misleading the jury's focus away from the night in question is significant. We remand to the trial court for further proceedings in light of this opinion with respect to the admissibility of evidence of subsequent consensual sexual relations between the complainant and the defendant.

Particular Sexual Activity

The defendant argues that evidence of the couple's marital digital-anal sexual activity is relevant to show that on prior occasions the complainant was not offended or humiliated by digital-anal sexual activity and that, if the alleged sexual assault had indeed occurred as suggested by the complainant, this would have been normal sexual activity for the couple. However, the victim's offense or humiliation is not an element of third-degree criminal sexual conduct. Moreover, the fact that the couple engaged in digital-anal sexual activity during their marriage *before* the alleged sexual assault is not probative of the defense theory that the alleged events on the night in question never occurred. "The right to confront and cross-examine is not without limits. It does not 513*513 include a right to cross-examine on irrelevant *issues.*"*Arenda,* 416 Mich. at 8, 330 N.W.2d 814. Exclusion of this evidence will not violate the defendant's constitutional rights.[10]

We hold that the trial court did not abuse its discretion in precluding the defendant from introducing evidence of prior consensual digital-anal sexual activity, given its highly prejudicial nature and its nonexistent probative value.

IV

We reverse the decision of the Court of Appeals and remand to the trial court for further proceedings consistent with this opinion.

BOYLE, RILEY, MALLETT, and WEAVER, JJ., concur with CAVANAGH, J.

LEVIN, Justice (*separate opinion*).

I agree with the majority that "past sexual conduct" includes consensual sexual conduct between the complainant and the defendant after the assault charged in the information. I concur in the reversal of the Court of Appeals for essentially the reasons set forth in the majority opinion. I dissent from the holding that

> *the trial court did not abuse its discretion in precluding the defendant from introducing evidence of prior consensual digital-anal sexual activity, given its highly prejudicial nature and its nonexistent probative value. [Op., p. 513.][*[1]*]*

The evidence of the prior consensual atypical sexual conduct in the instant case is evidence tending to show that before the atypical sexual conduct, alleged in the information to have been nonconsensual, the defendant and the complainant consensually engaged in the same atypical sexual conduct on a number of occasions. Perforce, the probative value of the past atypical consensual sexual conduct outweighs any inflammatory or prejudicial nature of the past consensual atypical sexual conduct.

For the same reason that evidence of the "victim's past [*normal*] sexual conduct with the actor" is, pursuant to the rape-shield statute, probative and admissible as an exception to the strictures of the rape-shield statute,[2] evidence of past *atypical* sexual conduct between them is probative.

The information charges the defendant with engaging in unconsented-to digital-anal sex with his estranged wife. The complainant wife acknowledged that during the marriage, before the assault charged in the information, the complainant and the defendant had engaged in digital-anal sex on a number of occasions, which jurors might conclude, on the basis of such evidence, was normal for them.

Digital-anal sex may or may not be part of the sexual experience of one or more of the jurors who shall be empaneled to try this case. To the extent that it is, the evidence of past consensual digital-anal sex is less prejudicial; to the extent it is not, such evidence is 514*514more probative, especially for jurors who may have had little or no experience with digital-anal sex and who, on the basis of such inexperience, might regard digital-anal sex as deviant sexual behavior, and who might conclude—absent the evidence that the complainant and the defendant had consensually engaged on a

number of occasions in such atypical sexual conduct—that a woman (the complainant) would not consent to such a penetration of her body.

Resolution of the factual dispute will depend on the jury's assessment of the credibility of the estranged complainant wife and defendant husband. If the evidence of consensual digital-anal sexual activity is, as the majority opines and concludes, "highly prejudicial" to a fair assessment of the wife's credibility, then it is, by the same token, highly probative to a fair assessment of the husband's credibility.

BRICKLEY, Chief Justice (*concurring in part and dissenting in part*).

I write separately to express my partial disagreement with the majority's construction of Michigan's rape-shield law, M.C.L. § 750.520j(1)(a); M.S.A.§ 28.788(10)(1)(a), which generally excludes evidence of the complainant's sexual conduct. However, an exception to the statute permits the admission of "[e]vidence of the victim's past sexual conduct with the actor" if that evidence is material and if its "prejudicial nature does not outweigh its probative valu...." I agree with the majority that the trial court did not abuse its discretion in precluding the defendant from introducing evidence of specific acts of sexual activity between the defendant and the complainant. I also agree with the majority's characterization of the test balancing prejudice and probative value. However, I would uphold the Court of Appeals conclusion that the word "past" as used in the exception permits the admission only of evidence of sexual conduct occurring before the alleged assault.

The majority concludes that the word "past" is ambiguous because there was disagreement regarding its meaning among the Court of Appeals judges. In performing statutory construction, it relies on *People v. Arenda,* 416 Mich. 1, 330 N.W.2d 814 (1982), to conclude that the primary purpose of the exception is to permit the admission of relevant evidence. Although I do not contest this characterization, I would not reach the issues whether the proffered evidence is relevant and whether its prejudicial nature outweighs its probative value. That analysis need only be performed if the evidence falls within the exception permitting the admission of evidence of past sexual conduct.

Although this Court does examine the legislative intent in performing statutory construction, the first consideration must be the language actually used by the Legislature. If that language cannot be construed to further the legislative intent, it is the purview of the Legislature to amend the statute. Further, a statute must be construed so as to give every word meaning. "[I]n the interpretation of statutes, effect must be given, if possible, to every word, sentence and section...." *Drouillard v. Stroh Brewery Co.,* 449 Mich. 293, 303, 536 N.W.2d 530 (1995). The result reached by the majority renders the word "past" in the exception nugatory, thereby violating this rule of statutory construction. Accordingly, I must dissent.

The majority finds support for its conclusion in the dictionary definition of past as "having occurred during a time previous to the present." Op. at 511, n. 8. However, the dictionary definition of "past" makes it meaningless in the context of the statute. In order for evidence of sexual conduct to be admitted at trial, the conduct must necessarily have occurred during a time previous to the trial. It would be impossible to

admit evidence of future sexual conduct. The result reached by the majority could have been obtained had the Legislature worded the exception so as to permit the admission of "evidence of the victim's sexual conduct with the actor" or "evidence of the victim's other sexual conduct with the actor," rather than evidence of "the victim's *past* sexual conduct with the actor." However, as the statute is written, in order to imbue "past" with meaning, this Court should find that only evidence of conduct that occurred before the alleged assault may be admitted.

515*515 The majority's construction is not possible under the rule requiring that every word in a statute be given meaning. I conclude that the proffered evidence does not fall within the exception to the rape-shield statute permitting the admission of evidence of past sexual conduct because it deals with sexual conduct that occurred after the incident. The evidence should not be admitted under the current wording of the statute. Accordingly, I would remand the case to the trial court with instructions to apply the rule that "past" refers only to sexual conduct occurring before the alleged assault.

[1] M.C.L. § 750.520d(1)(b); M.S.A. § 28.788(4)(1)(b).

[2] She testified:

Q. And have you had any consensual sexual relations with your husband since September 27?

A. There was a brief reconciliation at which time we did.

Q. Subsequent to the alleged criminal offense you've had sexual relations with your husband willingly?

A. Yes.

Q. How many occasions?

A. I don't remember.

Q. More than five?

A. No.

[3] The court also precluded evidence of the complainant's alleged sexual conduct with any third party. The defendant has not challenged this portion of the order.

[4] See also *United States v. Torres,* 937 F.2d 1469, 1472 (C.A.9, 1991) (FRE 412 applies to all sexual behavior preceding trial); *Flurry v. State,* 290 Ark. 417, 419, 720 S.W.2d 699 (1986) (the statute applies to all sexual conduct); *Cuyler v. State,* 841 S.W.2d 933, 936 (Tex.App., 1992) (the statute applies to all sexual conduct occurring before trial); *State v. Gulrud,* 140 Wis.2d 721, 729, 412 N.W.2d 139 (Wis.App., 1987) (the statute precludes evidence of all secual conduct occurring before the conclusion of the trial).

[5] There are limited exceptions to the general exclusionary rule in situations where the evidence is *relevant* for impeachment purposes such as bias, motive, or a pattern of

false accusations because it is probative of the complainant's truthfulness. *Id.* at 348-349, 365 N.W.2d 120.

[6] See *People v. Haley,* 153 Mich.App. 400, 405, 395 N.W.2d 60 (1986) (the evidence of adult third-party penetration was relevant to prove that the condition of the eight-year-old girl's hymen may have been caused by someone other than the defendant).

[7] The trial court stated that he would find evidence of consensual sexual relations with the alleged assailant on the day after the alleged sexual assault to be *more* probative of whether the sexual assault occurred than evidence of consensual sexual relations on the day before the alleged sexual assault.

[8] This interpretation corresponds to the dictionary definition of "past." Past is defined as:

gone by or elapsed in time ... of, having existed in, or having occurred during a time previous to the present; bygone ... gone by just before the present time; just passed.... [The Random House Dictionary of the English Language: Second Unabridged Edition, p 1419.]

In turn, "present" is defined as:

being, existing, or occurring at this time or now; current ... at hand; immediate ... noting an action or state occurring at the moment of speaking. [*Id.,* p. 1529.]

Accordingly, dictionary definitions indicate that the term "past" refers to sexual conduct evidence that has occurred before the moment it is offered at trial.

[9] This is not unlike what often occurs with battered spouses. *People v. Christel,* 449 Mich. 578, 537 N.W.2d 194 (1995).

[10] We note that if the complainant were to testify on direct examination that she and the defendant had never before engaged in this activity, then the evidence may become proper impeachment. MRE 607.

[1] The circuit judge limited the evidence of postassault consensual sexual conduct only to such consensual conduct as occurred within thirty days after the assault alleged in the information. Op., pp. 507 and 512.

It appears that the postassault consensual sexual conduct occurred within two weeks of the alleged assault, and thus the thirty-day limitation was not protested by the defendant either at the trial or the appellate level. The following occurred at the hearing on the motion in limine:

The Court: And that in terms___you're alleging that there was subsequent sexual conduct within like thirty days of this?

[*Defense Counsel*]: Oh, yes, Your Honor, actually within two weeks I think it is.

Accordingly, whether the thirty-day limitation is proper has not been put in issue in this case.

[2] Although the defense is not consent, but that there was no sexual conduct on the occasion charged in the information, the evidence of past consensual atypical sexual conduct is relevant to negative the inferences jurors might draw, on their own initiative, absent such evidence, that the incident must have occurred as the complainant testified, because she could not have imagined such abnormal sexual conduct, or that this abnormal sexual conduct is just the kind of hostile behavior an estranged husband would perpetrate on his wife to humiliate and subjugate her.

People v Adamski

198 Mich. App. 133 (1993)

497 N.W.2d 546

PEOPLE

v.

ADAMSKI

Docket No. 131546.

Michigan Court of Appeals.

Submitted May 6, 1992, at Lansing.

Decided February 1, **1993**, at 9:30 A.M.

134*134 *Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *Dennis M. Swain,*Prosecuting Attorney, and *J. Ronald Kaplansky,* Assistant Attorney General, for the **people**.

Fredric S. Abood and *Grant J. Gruel,* for the defendant on appeal.

Before: WAHLS, P.J., and MARILYN KELLY and REILLY, JJ.

WAHLS, P.J.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and was thereafter sentenced to a term of seventeen to forty years' imprisonment. Defendant's motion for a new trial was denied, and this appeal as of right followed. We reverse.

I

Defendant's conviction stems from an act of sexual intercourse that allegedly occurred in late June 1988 between him and his daughter, age fourteen at the time. Defendant and the complainant's mother had been divorced years earlier and physical custody of the complainant changed several times. Relations between defendant and his former wife were apparently bitter.

At trial, the complainant testified that, on the 135*135 day of the alleged misconduct, defendant was reading the local newspaper in a hot tub while she was in the swimming pool. The complainant joined defendant in the hot tub, where defendant showed her an article about an airplane crash.[1] Defendant asked her to stand, removed her bathing suit, and proceeded to fondle her. Defendant then engaged in sexual intercourse with the complainant. The complainant also testified with regard to a second act of intercourse with defendant that allegedly occurred later that night when she and defendant watched television together in his bedroom. Over defendant's objection, the complainant related a five-year history of sexual misconduct of escalating severity. The complainant testified that sexual intercourse with defendant first began 1 or 1 1/2 years before the June 1988 incident.

Defendant's theory was that the complainant had leveled a false accusation at him in order to get even with him for disciplining her and out of the complainant's alleged jealousy of defendant's girl friends. Defendant had enrolled the complainant in a counseling program in January 1988 because of the complainant's poor school grades and after discovering marijuana in the complainant's possession. Defendant later made arrangements to send the complainant to the 1988 summer session of a boarding school in New York, which the complainant began to attend a few weeks after the charged incident of sexual misconduct. The complainant acknowledged on cross-examination that she resented having to ask defendant's girl friends for permission to visit her friends. She also believed that defendant and Barbara Lokovich, defendant's girl friend in June 136*136 1988 and wife at the time of trial, had sent her to boarding school to get rid of her. The complainant also acknowledged that she became upset when defendant informed her in August 1988, upon her return from the boarding

school, that she would attend the school in the fall and that she did not want to return. The complainant told her mother of defendant's alleged misconduct shortly after she returned from the summer session. Her mother informed the authorities.

II

Before trial, defendant had obtained records concerning the complainant's discussions in January 1988 with a mental health therapist. Defendant sought to impeach the complainant with several statements she had made to the therapist that were inconsistent with her trial testimony, the most damaging of which was as follows:

> *[The complainant] states that she sometimes fears that her father may be inappropriately sexual with her though she states he has never acted in this way. She states her fear comes from her mother discussing this subject with her often.[*[2]*]*

The prosecutor objected to defendant's use of any statement the complainant had made in connection with counseling, arguing that such statements were absolutely privileged under Michigan's statutory psychologist-patient privilege, MCL 330.1750; MSA 14.800(750).[3] The trial court conditionally 137*137 agreed with the prosecutor and allowed the complainant's mother to invoke the privilege on the complainant's behalf. The trial court later upheld its ruling after further argument on the issue. During defendant's motion for a new trial, however, the trial court held that its earlier ruling was an error of "constitutional dimension," on the basis of *Davis v Alaska,* 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974). Nonetheless, the trial court denied defendant's motion, believing that the error was harmless beyond a reasonable doubt.

> *I think that this evidence, which as I say could have and should have been allowed in, was in a sense cumulative evidence. Defense counsel sought to and did impeach [the complainant] numerous ways, numerous times. Her credibility was an issue throughout.*

We agree with the trial court that the complainant's prior inconsistent statements to her counselor were admissible for impeachment despite the bar of the statutory privilege. It appears well settled as a matter of constitutional law that common-law or statutory privileges, even if purportedly absolute, may give way when in conflict with the constitutional right of cross-examination. The failure of the trial court to allow defendant to cross-examine the complainant, at least with regard to her statement that defendant had not acted inappropriately with her,[4] denied defendant 138*138 his Sixth Amendment right of confrontation by limiting cross-examination. US Const, Am VI; Const 1963, art 1, § 20.

A primary interest secured by the Confrontation Clause is the right of cross-examination.*Delaware v Van Arsdall,* 475 US 673, 678; 106 S Ct 1431; 89 L Ed 2d 674 (1986); *Douglas v Alabama,* 380 US 415, 418; 85 S Ct 1074; 13 L Ed 2d 934 (1965). The right of cross-examination is not without limit; neither the Confrontation Clause nor due process confers an unlimited right to admit all relevant evidence or cross-examine on any subject. ***People*** *v Hackett,* 421 **Mich** 338, 347; 365 **NW2d** 120 (1984); *Dutton v Evans,* 400 US 74; 91 S Ct 210; 27 L Ed 2d 213 (1970). The right of cross-examination does not include a right to cross-examine on irrelevant issues and may bow to accommodate

other legitimate interests of the trial process or of society. *United States v Nixon,* 418 US 683; 94 S Ct 3090; 41 L Ed 2d 1039 (1974); *Mancusi v Stubbs,* 408 US 204; 92 S Ct 2308; **33** L Ed 2d 293 (1972); ***People*** *v Arenda,* 416 **Mich** 1, 8; 330 **NW2d** 814 (1982). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall, supra,* p 679. Defendants are, however, guaranteed a reasonable opportunity to test the truth of a witness' testimony. *Hackett, supra.*

Privileges such as the one before us in this matter are intended to encourage society's interest in open discussion between persons in need and those from whom they seek help. At the same time, however, privileges impede a defendant's ability to present a defense by limiting the evidence 139*139 available. Both this Court and our Supreme Court have not been hesitant to hold that confidential or privileged information must be disclosed where a defendant's right to effective cross-examination would otherwise be denied. See, e.g., *Hackett, supra* (evidence of the complainant's sexual conduct otherwise barred by the rape-shield statute, MCL 750.520j(1); MSA 28.788(10)(1), admissible to show the complainant's bias, ulterior motive, or prior false accusations); ***People*** *v Hooper,* 157 **Mich App** 669; 403 **NW2d** 605 (1987), and ***People*** *v Rohn,* 98 **Mich App** 593; 296 **NW2d** 315 (1980) (witness' prior inconsistent statements from presentence investigation admissible despite confidentiality statute, MCL 791.229; MSA 28.2299); ***People*** *v Redmon,* 112 **Mich App** 246; 315 **NW2d** 909 (1982) (impeachment of prosecution witness by conviction over ten years old permissible despite ten-year limit of MRE 609[b], now 609[c]).

In the present case, we recognize the important policy underlying the statutory psychologist-patient privilege, MCL 330.1750; MSA 14.800(750). Weighing against this policy is defendant's interests in his liberty and receiving a fair trial. On its face, the privilege poses an absolute bar to the use of the complainant's statements for impeachment. In *Advisory Opinion to the House of Representatives,* 469 A2d 1161 (RI, 1983), the Supreme Court of Rhode Island considered a proposed statute that would have made privileged all communications between a sexual assault victim and a counselor. The court found that the proposed statute would absolutely bar the introduction of a class of evidence and would violate the constitutional rights of a defendant to confront his accusers, to obtain compulsory process, and to offer testimony. *Id.* MCL 330.1750; MSA 14.800(750) presents the same situation, and we believe that the statute must140*140 yield to defendant's constitutional right of confrontation. See also *State v Hembd,* 305 Minn 120; 232 **NW2d** 872 (1975).

III

Whether to allow the use of any particular statement protected by the privilege for impeachment is a separate question that is within the trial court's discretion. *Van Arsdall, supra,* p 679. Assuming, as the trial court found at the hearing regarding defendant's motion for a new trial, that defendant should have been able to impeach the complainant with the prior inconsistent statement quoted in this opinion, the

question becomes whether the restriction on cross-examination was harmless error. *Van Arsdall, supra,* p 684. In this inquiry, we look to the following considerations: (1) the importance of the complainant's testimony to the prosecutor's case; (2) whether the excluded testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the complainant's testimony; (4) the extent of the cross-examination of the complainant; and (5) the overall strength of the prosecutor's case. *Id.*Contrary to the trial court's belief, we hold that the error was not harmless.

Apart from expert opinion testimony presented by both sides concerning the typical behavior of child sexual abuse victims, this case was a contest between the credibility of the complainant and the credibility of defendant. The complainant's testimony was of paramount importance to the prosecutor's case, and her testimony was not corroborated by any witnesses or physical evidence. The complainant was cross-examined extensively, but the impeachment that was allowed was relevant to the complainant's possible bias toward defendant 141*141 and motive to make a false accusation. The excluded prior inconsistent statement's probative value with regard to the complainant's credibility went beyond a tendency to show bias or ulterior motive — it called into question the veracity of the bulk of the complainant's inculpatory testimony. We therefore conclude that the error was not harmless and reverse defendant's conviction.

In the event that this case is again brought to trial, if defendant desires to introduce impeachment evidence that would otherwise be barred by MCL 330.1750; MSA 14.800(750), the trial court and the parties shall follow the procedure outlined in *Hackett, supra,* for an initial offer of proof of the relevancy of the proposed evidence, followed by an in camera hearing if an adequate offer of proof is made. The trial court should not admit privileged statements into evidence unless defendant's right of confrontation would be unduly infringed by exclusion.*Hackett, supra,* pp 350-351.

We recognize that our holding today will distress, if not outrage, a great many **people**, and in recognition thereof we do not make this decision lightly. Nonetheless, our understanding of the law compels us to do so. It is possible that the policy behind the privilege may somehow be reconciled with the constitutional right of confrontation in a manner that fully preserves both, but if this is so, the method has not been made known to us, and we invite the Legislature or a higher appellate court to consider the problem.

IV

We also agree with defendant that the trial court erred in prohibiting defendant from cross-examining the complainant with regard to a civil action she had brought or was about to bring,142*142 through her mother, against defendant. See ***People*** *v Grisham,* 125 **Mich App** 280, 284; 335 **NW2d** 680 (1983); ***People*** *v Johnston,* 76 **Mich App** 332, 334-336; 256 **NW2d** 782 (1977).

V

Defendant had sought to introduce evidence of two alleged false accusations of rape made by the complainant. Defendant now claims that the trial court erred in holding that defendant's offer of proof regarding the alleged false accusations was insufficient. We disagree. Defendant's offer of proof consisted of a transcript of an interview with the complainant, held after charges were brought against defendant, during which the complainant stated that, while she was at the boarding school during the summer, "[t]here was two guys and the other guy forced the other guy to go to bed with me." The offer of proof also included a transcript of a probate court hearing, held after charges were brought against defendant, at which the complainant's mother testified that the complainant "was raped by her dad and two **people** from New York."

Defendant's offer of proof was insufficient to show a prior false accusation. *Hackett, supra,* pp 348-351; ***People*** *v Mikula,* 84 **Mich App** 108, 115-116; 269 **NW2d** 195 (1978). No showing of falsity was made. The slight difference between the complainant's account of the boarding school incident and that related by the complainant's mother do not show falsity, nor does the fact that the complainant refused to report the incident to school authorities or divulge the names of her attackers. The trial court's decision to exclude inquiry into this matter was not an abuse of discretion.

VI

Defendant's remaining issues may be dealt with 143*143 briefly. Defendant argues that the trial court improperly allowed the complainant to testify regarding the history of sexual abuse allegedly committed by defendant. Defendant's argument on appeal, however, is that the testimony should not have been allowed because defendant was not allowed to cross-examine the complainant concerning her prior inconsistent statements, discussed above. This argument, to the extent that it stands on its own, is not properly before us because defendant failed to identify relevant authority, ***People*** *v Fowler,* 193 **Mich App** 358, 361; 483 **NW2d** 626 (1992), and because an objection on this ground was not raised below,[5] ***People*** *v Michael,*181 **Mich App** 236, 238; 448 **NW2d** 786 (1989). In any event, it does not appear that the trial court abused its discretion in admitting the testimony. ***People*** *v Dermartzex,* 390 **Mich** 410; 213 **NW2d** 97 (1973).

Defendant's remaining arguments are not preserved for appellate review. Defendant failed to object to the cautionary instruction given by the trial court to the jury regarding the prior similar acts evidence that was introduced. ***People*** *v Puroll,* 195 **Mich App** 170, 171; 489 **NW2d** 159 (1992). Nor did defendant object to the allegedly improper comments made by the trial court.[6] ***People*** *v Weatherford,* 193 **Mich App** 115, 121; 483 **NW2d** 924 (1992). No manifest injustice would occur if we declined review. Finally, we need not address defendant's sentencing argument in light of our disposition of the case.

Reversed.

[1] The prosecutor stipulated the fact that no airplane crashes were reported in the local newspaper one week before and one week after the incident.

[2] This quote is taken from the therapist's initial written evaluation of the complainant.

[3] Section 2 of the statute provides:

Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section. [MCL 330.1750(2); MSA 14.800(750)(2).]

[4] The record received by this Court does not include all the statements made by the complainant to her counselor, but only brief excerpts, including the statement quoted in this opinion. We therefore do not know the full extent to which the complainant's discussions with her counselor may have been inconsistent with her trial testimony.

[5] Defendant objected to the prior-acts testimony below, but did not argue that the evidence should be excluded because of the trial court's limitation on cross-examination.

[6] Of particular interest is defendant's claim that the trial court's reference to the film *Bull Durham* was prejudicial because "[t]he word `Bull' is commonly used to comment upon the lack of credibility of nearly anything." This argument would be amusing, were it not patently frivolous.

People v Allen

429 Mich. 558 (1988)

420 N.W.2d 499

PEOPLE

v.

ALLEN

PEOPLE

v.

BROOKS

PEOPLE

v.

GRAY

PEOPLE

v.

SMITH

PEOPLE

v.

PEDRIN

Docket Nos. 70740, 71633, 72346, 72753, 73297, (Calendar Nos. 1-5).

Supreme Court of Michigan.

Argued October 7, 1986.

Decided January 19, 1988.

Amended February 16, 1988.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, *John D. O'Hair,*Prosecuting Attorney, *Timothy A. Baughman,* Chief, Criminal Division, Research, Training and Appeals, and *Jeffrey Caminsky,* Assistant Prosecuting Attorney, for the people in *Allen* and*Gray,* and 563*563 *Rosemary A. Gordon,* Assistant Prosecuting Attorney, for the people in *Smith; L. Brooks Patterson,* Prosecuting Attorney, *Robert C. Williams,* Chief Appellate Counsel, and*Richard H. Browne,* Assistant Prosecuting Attorney, for the people in *Brooks; James P. Hoy,*Prosecuting Attorney, and *Thomas C. Johnson,* Assistant Attorney General, for the people in*Pedrin.*

Bell & Hudson, P.C. (by *Glen R. Warn*), for defendant Allen.

Faintuck, Shwedel & Wolfram (by *William G. Wolfram*) for defendant Brooks.

State Appellate Defender (by *Derrick A. Carter*) for defendant Gray; (by *F. Michael Schuck*) for defendant Smith; (by *Rolf E. Berg*) for defendant Pedrin.

Amended February 16, 1988., post, p 1216.

BRICKLEY, J.

These cases were consolidated in order to resolve differing interpretations of the application of MRE 609(a) to the practice of impeaching criminal defendants by prior conviction.

We find that MRE 609(a), as presently constituted, leads to an interpretation that encourages the use of "bad man" evidence without a commensurate gain in the evaluation of a witness' testimony. More specifically, the central element in the exercise of discretion in this area, i.e., the extent to which the prior conviction is probative of credibility, has been greatly de-emphasized. The lower courts have focused instead on other issues such as the need for credibility evidence. The resulting difficulty in interpreting this important rule of evidence more often acts to the detriment of the defendant's right to testify than to the service of the jury's ability to evaluate a witness' credibility.

The approach of the dissenting opinions, in our 564*564 view, does not clarify the present confusion and, in one respect, adds a standard that creates an irreconcilable conflict in the application of MRE 609.

In order to resolve the cases before us, we therefore set forth a more specific procedure for the exercise of discretion under the present MRE 609(a) which we think more fully comports with its original intent. We also take this opportunity to promulgate an amendment to MRE 609(a) which will apply to all cases tried after March 1, 1988. (See appendix A.) It provides for bright-line rules that recognize and exclude certain prior convictions which are inherently more prejudicial than probative and allows admission of those convictions which are inherently more probative than prejudicial. For those crimes that fall in between, because their relationship to credibility is less clear, the amendment adopts the same standard for the exercise of judicial discretion as is set

forth herein for the resolution of these cases and for cases yet to be resolved under MRE 609(a) prior to its amendment.

I

The facts of these cases are succinctly set forth in the opinion of Chief Justice RILEY.

II

The use of prior convictions to impeach a witness-accused has long been controversial. This controversy is apparent in the debates surrounding the adoption of Michigan Rule of Evidence 609,[1] as 565*565 well as the relevant federal rule.[2] The question has been the source of more scholarly commentaries than can be cited here.[3] What underlies this controversy is the clash between the fundamental principle defined in MRE 404 that character evidence (including prior conviction evidence) may not be admitted to prove that a defendant acted in conformity therewith and the practice of permitting 566*566 the admission of prior conviction evidence as contained in MRE 609 for purposes of impeaching a witness-accused's credibility when he testifies in his own behalf.[4]

A

There can be little doubt that an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity. Nevertheless, in our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant's prior acts in reaching its verdict.[5] See*United* 567*567 *States v Mitchell,* 2 US (2 Dall) 348, 357; 1 L Ed 410 (1795).[6]

However, when a defendant testifies, he takes on a second role, that of a witness. And the question of the reliability of a witness' testimony, though a collateral issue, may play an important role in a jury's decision. We therefore permit the introduction of evidence to prove that a witness is not worthy of belief. For example, the witness' ability to perceive or understand events may be questioned. (MRE 601.) Similarly, the witness' testimony may be disallowed if he has no personal knowledge of the events about which he testifies. (MRE 602.) In addition, the witness' reputation for dishonesty may be introduced or specific instances of conduct demonstrating a lack of veracity elicited on cross-examination. (MRE 608.) These methods of impeachment may be used against all witnesses, and their use against a witness-accused has not been challenged. However, when a defendant takes on the role of witness, the rule permitting impeachment of witnesses by prior conviction presents a special problem, i.e., the danger that evidence admitted to impeach the defendant-as-witness will be used by the jury in evaluating defendant-as-defendant.[7]

568*568 A jury should not be allowed to consider the defendant's guilt of the crime before it on the basis of evidence of his propensity for crime. Finding a person guilty of a crime is not a pleasant or easy assignment for a representative group of twelve people. It is much easier to conclude that a person is bad than that he did something

bad. Hence the appetite for more knowledge of the defendant's background and the slippery slope toward general "bad man" evidence.[8]

569*569 This appetite presents three types of impropriety. First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no "innocent" man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged. Beaver & Marques, *A proposal to modify the rule on criminal conviction impeachment,* 58 Temple L Q 585, 592-593 (1985). All three of these dimensions suggest a likelihood that innocent persons may be convicted.

The danger then is that a jury will misuse prior conviction evidence by focusing on the defendant's general bad character, rather than solely on his character for truthtelling.

B

Judge Weinstein has described the basis for MRE 609 admissions as follows:

> *The theory that all convictions are relevant to credibility depends on a two-fold assumption: (1) that a person with a criminal past has a bad general characterand (2) that a person with a bad 570*570 general character is the sort of person who would disregard the obligation to testify truthfully. [3 Weinstein, Evidence, ¶ 609[02] at 609-59. Emphasis added.]*

Similarly, Judge Holmes stated in *Gertz v Fitchburg R Co,* 137 Mass 77, 78 (1884), that

> *when it is proved that a witness has been convicted of a crime, the only ground for disbelieving him which such proof affords is the general readiness to do evil which the conviction may be supposed to show. It is from that general disposition alone that the jury is asked to infer a readiness to lie in the particular case, and thence that he has lied in fact. The evidence has no tendency to prove that he was mistaken, but only that he has perjured himself, and it reaches that conclusion solely through the general proposition that he is of bad character and unworthy of credit.*

The same analysis was offered in the Advisory Committee notes to the first draft of federal rule 609 which permitted impeachment by all prior felony convictions:

> *A demonstrated instance of willingness to engage in conduct in disregard of accepted patterns is translatable into willingness to give false testimony. [46 FRD 161, 297.]*

Thus, jurors are not directly informed through impeachment evidence, with the exceptions described above, that a witness may not be truthful. That understanding is derived indirectly through the mediation of the belief that the witness has a "general readiness to do evil." *Gertz, supra,* p 78. In other words, for example, the commission of an assault does not involve the telling of a lie.

The dissent's reference to the diagnostic criteria 571*571 of the antisocial personality disorder described in the Diagnostic and Statistical Manual of Mental Disorders (3d ed) (DSM III R), (Washington, DC: American Psychiatric Association, 1987), further demonstrates this phenomenon. While the manual does not indicate that violent behavior is an example of a lack of veracity, it explains instead that the presence of a certain set of behaviors categorize an individual as antisocial, and that an antisocial person often is a liar, e.g., that an assaultive individual is a bad person or of bad general character and that such people have a tendency to lie.[9]

Most crimes can, therefore, be seen as evidence of a lack of veracity only when mediated through the belief that the individual has a bad general character. This results in both a low probative value and a strong potential for prejudice, as it will be difficult for jurors to put out of their minds the very step which allowed them to reach their conclusion as to veracity. On the other hand, crimes having an element of dishonesty or false statement are *directly* probative of a witness' truthfulness and at the same time present little possibility for prejudice since they can be understood as such, absent the mediation of the conclusion that the witness-accused is of bad general character.

In spite of the likelihood of prejudice, it can be argued, and indeed the dissent does so eloquently, that a limiting instruction will suffice. As the United States Supreme Court stated in*Delli Paoli v United States,* 352 US 232, 242; 77 S Ct 294; 1 L Ed 2d 278 (1957):

> *Unless we proceed on the basis that the jury will 572*572 follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense.*

However, as the United States Supreme Court later stated in *Bruton v United States,* 391 US 123, 135; 88 S Ct 1620; 20 L Ed 2d 476 (1968), when overturning the holding in *Delli Paoli:*

> *[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare Hopt v Utah, [120 US 430, 438; 7 S Ct 614; 30 L Ed 708 (1887)];Throckmorton v Holt, 180 US 552, 567[; 21 S Ct 474; 45 L Ed 663 (1901)]; Mora v United States, 190 F2d 749 [CA 5, 1951]; Holt v United States, 94 F2d 90 [CA 10, 1937].*[10]

573*573 We believe that we are now presented with such an exceptional circumstance. Limiting instructions are generally employed where more than one fact may be derived from a given piece of evidence, but not all are permissible considerations. This is not always easy for a jury to do, but we must sometimes rely on limiting instructions if our system is to function. However, as explained above, in the case of most prior conviction evidence the permissible consideration can only be understood by first recognizing the impermissible consideration. Where the two factors are so inextricably linked, we do not believe that a jury can be reasonably expected to follow the instruction.

We do not believe, however, that jurors are by any means deficient because they are unable to574*574 ignore general character evidence. To look to such evidence is natural, and many "experts" have done the same.

Our own Court of Appeals has at times been unable to resist doing so, and, indeed, it is sliding further along the slope to complete elimination of MRE 404 protection. In *People v Jones,* 98 Mich App 421, 428-429; 296 NW2d 268 (1980), the Court opined:

> *[F]requently the probative value of a conviction, or series of convictions, is increased, proportionally or greater, on the issue of credibility because of [the] similarity [to the present charge].*
>
> * * *
>
> *[I]t is more probable that a person has committed a crime if he has done it before, maybe several times. ... When it comes to whom to believe, it should not benefit the defendant that he is a repeater, perhaps specializing in this kind of crime, or that his record is so bad that it will weigh heavily against him. After all, he committed the previous crimes and they tell a great deal about him and about whether he is lying now. [Emphasis added.]*

A similar view of prior conviction evidence was expressed by Congressman Hogan in his dissent to the House Judiciary Committee's version of the rule which would have allowed impeachment only by crimes involving dishonesty or false statement. He argued that "it would be misleading to permit the accused to appear as a witness of blameless life on those occasions when the accused chooses to take the stand."[11]

The notion that a limiting instruction can prevent misuse of prior conviction evidence is simply mistaken, as it asks the jury to do what it cannot. 575*575 This view is supported by a number of empirical studies. A Canadian study concluded that

> *present research leaves little doubt that knowledge of a previous conviction biases a case against the defendant. The likelihood that a jury will convict the defendant is significantly higher if the defendant's record is made known to the jury. The fact that the defendant has a record permeates the entire discussion of the case, and appears to affect the juror's perception and interpretation of the evidence in the case.*
>
> *... These effects are present in spite of the fact that jurors were given specific instructions to ignore the fact of record while assessing the defendant's guilt.[Hans & Doob, Section 12 of the Canada Evidence Act and the deliberations of simulated juries, 18 Crim L Q 235, 251 (1975-76). Emphasis added.]*

Perhaps most disturbing was the study's conclusion that

> *jurors used [prior conviction evidence] only minimally in considering the issue of credibility. [Id. at 247.]*

Thus, the intended use of the evidence was of little actual importance.

Another study observed that the notion of a successful limiting instruction, with respect to character evidence, runs counter to the basic evaluative mechanisms discussed above.

> *The assumption that people can differentiate the use of information goes directly against what is known as the "halo" effect: the phenomenon by which a person will infer positive characteristics about a person where favourable information has been received and will infer negative characteristics about someone where unfavourable information 576*576 has been received. As Rosenberg and Olshan (1970) [citing Rosenberg & Olshan, Evaluative and descriptive aspects in personality perception, J of Personality and Soc Psyc, 16, 619-626 (1970)] have pointed out, "Studies using [the technique by which a subject is asked to infer characteristics about an individual on the basis of information about other characteristics] ... have consistently shown that subjects infer favourable traits from one or more favourable stimulus traits and infer unfavourable traits from unfavourable stimulus traits" (p 619). Thus, if a person is told one negative thing about another person, he is going to assume other negative things. With respect to s. 12 of the Canada Evidence Act, it follows that we would expect that if a juror hears that an accused has one unfavourable characteristic (e.g., that he has a criminal record) he will then think of that accused as a generally bad person. If this same juror is then asked to judge the guilt of the accused, he will be likely to infer that the accused is guilty of the crime in question. [Doob & Kirshenbaum,Some empirical evidence on the effect of s. 12 of the Canada Evidence Act upon an accused, 15 Crim LQ 88, 89-90 (1972-1973).]*

One of the researchers in the University of Chicago report leading to publication of *The American Jury* stated that the jury examinations revealed

> *"almost universal inability and/or unwillingness either to understand or follow the court's instruction on the use of defendant's prior criminal record for impeachment purposes. The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial."*
>
> *Letter from Dale W. Broeder, Associate Professor, the University of Nebraska College of Law, who conducted intensive jury interviews, to Yale 577*577 Law Journal, dated March 14, 1960, on file in Yale Law Library. [Note, Other crimes evidence at trial: Of balancing and other matters, 70 Yale L J 763, 777, n 89 (1961).]*

In a far less scientific study, the Columbia Journal of Law and Social Problems conducted a random national survey of trial judges and criminal defense attorneys. When asked whether they believed jurors were able to follow limiting instructions concerning the use of prior conviction evidence, ninety-eight percent of the responding attorneys answered negatively, and, even more disturbingly, forty-three percent of the responding judges agreed. Note, *To take the stand or not to take the stand: The dilemma of the defendant with a criminal record,* 4 Colum J of Law & Social Problems 215, 218 (1968).

The most recent study of this problem concluded that mock jurors used prior conviction evidence to "help them judge the likelihood that the defendant committed the crime charged" in spite of limiting instructions. Wissler & Saks, *On the inefficacy of limiting*

instructions: When jurors use prior conviction evidence to decide on guilt, 9 Law & Human Behavior 37, 44 (1985).[12] Most telling was the fact that a higher conviction rate was found where, all else being the same, the impeaching crime was murder than where the impeaching crime was perjury. *Id.*at 43. The only explanation for this last result is that the prior conviction evidence was not used exclusively to evaluate credibility. This is emphasized by the fact that the 578*578 researchers found that there was no significant difference between the mock jurors' ratings of defendant's credibility when a prior conviction was introduced and when one was not. *Id.* at 41. They concluded that "[t]he credibility ratings of defendant did not vary as a function of prior conviction," while "[c]onviction rates [did vary] as a function of prior conviction...." *Id.*

In *State v McAboy,* 160 W Va 497; 236 SE2d 431 (1977), the Supreme Court of West Virginia barred impeachment of a defendant's credibility by prior conviction except where the prior convictions were for perjury or false swearing as "[c]onviction of these crimes goes directly to the credibility of the defendant and ... their relevancy has a priority over their prejudicial effect."*Id.* at 508. Responding to the argument that we must rely on jurors' ability to distinguish between impeachment of a defendant's credibility as a witness and impeachment of his character in general, the court stated:

> *We are not unaware of the contention that such a rationale is pure sophistry and that the State, under the guise of testing credibility, relies upon the hope that the jury, in spite of being instructed by the court as to the purpose for which the evidence is admissible, will nonetheless consider the revelation of other convictions as indicating guilt in the case being tried. [Id. at 502 (quoting State v McGee, 160 W Va 1, 9; 230 SE2d 832 (1976).]*

The *McAboy* court also pointed out that most prior convictions were of dubious relevancy to credibility, stating that the relevancy proposition "is based on the premise that all persons convicted of a crime are disposed not to tell the truth...." *Id.* at 504. The court footnoted a hypothetical situation which bears repeating:

> *579*579 The ultimate paradox of the relevancy premise can be illustrated by altering slightly the example given in Bentham, Rationale of Judicial Evidence (Bowring's ed. 1827), and quoted in 2 Wigmore, Evidence, § 519 at 610 (3rd ed, 1940). It concerns a man so proud of his truthfulness that he challenges a person who called him a liar to a duel. He wins the duel but is subsequently convicted of murder. Several years later, after release from prison, he is indicted on another crime. If he elects to testify, he knows that his propensity to lie will be evidenced by his prior conviction. [Id. at 504, n 6.]*

Even if relevancy was assumed, the court continued, the chilling effect on defendant's right to testify is overarching. In addition,

> *the presumption of innocence is impaired in the eyes of the jury, which conceives that his failure to testify, notwithstanding instructions to the contrary, is an indication of guilt. [Id. at 505.]*

In light of the overwhelming tendency for jurors, and even trial and appellate judges to misuse prior conviction evidence, it is our view that there is an "overwhelming probability" that most prior conviction evidence introduced for the purpose of

impeachment will be considered as if it had been introduced to show that the defendant acted in conformity with his criminal past. See*Richardson v Marsh,* 481 US ___; 107 S Ct 1702; 95 L Ed 2d 176 (1987).

The dissenters criticize us for making behavioral judgments and relying on studies in reaching this determination. They critique at length the conclusions and methodologies of the studies we have cited. We do not agree with their conclusions, but welcome their critique of these materials as social science experiments cannot serve as the primary 580*580 basis for judicial decision. Many fundamental principles of our jurisprudence are based on assumptions of human behavior that have never been, and in most cases cannot be, scientifically tested. We also note that the rule we modify today, and that the dissent urges us to leave as is, was the result of assumptions about jury behavior and the effectiveness of limiting instructions that were accompanied by relatively little analysis or study.

The studies cited are nevertheless relevant, support our view, and deserve consideration. In citing them, however, we do not suggest that the amendment of MRE 609 is based solely upon them. The rule change is instead based upon the underlying principles of our legal system and our perception that these principles are not served by the scope of prior-conviction impeachment which is presently permitted.

Some of the most cherished and well-accepted of these principles have been defined by jurists who were willing to state the obvious. The obvious in this area is that criminal defendants are prejudiced by prior conviction evidence as presently allowed and that leaving the question to trial judges has not been successful. As the cases on abeyance (see appendix B) demonstrate, the appellate burden resulting from the present scope of discretion is great; defendants are often impeached with crimes similar or identical to the ones with which they are charged, and in many cases these defendants choose not to testify rather than risk impeachment. Further, in most cases, the standard of appellate review prevents correction of error, and, in those cases where the error amounts to an abuse of discretion, the time and expense of a new trial is required.

We, therefore, in the words of the dissent, act not on the basis of studies, but on the "commonsense 581*581 premise" (*post,* p 678) that some prior convictions are more probative than others, that some are inherently more prejudicial, and that it is absurd to suggest that jurors will be able to avoid improper consideration of a defendant's criminal character once it has become known to them. As will be explored in the following section, we are not alone in these conclusions.

III

The foregoing discussion indicates that prior conviction impeachment of a witness-accused presents significant difficulties. Juries will often misuse this evidence and a limiting instruction is of dubious benefit. The amendment of MRE 609 which we adopt today creates a framework which responds to the realities just described and also takes into account the case law defining the purpose and practice of MRE 609 as well as that of the comparable federal rule. A brief overview of both standards will be helpful in determining which types of prior convictions should be excluded from evidence, which

types should be included, and what factors should be employed in the exercise of trial court discretion in this area.

A

The traditional rule in the federal courts permitted impeachment of witnesses by prior felony convictions or by any convictions involving dishonesty *(crimen falsi).* This rule underwent its first major change in 1965 in the District of Columbia Circuit case *Luck v United States,* 121 US App DC 151; 348 F2d 763 (1965). In that case, the District of Columbia Circuit Court held that evidence of a conviction could not automatically be introduced 582*582 to impeach a witness-accused. The relevant provision of the District of Columbia Code read in pertinent part:

> *No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters. [DC Code Ann, § 14-305 (1961) (amended 1973). Emphasis added.]*

The court held that the word "may" provided discretion not only to the prosecutor, but also to the trial court to exclude such evidence

> *where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. [121 US App DC 156.]*

In order to assist trial court judges, the circuit court defined a nonexhaustive list of factors relevant to this exercise of discretion:

> *the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and, above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.[Id. at 157.]*

Two years later, the District of Columbia Circuit Court further explored this issue in *Gordon v United States,* 127 US App DC 343; 383 F2d 936 (1967), with Judge Warren Burger writing for the court. First, the court held that the burden of persuasion in such a matter is on the accused. 583*583 Second, Judge Burger expanded upon the passage found in *Luck,* quoted above, describing the relevant factors:

> *In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not; traffic violations, however serious, are in the same category. The nearness or remoteness of the prior conviction is also a factor of no small importance. Even one involving fraud or stealing, for example, if it occurred long before and has been*

followed by a legally blameless life, should generally be excluded on the ground of remoteness.

A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity.

*Of course, there are many other factors that may be relevant in deciding whether or not to exclude prior convictions in a particular case. See Luck, supra at 157, 348 F2d at 769. One important consideration is what the effect will be if the 584*584defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment. [127 US App DC 347-348.]*

The *Gordon* factors enumerated above thus include: the vintage of the relevant conviction, the need for defendant's testimony, the similarity to the crime charged, and the nature of the prior offenses, with assaultive crimes and traffic violations being presumptively inadmissible and acts involving *crimen falsi* (including stealing) presumptively admissible. While not specifically enumerated as a factor in the balance, the *Gordon* court also stated that the defendant's prior record had been received into evidence "because the case had narrowed to the credibility of two persons — the accused and his accuser — and in those circumstances there was greater, not less, compelling reason for exploring all avenues which would shed light on which of the two witnesses was to be believed." *Id.* at 348. This statement would later prove to be a cause of confusion and contradiction in Michigan law. See *post,* pp 587-593.

Gordon also took note of the fundamental problem with this type of impeachment observing that its legitimate purpose

is, of course, not to show that the accused who takes the stand is a "bad" person but rather to show background facts which bear directly on whether jurors ought to believe him rather than other and conflicting witnesses. [Id. at 347.]

585*585 Finally, Judge Burger expressed his belief that the task of trial judges in this area would be "extremely difficult" and that

it would be much simpler if prior convictions of an accused were totally admissible or totally excludable as impeachment.... [Id. at 348.]

However, he felt that the language of the evidentiary statute (see *ante,* p 582) foreclosed a brightline rule barring all such impeachment, while *Luck* foreclosed a return to the traditional rule allowing all prior-conviction impeachment.

The *Luck-Gordon* doctrine began to have an effect on other circuits and some states, including our own, in spite of the fact that Congress ultimately amended the relevant statute so as to read "shall be admitted," rather than "may be admitted" (PL 91-358, § 133[a], DC Code Ann, § 14-305[b][1] [1973]), thus eliminating the doctrine in the jurisdiction in which it had been created.

Meanwhile, Congress was moving toward adopting a federal code of evidence.

The evolution of FRE 609(a) was somewhat tortured, with the text being substantially revised at virtually every level of consideration. For our purposes, it is sufficient to note that the rule ultimately adopted by Congress reads as follows:

> *(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved 586*586 dishonesty or false statement, regardless of the punishment.*

Contrary to MRE 609 and the *Luck* standard, FRE 609 balancing is not engaged in where the prior offense involved dishonesty or false statement and those words, supplying a bright-line rule for admissibility, were intended to be clearly related to credibility:

> *By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. [Conference Report, HR No 93-1597, reprinted at 120 Cong Rec, H 39939, 39941 (December 14, 1974).]*

Since the federal Rules of Evidence have been codified, the federal courts have used those factors described in *Gordon* in determining the outcome of the balancing test for felonies. These factors have been repeatedly summarized as follows:

(1) The impeachment value of the prior crime.

(2) The point in time of the conviction and the witness' subsequent history.

(3) The similarity between the past crime and the charged crime.

(4) The importance of the defendant's testimony.

(5) The centrality of the credibility issue.

United States v Jackson, 696 F2d 578 (CA 8, 1982); *United States v Preston,* 608 F2d 626 (CA 5, 1979); *United States v Mahone,* 537 F2d 922, 929 (CA 7, 1976); *United States v Paige,*464 F Supp 99 (ED 587*587 Pa, 1978); 3 Weinstein, Evidence, ¶ 609[04] at 609-77 to 609-78.

B

It was not until the passage of 1861 PA 125 that a criminal defendant in Michigan could make a statement at his own trial. Even after the passage of that act, criminal defendants could not testify under oath. *People v Thomas,* 9 Mich 314 (1861). It took an additional twenty years before the Legislature, with the passage of 1881 PA 245, removed all obstacles to a criminal defendant testifying on his own behalf. In *People v Cummins,* 47 Mich 334, 336; 11 NW 184 (1882), decided shortly after the Legislature so acted, this Court held that when criminal defendants testify, they may be impeached by their prior convictions. Impeachment of witnesses, including criminal defendants, by introduction of prior convictions was, for approximately the next ninety years, allowed at the desire of the prosecutor. Finally, in 1974, this Court, in *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974), adopted the *Luck* rule of discretionary exclusion of such evidence.

Justice SWAINSON concurred in *Jackson,* but called for a bright line barring all impeachment of criminal defendants by prior conviction:

> *I think that it is now time for this Court to recognize a fact that has been well illustrated by commentators and confirmed by the facts in the present case. When the prospective witness is a criminal defendant with a prior record, there is often no real distinction between the common-law prohibition from testifying and our present rule. Rather than expose his prior record to the trier of fact the defendant must forego his right to testify in his own behalf. State v Santiago, 53 Hawaii 254, 588*588 258; 492 P2d 657, 660 (1971); H. Kalven and H. Zeisel, The American Jury 146 (1966); McCormick, Law of Evidence (2d ed), § 43, p 84.*
>
> *If we expect the trier of facts to intelligently and impartially decide if a defendant has committed the crime for which he is standing trial, it makes no sense to permit artificial barriers to remain in the fact-finding process. A total understanding of the events in question at an adversary trial cannot logically be achieved unless the defendant is able to freely testify as to his recollection of them. Conversely, if a defendant with a record does elect to testify, we ask the jury to perform unattainable feats of "mental gymnastics" by exposing it to a defendant's record for the stated purpose of weighing his credibility and then asking the jury to totally disregard the criminal record when passing on the defendant's guilt or innocence of the present charge. E. Griswold, The Long View,51 ABAJ 1017, 1021 (1965); 70 Yale L J 763, 777 (1961).*
>
> *I find it undeniable at this time that the prejudice resulting from allowing impeachment of a defendant by prior conviction evidence clearly outweighs whatever small probative value might result from the practice. I believe that under our duty to supervise the administration of justice in the State of Michigan we would promote fairness and uniformity by setting forth a clear rule prohibiting impeachment of a criminal defendant*

by his prior convictions rather than leaving the decision to be made in each case at the trial court level. [Id. at 343-345.]

The majority, however, rejected the bright-line approach and instead referred to the *Gordon*factors regarding discretionary admission. However, the Court did not simply state verbatim the factors listed in *Gordon.* Instead, it stated:

*Among the factors to be considered are the nature of the prior offense, whether it is for substantially the same conduct for which the accused 589*589 is on trial, and the effect on the decisional process if the accused does not testify from fear of impeachment by prior convictions. [Id. at 333.]*

Four years after *Jackson,* the Michigan rule, as originally proposed, was developed by a committee established by this Court to draft a code of evidence. By that time the federal rules were largely adopted and Michigan, like many other states at that time, looked to those rules for guidance. In addition, the committee saw *Jackson* as the basis for any rule in this difficult area.[13]

Four months after the Michigan Rules of Evidence were promulgated, the Court of Appeals decided *People v Crawford,* 83 Mich App 35; 268 NW2d 275 (1978), which, along with*Jackson,* has been consistently cited in MRE 609(a) cases. In that case, defendant was charged with six counts of armed robbery, and the trial court allowed him to be impeached by two prior armed robbery convictions. The Court of Appeals explained the balancing test as follows:

*The factors which the judge must weigh in making his determination include: (1) the nature of the prior offense (did it involve an offense which directly bears on credibility, such as perjury?), (2) whether it is for substantially the same conduct for which the defendant is on trial (are the offenses so closely related that the danger that the jury will consider the defendant a "bad man" or infer that because he was previously convicted he likely committed this crime, and therefore create prejudice which outweighs the probative value on the issue of credibility?), and (3) the effect on the 590*590 decisional process if the accused does not testify out of fear of impeachment by prior convictions (are there alternative means of presenting a defense which would not require the defendant's testimony, i.e., can his side of the story be presented, or are there alternative, less prejudicial means of impeaching the defendant?). [83 Mich App 39.]*

The Court held that the trial court erred by not excluding the evidence of prior convictions.[14]

In *People v Kelly,* 66 Mich App 634, 637; 239 NW2d 691 (1976), the Court of Appeals enunciated for the first time the *Gordon* factor not mentioned in either *Jackson* or MRE 609, but which the dissenters, in their analyses of the cases before us, would elevate to dispositive status:

A consideration not discussed in People v Jackson, supra, but central to Gordon v United States, supra, was the fact that there was a direct conflict between the testimony of the

complainant and the defendant. The verdict in Gordonnecessarily turned on how the jury resolved the credibility contest between the complainant and the defendant....

* * *

This is precisely the situation in the instant case. There was a direct conflict in the testimony between the security guard who testified that he saw the defendant leave with a box of dishes and the defendant who testified that he carried trash out of the store. This conflict in testimony was as compelling as in Gordon for exploring all avenues which would shed light on the credibility of the two witnesses. The trial judge correctly denied the defendant's motion to suppress his prior felony convictions.

591*591 This Court has never, until these cases, addressed this particular holding in *Kelly.*

In *People v Hughes,* 411 Mich 517, 520-521; 309 NW2d 525 (1981), we described the procedure under 609(a) as follows:

In People v Jackson, 391 Mich 323, 333; 217 NW2d 22 (1974), and People v Baldwin, 405 Mich 550, 552-553; 275 NW2d 253 (1979), we set forth guidelines for the exercise of the trial court's discretion in balancing the prejudicial effect of evidence of prior convictions against their probative value on the issue of credibility. Among the factors to be considered are the nature of the prior offense, whether the conviction was for substantially the same conduct as that for which the accused is on trial, and the effect on the decisional process if the accused does not testify for fear of impeachment by prior convictions.[1]

The purpose of this inquiry is two-fold:

1) To put before the jury only those prior convictions indicative of the defendant's disposition toward truthfulness and veracity; and

2) To keep from the jury those convictions which, although they may be indicative of defendant's disposition toward truthfulness, may interfere with the jury's ability to determine the defendant's guilt or innocence on the basis of the evidence. Such interference is what is meant by "prejudice." [Emphasis added.]

[1] The trial in this case preceded the March 1, 1978 effective date of the Michigan Rules of Evidence. The listed factors continue to be relevant in the balancing required by MRE 609(a)(2).

Not only is the *Kelly* credibility-contest factor not mentioned here, but the "purpose of the inquiry," as described in the passage above, indicates that the process is a two-step process of *elimination* rather than simply a two-factor balancing; i.e., 592*592 first, nonprobative convictions are excluded, and, second, of the probative offenses, those which would cause prejudice should also be excluded. This description does not seem to encompass a consideration of the need to compare the credibility of defendant with that of a prosecution witness.

Similarly, *People v Woods,* 416 Mich 581; 331 NW2d 707 (1982), does not address *Kelly* or the credibility-contest factor, citing only *Luck* and *Gordon* "as adopted by *Jackson."* In addition,*People v Wakeford,* 418 Mich 95; 341 NW2d 68 (1983), this Court's most recent statement on 609(a), states that "among" the factors are:

> *— The nature of the prior offense, whether similar or dissimilar to the offense charged, similarity standing as a factor weighing against admissibility, but not conclusive of the matter;*
>
> *— Recency of the prior offense as probative of the defendant's veracity at the time of trial, should he elect to testify;*
>
> *— The importance to the truth-seeking process, not merely the prospects for acquittal, of obtaining the defendant's version of the events in question. The notion here is that otherwise presumptively admissible prior convictions should be excluded if the price of a ruling of admissibility is to keep the defendant from the witness stand when the testimony he would offer would be central to the matters seriously controverted. [418 Mich 116-117. Emphasis in original.]*

While this Court's description of the third factor, particularly in light of the emphasized phrase, is opposite to the *Kelly* view, we did not at that time explicitly reject it, and in some decisions of the Court of Appeals that factor has continued to prove dispositive. In *People v Jones, supra,*the defendant was charged with larceny from a building and was impeached with two convictions of the 593*593 same crime and one conviction of attempted larceny from a building. The Court of Appeals in that case extended the *Kelly* factor so that it would apply even where there was not a one-to-one credibility contest. There were two eyewitnesses who testified against defendant, but the panel stated that "[w]hen the defendant testifies, the trial often becomes a contest as to who is telling the truth." 98 Mich App 428. See *People v Monasterski,*105 Mich App 645; 307 NW2d 394 (1981), *People v Casey,* 120 Mich App 690; 327 NW2d 337 (1982), and *People v Holmes,* 132 Mich App 730; 349 NW2d 230 (1984), where the *Kelly*credibility-contest factor was also employed.

IV

As this historical survey indicates, our jurisprudence in this area has long recognized that certain crimes are more strongly related to truthfulness than others. Moreover, as discussed above, the relationship of the commission of a crime to veracity is often present only when seen through the prejudicial conclusion that the witness-accused is of bad general character. The amendment of MRE 609 addresses these realities by dividing the range of prior convictions into three categories.

As previously described, crimes having an element of dishonesty or false statement[15] are directly 594*594 probative of a witness' truthfulness and can be understood as reflecting upon veracity by jurors without the mediation of their deciding that the defendant has a bad general character. Such convictions are of high probative value and possess little likelihood of prejudice. Therefore, the revised MRE 609 does not permit the exclusion of these convictions.[16]

595*595 No crimes, other than those including elements of false statement or dishonesty are directly probative of veracity. It may seem, therefore, that evidence of a prior conviction for any other crime should always be excluded. We are, however, mindful that theft offenses have traditionally been viewed as strongly probative of veracity.

In adopting our code of evidence this Court chose to treat theft crimes as it did crimes involving dishonesty or false statement, thus indicating a belief that theft crimes are more probative of veracity than other crimes. Similarly, as noted *ante,* p 583, Judge Burger, in *Gordon v United States,* stated:

> *In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not.... [Emphasis added.]*

Judge Burger's analysis and MRE 609, as originally adopted, suggest that crimes having an element of theft should be treated in the same manner 596*596 as false statement crimes. At the same time, however, the fact that jurors will invariably use evidence of theft convictions to draw conclusions about defendant's general character suggests that these convictions always be excluded. Rather than adopt one approach or the other, the amendment of MRE 609 leaves the admission of most theft crimes to the trial court's discretion.[17]

We do not see countervailing grounds to exclusion where other crimes are involved. Those crimes do not bear an equally strong relationship to credibility. Moreover, their relationship to this trait is mediated through the determination that defendant has a bad general character and thus possess a strong potential for prejudice. Therefore, prior convictions for non-theft crimes which do not contain elements of dishonesty or false statement should never be admitted into evidence.

It could be argued that this three-part division is purely arbitrary. We do not agree. The division is based upon our understanding of which prior convictions are most probative of credibility and which are most prejudicial. It is, however, interesting to note in examining MRE 609 that most of the provisions are arbitrary. Certainly the dividing line between those crimes which are punishable by more than a year's imprisonment and those which are not will not always divide those prior convictions which should or should not be admitted. Similarly, ten years does not finely divide those prior convictions that are probative from those that are not. Therefore, if there is an element of arbitrariness in the scheme we have defined, it is of a degree inherent in defining practicable evidentiary rules. While the dissent criticizes us for 597*597 categorizing "classes of evidence" (*post,* p 671), excluding classes of relevant evidence is the very essence of defining evidentiary rules.[18] We are also mindful of the appellate burden created by the present rule which the dissent points out "results in the greatest

percentage of appeals...." (*Post,* p 701.) The bright-line rules will facilitate trial court determinations and greatly reduce the number of appeals. In addition, an examination of other jurisdictions demonstrates that in this area the use of trial court discretion is generally circumscribed and that bright-line rules are used much more extensively than has been the case in Michigan.

The federal rule of evidence imposes a bright-line rule on the clearly probative end of the spectrum and a probative versus prejudice balancing for remaining crimes. Approximately thirteen states have adopted the federal approach.[19] Five other states have drawn bright lines which permit automatic admission of evidence of all or nearly all prior convictions.[20] In addition, eight jurisdictions 598*598 have bright lines permitting automatic impeachment by certain prior convictions,[21] and three other states allow impeachment as long as the prior convictions bear some relevancy to credibility.[22] At the same time, four states altogether bar the impeachment of criminal defendants by prior conviction,[23] and one has barred such impeachment unless the prior conviction was for perjury or false swearing.[24]

There are, therefore, thirty-five jurisdictions (including the federal and the District of Columbia) which employ bright lines in addressing the impeachment problem. Of those thirty-five, twenty do not permit the probative/prejudice balance to ever be considered by the court.[25] Only sixteen states 599*599 grant their trial courts discretion over the admission of those prior convictions which may be admitted,[26] and of those sixteen, five limit, to a greater degree than Michigan, those prior convictions which may even be considered for admission.[27]

While this survey demonstrates that there is a wide range of evidentiary rules governing the question of impeachment of a witness-accused, it also indicates that bright-line rules, to one extent or another, are employed in the majority of jurisdictions and that the extent of probative/prejudice discretion exercised by trial judges in our state stands at one extreme of the range of approaches now in practice.

The bright-line approach was also favored by the drafters of the 1953 Uniform Rules of Evidence and the Model Code of Evidence. The 1953 Uniform Rule 21 would have permitted impeachment of witnesses who were not criminal defendants only where the prior conviction involved dishonesty or false statement. Where the witness was a 600*600 criminal defendant, it would have, with one exception, completely barred any such impeachment:

> *If the witness be the accused in a criminal proceeding, no evidence of his conviction of a crime shall be admissible for the sole purpose of impairing his credibility unless he has first introduced evidence admissible solely for the purpose of supporting his credibility.*

The Model Code Rule 106 states in pertinent part:

> *If an accused who testifies at the trial introduces no evidence for the sole purpose of supporting his credibility, no evidence concerning his commission or conviction of crime shall, for the sole purpose of impairing his credibility, be elicited on his cross-examination or be otherwise introduced against him....*

V

Having left the admission of theft convictions to the judge's discretion, it is necessary to clarify the manner in which this discretion should be exercised. At the present time there is a split in the Court of Appeals as to what factors are properly considered in the balancing test conducted under MRE 609 prior to the amendment adopted today.[28]

In light of this split in the Court of Appeals and the contradictory nature of some of the factors employed in the past, we define a more specific probative versus prejudice balancing test consistent with what we feel was the original intent of the existing MRE 609, and our prior decisions on this subject. It will be used to resolve the cases at 601*601 hand, as well as to serve as the balancing test pursuant to the amended MRE 609.

In enumerating his criteria in *Gordon,* Judge Burger observed that "[o]ne important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions." *Id.* at 347. The subsequent application of the *Gordon* guidelines makes clear that the credibility-contest factor contradicts this consideration since the defendant's testimony is never more crucial, a failure to testify more damaging, and the decision to admit prior convictions more prejudicial than when "the case ... narrow[s] to the credibility of two persons — the accused and his accuser...." *Id.* at 348. This contradiction lends great credence to Judge Burger's prophecy that employing the*Luck-Gordon* rule was "extremely difficult." *Id.* Indeed, as one writer has observed, "When one [of these two factors] increases in importance, the other does also, and there appears to be no principled way to determine which factor should prevail." Surratt, *Prior-conviction impeachment under the federal rules of evidence: A suggested approach to applying the "balancing" provision of Rule 609(a),* 31 Syracuse L R 907, 945 (1980).

The dissenters' focus on the credibility-contest factor in two of the cases before us, *Allen* and*Gray,* without any balancing of the "important" and countervailing standard of the "effect on the decisional process if the accused does not testify from fear of impeachment by prior convictions," *Jackson, supra* at 333, is the latest example of the fluidity and unpredictability of attempts to apply our current rule to these questions. The dissenters would not only employ a factor that has not been previously utilized by this Court or in the oft-cited Court of Appeals*Crawford* case, but would do so in 602*602 such a manner as to strip the probative/prejudice balance of any real meaning. The dissenters discard the most-cited balancing test and the only test for judicial discretion actually set forth in MRE 609 — probativeness versus prejudice "on the issue of credibility." It has not heretofore been suggested that the "probative value of admitting this evidence" escalated with its need or that "its prejudicial effect" decreased with its need.

In the remaining three cases before us, the dissenters would find error, again, not based principally on an analysis of the "probative value of admitting this evidence on the issue of credibility" and "its prejudicial effect," but rather on the *need* or lack thereof for evaluating the defendants' credibility.[29]

It is our view that it is the effect on the decisional process if the defendant does not testify which must predominate and so the contradicting "credibility contest" factor must therefore be eliminated. We note, initially, that both the first federal case and the first Michigan case dealing with the prior impeachment question failed to cite the credibility-contest factor. *Luck, supra* at 157, instead cited *"above all,* the extent to which it is more important to the search for truth in a particular 603*603 case for the jury to hear the defendant's story than to know of a prior conviction." (Emphasis added.) Similarly, *Jackson, supra* at 333, cited "the effect on the decisional process if the accused does not testify from fear of impeachment by prior convictions."

We also acknowledge that when a criminal defendant testifies jurors are quite aware that he has a unique concern with the outcome of the trial and is more likely to have fabricated his testimony than any other witness. His testimony is therefore likely to be given diminished weight irrespective of impeachment. Note, *Procedural protections of the criminal defendant — A reevaluation of the privilege against self-incrimination and the rule excluding evidence of propensity to commit crime,* 78 Harv L R 426, 440, 450 (1964); 9 Law & Human Behavior, *supra*at 43.

In addition, as pointed out in *Crawford,* excluding evidence of prior convictions does not mean that a defendant's testimony will reach the jury unassailed. The prosecutor on cross-examination may draw out contradictions or indications of unreliability in defendant's testimony. The prosecutor may also bring forward prior inconsistent statements or challenge the defendant's sensory capabilities. Assuming, as the dissent seems to do, that the defendant is almost certainly guilty, and thus fabricating his story, it is quite likely that defendant's story will not hold up under these less prejudicial forms of impeachment.

Finally, unless one were to take the position that a defendant's testimony is not relevant to truth finding, in which case there is little need for criminal trials at all, we cannot ignore the burden placed upon truth finding when a defendant chooses not to testify out of fear of prior conviction impeachment. Only the dissenters' assumption 604*604 that "ninety percent of those charged are guilty"[30] 605*605 (*post,* p 672, n 6) explains their failure to apply the same rigorous analysis to this burden that they apply to the burden of barring impeachment by prior conviction.

In sum, the trial judge's first task, under the amended MRE 609, will be to determine whether the crime contains elements of dishonesty or false statement. If so, it would be admitted without further consideration. If not, then the judge must determine whether the crime contains an element of theft. If it is not a theft crime, then it is to be excluded from evidence without further consideration. If it is a theft crime and it is punishable by more than one year's imprisonment,[31] the trial 606*606 judge would exercise his discretion in determining the admissibility of the evidence by examining the degree of probativeness and prejudice inherent in the admission of the prior conviction. For purposes of the probativeness side of the equation, only an objective analysis of the degree to which the crime is indicative of veracity and the vintage[32] of the conviction would be considered,[33] not either party's need for the evidence. For purposes of the prejudice factor, only the similarity to the charged offense and the importance of the

defendant's testimony to the decisional process would be considered. The prejudice factor would, of course, escalate with increased similarity and increased importance of the testimony to the decisional process. Finally, unless the probativeness outweighs the prejudice, the prior conviction would be inadmissible.

VI

The bright-line aspects of the amendment of MRE 609 will, with the exception of the execution of the balancing test, apply to witnesses called by the prosecution and nondefendant witnesses called by the defense in the same way they apply to 607*607 defendants. We recognize that symmetry is "neither an object of criminal procedure nor a proper criterion of fairness." *People v Hayes,* 410 Mich 422, 425; 301 NW2d 828 (1981). However, since we have eliminated the credibility contest factor in the balancing test and barred the introduction of most prior convictions against the defendant, it would skew the decisional process if prosecution witnesses, including the complaining witness, were subject to the level of impeachment permitted prior to today's amendment. Similarly, since the new rule will apply to all prosecution witnesses, it should, in fairness, also apply to all defense witnesses.

Unfortunately, perfect symmetry cannot be attained. While the bright lines can be easily applied to nondefendant witnesses,[34] the application of the balancing test for theft crimes poses a problem as the factors relevant to prejudice do not arise where the witness is not the defendant. No one is prejudiced where the offense used to impeach a nondefendant witness is similar to the offense with which defendant is charged. Similarly, since, in general, the only individual who can refuse to testify is the defendant, the specter of impeachment cannot result in the loss of a nondefendant's testimony. The "effect on the decisional process" factor is, therefore, irrelevant. The dissent would argue that prejudice also lies in the possibility that a prosecution witness will be impeached for a theft crime while the defendant is not.

We agree that this represents an imbalance, but do not consider it to be prejudice as we have described it. Assymetry has long been present in 608*608 this area of the law. For example, under the federal rule a prosecution witness can never escape impeachment with a timely felony or false statement conviction.[35] Moreover, today's amendment does not permit consideration of possible prejudice to defendant if a nondefendant defense witness is to be impeached. As with impeachment of prosecution witnesses, the only "prejudice" arises out of the fact that the witness may not be believed, as the nondefendant witness' general character will not be considered by the jury.

Therefore, where a party seeks to impeach a nonaccused witness, the bright lines will apply. Where the relevant offense is a theft crime, the judge need only determine that the prior offense, in light of its nature and vintage, is significantly probative[36] of veracity.[37] If so, the impeachment evidence should be admitted. If not, it should be excluded.

VII

The bright-line test substantially revises our approach to impeachment by prior conviction. Trial judges have, in good faith, attempted to follow the framework described in MRE 609 prior to the amendment we now announce. Thus, parts 609*609 of the amendment of MRE 609 are "clear breaks" in our jurisprudence, and we will apply them only prospectively. See, e.g., *Tebo v Havlik,* 418 Mich 350; 343 NW2d 181 (1984). Accordingly, the amendment of MRE 609 will take effect March 1, 1988. Trials begun before that date will be governed by the existing version of MRE 609 as interpreted by this opinion.

We do not believe, however, that our clarification of the balancing test represents a "clear break" in our jurisprudence. The balancing test, as such, has long been in place, and, as described above, there has been a split in the Court of Appeals regarding its proper exercise. Resolution of the many cases now on appeal requires clarification of that test. Therefore, the clarified balancing test, as described in this opinion and in the amendment of MRE 609, will be given limited retroactivity as follows: 1) to the instant cases; 2) all cases pending on initial and direct appeal in which the issue of impeachment by prior conviction under the then-existing MRE 609(a) has been raised and preserved;[38] 3) currently pending appeals in which the appellant's initial brief has not yet been filed, but the issue was raised and preserved in the trial court; and 4) cases in which the issue has been raised and preserved in the trial court, but no first appeal from the original judgment has yet been filed.

In conclusion, the bright-line tests will become effective March 1, 1988 and will apply to cases begun on that date and thereafter. The balancing test, although part of the amendment of MRE 609, should also be understood as a clarification of the proper procedure pursuant to MRE 609 prior to its 610*610 amendment.[39] It will, therefore, be given the limited retroactive application just described.[40]

We therefore review the instant cases in the context of the clarified balancing test, but not in the context of the bright-line rules.

In *Gray,* defendant was convicted of first-degree felony murder and felony-firearm. The trial court ruled that he could be impeached with three prior concealed weapons convictions, as well as with a conviction for possession of heroin. The convictions occurred from five to nine years prior to the instant trial and all were for possessory crimes which have a low degree of probativeness. At the same time, the concealed weapon convictions were similar to the felony-firearm charge, and Gray's own testimony was the only evidence presented in the defense's case. His testimony was therefore very important to the decisional process. In light of the low probative value of the evidence and its very high level of prejudice, we find that the prejudice outweighed the probativeness of the evidence of prior convictions. Its admission was, therefore, error, and we reverse the conviction and remand for a new trial.

In *Pedrin,* defendant was, in 1982, tried and convicted of breaking and entering an unoccupied building with the intent to unlawfully drive away an automobile. The trial court ruled that defendant could be impeached with a prior 1981 conviction for breaking and entering with intent to commit larceny. Such a theft crime is moderately

611*611 probative of veracity, and the recentness of the crime accents that probative value. The level of prejudice was, however, significantly greater. The charged offense was very similar to the prior conviction. In addition, defendant's testimony was very important to the decisional process, as he had no other means of presenting his version of events. Accordingly, we reverse and remand for a new trial.

In *Allen,* defendant was tried and convicted of first-degree criminal sexual conduct. He was impeached with a conviction for second-degree criminal sexual conduct which occurred less than three years before the case in question. While the conviction was of recent vintage, the probative value of assaultive crimes is low. As to the level of prejudice, the prior crime and the charged offense were extremely similar. In addition, although the defense presented a witness who testified as to the defense claim of prior consensual sexual activity, the only evidence as to defendant's version of events regarding the charged incident was defendant's own testimony. We therefore reverse and remand for a new trial.

In *Brooks,* defendant was, in 1981, convicted of armed robbery and felony-firearm. He was impeached with two 1975 armed robbery convictions and a 1981 unarmed robbery conviction. Since robbery, although it contains an element of theft, is primarily an assaultive crime (*People v Wakeford,* 418 Mich 95; 341 NW2d 68 [1983]), and does not involve stealth, it has a lower probative value on the issue of credibility than would other theft crimes. At the same time, the recentness of the last conviction heightens its probative value. However, the similarity of the prior convictions to the charged crime was highly prejudicial, and defendant was the only witness presented by the defense. 612*612 The evidence of prior convictions should therefore have been excluded. Nevertheless, for the reasons described in Chief Justice RILEY'S opinion, we find that the error was harmless. We also agree with the Chief Justice that it was not error for the trial court to fail to give a limiting instruction sua sponte on the use of prior convictions. We therefore affirm the conviction.

In *Smith,* defendant was convicted of two counts of first-degree criminal sexual conduct and one count of assault with intent to murder. The trial court ruled that defendant could be impeached with an eight-year-old manslaughter conviction. Manslaughter, an assaultive offense, is of low probative value, and the conviction was of relatively late vintage. The level of prejudice was high, since manslaughter is similar to the charge of assault with intent to murder. In addition, although the defense presented three witnesses whose testimony lent some credence to defendant's theory of the case, only defendant's own testimony could have put his version of events into evidence, since his codefendants testified against him. The high level of prejudice and low level of probativeness lead us to conclude that the trial court's ruling that the evidence of prior convictions could be admitted was erroneous. Nevertheless, the prosecutor's case was so strong that we do not believe a reasonable juror could have voted to acquit defendant, even if he had testified and not been impeached. We therefore find that the error was harmless. Defendant also raises four other issues which are described and carefully examined in Chief Justice RILEY'S opinion. We agree with the Chief Justice's analyses of these issues, and thus we affirm the conviction.[41]

613*613 VIII

Because the Court is unable to achieve a majority position on the merits of the rule announced in *Luce v United States,* 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984), we decline to address its proposed applicability in Michigan, reserving that question for another day.

LEVIN, CAVANAGH, and ARCHER, JJ., concurred with BRICKLEY, J.

614*614 APPENDIX A

REVISED MRE 609

IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) Determining probative value and prejudicial effect. For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

(c)-(f) [(b)-(e) redesignated but otherwise unchanged.]

615*615 APPENDIX B

SUMMARY OF ABEYANCES FOR PEOPLE v ALLEN

Abeyance Summary Abbreviation Key

A Assault A&B Assault and battery AR Armed robbery Att Attempted AWI Assault with intent, plus suffixes for: GBH Great bodily harm M Murder RA Robbery while armed RU Robbery while not armed B&E Breaking and entering CCW Carrying a concealed weapon CSC Criminal sexual conduct, plus suffixes I-III Entry w/o B Entry without breaking FA Felonious assault FF Felony firearm FPF Felon in possession of firearm GL Grand larceny HO Habitual offender, plus suffixes I-IV K Kidnapping L Larceny LIB Larceny in a building LIMV Larceny in a motor vehicle LP Larceny from a person $100L Larceny over $100 $100MD Malicious destruction over $100 M1 First-degree murder M1[F] Felony first-degree murder M2 Second-degree murder NSF Non-sufficient funds Poss cocaine Possession of cocaine R&C Receiving and concealing SA Simple assault U&P Uttering and publishing UR Unarmed robbery *Example:* "AR (x3)" — defendant had three armed robbery convictions.

616*616 Abbreviations pertinent to defendants' testimony:

T Testified DNT Did not testify

617*617 SUMMARY OF ABEYANCES FOR PEOPLE v ALLEN

T Testified DNT Did not testify

617*617 *SUMMARY OF ABEYANCES FOR PEOPLE v ALLEN* DOCKET PEOPLE v ORIGINAL CHARGE(S) PRIOR CONVICTIONS ---------- 71228 *Casey* AWIM; CSC I (x3) (1) Manslaughter (2) FA ---------- 72219 *Newman* M1; AWIM (1) Bank robbery (2) Possession of illegal firearm [(1)&(2) both in federal court] ---------- 73034 *Baker* M1[F]; FF (1) AR (x3) The enumerated felony was AR. ---------- 73049 *Owens* Incitement M1 (x2); [most from other 73050 Conspiracy M1 (x2) states] (Prosecutor's (1) Burglary (x2) Appeal) (2) Poss cocaine (3) GL (4) CCW (x2) (5) Falsification (6) CSC II (att) (7) NSF ---------- 74216 *Stokes* AWIM (1) A&B (x2) (2) SA (3) AWIM ---------- DOCKET IMPEACHMENT WITH CONVICTED OF COA RULING ---------- 71228 (2); DNT AWIGBH AFF'D; 120 Mich App 690 (1982) ---------- 72219 (2); T M1; AWIM AFF'D ---------- 73034 (1); DNT M1; FF AFF'D ---------- 73049 (1); (3); (5); Incitement REVERSED 73050 (7); DNT M1 (x2); 131 Mich App 76 (Prosecutor's Conspiracy M1 (1983) Appeal) (x2) ---------- 74216 (3); T AWIGBH AFF'D 134 Mich App 146 (1984) ---------- 618*618 DOCKET PEOPLE v ORIGINAL CHARGE(S) PRIOR CONVICTIONS ---------- 74321 *McDuffie* M2; FF (1) CSC III ---------- 74725 *Swartz* LIB; HO II (1) LP ---------- 75320 *Schock* CSC I (x2); (1) R & C 75321 FF (x2) (2) AWIGBH ---------- 75593 *Durham* AWIGBH; FA; (1) CCW B&E (AWIGBH); FF ---------- 76128 *Cope* CSC III (1) Gross sexual imposition (Ohio) (2) UR (Ohio) (3) CSC III ---------- 76132 *LaBadie* B&E (L) (1) Federal firearms conviction (exact nature unspecified) ---------- 78343 *Times* M1 (1) AWIRU ---------- 78359 *Lee* M2; AWIM; FF (1) CCW (Att) ---------- DOCKET IMPEACHMENT WITH CONVICTED OF COA RULING ---------- 74321 (1); T Manslaughter; AFF'D FF ---------- 74725 (1); DNT LIB; HO II AFF'D ----------

---------- 75320 (1); (2); CSC I (x2); AFF'D 75321 DNT FF (x2) ----------
---------- 75593 (1); DNT AWIGBH; FA; AFF'D B&E (AWIGBH); FF ---------- 76128 (1), (2); T CSC III AFF'D ---------- 76132 (1); DNT B&E (L) AFF'D ----------
---------- 78343 (1); DNT M2 AFF'D ----------
---------- 78359 (1); T Manslaughter; AFF'D AWIGBH: FF ----------
---------- 619*619 DOCKET PEOPLE v ORIGINAL CHARGE(S) PRIOR CONVICTIONS ----------
78451 *Walker* CSC I; HO IV (1) Extortion (2) U&P (3) LIB (Att) ----------
---------- 78831 *Aldridge* B&E (L); (1-5) Theft HO II (or III ?) misdemeanors (6) B&E (7) B&E (Att) ---------- 78952 *Minor* AR; FF (1) AWIR (armed) (2) AWIGBH (3) AR (4) AR ----------
----- 78990 *Lake* $100L; HO IV (1) $100L (2) $100L (3) LIB (4) LIB ----------
---------- 79116 *O'Rourke* B&E (L) (1) B&E HO IV (2) FA (3) $100MD (4) CSC III ---------- 79234 *Bell* B&E; HO IV (1) LIB (Att) (2) CSC II (3) Entry w/o B (4) R&C 1/t $100 ----------
--- DOCKET IMPEACHMENT WITH CONVICTED OF COA RULING ----------
---------- 78451 (1); (2); (3); T CSC 1 AFF'D (jur); HO IV (plea) ----------
---------- 78831 (1-5); (7); T B&E (L) AFF'D (jury); HO II (plea) ----------
---------- 78952 (2); (4); T AR; FF AFF'D ----------
---------- 78990 (1); DNT $100L AFF'D (jury); HO IV (plea) -------
---------- 79116 (2); (3); T B&E (L) AFF'D (jury); HO IV (plea) ---------- 79234 (1); (2); (3); Entry w/o B AFF'D (4); T (jury); HO IV (plea) ----------
620*620 DOCKET PEOPLE v ORIGINAL CHARGE(S) PRIOR CONVICTIONS ----------
---------- 79340 *Crawford* K; CSC I; (1) AR UR ----------
---------- 79378 *Brown* K; UR; CSC I (1) AR (Att) (2) AWIRA ----------
---------- 79399 *McGee* AR; CCW (1) B&E 79400 (2) AR (3) FPF (4) CCW (Att) ---------- 79522 *Duncan* CSC III (1) AWIM (2) CCW ---------- 80333 *Jones* B&E (1) LIB (2) LIMV (3) L (misdemeanor) ---------- 80377 *Johnson* R&C (1) Manslaughter ---------- 80555 *Cannon* LIB; HO II (1) LIB (Prosecutor's Appeal) (Defendant's Cross-appeal) ----------
---------- DOCKET IMPEACHMENT WITH CONVICTED OF COA RULING ---------- 79340 (1); T CSC I; UR AFF'D ---
---------- 79378 (2); T K; LP; CSC I AFF'D ----------
---------- 79399 (2); DNT AR; CCW AFF'D 79400 ----------
---------- 79522 (1); (2); DNT CSC III AFF'D ----------
---------- 80333 (1); (2); (3); B&E AFF'D T ----------
---------- 80377 (1); T R&C AFF'D 157 Mich App 248 (1987) ----------
---------- 80555 (1); DNT LIB (jury); REVERSED (Prosecutor's HO II (plea) Appeal) (Defendant's Cross-appeal) ----------
------- 621*621 DOCKET PEOPLE v ORIGINAL CHARGE(S) PRIOR CONVICTIONS ----------
---------- 80592 *Belanger* AR; B&E; (1) B&E (Prosecutor's AWIRA (2) FA Appeal) (3) FF ---------- 80839 *Wesley* CSC I (1) M2 AR FF ---------- DOCKET

IMPEACHMENT WITH CONVICTED OF COA RULING ---------- 80592 (3); DNT AR; B&E; REVERSED (Prosecutor's AWIRA 158 Mich App 522 Appeal) (1987) ---------- 80839 (1); DNT CSC I AFF'D AR 159 Mich App 801 FF (1987) ----------

622*622 Riley, C.J. (*dissenting*).

I disagree with the majority's adoption of the "bright-line" rule contained in revised MRE 609(a). I share the concerns and criticisms expressed by Justice BOYLE and concur in parts I, II, III, and IV of her dissent.

Furthermore, in granting leave in *People v Allen, People v Pedrin,* and *People v Smith,*[1] we directed the parties to include among the issues to be briefed whether this Court should adopt the rule announced in *Luce v United States,* 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984), that to preserve for appellate review a claim of improper impeachment with a prior conviction, a defendant must testify. In my view, the Court should address this issue and follow the lead of the United States Supreme Court in *Luce,* by requiring a defendant to testify to preserve a claim of improper impeachment with a prior conviction. However, due to considerations of fundamental fairness, I would opt to apply this rule prospectively.

I

FACTS

A. PEOPLE v GRAY

On March 25, 1981, the jury convicted the defendant, Dennis Gray, of first-degree felony murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The defendant was sentenced to life imprisonment for the first-degree murder conviction, and to a consecutive two-year term for the felony-firearm conviction. His convictions were affirmed by the Court of Appeals on 623*623 August 3, 1983.*People v Gray,* unpublished opinion per curiam (Docket No. 59085).

Defendant brought a pretrial motion to suppress evidence of his criminal record for impeachment purposes. Defendant had five prior felony convictions, including a 1969 conviction of assault with intent to rob, a 1972 conviction of attempting to carry a concealed weapon, a 1975 conviction of carrying a concealed weapon, and a 1976 conviction of possession of heroin. The trial judge suppressed the 1969 conviction of assault with intent to rob, noting the similarity between that offense and the felony-murder charge, but declined to suppress the four other convictions.

During the trial, prosecution witness Matta Morgan testified that sometime between 8:30 P.M. and 9:00 P.M. on March 13, 1980, her boyfriend, Lewis Carter, came to her home to visit. The defendant, Morgan's cousin, arrived at her home sometime after midnight. Morgan asked defendant to drive Carter home and agreed to go with them. As Morgan was getting ready to leave, the defendant approached her and inquired

whether Carter was carrying any money. Morgan replied, "He should. He is a numbers man." All three then left in defendant's car.

After driving for a while, defendant stopped the car, produced a handgun, and demanded money from Carter. After Carter gave defendant his money, defendant shot him several times, fatally wounding him. Defendant drove the vehicle a short distance further, disposed of Carter's body, and drove home, where he gave Morgan $150.[2]

624*624 Defendant, testifying on his own behalf, denied robbing or shooting Carter, accused Morgan of being Carter's murderer, and admitted to the four prior convictions. According to defendant's version, Morgan summoned him to her residence during the early morning hours of March 14, 1980. When he arrived he saw Carter's body on the kitchen floor. Morgan told him that she killed Carter because "[he] didn't think I was serious." Defendant then allegedly helped Morgan get rid of the body by putting it into his car and driving around until they found a place to dispose of it.

B. PEOPLE v BROOKS

On July 30, 1981, the jury convicted defendant, James R. Brooks, of armed robbery, MCL 750.529; MSA 28.797, and felony-firearm, MCL 750.227b; MSA 28.424(2). The defendant was sentenced to imprisonment for a term of fifteen to fifty years for the armed robbery conviction and to the mandatory two years for the felony-firearm conviction. His convictions were affirmed by the Court of Appeals on April 11, 1983. *People v Brooks,* unpublished opinion per curiam (Docket No. 60075).

Defendant brought a pretrial motion to suppress evidence of his criminal record. Pursuant to MRE 609(b), the trial court excluded defendant's 1967 conviction of carrying a concealed weapon. However, the court denied the motion with respect to defendant's two prior convictions of armed robbery and one prior conviction of unarmed robbery.

The evidence advanced at trial by the prosecution showed that on November 15, 1980, at approximately 4:00 P.M., defendant entered the Professional Arts Pharmacy in Ferndale, produced a handgun, and ordered the clerk, Anne Nastas, and the pharmacist, Edward Lis, to lie down on the 625*625 floor. Defendant then took various prescription medicines, drugs, money, and a gun from the premises.

Defendant was identified by Lis, Nastas, and a customer who saw the defendant as he was leaving the store. The customer found Lis and Nastas lying on the floor behind the counter. They told the customer that they had just been robbed.

The prosecution also presented Leslie Parker, who had been located by the police through a license plate number given them by an unidentified person who had observed Parker's car driving away from the store near the time of the robbery. Parker testified that he had driven a person known to him as "Tony" to a drugstore in Ferndale on November 15, 1980, at approximately 4:00 P.M. Parker stated that defendant looked very similar to "Tony," but he could not positively identify him as the same person he had driven to the store.

On direct examination, defendant testified that he had previously been convicted of armed robbery, that he was in custody for another robbery, and that he knew Edward Lis because they "did business" together. Defendant's relationship with Lis started with prescription sales, but Lis eventually agreed to sell defendant pills without a prescription and sometimes gave him pills on consignment which defendant would sell on the street.

Defendant admitted that, at approximately 1:00 P.M. on the day in question, he went to the Professional Arts Pharmacy to obtain Talwin pills. Lis refused to give him the pills and asked defendant for money owed him for pills previously taken on consignment. Defendant denied perpetrating the robbery and maintained that he did not have a firearm in his possession when he was in the pharmacy earlier that day.

626*626 *C. PEOPLE v PEDRIN*

On July 21, 1982, the jury convicted the defendant, Jeffrey Pedrin, of breaking and entering an unoccupied building with intent to commit larceny. MCL 750.110; MSA 28.305. Defendant was sentenced to a term of imprisonment of four to ten years. His conviction was affirmed by the Court of Appeals on October 25, 1983. *People v Pedrin,* 130 Mich App 86; 343 NW2d 243 (1983).

The prosecutor filed a pretrial motion seeking permission to impeach the defendant with evidence of his prior conviction of breaking and entering with the intent to commit larceny. The court determined that the probative value of admitting the prior conviction on the issue of defendant's credibility outweighed its prejudicial effect and granted the motion.

The defendant's former wife testified that defendant came to her home in Munising at 6:00 A.M. on June 8, 1982, and attempted to open the door. He told her that "he just took a car." Defendant then fell asleep on the front porch, at which time, his former wife called the police. Defendant was arrested on her porch sometime between 8:15 A.M. and 8:30 A.M.

An automobile dealer testified that a 1983 Ranger pickup truck was stolen from his garage in Newberry on the evening of June 7, 1982.

A state trooper testified that the stolen vehicle was recovered one and three-quarters blocks away from the home of defendant's former wife, and that the keys to the vehicle were found ten to fifteen feet from her side porch. Defendant did not testify and presented no evidence.

D. PEOPLE v ALLEN

On July 2, 1981, the jury convicted the defendant, 627*627 Mark Anthony Allen, of first-degree criminal sexual conduct. MCL 750.520b; MSA 28.788(2). Defendant was sentenced to life imprisonment. His conviction was affirmed by the Court of Appeals on November 24, 1982.*People v Allen,* unpublished opinion per curiam (Docket No. 59151).

On the first day of trial, defendant moved in limine to suppress evidence of his prior conviction of second-degree criminal sexual conduct. MCL 750.520c; MSA 28.788(3). Stating that defendant would not dispute having sexual relations with the complainant, but would maintain that those relations were consensual, defense counsel argued that the prejudicial effect of prior conviction evidence would far outweigh its probative value on the issue of defendant's credibility.

In exercising his discretion to determine whether to admit the evidence, the trial judge considered the similarity of the prior conviction to the instant charge and the fact that the crime involved a one-on-one confrontation between the complainant and the defendant. The court, noting that defendant's credibility would be an important issue, concluded that the probative value of evidence of the prior conviction on the issue of defendant's credibility outweighed its prejudicial effect and denied the motion to suppress.

The complaining witness, Stacy Dougherty, testified that on March 24, 1981, she was working at Arby's Restaurant on Ford Road in Garden City. At approximately 8:15 P.M., Dougherty took her evening work break and went to the ladies' rest-room, where she was confronted by the defendant who was armed with a knife, and who forced her to perform an act of fellatio.

Another Arby's employee, Kathy Bedford, testified that she went into the ladies' restroom shortly 628*628 after the assault allegedly occurred and found Dougherty crouched beneath the sink, "all curled up crying really hard, [and] hyperventilating."

The defendant, who did not testify, presented Kevin Young as his only witness. Young's testimony implied that both he and the defendant had had consensual sexual relations with the complainant in the men's restroom at Arby's prior to the day of the alleged assault.

E. PEOPLE v SMITH

On June 30, 1981, the jury convicted defendant, Jackie Hagan Smith, of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of assault with intent to murder, MCL 750.83; MSA 28.278. Defendant was sentenced to two terms of sixty to ninety years imprisonment for the criminal sexual conduct convictions, and to life imprisonment for the assault conviction. His convictions were affirmed by the Court of Appeals on August 15, 1983. *People v Smith,* memorandum opinion (Docket No. 61883).

Defendant moved in limine to suppress evidence of a 1969 breaking and entering conviction and a 1973 manslaughter conviction. The prosecutor stipulated to suppressing the breaking and entering conviction because it was more than ten years old.[3] The trial judge granted the motion to suppress that conviction, but denied suppression of the manslaughter conviction.

629*629 Defendant also moved in limine to suppress evidence of the complaining witness' line-up identification and any subsequent in-court identification. Defendant

argued that his arrest was illegal because it was made without probable cause and that the line-up identification should be suppressed as a fruit of the illegal arrest, as well as any subsequent in-court identification.[4] The trial court denied the motion based upon its determination that the arresting officers did have probable cause for the arrest. The defendant did not testify.

The complaining witness, Robin Northover, testified that at approximately 6:00 P.M., on January 21, 1981, she left her aunt's house in Taylor and went with three friends to the Arcade on Beech-Daly Road in Dearborn Heights. At approximately 8:45 P.M., Northover left the Arcade and, on her return walk to her aunt's house, the defendant and two codefendants, Phillip Panik and Dana Minkler,[5] drove up alongside her.[6] Panik leaned out of the car window and asked Northover if she had any "papers." When Northover responded "no," Panik got out of the vehicle and offered her a ride.

Northover accepted the offer and got into the front seat of the car between the defendant, who was driving the vehicle, and Panik. Minkler was sitting in the back seat. After purchasing some beer, they drove around drinking and smoking 630*630 marijuana that was mixed with "crystal."[7] Northover smoked a marijuana cigarette with the men, drank one sixteen-ounce beer, and snorted some "tea."

After driving around for approximately two hours, the defendant drove to a Seven-Eleven store on Wayne Road to purchase more beer. Panik testified that while they were parked outside the store, two Wayne County Sheriff's deputies drove into the lot. As the deputies were walking into the store, they looked at the defendant's vehicle. Panik was smoking marijuana at the time, and he testified that seeing the police made him feel somewhat uneasy, and that "we didn't need them to come up to the car." The defendants then drove away from the store.

Shortly after the parties drove away from the Seven-Eleven store, Minkler reached over the front seat and started grabbing Northover's breasts. Northover pushed Minkler's arm away and then began struggling with Panik and Minkler. Minkler then pulled Northover into the back seat with Panik's assistance. Minkler removed the bottom half of Northover's clothing and unsuccessfully attempted to have sexual intercourse with her. While Smith was still driving, Panik and Minkler traded places. Panik also unsuccessfully attempted to have sexual intercourse with Northover. Smith then stopped the car, got into the back seat while Minkler drove, and had sexual intercourse with Northover. All three of the men subsequently forced Northover to perform fellatio on them which was followed by a third round of sexual activity with the three defendants.

631*631 After the trio finished sexually abusing Northover, Minkler stated, "we've got to get rid of her." Smith pulled the car over on a dirt road in a wooded area of western Wayne County. Smith grabbed Northover who was naked and dragged her into the woods. When they were out of sight of the car, defendant put his arm around Northover's neck and choked her until she was unconscious.

When Northover awoke, she was bleeding profusely from a stab wound to her neck. She packed the wound with snow and walked to a nearby residence where the police were summoned.

Following defendant's arrest, he was incarcerated in a local "lockup" with codefendant Panik. Prosecution witness Donald Perdue was also incarcerated there at that time on charges of nonpayment of child support. The prosecutor moved in limine to suppress evidence of Perdue's twenty-six-year-old conviction for assault with intent to do great bodily harm less than murder. The court granted the motion because the conviction was outside the ten-year time limit of MRE 609(b).[8] Perdue testified regarding various incriminating statements he overheard defendant make during a conversation between defendant and Panik while they were confined.

On redirect examination, the prosecutor asked Panik several questions about what happened in front of the Seven-Eleven store in an apparent attempt to clarify how well the sheriff's deputies had seen the defendants. The prosecutor asked Panik what he did when he saw the deputies. Panik responded, "[w]e had beer, you know, *we was all on parole,* we didn't need them to come up to the car." Defendant moved for a mistrial due to 632*632 Panik's statement "we was all on parole." The court denied the motion without explanation.[9]

II

LUCE v UNITED STATES

In granting leave to appeal in *People v Allen, People v Pedrin,* and *People v Smith,* we directed the parties to include among the issues to be briefed whether this Court should adopt the rule announced in *Luce, supra,* that to preserve for appellate review the claim of improper impeachment with a prior conviction, a defendant must testify.

In *Luce,* the defendant was charged with conspiracy and possession of cocaine with intent to633*633 distribute. The trial court denied defendant's motion to preclude the prosecution from using evidence of defendant's prior state conviction of possession of a controlled substance. On appeal, the defendant contended that the trial court abused its discretion under MRE 609(a) in allowing evidence of the prior conviction.[10] The Sixth Circuit Court of Appeals held that the issue was not reviewable because defendant did not testify at trial.

The United States Supreme Court affirmed in a unanimous decision, holding "that to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." *Id.,* 469 US 43. In so ruling, the Court reasoned:

> *A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context. This is particularly true under Rule 609(a)(1), which directs the court to weigh the probative value of a prior conviction against the prejudicial effect to the defendant. To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable 634*634when, as here, the defendant does not testify. [Id., 41.]*

The *Luce* Court further explained that "any possible harm" flowing from such a ruling in limine is wholly speculative. The Court noted that a trial court can change its ruling in limine after the evidence unfolds, particularly where the defendant's testimony differs from that which was stated in the proffer. Moreover, the Court noted that a reviewing court has no way of knowing whether the prosecution would have actually used the prior conviction to impeach the defendant. A prosecutor may choose not to use an arguably inadmissible prior conviction, particularly where the defendant's testimony can be impeached by other means or when the prosecution's case is strong. *Id.*

The defendants essentially argue that the *Luce* rule is unnecessary, that the concerns expressed by the *Luce* Court are exaggerated, and that its underlying rationale is contrary to well-established principles in this jurisdiction. I disagree.

MRE 609(a) was derived from FRE 609(a) and similarly requires the court to engage in a balancing process in determining whether the probative value of admitting a prior conviction for impeachment purposes outweighs its prejudicial effect upon the defendant.[11] Our Court of Appeals has recognized the difficulty inherent in reviewing claims that a trial court erred in allowing a defendant to be impeached with prior convictions outside of a concrete factual context.

The case of *People v Jones,* 98 Mich App 421; 296 NW2d 268 (1980), illustrates the difficulty encountered. In balancing the probative value against the prejudicial effect on the issue of credibility, 635*635 the court must consider, inter alia, the effect on the decisional process if the accused does not testify out of fear of impeachment by prior convictions.[12] In *Jones,* the Court recognized that in most cases, a trial judge is in no position to conclusively rule on that factor until he has heard the prosecution's proofs, learned the substance of the defendant's proposed testimony, and has some idea of what other proofs the defendant will present. The *Jones* Court keenly observed that the following questions represent a partial list of factors crucial in determining the effect on the decisional process of a defendant's decision not to testify:

> *(1) Will the defendant's testimony directly contradict the testimony of one or more key prosecution witnesses? When the trial becomes a credibility contest, background information about the disputants is essential to a jury. (2) Will the defendant claim or imply good character, by his own testimony or by a character witness, that his hidden record would refute? MRE 609 does not entitle a defendant to "pull the wool" over the jury's eyes. (3) Will the defendant claim a defense such as diminished capacity due to intoxication, mistake, ignorance or accident that becomes far less probable in the light of his prior criminal conduct? A claim by a defendant, for example, that he left the store without paying for an item because he forgot he had put it in his pocket does not go over so well when it becomes known, on cross-examination, that the defendant has been convicted of several thefts before. [Id., 430.]*

The *Jones* Court further recognized that, in some cases, defense counsel will make a motion in limine under MRE 609(a), although the defendant 636*636 had nothing reasonable to say in his own defense and will not testify regardless of the ruling; that he

may even prefer an adverse ruling to gain an appealable issue out of an otherwise hopeless trial. *Id.*

In light of these inherent problems, the Court of Appeals adopted the following rule expressed in*United States v Cook,* 608 F2d 1175, 1186 (CA 9, 1979):

> *"In future cases, to preserve the issue for review, a defendant must at least, by a statement of his attorney: (1) establish on the record that he will in fact take the stand and testify if his challenged prior convictions are excluded; and (2) sufficiently outline the nature of his testimony so that the trial court, and the reviewing court, can do the necessary balancing contemplated in Rule 609." [Jones, supra, 431.]*

The *Luce* Court rejected the above procedure because "[r]equiring a defendant to make a proffer of testimony is no answer; his trial testimony could, for any number of reasons, differ from the proffer." *Luce, supra,* 41, n 5. The *Luce* Court was also concerned with the potential for planting error requiring reversal.[13]

I share the concerns of the *Luce* Court. Furthermore, from my review of the cases, I note that in the overwhelming majority of jurisdictions that have addressed this issue, the rule enunciated in637*637 *Luce* has been adopted.[14] Moreover, some federal circuits have extended application of the *Luce* rule to other rulings in limine outside the context of FRE 609(a).[15] I am persuaded that the rationale underlying the Supreme Court's adoption of the *Luce* rule is sound and that it is equally applicable to Michigan practice. Therefore, I would hold that to preserve a claim of error as to the admission of evidence of a prior conviction for impeachment purposes, a defendant must testify.

It does not follow, however, that the *Luce* rule 638*638 should govern the cases before us. This Court has held that three factors must be considered in determining whether a judicially created rule of law should be applied retroactively.

[1] the purpose of the new rule,

[2] the general reliance on the old rule, and

> *[3] the effect on the administration of justice. [People v Nixon, 421 Mich 79, 85; 364 NW2d 593 (1984).]*

I believe that the defendants' reliance on the old rule outweighs other considerations favoring retroactive application. The defendants have done everything necessary to preserve the issue under the old rule. Adoption of the *Luce* rule was not even reasonably foreseeable at the time of their trials. Under these circumstances, I believe it would be unduly harsh to apply the *Luce*rule to these defendants. Therefore, I would apply the rule only prospectively, i.e., to trials beginning after this decision is final.

III

ANALYSIS

MRE 609(a) pertinently provides:

General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if

(1) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or the crime involved theft, dishonesty or false statement, regardless of the punishment, and

*(2) the court determines that the probative value 639*639 of admitting this evidence on the issue of credibility outweighs its prejudicial effect and articulates on the record the factors considered in making the determination.*

As noted by the majority, the factors to be considered in performing the balancing required by MRE 609(a)(2) have been gleaned from case law which predated adoption of the Michigan and federal Rules of Evidence. Five factors have repeatedly emerged as the appropriate criteria to be considered in determining whether to allow a defendant witness to be impeached with prior conviction evidence:

(1) the impeachment value of the prior offense (i.e., to what degree does the prior offense relate to the witness' propensity for truthfulness?);

(2) the vintage of the prior offense (the probative value is enhanced with the recency of the prior offense);

(3) the similarity of the prior offense to the crime charged (the greater the similarity the greater the prejudicial effect);

(4) the effect on the decisional process should the accused choose not to testify out of the fear of impeachment;

(5) the centrality of the credibility issue.[16]

This Court has stated that the underlying purpose in balancing these factors is:

1) [t]o put before the jury only those prior convictions indicative of the defendant's disposition toward truthfulness and veracity; and

*640*640 2) [t]o keep from the jury those convictions which, although they may be indicative of defendant's disposition towards truthfulness, may interfere with the jury's ability to determine the defendant's guilt or innocence on the basis of the evidence. Such interference is what is meant by "prejudice." [People v Hughes,411 Mich 517, 520-521; 309 NW2d 525 (1981).]*

I believe that a further purpose properly served by this inquiry is to assure that the jury is not deprived of this traditional device for assessing a witness' credibility when its value to the truth-seeking process is crucial.

Although credibility is virtually always at issue in any trial, its significance is critically magnified, and often becomes the dispositive issue, when the trial is essentially reduced

to a swearing contest between two opposing witnesses. I believe that this situation may tip the balance in favor of allowing the defendant to be impeached with evidence of prior convictions if the question is otherwise close.

I believe that the existing factors utilized in making determinations under MRE 609(a) constitute appropriate and adequate criteria. The following analyses of the cases sub judice illustrate how these factors should be applied, under varying circumstances, to best serve the purposes behind the sometimes difficult balancing process required by MRE 609(a)(2).

A. PEOPLE v GRAY

In ruling on defendant Gray's motion to suppress evidence of his five prior felony convictions, the trial court stressed that the case primarily involved a credibility contest between the prosecution's chief witness, Matta Morgan, and the defendant. The court determined that it would be important for the jury to be aware of both the 641*641 defendant's and the witness' prior criminal records in determining who was telling the truth.[17] Therefore, the court denied the motion with regard to the three prior convictions of carrying a concealed weapon and the possession of heroin conviction. The court suppressed the assault with intent to rob conviction, recognizing the similarity between that offense and the felony-murder charge, the underlying felony being robbery. Defendant admitted to the four prior convictions on direct examination.

The Court of Appeals held that the trial judge properly considered the relevant factors in allowing defendant to be impeached with his prior convictions and that she did not abuse her discretion in doing so.

I agree that the trial judge did not abuse her discretion in allowing the defendant to be impeached with his four prior felony convictions. The principal issue at trial was the identity of the murderer. Resolution of that issue necessarily depended upon whether the jury believed defendant's or Morgan's version of what happened.

Morgan testified that the defendant robbed and then fatally shot the victim as they were driving in the defendant's car. Defendant maintained that Morgan had murdered the victim in her house and then asked him to help her dispose of the body.

Standing alone, evidence of convictions of carrying a concealed weapon and possession of heroin may not be highly probative of an individual's credibility. However, the value of such evidence to 642*642 the truth-seeking process was critical because the trial had boiled down to a swearing contest between two opposing witnesses. Thus, it was essential that the jury be aided by any evidence that was probative of credibility. It would indeed have been deceptive to permit the defendant to portray himself as a person who has led a blameless life and as worthy of belief as one who has.[18]

In light of the foregoing, I cannot say that the trial judge abused her discretion in allowing the defendant to be impeached with the evidence of the prior convictions. Therefore, I would affirm the decision of the Court of Appeals.

B. PEOPLE v BROOKS

Defendant Brooks similarly argues that the trial court erred in admitting evidence of his two prior convictions of armed robbery and one prior conviction of unarmed robbery. In *People v Baldwin,*405 Mich 550, 553; 275 NW2d 253 (1979), we held that it was error for a trial judge to consider the similarity of a prior offense as a factor weighing in favor of admissibility. Although evidence of prior similar offenses is not inadmissible per se for impeachment purposes, such offenses should be admitted for that purpose only when there is a compelling need for such evidence, and then only sparingly. The danger inherent in admitting evidence of a prior conviction for impeachment purposes is particularly acute when the prior offense is the same or similar to the charged offense. The court in *Gordon v United States,* 127 US App DC 343, 347; 383 F2d 936 (1967), stated:

> *643*643 A special and even more difficult problem arises when the prior conviction is for the same or substantially the same conduct for which the accused is on trial. Where multiple convictions of various kinds can be shown, strong reasons arise for excluding those which are for the same crime because of the inevitable pressure on lay jurors to believe that "if he did it before he probably did so this time." As a general guide, those convictions which are for the same crime should be admitted sparingly; one solution might well be that discretion be exercised to limit the impeachment by way of a similar crime to a single conviction and then only when the circumstances indicate strong reasons for disclosure, and where the conviction directly relates to veracity.*

In the instant case, there were no compelling reasons to impeach the defendant with three prior robbery convictions. I believe that once the jury learned that defendant had committed three prior robberies, the danger that the jury would draw the impermissible inference, i.e., he did it three times before so he probably did it again this time, is too substantial to allow such evidence to be used. The prejudicial effect of the error was exacerbated by its cumulative nature. The admission of two prior convictions of the very same offense and one prior conviction of a very similar offense was unwarranted.

I am persuaded, however, that, although the court clearly abused its discretion in allowing the prior convictions for impeachment purposes, the error was harmless beyond a reasonable doubt under the particular facts of this case.

It was the defendant's theory that the pharmacist fabricated the robbery allegations because the defendant was in arrears on payments he owed the pharmacist for prescription drugs he had taken on an earlier consignment. However, my review of 644*644 the record compels the conclusion that defendant's theory is wholly incredible. Were defendant's story true, the pharmacist and the clerk would have to have been uncommonly good actors. Three different police officers testified that the pharmacist was visibly shaken when he reported the robbery. Furthermore, the question left unanswered by defendant is, why would the pharmacist wait until 4:00 P.M. to report the robbery if the defendant, by his own admission, was in the store at approximately 1:30 P.M. the same day?

Defendant's story also does not posit any explanation as to why the clerk, who had only been working at the store for two months, would perjure herself. There was never any suggestion that she was involved in the alleged illicit business. The clerk corroborated the pharmacist's testimony that an armed robbery had occurred and positively identified the defendant as the perpetrator.

Most importantly, there is absolutely no reason to believe that the customer who entered the pharmacy immediately after the robbery allegedly occurred would have perjured herself. The customer positively identified defendant as the person she had observed in the pharmacy immediately before she approached the counter and found the pharmacist and clerk lying on the floor.

Therefore, in light of the totally unbelievable nature of the defendant's testimony and the overwhelming strength of the prosecution's case, I would find that the error in admitting evidence of defendant's prior convictions for impeachment purposes was harmless beyond a reasonable doubt.

Defendant further argues that the trial court erred in failing, sua sponte, to give a limiting instruction on the use of prior convictions for 645*645 impeachment purposes pursuant to CJI 3:1:08.[19] The defendant did not request such an instruction; nor did he object to the trial court's failure to so instruct.

A trial court is under no obligation to give, sua sponte, a limiting instruction to the jury. *People v Chism,* 390 Mich 104; 211 NW2d 193 (1973); *People v DerMartzex,* 390 Mich 410; 213 NW2d 97 (1973). This Court held in *Chism* and *DerMartzex* that "in the absence of request or proper objection under present Michigan case law, there is no absolute requirement that the trial judge give limiting instructions, even though such an instruction should have been given." *Id.,* 416. At issue in both cases was the trial court's failure, sua sponte, to give a limiting instruction regarding evidence of other crimes offered for purposes other than impeachment.[20] In*DerMartzex,* this Court noted that defense counsel may have declined to request a limiting instruction to avoid highlighting the prior acts to the jury. That rationale is similarly applicable to limiting instructions regarding evidence of prior convictions offered for impeachment purposes. Therefore, the trial court did not err in failing, sua sponte, to give the limiting instruction on the use of prior conviction evidence.

I would affirm the defendant's conviction.

646*646 *C. PEOPLE v PEDRIN*

The sole issue raised by defendant Pedrin is whether the trial court erred in granting the prosecutor's motion in limine to allow impeachment of defendant with evidence of his October, 1981, conviction of breaking and entering. At the hearing on the prosecutor's motion to allow impeachment with evidence of defendant's prior breaking and entering conviction, defense counsel proffered that, if defendant testified, he would deny breaking into the garage and stealing the truck, and would testify that he had hitchhiked to his former wife's residence in Munising. Defense counsel stated that defendant had

no alternative method of presenting his defense because he did not know who drove him to Munising.

The trial judge noted that the similarity of the prior conviction to the charged offense, and the defendant's inability to present his defense other than by testifying, militated against its admissibility. Nevertheless, the judge determined that the probative value of evidence of the prior conviction on the issue of defendant's credibility outweighed the prejudicial effect because the prior offense involved "moral turpitude" and "dishonesty." Defendant maintains that he did not testify as a result of that ruling.

The Court of Appeals, emphasizing that the prior conviction was a theft offense, held that the trial court's decision to admit the evidence was not an abuse of discretion.

I disagree and conclude that the trial court did abuse its discretion in ruling that defendant could be impeached with evidence of the prior breaking and entering conviction. As in *Brooks, supra,* the similarity of the prior conviction to the charged offense was a factor weighing heavily against its 647*647 admission, and there were no compelling reasons to permit such impeachment. *Gordon, supra.* The effect on the decisional process of the defendant's failure to testify out of fear of impeachment similarly weighed against admissibility. There was no alternative way for defendant to present his story that he had hitchhiked to his former wife's residence, and there were less prejudicial means of impeaching the defendant, e.g., by evidence of his statement to his former wife that he "just took a car."

Furthermore, I cannot conclude that the error was harmless. The prosecutor's case was not overwhelming, being based primarily on circumstantial evidence. I cannot say that not even one juror would have voted for acquittal had defendant testified. Therefore, I would reverse defendant's conviction and remand the matter for a new trial.

D. PEOPLE v ALLEN

Defendant Allen argues that the trial court erred in denying his motion to suppress evidence of his conviction of second-degree criminal sexual conduct. Defense counsel proffered that defendant would admit to having had sexual relations with the victim in the women's lavatory at Arby's and that he would maintain that the relations were consensual. The trial judge noted that the similarity between the prior conviction and the charged offense militated against admissibility. However, recognizing that the crime involved a one-to-one confrontation of the defendant and the victim, and the centrality of the credibility issue, the court denied the motion to suppress.

The Court of Appeals affirmed, holding that it was not an abuse of discretion to admit the prior conviction under the particular circumstances presented. 648*648 I agree. The similarity of the prior offense and the fact that it is not an offense like perjury which bears directly on credibility weigh against its admission. Nevertheless, the rationale underlying our decision in *Gray, supra,* is similarly applicable here where the question of guilt or innocence rests on the credibility of opposing witnesses. Had defendant testified, his credibility, as well as the victim's, would have been the dispositive issue which had narrowed to the question whether the complaining witness had consented to

sexual relations. Furthermore, it does not appear that there were any less prejudicial means to impeach the defendant, and he was able to present his consent defense, in part, through the testimony of Kevin Young.

Young testified that on a previous occasion, he and the defendant had met the victim at the restaurant, at which time both of them engaged in consensual sexual relations with her. The defendant was able to inferentially raise his consent defense and mitigate the prejudicial effect of his failure to testify, while simultaneously impeaching the victim's assertion that the sexual relations were in fact nonconsensual. Had the defendant testified, his testimony would have directly contradicted the victim's testimony on the consent issue. Under these circumstances, I cannot say that the trial judge abused his discretion in allowing impeachment with evidence of the prior conviction.

Defendant Allen argues further that the trial court erred in denying him the opportunity to impeach the complaining witness, Stacy Dougherty, with her testimony at the preliminary examination. Defendant argues that Dougherty's testimony at the examination was inconsistent with her testimony at trial.

At the preliminary examination, Dougherty testified 649*649 that when she walked into the ladies' restroom the door to the stall for handicapped persons was open and she noticed someone standing in that stall. She could not tell whether the person standing there was a male or female, being able to see only the person's backside, tan corduroy pants, and an orange kinky hairdo. After entering the stall adjacent to the handicapped stall and latching the door, she came back out immediately because she thought that something was "fishy." Witness Dougherty was washing her glasses at the sink when the defendant approached her and told her to perform an oral sex act. She said "no" and the defendant then forced her to do so. Defense counsel asked if defendant had asked her to perform the sex act with the understanding that he would reciprocate by engaging in oral sex with her. Dougherty stated that she could not recall.

At trial, Dougherty testified that when she walked into the ladies' restroom she could only see the person in the handicapped stall from approximately the knee down on one leg and that she did not notice what color pants the person was wearing. She also testified that when she first went into the restroom, she thought the person standing in the handicapped stall may have been sick. She denied that she had agreed to engage in a mutual sex act with defendant.

During cross-examination, defendant attempted to impeach Dougherty with the preliminary examination transcript in regard to the above differences in her testimony. Pursuant to the prosecutor's objection, the trial court declined to allow defense counsel to impeach Dougherty with her preliminary examination testimony as a prior inconsistent statement.[21]

650*650 The Court of Appeals held that there was no inconsistency between Dougherty's preliminary examination testimony and her testimony at trial; thus, the trial judge did not abuse his discretion in denying the admission of Dougherty's examination testimony.

As a general rule, the only contradictory evidence that is admissible for impeachment purposes is that which directly tends to disprove the exact testimony of the witness. *People v McGillen #1,* 392 Mich 251; 220 NW2d 667 (1974); *People v Johnson,* 113 Mich App 575, 579; 317 NW2d 689 (1982). The question of inconsistency is one within the discretion of the trial judge.*People v Graham,* 386 Mich 452, 457; 192 NW2d 255 (1971). In the instant case, I am not persuaded that the trial judge abused his discretion in ruling that Dougherty's trial testimony was not inconsistent with her testimony at the preliminary examination. Although Dougherty's preliminary examination testimony contained certain details about defendant's clothing which she was unable to recall at trial, her trial testimony was not inconsistent, but rather, it appears to reflect a lapse in memory. Similarly, at the preliminary examination, complainant testified that she could not recall if defendant had asked her to consent to a sexual act and subsequently testified at trial that he did not. Considered in the total context of Dougherty's testimony, I do not view these two variances in the testimony as contradictory. Therefore, I conclude that the trial judge's refusal to allow impeachment with the preliminary examination testimony was not an abuse of discretion, thus I would affirm defendant's conviction.

E. PEOPLE v SMITH

Defendant Smith argues that the trial court 651*651 erred in denying his motion to suppress evidence of his prior manslaughter conviction. The trial court ruled that the prior conviction would be admissible for impeachment purposes without explanation.

The Court of Appeals affirmed defendant's conviction finding no error on this issue.

Defendant first argues that the trial judge erred by failing to state, on the record, the factors he considered in deciding to admit the manslaughter conviction and that reversal is required. MRE 609(a)(2) provides in part that the court must articulate on the record the factors it considered in making its determination. The trial judge in the instant case did not comply with that requirement. Nevertheless, the record establishes that the trial judge was aware of his discretionary power to exclude use of prior convictions to impeach defendant and that he considered the relevant factors in reaching his decision to admit the manslaughter conviction. I would deem the error to be harmless under these circumstances. *People v Eggleston,* 148 Mich App 494; 384 NW2d 811 (1986), lv den 426 Mich 862 (1986).

Defendant further argues that the trial judge misapplied the relevant factors and abused his discretion in denying the motion to suppress. I agree. Defendant aptly notes that all of the pertinent factors militate against admissibility. Manslaughter is not an offense which is very probative of credibility. Such convictions should only be admitted when the weight of the other factors tips the balance in favor of admissibility.

In this case, all of the remaining relevant factors militate against admissibility. Manslaughter is sufficiently similar to the charged offense of assault with intent to murder to be deemed a 652*652factor weighing against admissibility. There were no compelling reasons to justify the use of a similar conviction. The offense did not involve a one-to-one confrontation of the defendant and the victim, nor did the determination

of defendant's guilt or innocence reduce itself to a credibility contest between two key witnesses. Thus, the need for such impeachment evidence was marginal.

In light of the foregoing, I believe the trial judge abused his discretion in declining to suppress the manslaughter conviction. Nevertheless, I conclude that the error was harmless beyond a reasonable doubt due to the overwhelming strength of the prosecution's case. The victim's positive identification of the defendant was well substantiated in light of the face-to-face confrontation she had with her assailants over several hours. Most importantly, the two codefendants, Panik and Minkler, consistently testified in minute detail of defendant's complicity in perpetrating the offense. Under these circumstances, I find it inconceivable that the jury would have acquitted defendant on the basis of his tenuous purported defense of misidentification. Thus, the trial judge's erroneous ruling on defendant's motion to suppress use of his prior manslaughter conviction does not constitute grounds for reversal of defendant's conviction.

Smith raises several other issues which I believe merit discussion. First, defendant argues that the trial court erred in denying his motion to suppress evidence of the line-up identification and any subsequent in-court identification. At trial, defendant argued that he had been arrested without probable cause, that his line-up identification should be suppressed as a product of the illegal arrest, and that any subsequent in-court identification would be the product of the illegal line-up identification 653*653 which similarly should be suppressed.[22] The trial court denied the motion. Detective Kohlstrand subsequently testified to the line-up identification of the defendant by the complaining witness, Robin Northover, who also identified defendant at trial as one of her assailants.

On this appeal, defendant has abandoned his theory that the arrest was illegal because it was made without probable cause. Defendant now argues that the arrest was illegal because there were no exigent circumstances justifying an arrest without a warrant, relying on *Payton v New York,* 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

Generally, issues not raised in the trial court will not be considered on appeal. *People v Lynch,*410 Mich 343, 351; 301 NW2d 796 (1981); *People v Snow,* 386 Mich 586, 591; 194 NW2d 314 (1972). While exception to the general rule has been made on numerous occasions in both civil and criminal cases, a prerequisite to having new issues considered on appeal is that there must be a sufficient record to allow for thorough judicial review. *Id.; Meek v Wilson,* 283 Mich 679, 689; 278 NW 731 (1938).

In the instant case, an adequate record was not established to resolve the new arguments raised by the appellant here. Defendant's contention that the police made an illegal warrantless entry into his home to effect his arrest is clearly not supported by the record. The evidence and arguments advanced on defendant's motion to suppress the identification evidence related solely to whether there was probable cause for the arrest. No evidence was presented concerning the circumstances surrounding defendant's arrest, nor can such evidence be gleaned from elsewhere in the record. 654*654 Although there is no question that the defendant's arrest was made without a

warrant, it cannot be determined from the record whether the arrest was justified by one of the various exceptions to the warrant requirement.[23] Therefore, the issue has not been properly preserved for appellate review. *Id.*

Defendant next argues that the trial court erred in admitting photographs and slides of the victim's wounds.[24] It is well-settled that the admission of photographic evidence lies within the sound discretion of the trial judge. *People v Eddington,* 387 Mich 551, 562; 198 NW2d 297 (1972). The court's decision to admit photographs will be upheld if they were substantially necessary or instructive to show material facts and it does not appear that they were offered in an attempt to excite passion or prejudice. *People v Falkner,* 389 Mich 682, 685; 209 NW2d 193 (1973). Assuming relevance of the photographs, it must still be determined whether the probative value of admitting the photographs outweighs the prejudicial effect. *Id.*

In the instant case, defendant argues that the photographs and slides admitted into evidence were gory, inflammatory, and irrelevant to any issue in dispute. Defense counsel indicated that he would stipulate to the sexual assault and the assault with intent to murder because the defense was that the defendant was not the perpetrator.

The prosecutor argues that the photographs were relevant to proving the intent element of the655*655 assault with intent to murder charge notwithstanding defendant's offer to stipulate to that element. There is no rule that stipulations per se negate admissibility. *People v Green,* 74 Mich App 351, 357; 253 NW2d 763 (1977), aff'd 405 Mich 273; 274 NW2d 448 (1979). The prosecution bears the burden of establishing each and every element of the charged offense beyond a reasonable doubt, and the jury must be instructed to consider each element regardless of stipulation. *Id.* See also *People v Reed,* 393 Mich 342; 224 NW2d 867 (1975), cert den 422 US 1044, 1048 (1975). Therefore, defendant's argument that the offer to stipulate to the elements of the crime rendered admission of the photographs irrelevant to proving the element of intent is without merit.

Furthermore, I believe the probative value in admitting the photographs outweighed the danger of unfair prejudice. There were no witnesses to the slashing of the victim's neck. The victim was herself rendered unconscious before her neck was cut. The photographs and slides at issue depict the location of the wound and its severity. Coupled with the treating physician's testimony, I believe the photographs and slides were highly probative of defendant's intention to kill the victim. Photographs that are admissible for a proper purpose are not rendered inadmissible merely because they vividly depict a gruesome injury, even though they may arouse the passions or prejudice of the jurors. *Eddington, supra,* 563. Thus, I cannot conclude that the trial judge abused his discretion in admitting the photographs and slides at issue.

Next, defendant contends that the trial court erred in denying his motion for a mistrial. Defendant argues that he was entitled to a mistrial when witness Panik testified on redirect examination that "we was all on parole" when the prosecutor 656*656 was questioning him about the encounter with two Wayne County Sheriff's deputies in front of the Seven-Eleven store.[25]

It is well settled that the decision to grant or deny a motion for mistrial rests within the sound discretion of the trial court. *People v Kelsey,* 303 Mich 715; 7 NW2d 120 (1942); *People v Holly,* 129 Mich App 405, 415; 341 NW2d 823 (1983). To constitute error requiring reversal in a criminal trial, the error complained of must have been so extreme that it deprived the defendant of a fair trial and resulted in a conviction that was a miscarriage of justice. *People v Ritholz,* 359 Mich 539, 559; 103 NW2d 481 (1960); MCL 769.26; MSA 28.1096. A volunteered and unresponsive answer to a proper question is generally not cause for granting a mistrial. *Kelsey, supra.*

From my review of the record, I am not persuaded that Panik's volunteered and unresponsive answer to the prosecutor's question deprived defendant of a fair trial. The statement "we was all on parole" was ambiguous, and it cannot be said that it was an improper and prejudicial reference to the defendant's prior record. It is highly unlikely that this one isolated, ambiguous, and unresponsive comment resulted in significant prejudice to defendant. Therefore, I cannot say that the trial court abused its discretion in denying the motion for a mistrial.

Finally, the defendant also argues that reversal is warranted because he was not permitted to impeach prosecution witness Donald Perdue with evidence of Perdue's 1955 conviction of assault with intent to do great bodily harm less than murder. He relies on the Court of Appeals decision in *People v Redmon,* 112 Mich App 246; 315 NW2d 657*657 909 (1982).[26] The trial court agreed with the prosecutor that such impeachment was precluded under MRE 609(b) because of the age of the conviction.

MRE 609(b) provides:

> *Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.*

Crucial to our analysis of this issue is an examination of the unique facts in *Redmon.*Defendant Redmon was charged with inciting, inducing, or exhorting prosecution witness Russell Haynes to commit murder. At her 1980 trial, the defendant sought to put before the jury the fact that between 1940 and 1967 Haynes had been convicted eight times of larceny and fraud-related activities. The trial court reluctantly disallowed such impeachment under authority of MRE 609(b).

The Court of Appeals reversed, stating that the Sixth Amendment right to confrontation took precedence over the court rule, as applied to a prosecution witness, under the peculiar facts in*Redmon.* The Court emphasized that the defendant's theory was that Haynes had lied to authorities about the defendant's involvement in an effort to ward off a severe sentence, which he feared because of his past extensive criminal record.

The instant case is clearly distinguishable. The compelling need for admission of the evidence of the prior conviction which was present in *Redmon* is not present here. Perdue's prior conviction was not relevant to the defense theory; indeed, it had nothing to do with the facts of the instant case. 658*658 Further, I note that Perdue's twenty-six-year-old conviction was not for an offense bearing on truthfulness, and that defendant

was permitted to explain fully the reason for Perdue being in jail with defendant, i.e., nonpayment of child support.

Our conclusion that *Redmon* is distinguishable makes it unnecessary for us to discuss the correctness of the Court of Appeals opinion in *Redmon.* Nonetheless, I emphasize the narrowness of that decision, and further observe that nothing in MRE 609(b) restricts its applicability to defendants who testify as opposed to other witnesses.

Finding no error, I would decline to extend the *Redmon* decision to encompass the facts in this case, and would affirm the decision of the Court of Appeals.

IV

SUMMARY

On the issue for which leave was granted, I would hold that to preserve a claim of improper impeachment with a prior conviction for appellate review, a defendant must testify. However, because considerations of fundamental fairness compel prospective application of the rule, it should not govern the cases at bar.

In *People v Gray,* I would hold that the trial court did not abuse its discretion in allowing the defendant to be impeached with evidence of three prior convictions of carrying a concealed weapon, and one prior conviction of possession of heroin.

In *People v Brooks,* I would hold that the trial court abused its discretion in allowing the defendant to be impeached with two prior robbery convictions and one prior unarmed robbery conviction due to the similarity of those offenses and the 659*659 charged offense of armed robbery. However, I find the error harmless beyond a reasonable doubt. I find no merit in the remaining issue raised in *Brooks.*

In *People v Pedrin,* I would hold that the trial court abused its discretion in allowing the defendant to be impeached with a prior breaking and entering conviction due to the similarity of that offense and the charged offense of breaking and entering.

In *People v Allen,* I would hold that the trial court did not abuse its discretion in allowing the defendant to be impeached with a prior conviction of second-degree criminal sexual conduct, notwithstanding the similarity of that offense to the charged offense of first-degree criminal sexual conduct. The impeachment evidence was properly ruled admissible due to the one-to-one nature of the offense, the centrality of the credibility issue, the lack of an alternative method of impeachment, and the defendant's ability to present his theory of defense without testifying. I find no merit in the remaining issue raised in *Allen.*

In *People v Smith,* I would hold that the trial court abused its discretion in ruling that defendant could be impeached with evidence of his prior conviction of manslaughter. However, I find the error harmless beyond a reasonable doubt. Further, after careful consideration of the remaining issues raised in *Smith,* I conclude that there is no basis for reversal.

BOYLE, J. (*dissenting*).

I

The majority has today replaced the trial judge's discretionary authority to advance the truth-seeking 660*660 process with its own view of the proper use of impeachment evidence. The majority's opinion would, for example, categorically prevent an accused drug seller from being impeached with evidence of prior convictions of the sale of drugs, and a defendant accused of sexual offenses from being impeached with prior convictions of sexual offenses. As a result, the majority's limitation of trial-judge discretion will multiply the opportunity for even the guilty defendant to escape punishment and make the discovery of truth more difficult.

The majority imposes this policy choice on the criminal justice problems of this state on the basis of its "perception" of the need for a new rule. It does so with a citation to the law of West Virginia and on the basis of social science studies of mock jurors, without analysis of the impact on the factual accuracy of jury verdicts and without consideration of existing safeguards protecting the innocent. If our "relatively low regard for truth-seeking is perhaps the chief reason for the dubious esteem in which the legal profession is held," today's decision will provide further reason "to question our service in the quest for truth," Frankel, *The search for truth: An umpireal view,* 123 U Pa LR 1031, 1040, 1041 (1975).

The prosecution must be held to the burden of proving guilt beyond a reasonable doubt, and safeguards must exist permitting postconviction review of claims of erroneous conviction. The issue here, however, does not involve a question of effectuating a constitutional right or of assuring review of a claim of innocence. The only issue addressed today is that of a new policy regarding impeachment with prior convictions. I disagree with the majority's determination to impose upon our jurisprudence a policy that automatically excludes 661*661 or includes[1] categories of prior convictions for impeachment. In my judgment, a policy rule that takes relevant and reliable evidence away from the factfinder is justifiable only if it advances countervailing interests equal or superior to the truth-finding function. The revised interpretation of MRE 609 here announced and the new version of MRE 609 here adopted do not attempt such an analysis and perforce do not meet that burden.

The rules of automatic exclusion and admission and the artificially circumscribed discretion adopted today create a conclusive presumption against the admission of certain prior convictions and a conclusive presumption in favor of the admission of others. Despite the failure to establish a deficiency in the system that requires this result,[2] the opinion suppresses relevant and unquestionably reliable evidence, proof beyond a reasonable doubt of the commission of a prior felony by the defendant.

Because the "clarified" balancing test is applied to cases which antedate today's decision, validly obtained convictions will be reversed, and appellate resources will be taxed as the parameters of the new "rules" are developed. Neither this clarification nor the bright-line rules can, in good faith, be justified by rule-making authority. No comment, no input, no weighing of policy concerns by 662*662 the bench and bar, has

been allowed. The Court has simply created new law not even argued by the parties in these cases. Cases are reversed today and will be reversed hereafter, not because our current rule was violated, or because the constitution was violated, or because juries have returned verdicts that are not supported by the evidence. These cases will be reversed solely because a majority of this Court believes that trial judges cannot be trusted to appropriately exercise Rule 609 discretion and lay jurors inevitably misuse prior-conviction evidence.

As with other experiments, the system will stagger and lurch through a period of adjustment silently attended by the human and social costs that are the price of today's undertaking. In the interim, before the imperatives of the system gain the approval of a new majority of this Court, today's opinion will have impeded truth finding and undermined the institutional integrity of the trial judiciary and of the jury system.

The suggestion that these per se rules advance "the integrity of fact finding" is on an intellectual par with a claim that book burning advances knowledge. The essence of every censor's position is that readers cannot be trusted to properly use the knowledge they might obtain.

II

Cross-examination, "the greatest legal engine ever invented for the discovery of truth," 5 Wigmore, Evidence (Chadbourn rev, 1974), § 1367, p 32, is derailed today because of a policy decision that eschews legal analysis in favor of the majority's "perception" of the need for a new rule. The result is the replacement of trial-judge discretion with the majority's value system; the cost is making the discovery of truth more difficult.

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The deficiency in the majority's jurisprudential approach to this issue is aptly illustrated by Professor Grano's explanation of the analogous objectives of rules of criminal procedure:

> *When the guilty are convicted and the innocent are acquitted, the result does "accord with substantive law," but when the innocent are convicted or the guilty escape, the substantive law is defeated. Truth, therefore, must be the primary goal of procedure. Indeed, truth must be the goal of any rational procedural system, whether accusatorial or inquisitorial. Reasonable persons may disagree about the better method of determining truth, but no rational person touts a procedural system because it makes discovery of truth more difficult.*
>
> *Complexity is introduced, however, by an unavoidable dilemma: "the easier it is ... to prove guilt, the more difficult does it become to establish innocence." While the prevalence of truth is preferable, if error is inevitable, a guilty person should escape before an innocent one is convicted. Thus, despite the desire for truth, we sometimes deliberately increase the risk of error to ensure that the innocent are acquitted. For example, the standard of proof beyond a reasonable doubt undoubtedly helps more guilty than innocent defendants. Nevertheless, we appropriately would resist any effort to lower the*

burden of proof, for the overall gain in the number of correct verdicts would come at an unacceptable cost.

* * *

[T]he appropriate focus must be on the anticipated benefits to be derived from the rule, the scope of the risk [of convicting innocent persons], and the existence of other safeguards to counter the risk. .. .

*Because truth is the primary goal, we should prefer those procedures for protecting the innocent that do not increase the risk of erroneous acquittal. 664*664[Grano, Implementing the objectives of procedural reform: The proposed Michigan rules of criminal procedure — part I, 32 Wayne L R 1007, 1011-1012, 1014-1015 (1986).]*

The majority does not attempt to evaluate truth seeking against competing concerns or consider alternative safeguards for both truth seeking and a competing concern. It wholly fails to acknowledge the fact that the legal system presumes that juries will follow instructions, and that, where that presumption has been overcome, it has been where the inadmissible evidence contained elements of unreliability or unlawfulness and was offered in the case in chief to create an "overwhelming probability" of improper substantive use. *Jackson v Denno,* 378 US 368; 84 S Ct 1774; 12 L Ed 2d 908 (1964).

Thus, in *Bruton v United States,* 391 US 123; 88 S Ct 1620; 20 L Ed 2d 476 (1968), the Court rejected the government's argument that in a joint trial use of a confession to prove the confessor's guilt promoted truth, because severance was an alternative means to achieve truth, because arguments of speed, economy, and convenience were insufficient to justify infringement on the nontestifying defendant's right of confrontation, and because evidence of the confession became "intolerably" unreliable when the confessing accomplice did not testify.

The balancing analysis produced a different result in the Court's unanimous opinion in*Tennessee v Street,* 471 US 409; 105 S Ct 2078; 85 L Ed 2d 425 (1985), where the Court held that the defendant's rights under the Confrontation Clause were not violated by the introduction of the accomplice's confession. Here, by contrast with *Bruton,* and as in this situation, the evidence was not 665*665 introduced in the case in chief. Rather, the defendant took the stand and testified that his own confession had been coercively derived from the accomplice's statement. The state called the sheriff who testified in rebuttal that respondent was not read the accomplice's confession and then read that confession to the jury. The trial judge instructed the jury that the confession was not admitted for the purpose of proving its truthfulness, but solely for the purpose of rebuttal. The Court noted that, because the accomplice's confession was not introduced in the case in chief on the issue of guilt, the only similarity to *Bruton* was the fact that the confession could have been misused by the jury as evidence of the defendant's guilt. The jury, however, was "pointedly" told not to consider the truthfulness of the statement. Thus, the critical question for the Court was "whether, in light of the competing values at stake, may we rely on the `crucial assumption' that the jurors followed the `instructions given them by the trial judge?'"

The Court concluded:

> *Had the prosecutor been denied the opportunity to present Peele's confession in rebuttal so as to enable the jury to make the relevant comparison, the jury would have been impeded in its task of evaluating the truth of respondent's testimony and handicapped in weighing the reliability of his confession. Such a result would have been at odds with the Confrontation Clause's very mission — to advance "the accuracy of the truth-determining process in criminal trials." [Tennessee v Street, supra, p 415.]*

Moreover, unlike the situation in *Bruton,* in *Street* there were no alternatives that would have both assured the integrity of the trial's truth-seeking 666*666 function and eliminated the risk of the jury's improper use of evidence.

The majority's attempt to distinguish *Street* does not come to grips with the fact that the evidence there was not offered in the case in chief or that the Court concluded that the jurors could be relied upon to follow instructions. The fact is that the defendant had denied the truth of his confession, and it is simply incorrect to assert that the evidence provided little if any inculpatory information "that was not already before [the jury] in defendant's own confession."*Ante,* p 573, n 10. The improper purpose prohibited by the instruction was the jurors' misuse of the accomplice's confession implicating the defendant. That is, the potential prejudice to the defendant was that the jury would use the accomplice's confession not solely to find that defendant's denial was untrue, but also to conclude that the accomplice's statement was substantive evidence of defendant's guilt. To use the majority's terminology, the veracity of defendant's denial of his confession had to be "mediated" through the knowledge that the absent accomplice had confessed and incriminated the defendant as an active participant in the decedent's hanging, an obviously far more damaging "independent and improper basis for a guilty verdict," *ante,* p 572, n 10, than the situation presented by impeachment with prior convictions.

The Court has also upheld the efficacy of limiting instructions and concluded that evidence of a defendant's prior criminal convictions could be introduced for the purpose of sentence enhancement, so long as the jury is instructed it could not be used to determine guilt, *Spencer v Texas,* 385 US 554; 87 S Ct 648; 17 L Ed 2d 606 (1967).

In *Spencer, supra,* p 561, Justice Harlan noted that the "conceded possibility of prejudice" was667*667 "outweighed by the validity of the State's purpose in permitting introduction of the evidence" and that "[t]he defendants' interests are protected by limiting instructions ... and by the discretion residing with the trial judge to limit or forbid the admission of particularly prejudicial evidence...." Justice Harlan further noted that instructions to a jury limiting the proper use of evidence elicited on cross-examination of defense witnesses as to defendant's character and a prior conviction "are no more difficult to comprehend or apply than those upon various other subjects," *id.,* p 563. The Court has also permitted illegally seized evidence, *Walder v United States,* 347 US 62; 74 S Ct 354; 98 L Ed 503 (1954), and improperly obtained confessions, *Harris v New York,* 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971), to be used by the jury in assessing credibility, so long as the jury is properly instructed. Thus, the United States

Supreme Court has created a narrow exception to the rule that juries are presumed to follow instructions where there is an "overwhelming probability" that the jury cannot follow the instruction and the result would be devastating to the defendant's case, *Richardson v Marsh,*481 US ___; 107 S Ct 1702; 95 L Ed 2d 176 (1987), a proposition that the majority has here failed to demonstrate.

These cases illustrate that a proper approach to the problem of potential prejudice requires an inquiry as to: whether the possibility of prejudice is protected by trial-judge discretion and limiting instructions; whether there is no alternative short of suppression of evidence to uphold the competing concern; and whether, if alternatives exist, the value underlying the competing concern has been fairly served. Application of these principles to the question of potential prejudice from impeachment with prior convictions demonstrates that there are 668*668 existing safeguards against the misuse of prior convictions, and that there is no alternative to the suppression of truthful evidence relevant to the credibility question other than trial-judge discretion and the limiting instruction.

It might be observed, as the majority at one point does, *ante,* p 572, n 10, that the law is itself rendered irrelevant because this decision is based not on constitutional grounds, but on policy. The majority does not, however, evaluate the very factors most crucial to the adoption of a wise policy. The majority's policy does not balance the negative effect on the truth-finding function against the benefit of the elimination of potential prejudice. Nor does the majority evaluate the significant alternative barriers to the improper use of "bad man" evidence that the system has erected,[3] barriers that both protect against the risk that innocent persons are convicted and insure that the fact-finding process is not emasculated.

The majority does not weigh the fact that a magistrate must determine that there is probable cause to believe a defendant is guilty, that a trial judge must assure through motion practice that the evidence has been obtained through lawful means, that Rule 404(a) precludes the use of "bad man" evidence as substantive proof of guilt, that the prosecutor must present in the*case in chief* evidence sufficient to permit a rational jury to find 669*669 guilt beyond a reasonable doubt, or be directed out of court, *People v Hampton,* 407 Mich 354; 285 NW2d 284 (1979), and *Jackson v Virginia,* 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1979), that the prosecutor may not comment on the defendant's failure to testify, *Griffin v California,* 380 US 609; 85 S Ct 1229; 14 L Ed 2d 106 (1965), and that a trial court has discretion to grant a new trial where it has concluded that the verdict is against the great weight of the evidence, *People v Hampton, supra,* p 375.

The majority further fails to focus on the fact that it is only where a defendant exercises a right that a defendant alone possesses, and elects to testify, that the credibility issue is presented. Before this point in the process, the safeguards in the system assure us of that which every trial judge and lawyer knows, that "the preponderant majority," Frankel, *supra,* p 1037, of defendants are guilty of the charged offense or a lesser or related offense. At the point in a trial where the issue is the credibility of the defendant's testimony, the prosecution has carried the burden of proving guilt in the case in chief without resorting to prior record evidence, and the risk of convicting an

innocent person has been tempered. Reliance on the discretion of the trial judge and the limiting instruction to curb a potential for prejudice more effectively advances the goal of protecting the innocent while not increasing the risk of erroneous acquittal than suppressing truthful evidence relevant to the very issue the jury must decide.

The cogent analysis of the United States Supreme Court teaches that when a reason for erecting a barrier against truth is advanced, the burden on truth seeking and the risk of erroneous conviction must be evaluated. The majority simply ignores the fact that when the prosecution has 670*670 carried the burden of proving guilt beyond a reasonable doubt without resort to the use of prior conviction evidence, the risk of convicting the innocent through misuse of the evidence has been diminished, and the issue is whether the factfinder should be deprived of relevant and reliable evidence when a defendant takes the stand and denies guilt.

The majority's lack of assessment of the alternative means to suppressing reliable and relevant evidence also explains the failure to acknowledge that the Legislature of this state has given defendants an additional protection against the possibility that a lay jury might misuse evidence of prior convictions. In Michigan, the defendant has the sole right to select a bench trial or a trial by jury, MCL 763.3; MSA 28.856; *People v Stoeckl,* 347 Mich 1; 78 NW2d 640 (1956). Given the choice between a judge who until today was presumed to have the ability to limit prior conviction evidence to its proper purpose or an untrained and inexperienced jury, it is simply illogical and unfair to permit a defendant to select a lay jury and then to claim that its inability to properly assess reliable evidence requires suppression.

Each exception to the truth-finding function bears a heavy burden. Contrary to the majority's assumption, the fact that one exception exists is no evidence that another should be created. The majority itself slides along the "slippery slope" from the exclusion of prior convictions in the case in chief to exclusion of convictions on cross-examination without a clear understanding of the protection already afforded a defendant, or a persuasive answer to the question as to why, even if jurors might in a given case not be able to restrict use of prior conviction evidence to the issue of credibility, 671*671 truthful evidence should be subject to generic suppression in the forum that exists for its determination.

In sum, the majority does not carry the burden of establishing the need for rules which generally exclude classes of evidence. If that need is indeed established by the jury's inability to "mediate" a proper use through a potential misuse, the need is revealed as an attack on the fact-finding system itself because, clearly, both jurors and judges as factfinders are called upon to "mediate" in every situation where evidence is admitted for a limited purpose.

The majority has ignored the policy expressed in a state statute, distorted the rule-making process, and rejected the approach to this issue which is followed by the overwhelming majority of other states,[4] by the federal courts, and by this state until today.

The majority has not only failed to consider the protections against potential prejudice that exist in our system, it has wholly failed to balance the likelihood of a negative effect on the judicial system, the risk of erroneous acquittal, against the systemic gains to be achieved by the new rules. The majority analysis indicates that of the twenty-five cases in abeyance, eighteen defendants were to 672*672 be, or were, impeached with bright-line[5] excludable convictions.

The majority accuses the dissent of "[a]ssuming ... that the defendant is almost certainly guilty...." (*Ante,* p 603.) I have not assumed that any given defendant is guilty, but, rather, have attempted to urge the majority to a rational examination of the implications of its new policy[6] 673*673 for the criminal justice system.

If an innocent person is convicted despite all the current protections of the system, the system has, in that instance, failed. Thus, a just system must provide a method to insure that an arguably wrongfully convicted individual has an avenue for redress. By contrast, the majority has converted a potential for an undesirable and deplorable consequence in individual instances into a presumption of prejudice mandating a systemic revision that prevents juries from learning of generic types of prior convictions.

The rules announced today impede the task of weighing and evaluating the truth of testimony. Here, unlike the situation in *Bruton,* or in *Cruz v New York,* 481 US ___; 107 S Ct 1714; 95 L Ed 2d 162 (1987), the prosecutor's obligation to prove guilt beyond a reasonable doubt in the case in chief, Rule 404 itself, and the right to waive a 674*674 jury, provide alternative means to protect the legitimate interest in avoiding misuse of "bad man" evidence. Categorical denial of impeachment evidence impedes the jury "in its task of evaluating the truth of respondent's testimony" in opposition to "the Confrontation Clause's very mission — to advance `the accuracy of the truth-determining process in criminal trials.'" *Tennessee v Street, supra,* p 415.

2

The majority's preference for bright-line rules also constricts the trial court's responsibility to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth...." MRE 611; see MRE 102. To a person who is or has been a trial judge, this is the most disturbing aspect of the new rules, and the dimension of the rules most revealing of the majority's lack of experience with the trial court's role.

The majority fails to understand that the principal business of the trial judge in a jury trial is ruling on evidence. With few exceptions, these rulings are not either/or decisions. Relevancy decisions are judgment calls committed to the trial court's discretion. The rules of the game would consume the purpose of a trial if trial judges did not assess the purpose and value of the evidence in the evolving context of the trial. To a trial judge, the trial is not an abstraction, but an evolving process requiring ongoing evaluation. It was to that evolving reality that Justice RYAN spoke in observing that, as with other rulings on relevancy, the Rule 609 decision requires assessment of "[t]he importance to the truth-seeking process, *not* 675*675 *merely the prospects for acquittal,* of obtaining

the defendant's version of the events in question." *People v Wakeford,* 418 Mich 95, 116; 341 NW2d 68 (1983).

Skillful lawyers on both sides of the counsel table know that advance bright-line rulings from a trial judge can benefit their client's theory of the case. The responsibility of the trial judge, however, is not to monitor the gladiators' battle, but rather to assure that the advocates' perspectives do not unfairly blindside the truth-finding process. The trial judge occupies an area within the arena of effective representation by defense counsel and zealous but evenhanded presentation by the prosecution. In this area, the primary obligation of the judge is not to the adversaries, but to the trial process and to the twelve persons who are sworn to determine the truth.

As the Supreme Court explained in *Luce v United States,* 469 US 38, 41-42; 105 S Ct 460; 83 L Ed 2d 443 (1984),

> *The ruling [regarding impeachment] is subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's [in limine] proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling.*

The majority's failure to appreciate the role of a judge in a jury trial is more remarkable because it squarely contradicts the rationale of a case on which the majority purportedly relies, *Gordon v United States,* 127 US App DC 343, 348; 383 F2d 936 (1967). In *Gordon,* Judge Warren Burger wrote that an admission of prior convictions for impeachment was proper, partially

> *676*676 because the case had narrowed to the credibility of two persons — the accused and his accuser — and in those circumstances there were greater, not less, compelling reasons for exploring all avenues which would shed light on which of the two witnesses was to be believed.*

Thus, in the very case in which a prior conviction's relation to credibility is most important to the truth-seeking process, the majority would ban it.[7] It is true that in a credibility contest the "prejudice" to the defendant of such a prior conviction will be high. However, in many such contests, the Court now mandates that the full dimension of the credibility issue can never be disclosed to the jury.[8]

677*677 The majority prevents the trial judge from evaluating the context and purpose of the cross-examination and leaves the jury to falsely conclude that since it has not learned of a prior conviction of the defendant, defendant's crime-free life entitles his testimony to more credibility than that of the impeached witness. This result contravenes, as described by Judge Burger, "the very nature of judicial discretion [which] precludes rigid standards for its exercise...."[9] *Gordon v United States, supra,* p 348. In these situations the majority dictates that only the need to include the testimony and never the need to permit impeachment can be considered. The result is obvious: the trial court is stripped of its authority, the jury is barred from access to the facts, and the victim and society lose.

Contrary to the majority's suggestion, it is not the dissent which "strip[s] the probative/prejudice balance of any real meaning," *ante,* p 602. It is the majority's inhibition of the trial judiciary that drastically limits the authority to evaluate the proffered impeachment evidence in the context of the purpose and situation in which it is offered.[10] 678*678 The result is exclusion of generic classes of evidence regardless of probativeness in a given case and inclusion of generic classes of evidence regardless of existential prejudice in a given case. In effect, these rules determine probativeness without regard to prejudice and prejudice without regard to probativeness.

Rule 609 reflected the decision of a committee of lawyers and judges adopting the common-sense premise that any past felony committed by a witness is to some extent relevant to credibility. This premise was as simple and as profound as the observation that if the far more imperative social obligation not to commit crime does not prevent criminal conduct, a defendant is far less likely to have inhibitions against lying.[11]

679*679 While it has not been proven, it may be safely assumed that some jurors misuse prior conviction evidence admitted only for credibility. Rule 609 thus does not guarantee that an innocent person will never be convicted. It is one thing, however, to provide a procedure to protect against the possibility of an erroneous conviction in isolated cases;[12] it is quite another to create a rule on the basis of supposition or personal perception that suppresses logically relevant evidence and increases the risk of erroneous acquittal.

Nonetheless, because of the perceived "low probative value" of all bright-line excludable convictions, the majority denies a relationship between believability and prior felonious conduct and refuses to allow judges the discretion to permit lay factfinders to draw an inference that a person who has previously flaunted society's conventions by violating the criminal law of the state may also be willing to lie under oath.[13]

The majority's answer to a potential for juror misuse is the creation of an analytical rule.[14] On680*680 the basis of speculation as to the effect on the process caused by jurors' inability to follow a limiting instruction, the majority imposes an administrative solution for what is in fact an existential problem. This solution ignores the fact that these problems are quintessentially ad hoc and call for ad hoc solutions. Therefore, the wise course for an appellate court is to recognize a wide discretion in the trial court with a correspondingly narrow scope of appellate review. As the United States Supreme Court instructs, fixed and arbitrary rules that suppress truth should be adopted only for compelling constitutional or societal reasons.

I am persuaded that the vast majority of the trial judiciary believes that it is desirable that a defendant have a fair opportunity to present a defense, and that it is frequently appropriate to limit attack on a defendant in order to encourage him to take the stand. I would trust these judgments, made with a "vision not vouchsafed to us, as we scan the printed page ...." *People v Stoeckl, supra,* 7 (SMITH, J., dissenting), to the integrity of trial judges, their fidelity to the rules we have already created, and to the wisdom of juries.[15]

681*681 3

The majority has looked to empirical studies[16] of mock jurors by behavioral psychologists to design these new rules. The very use of the concept that jurors "mediate"[17] their conclusions through other perceptions bespeaks the majority's application of behavioral decision theory to the jury system. The majority fails to acknowledge, however, that simulations 682*682 of the jury process are conceded even by proponents of "psycholegal" research to be "imperfect tools for answering empirical questions," Kerr & Bray, *The Psychology of the Courtroom* (New York: Academic Press, 1982), p 318. Notwithstanding such reservations and ignoring the fact that the prosecution must introduce sufficient evidence in the case in chief to support guilt beyond a reasonable doubt, the majority states that it is much easier for a jury to conclude that "a person is bad than that he did something bad," *ante,* p 568, and then flatly asserts that the limiting instructions do not accomplish their purpose.

One study the majority believes deserves consideration involves forty-eight mock jurors being advised of seven prior similar convictions, Doob & Kirshenbaum, *Some empirical evidence on the effect of s. 12 of the Canada Evidence Act upon an accused,* 15 Crim L Q 88, 93 (1972-73). It is this study which provides the "halo effect" explanation in the majority opinion.[18]

683*683 The second study cited used both individual verdicts and four-person mock juries and was performed with forty individuals and thirty four-person groups who read a hypothetical burglary scenario in which half the persons were informed that the defendant had a prior conviction for*burglary* and were given a single written instruction that read:

> *"[T]he accused person's prior criminal record should not be used to determine whether or not the defendant is guilty. Prior record should be used only to determine the credibility of the defendant, that is, whether he is to be believed as a witness." [Hans & Doob, Section 12 of the Canada Evidence Act and the deliberations of simulated juries, 18 Crim L Q 235, 240 (1975-76).]*

The results from the individual verdicts "did not replicate" Doob & Kirshenbaum's original findings, that is, the presence of a record did not seem to make a difference in the percentage of guilty verdicts when the verdicts were made individually. The presence of the record did appear to make a difference in the four-person groups, in which forty percent of the group knowing of a record found the defendant guilty and none of the fifteen groups not advised of a record found the defendant guilty. In evaluating the results, the authors conclude that 684*684knowledge of a previous conviction biases a jury against the defendant. They also note, however, that in the absence of a record, the "No Record groups *discredited* the evidence significantly and consistently more per unit time than Record groups did." (Emphasis in original.) *Id.,* p 245. While crediting the portion of the study that supports its result, the majority has failed to observe, as it formulates new policy for this state, that without any factual basis in the hypothetical problem the no-record mock jurors were more likely to be biased against the state by observing that the law was biased against the defendant, that police line-ups were biased, or that the evidence was only circumstantial.[19]

685*685 The most recent study cited by the majority is based on observations of 160 persons approached in Laundromats, supermarkets, bus terminals, and private homes who were asked to determine guilt or innocence of a hypothetical defendant from a two-page case summation. This study concludes that mock jurors are more likely to convict a defendant when advised of conviction of a prior *similar* crime, not, as the majority implies, of any prior conviction — a result that supports the current approach of our jurisprudence to this category of case, *People v Crawford,* 83 Mich App 35; 268 NW2d 275 (1978). Similarly, the study's observation that the participants' rating of the hypothetical defendant's credibility did not vary as a function of prior conviction is used by the majority to support its conclusion that a limiting instruction has no effect on how jurors use prior conviction 686*686 evidence. It is obvious even to the untutored, however, that the fact that there was no significant variation in the mock jurors' evaluation of the "defendant's" credibility is equally explained by the fact that there was no real defendant to evaluate. As the authors of this study themselves note:

> *One should be cautious in generalizing from the results of this study to jurors in a real trial. First, the ratio of trial evidence to prior conviction information is much lower in simulations than in actual trials. In an actual trial, the greater richness of evidence and actors probably provides jurors with more bases for forming credibility judgments than the subjects in our simulation had. [Wissler & Saks,On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt, 9 Law & Human Behavior 37, 46 (1985).]*

Finally, not only was there no real defendant, no actual deliberation or explanation of the limiting instruction, the most telling indication of the absence of persuasive weight in this study is the fact that the observation the majority finds most important, *ante,* p 577, that is, that all else being the same, the "conviction" rate was higher where the impeaching crime was murder, is a conclusion drawn from a survey of *twenty* people, fourteen of whom opined that the defendant was guilty.[20]

687*687 The Kalven & Zeisel study, *The American Jury* (Boston: Little, Brown & Co, 1966), which is the only attempt to measure the decisional processes of actual juries does not support the majority's result and is, therefore, not dealt with in the survey of empirical studies. Given the majority's reliance on hypotheticals presented to mock jurors to support its assumptions, and because *The American* 688*688 *Jury* is the seminal study of actual jurors, it is appropriate to examine its findings in depth.

The Kalven & Zeisel study measured the trial judge's assessment of guilt against the jury's verdict in 3,576 jury trials and *assumed* the performance of the judge as a baseline of expertise in understanding the facts and applying the law. The importance of the study for purposes of examining the majority's conclusion that there is a "likelihood" that jurors convict the innocent is that in 3,576 trials there was overwhelming judge and jury agreement; in sixty-four percent of the cases both would convict, and in fourteen percent both would acquit. The study found that judges and jurors reached contradictory results in twenty-two percent of the cases. Of this twenty-two percent, in nineteen percent the judge would convict where the jury would acquit, and in three percent the judge would acquit where the jury would convict.

The study concludes that the jury's disagreement is "massively in one direction," that is, for acquittal. *Id.,* p 58. The Kalven & Zeisel work does provide evidence that jurors are influenced by personal characteristics of defendants and witnesses and by perceptions that do not relate to the issue of guilt or innocence. The study does not prove that juries are more likely than a judge to convict where the defendant takes the stand and is impeached, but, rather, supports the view that jurors are twice as likely to reach what the study assumes are outcomes that are not controlled by formal law or professional evaluation of evidence because of jury sentiments about the law and the defendant. Thus, Kalven & Zeisel substantiate the view that where juries do not reach "correct" results, they are engaged in the historic function of jury equity, erring on the side of acquittal.

Nor does the Kalven & Zeisel study support the 689*689 majority's observation that it is "much easier" for a jury "to conclude that a person is bad than that he did something bad." *Ante,* p 568. The majority fails to observe that Kalven & Zeisel do not suggest that the jurors' higher acquittal rate is because the defendant is innocent. The majority thus erroneously implies that because a jury finds guilt at a higher rate where prior records are introduced, the verdicts are less likely to be factually accurate. In fact, as noted, the Kalven & Zeisel statistics assume the judge's evaluation as the standard of competence. Where judges and juries disagree (as they do less in cases of prior records) the disagreement describes not a factual inaccuracy suggesting conviction of innocent defendants, but a jury sentiment toward equity for a defendant despite factual accuracy and the rules of law.[21]

Having noted the phenomenon and the direction of judge and jury disagreement, the focus of the study turns to identification of the source and cause of the disagreement. The majority opinion neglects one entire chapter of the study devoted to the credibility hypothesis (chapter 13, pp 168-181). This chapter explores and rejects the existence of a defendant's repudiated confession as a source of 690*690 disagreement (p 174), it explores and rejects the effect of accomplice testimony as a source of disagreement (p 177), and it examines in detail the precise issue raised by the majority in this opinion, the "defendant-as-witness," *ante,* p 567, that is, the effect of the credibility of the defendant as a source of disagreement.

The study proves in table 56, p 179, that twenty-three percent of all disagreements in these trials are attributable to a defendant's taking the stand and testifying where either he had no record or his record had been suppressed. Specifically, in twenty-three percent of all cases of disagreement, the judge would have convicted, but the jury acquitted, where the defendant did not have a record or his record had been suppressed. Table 57, p 180, proves that the bulk of the effect of this defendant factor stems from the defendant having been charged with a serious crime. In other words, the more serious the crime, the more likely the jury is to disagree with the judge.

> *The jury's broad rule of thumb here, presumably, is that as a matter of human experience it is especially unlikely that a person with no prior record will commit a serious crime, and that this is relevant to evaluating his testimony when he denies his guilt on the stand. [Id., p 179.]*

Thus, assuming the factual accuracy of the trial judge's verdict,[22] the credibility hypothesis suggests 691*691 that jurors are likely to give disproportionate weight to an unblemished record to reach incorrect results. *Id.,* p 180.

The study also focuses on the credibility issue in the evaluation of the "cross-over phenomenon" — cases in which the judge is more lenient than the jury. *Id.,* p 375. The issue here is whether there are cases in which a jury convicts and a judge would acquit that are statistically traceable to the use of a record for impeachment. Assuming, as the majority does,*ante,* p 568, n 8, that the study's grouping[23] produces data relevant to our debate, 692*692 the study concluded that in a total of five cases out of 3,576 trials, a jury convicts where a judge would have acquitted either because a defendant testified and was impeached with a criminal record or did not testify at all (whether he had a record or not).

This study deals, of course, only with trials and not with all cases. However, if the Kalven & Zeisel results are applied on the basis of current data of all cases at the adjudicative level, fifteen percent will result in a trial, see discussion, n 12.

In the world of Kalven & Zeisel, there would be 23,840 defendants at the adjudicative level, of which 20,264 would admit guilt and plead guilty. Of the remaining 3,576 cases, even assuming all defendants chose a jury trial, *in five cases,* a defendant would be convicted by a jury who would have been acquitted by a judge (whether that result is attributable to the fact that the defendant testified and was impeached with a criminal record or did not testify).

Thus, the study proves that the risk of "erroneous" 693*693 conviction by a jury due to use of a criminal record for impeachment (whether by use of a criminal record or by the defendant not taking the stand) is .0013982 or .13982 percent of the cases. Applied to all cases at the adjudicative level, the risk of erroneous conviction is .0002097 or .02097 percent of all cases. In fact, the study supports the conclusion that in roughly one out of a thousand trials,[24] the jury may misuse the evidence.

The data cited by Kalven & Zeisel[25] not only refutes the majority's proposition that it is "likely" that misuse of the evidence leads to conviction of innocent defendants, but flatly contradicts it both ways. The study demonstrates that the risk of erroneous acquittal is greatest where a criminal record is suppressed and that the risk of erroneous conviction where a prior record is used is roughly one in a thousand cases.[26]

Finally, one additional matter, also neglected by the majority, is the role of the trial judge, *id.,*ch 32, p 411. As earlier noted, a trial judge must dismiss a case at the close of the prosecution's proofs if the prosecution has failed to carry its constitutional burden. The issue may be raised 694*694 again at the close of the case prior to jury submission. After a jury renders a verdict, the issue of sufficiency of the evidence can be raised by motions for a new trial or for judgment notwithstanding the verdict.

Moreover, and most importantly, in this state, although not constitutionally required, the trial judge may grant a new trial even when the evidence is constitutionally sufficient to prove guilt beyond a reasonable doubt, *Hampton, supra.*

Thus, there is a last resort to prevent the unjust conviction of the innocent. Chapter 32 of the Kalven & Zeisel study shows that of the cases in which the jury convicted and the judge would have acquitted, the judge respected the jury verdict in only forty-eight percent of the cases. The judge either set aside the verdict or gave a minimum penalty in over half the cases. In the forty-three cases involving serious crimes, the trial judge either set aside the verdict or gave a minimum penalty in sixty-one percent of the cases.[27]

The study concludes its analysis of the cross-over phenomenon as follows:

> *In the end the institutional arrangement is impressive. It gives the jury autonomy to do equity on behalf of the criminal defendant. Where the 695*695 jury's freedom leads to "illegally" harsh results, the judge is at hand, ready to erase them. [Id., p 413.]*

For purposes of examining the premises of the majority's new policy, the most significant observations in *The American Jury* can be summarized as follows: If there is a bias in the system by juries, it is massively toward acquittal; the bias leads to erroneous acquittals if the standard for "erroneous" is whether the trial judges' presumptive competence represents a valid judgment that the defendant's guilt has been factually established in accordance with law; the likelihood of "erroneous" acquittal is greatest where the defendant testifies and does not have a record or the record is suppressed; the risk of erroneous conviction by a jury is seventy-seven out of 3,576 trials, or 2.2 percent; in only five of these trials was the result traceable to impeachment with a criminal record (or the defendant's failure to testify); and the risk of error is offset by the trial judge's intervention at the postconviction stage in over half of the cases in which the jury presumably erroneously convicted.

It is not surprising that the majority has chosen to ignore these observations. *The American Jury* study does not support what the majority does today; indeed, it contradicts every assumption in which the majority indulges.

The fact is that there is no demonstrable evidence that juries resolve doubtful cases on the basis that the defendant is a "bad man" and should be punished, that juries lower the burden of proof even if a guilty verdict would be incorrect, that juries convict because of a belief that the defendant's convictions indicate that he is probably guilty of the crime charged, or that juries incorrectly convict where a defendant does not 696*696 take the stand because of fear of impeachment.[28] Thus, there is no basis other than the majority's preference for its own rules for the statements that there is an "overwhelming tendency for jurors ... to misuse prior conviction evidence," *ante,* p 579, or that MRE 609 presents a "likelihood that innocent persons may be convicted."[29] (*Ante,* p 569.)

697*697 The majority uses decisionmaking theory to support its result while ignoring the only actual evidence[30] of juror performance and federal law, as well as the law in the overwhelming number of sister states. That it has done so can only be understood as the measure of its determination to impose its values on the legal process.

The obvious risk in such an approach is the threat of a loss of faith in the system itself. Legal rules must appear to function both to advance factual accuracy and to reflect the normative values of society, not the values of the lawgivers themselves. Thus, to the extent that jury verdicts are attributable not to factual accuracy, due process requirements, or mercy dispensation, but to rules of law that do not reflect society's normative values, the jury process becomes more alien and more suspect to the citizenry.

Among the societal values the American legal system has consistently reflected is the value in a 698*698 trial by one's peers and the value of a crime-free life. While the majority may assume that the experience of other jurisdictions with impeachment by prior convictions represents an absence of enlightenment, the fact that forty-six other jurisdictions have adopted rules of inclusion or trial-judge discretion may instead represent a collective understanding that the societal value of a crime-free life must be reflected in rules of law.

The rules of the system cannot be dictated by popular opinion. The vitality of the institution is, however, appropriately gauged by the community's judgment that the law is reflecting values that are not merely those of the decisionmakers. See, generally, Tribe, *Trial by mathematics: Precision and ritual in the legal process,* 84 Harv LR 1329, 1392-1393 (1971).

III

The majority classifies prior convictions into three categories: the automatically admissible, the automatically excluded, and those requiring an exercise of modified discretion by the trial court. Those offenses which would be automatically admissible are offenses involving dishonesty or false statement. Those offenses which are automatically excluded are all other offenses, except theft offenses which would fall in a mid-range balancing area. In my judgment, the majority has seriously erred in disallowing the trial-judge discretion to exclude the former or admit the latter.

In a given case, a crime involving dishonesty or false statement could be so unfairly prejudicial as to require exclusion from a sense of justice, despite probative bearing on veracity. Similarly, crimes other than theft could, in a given case, be more probative of veracity than prejudicial. Rule 609 as 699*699 currently drafted recognizes that there are cases in which a trial court must, for the sake of justice, have the discretion to balance probativeness against prejudice. Without such discretion, the trial process will surely produce exceptions to the rules in order to admit or exclude evidence because the facts in a certain case seem to demand it. See, e.g., note, *Prior conviction impeachment in the District of Columbia: What happened when the courts ran out of luck?,* 35 Cath U L R 1157 (1986). The purpose of retaining any discretionary element is to avoid possible injustice under a given set of facts. To secure truth while screening prejudice, one should seek to broaden the scope of discretion and avoid the wooden strictures that a "bright-line" test creates.

When the Michigan Rules of Evidence were adopted, the question of a trial judge's discretion in relation to impeachment by prior convictions was clearly presented and

considered. MRE 609(a), as originally proposed,[31] and as ultimately adopted, 700*700 included a protection for criminal defendants that was not part of FRE 609(a)[32]: Under MRE 609(a), prior convictions of crimes involving dishonesty or false statement were not automatically admissible. Instead, the trial judge was entrusted with the discretion to exclude even these convictions when prejudice outweighed the probative value. As adopted by this Court, the balancing approach was applied not just to criminal defendants, but to all witnesses in civil and criminal cases faced with impeachment with prior crimes involving dishonesty or false statement. Wade & Strom, Michigan Courtroom Evidence, R 609, p 234.

Requiring the exercise of discretion before admitting either felonies or crimes of theft, dishonesty or false statement, has been described as an improvement over the Federal Rules by the Chairman of this Court's Committee on Rules of Evidence, James K. Robinson, because of the trial judge's control over unfair prejudice:

> *For example, MRE 609 ... solved several drafting problems of the counterpart federal rule and authorized the trial judge to exercise more control over unfairly prejudicial prior convictions offered for impeachment. [Robinson, Current issues in Michigan evidence law, 61 Mich B J 330, 333 (1982).]*

701*701 This very innovation over FRE 609(a) is swept away by the proposed "bright line" rule requiring automatic admission, regardless of the amount of prejudice, of crimes involving dishonesty or false statement.[33]

IV

The concerns discussed above are the tip of the iceberg.

Although the newly adopted "bright line" rule will be solely prospective in operation, the majority applies the "clarified" balancing test to the "cases at hand" on the ground that the balancing test does not represent a "clear break" in our jurisprudence. The Court thus creates a rule of general application in a field of law which results in the greatest percentage of appeals and which could affect virtually every trial begun in the years these cases have been pending and not concluded on direct appeal. The introduction of the low probative/presumptive exclusion analysis which is the heart of both the "bright line" and "non-bright line" tests is a substitute for the abuse of discretion standard which the trial judges of 702*702 this state have relied upon in hundreds and perhaps thousands of cases.

Moreover, the new "vintage" analysis is a heretofore unknown MRE 609 consideration. It simply cannot fairly be said that today's decision is simply a clarification of MRE 609. This fact demonstrates that the decision should be given purely prospective effect. This fact also demonstrates that the "modification" of Rule 609 should have been accomplished through the rulemaking process, making application wholly prospective. When the Court creates a rule, all courts of this state, including this Court, are bound by it. To pronounce this "clarification" of Rule 609 by case decision is, in fact, to retroactively amend a rule which bound us, no less than the Court of Appeals and trial court. The result is that cases that were unquestionably correctly decided under the rule

the lower courts were duty-bound to follow now contain error. If the lower courts cannot rely on this Court to uphold them when they comply with our rules, the process of rulemaking is undermined. If the purpose of the rule is to encourage defendants to take the stand, that purpose can be effected without retroactive application. The reliance by the trial judiciary on Rule 609 is clear, as is the burden on the administration of justice of judicial reexamination of all nonfinal cases in which the impeachment issue has been raised, *People v Nixon,* 421 Mich 79; 364 NW2d 593 (1984).[34]

Prospective application would have been accomplished through the rulemaking procedure. An honest appraisal of the effect of applying the "clarified" balancing test would dictate prospective application. The cost to society due to reversed convictions 703*703 and the concomitant strain on victims, witnesses, and public resources occasioned by retrials would be avoided, and the bench and bar would be allowed an opportunity to accommodate the change in procedure.

V

In resolving the appeals in the instant cases, I agree with Chief Justice RILEY'S holding that we should address the issue whether this Court should adopt the rule in *Luce v United States,* 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984), and hold that, "to preserve a claim of error as to the admission of evidence of a prior conviction for impeachment purposes, a defendant must testify," *ante,* p 637. I also agree that MRE 609(a) is the appropriate test governing the admissibility of prior convictions for impeaching a witness' credibility.

A. PEOPLE v GRAY

I agree with Chief Justice RILEY'S reasoning and result with regard to *Gray.* The trial judge did not abuse her discretion in allowing impeachment with the defendant's prior convictions for carrying a concealed weapon and possession of heroin. While the facial relation of these offenses to credibility is not as great as others, the value of the evidence was great. As the Chief Justice states, "the value of such evidence to the truth-seeking process was critical because the trial had boiled down to a swearing contest between two opposing witnesses."*Ante,* pp 641-642.

B. PEOPLE v ALLEN

I also agree with Chief Justice RILEY'S reasoning 704*704 and result in *Allen.* In *Allen,* as in *Gray,*the question of guilt or innocence rested upon the credibility of the complainant and the defendant. The sexual act was admitted by the defendant — the question was whether the act was consensual. This is the epitome of the one-to-one swearing contest in which credibility of the witnesses is crucial. I would affirm the decision of the Court of Appeals.

C. PEOPLE v SMITH

I concur with Chief Justice RILEY'S determination that the trial court erred in failing to state the factors it considered in admitting the defendant's prior conviction of

manslaughter for impeachment, and I agree that the error was harmless. However, because the error is a nonconstitutional evidentiary error, I believe that the proper standard for determining whether error which requires reversal occurred is "whether the defendant was unfairly prejudiced by the evidence." *People v Allen,* 424 Mich 109, 110; 378 NW2d 481 (1985). In light of the otherwise overwhelming evidence of the defendant's guilt, there was no unfair prejudice to the defendant. I concur in Chief Justice RILEY'S resolution of the remaining issues. Thus, I also would affirm the decision of the Court of Appeals.

D. PEOPLE v PEDRIN

In this case, the defendant, charged with breaking and entering with intent to commit larceny, was impeached with evidence of a prior conviction of breaking and entering with intent to commit larceny. The trial judge decided that the probative value of the prior conviction outweighed its prejudicial 705*705 effect. Because I see no abuse of the trial court's discretion, I would affirm the conviction.

The prior offense included the intent to commit larceny, a theft offense. As the trial judge noted, the prior offense involved dishonesty. While the prejudicial effect of impeachment with a conviction of the same prior offense is appreciable, the balance is, in the first instance, properly placed in the hands of the trial judge. This Court, when it adopted MRE 609(a) in 1978, acknowledged the probativeness of theft offenses by adding theft offenses to those misdemeanors which can be used for impeachment under the rule. The trial judge acknowledged the prejudicial effect, and balanced prejudice and probative value, noting that the defendant's credibility upon testifying would be a very important issue because his proposed testimony presented a story with no other corroboration or support. Thus, the need for the testimony was heightened. Under these circumstances, I see no abuse of discretion.

E. PEOPLE v BROOKS

While I am not convinced that the impeachment in this case was error, I agree that any error was harmless. Therefore, I would affirm the conviction in this case.

CONCLUSION

The "bright-line" rule of automatic admission and exclusion of certain prior convictions, combined with the drastically circumscribed discretion allowed trial judges in relation to remaining offenses, will not serve the fair administration of justice in this state.

RILEY, C.J., concurred with BOYLE, J.

GRIFFIN, J., took no part in the decision of these cases.

706*706 APPENDIX A

Percentage Not Percent Overall Guilty of Guilty Guilty Guilty Guilty Guilty Year Pleas Pleas at Trial at Trial at Trial Percent ---------- 1969 5522 84% 820 195 81% 97% 1970 6899 86% 773 342 69% 96% 1971 8144 90% 590 340 63% 96% 1972 7955 90% 489 393 55% 96% 1973 6432 86% 537 492 52% 93% 1974 6723 88% 505 446 53% 94% 1975 5907 83% 759 468 62% 93% 1976 5894 88% 488 314 61% 95% 1977 8970 83% 911 908 50% 92% 1978 5833 81% 810 544 60% 92% TOTAL 68,279 86% 6,682 4,442 60% 94%

707*707 APPENDIX B

TABLE 52

Jury Acquittal Rate and Strength of Evidence

(Per cent jury acquittals of all verdicts in each cell)[*]

Balance of Contradictions | | *Pro-defendant* | *Neutral* | *Pro-prosecution* Strength of *No* | | *No* | | *No* | Prosecution's *Record/* | *Record/* | *Record/* | *Record/* | *Record/* | *Record/* Case *Stand* | *No Stand* | *Stand* | *No Stand* | *Stand* | *No Stand* --------|----------|---------|----------|----------|--------- Normal 65 | 38 | 49 | 30 | 26 | 28 --------|----------|---------|----------|----------|--------- Strong 45 | 44 | 40 | 21 | 18 | 9 --------|----------|---------|----------|----------|--------- Very strong 31 | 13 | 30 | 17 | 21 | 12 (confession) | | | | | ==========|==========|========== Average 44 | 35 | 20 *Total No Record/Stand Total Record/No Stand* 42 25 Strength of || Prosecution's || Case || *Average* ||--------- Normal || 40 ||--------- Strong || 30 ||--------- Very strong || 21 (confession) || ||--------- Average || 33

708*708 Judge Acquittal Rate and Strength of the Evidence

(Per cent Judge Acquittals of all Verdicts in each Cell)

Balance of Contradictions

Balance of Contradictions Strength of Prosecution *Pro-defendant* | *Neutral* | *Pro-prosecution* Case *No Record* | *Record* | *No Record* | *Record* | *No Record* | *Record* ----------|----------|----------|--------|----------|------- Normal 29 | 37 | 31 | 22 | 6 | 6 ----------|--------|----------|--------|----------|------- Strong 19 | 28 | 20 | 11 | 4 | 5 ----------|--------|----------|--------|----------|------- Very 13 | 0 | 10 | 3 | 3 | 0 strong | | | | | ==========|==========|========== Average 25 | 19 | 4 *No Record Record* Total 21 14 Strength of Prosecution || *Average* Case || ||========== Normal || 24 ||---------- Strong || 15 ||---------- Very || 5 strong || ||---------- Average || 17 See Kalven & Zeisel, *supra,* pp 160, 162.

[1] MRE 609 reads in pertinent part:

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if

(1) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or the crime involved theft, dishonesty or false statement, regardless of the punishment, and

(2) the court determines that the probative value of admitting this evidence on the issue of credibility outweighs its prejudicial effect and articulates on the record the factors considered in making the determination.

[2] According to the recent report of the Michigan Rules of Evidence Committee, "[w]hen the federal rules were being considered by Congress, Rule 609 drew the most heated comments; and the Michigan Committee, meeting in 1976, spent more time on this rule than on any other." Report of the Committee on the Rules of Evidence, December 23, 1983, p 17.

[3] See, e.g., note, *Other crimes evidence at trial: Of balancing and other matters,* 70 Yale L J 763 (1961); note,*Procedural protections of the criminal defendant — A reevaluation of the privilege against self-incrimination and the rule excluding evidence of propensity to commit crime,* 78 Harv L R 426 (1964); comment, *Use of bad character and prior convictions to impeach a defendant-witness,* 34 Fordham L R 107 (1965-66); note, *To take the stand or not to take the stand: The dilemma of the defendant with a criminal record,* 4 Colum J of L & Social Problems 215 (1968); Glick, *Impeachment by prior convictions: A critique of Rule 6-09 of the proposed rules of evidence for US district courts,* 6 Crim L Bull 330 (1970); Spector, *Impeaching the defendant by his prior convictions and the proposed federal rules of evidence: A half step forward and three steps backward,* 1 Loyola Univ L J 247 (1970); Krauser, *The use of prior convictions as credibility evidence: A proposal for Pennsylvania,*46 Temple L Q 291 (1972); note, *An eclectic approach to impeachment by prior convictions,* 5 J of L Reform 522 (1972); Spector, *Rule 609: A last plea for its withdrawal,* 32 Okla L R 334 (1979); Nichol, *Prior crime impeachment of criminal defendants: A constitutional analysis of Rule 609,* 82 W Va L R 391 (1980); Surratt,*Prior-conviction impeachment under the federal rules of evidence: A suggested approach to applying the "balancing" provision of Rule 609(a),* 31 Syracuse L R 907 (1980); Beaver & Marques, *A proposal to modify the rule on criminal conviction impeachment,* 58 Temple L Q 585 (1985).

[4] Much of the dissent's argument appears to rest on the erroneous assumption that the relevancy of MRE 404 protections disappears at the close of the prosecution's case in chief and that therefore there is no practical contradiction between the purposes of MRE 404 and MRE 609. We find this approach flawed since the language of MRE 404 explicitly lists MRE 609 as an exception.

[5] This fundamental principle is the basis for MRE 404 which provides in part:

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

* * *

(4) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crime, wrongs, or acts are contemporaneous with, or prior or subsequent to the crime charged.

This rule bars a prosecutor, with specific and narrow exceptions, from introducing evidence of an accused's prior convictions in order to show that he acted in conformity with such prior activities.

[6] This is in marked contrast to civil law jurisdictions where the prosecutor, as part of his case in chief may introduce evidence of the accused's character, past activities, and criminal convictions. Comment, *Use of bad character and prior convictions to impeach a defendant-witness,* 34 Fordham L R 107, 108-109 (1965-66).

[7] The dissent seems to suggest that a defendant who does not have a criminal record will be prejudiced by today's decision and the adoption of the amendment of MRE 609. We do not agree. It is unreasonable to suggest that typical jurors will be sufficiently versed in the law to know that a witness-accused may have a criminal past which is not raised due to a rule of evidence. Even if this were to occur in an isolated case, it would not raise new problems. Any juror who is so informed as to the revised rule that he may suspect the bona fides of an apparently crime-free history would certainly do the same under the present rule, as it too results in the exclusion of evidence of some prior convictions. In addition, the suggestion that we must evaluate rules of exclusion on the grounds that jurors might suspect exclusion where none has occurred is, in fact, an argument for never allowing exclusion of evidence.

[8] *The American Jury* by Kalven and Zeisel (Boston: Little, Brown & Co, 1966), involved a study of jury behavior and indicates that the introduction of a defendant's prior convictions substantially increases the conviction rate. At one point, the authors divided defendants into two groups. The first group was composed of those defendants who took the stand and either had no record or were able to keep it from the jury as well as those defendants who did not take the stand but of whom the jury learned that they had no record. The second group was comprised of all other defendants, i.e., those who the jury learned had a criminal record and those who did not take the stand and of whom the jury received no information as to their record.

The acquittal rate of the first group was forty-two percent while that of the second group was twenty-five percent. In trial settings where the evidence suggested the highest probability of acquittal, the acquittal rate of the first group was sixty-five percent and that of the second group, thirty-eight percent.

While the study did not determine what percentage of those choosing not to take the stand did so out of fear of impeachment by prior conviction, it did conclude that defendants without records testify in ninety-one percent of the cases, those with records testify in only seventy-four percent. Kalven & Zeisel, *supra* at 146. Where the case is clear for acquittal, only fifty-three percent of defendants with records testify, apparently not wishing to risk their high chance of acquittal on impeachment. *Id.* If it

were true that impeachment went only to defendants' credibility, there would be little reason for defendants to shy away from testifying. At worst, their testimony would be disbelieved. It would appear, however, that the fact that the risks created by impeachment go far beyond its legitimate purpose is not lost on defendants.

The dissent ascribes the higher conviction rate to the use of prior conviction evidence in determining credibility. A recent study addressed that question and found that "prior conviction evidence does not have its impact on verdicts by way of an intervening impact on perceptions of credibility" and that mock jurors "were willing to state that the prior conviction evidence increased the likelihood of the defendants' guilt and was the reason they found him guilty, even though they had been instructed not to use the information for that purpose." Wissler & Saks, *On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt,* 9 Law & Human Behavior 34, 44 (1985). Thus, juries exposed to prior conviction evidence may decide on a defendant's guilt upon the basis of the inference that prior criminal activity indicates guilt of a charged crime. What the dissent views as contradictory results in this study are in fact consistent. See, *id.*

[9] We also note that at least one commentator takes issue with the psychological assumptions upon which even this notion is based. Spector, *Rule 609: A last plea for its withdrawal,* 32 Okla L R 334 (1979).

[10] The dissenters cite *Bruton, supra, Tennessee v Street,* 471 US 409; 105 S Ct 2078; 85 L Ed 2d 425 (1985), and *Richardson v Marsh,* 481 US ___; 107 S Ct 1702; 95 L Ed 2d 176 (1987), as the basis for the analysis described in section II(2), *post,* p 667 of the dissent. Initially, we note that the three-step "proper approach" (*post,*p 667) has never been so defined by the United States Supreme Court, nor was it employed in the determination of the federal or Michigan Rules of Evidence. Moreover, in *Street,* the defendant claimed that his confession was coerced and that it was based upon his accomplice's statement. The fact that his confession contained details of the crime not described in the codefendant's statement was extremely probative of the inaccuracy of defendant's explanation of his confession. Indeed, it is difficult to imagine more probative evidence of such a claim.

We do not view prior conviction evidence in the same light. It does not, as did the evidence in *Street,* go directly to the heart of defendant's explanation. Prior conviction evidence, on the other hand, is, in general, probative of the truthfulness of a defendant's claim only when mediated through the notion that defendant is of general bad character. (See above.) Consistent with this is the fact that prior conviction evidence, unlike the evidence in*Street,* may provide a jury with an independent and improper basis for a guilty verdict. The admission of Street's codefendant's statement did not serve to convince the jury that defendant was a bad man deserving of imprisonment regardless of his guilt in the tried case, or that the burden of proof would be lowered, or that defendant was the type of man who would have likely committed the charged offense. The evidence in *Street*provided little, if any, inculpatory information to the jury that was was not already before them in defendant's own confession. The

degree of prejudice was, as was the degree of probativeness, of a different magnitude than in the cases before us today which involve a very different type of evidence.

The dissenters also cite *Spencer v Texas,* 385 US 554; 87 S Ct 648; 17 L Ed 2d 606 (1967). In that case, the United States Supreme Court held that introducing a defendant's prior convictions did not violate the Due Process Clause of the United States Constitution. However, our decision today is not based on constitutional grounds, but rather on policy. Policy, not constitutional limitations, underlies most of Michigan's evidentiary code, and the determination of that policy has been explicitly left to this Court by art 6, § 5, of the 1963 Constitution. Moreover, the *Spencer* Court based its decision in part upon its belief that

[i]t would be a wholly unjustifiable encroachment by this Court upon the constitutional power of States to promulgate their own rules of evidence to try their own state-created crimes in their own state courts, so long as their rules are not prohibited by any provision of the United States Constitution.... [385 US 568-569.]

The rule which we today adopt is not, in our view, prohibited by any provision of the United States Constitution. It is also worth noting that four justices in *Spencer* believed that the procedure in that case was unconstitutional, and a fifth justice, while agreeing with the majority that there was no constitutional violation, viewed the procedure as bad policy.

[11] 120 Cong Rec, H 1414 (January 30, 1974).

[12] The dissent incorrectly states (*post,* p 685) that this study concluded that conviction was more likely only when the prior conviction was for a crime similar to the one charged. To the contrary, while similar crimes were the *most* prejudicial, the study resulted in a finding of jury bias where the prior conviction was for a dissimilar offense as well.

[13] Professor John Reed's memorandum of November 11, 1975, to the evidence committee summarizing its initial rule 609(a) activities stated that the proposed rule as to a witness-accused "was in accord with *People v Jackson, supra,* in directing the trial court to make a determination that probative value outweighs prejudicial effect...."

[14] While *Crawford* was initiated prior to the enactment of the Rules of Evidence, the Court of Appeals noted that "[a] similar analysis is appropriate under new MRE 609 and the result in a case such as this would be identical."83 Mich App 40, n 1.

[15] While a small number of federal courts have interpreted the phrase "involving dishonesty or false statement" broadly, e.g., *United States v Del Toro Soto,* 676 F2d 13 (CA 1, 1982), most have adhered to the House Conference Report's explanation that

by the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, *the commission of which involves some element of deceit, untruthfulness, or falsification* bearing on the

accused's propensity to testify truthfully. [Conference Report, HR No 93-1597, reprinted at 120 Cong Rec, H 39939, 39941 (December 14, 1974). Emphasis added.]

See, e.g., *United States v Lewis,* 200 US App DC 76, 82; 626 F2d 942 (1980); *United States v Donoho,* 575 F2d 718 (CA 9, 1978).

In order to avoid any confusion in our courts, we have drafted the new rule so as to make clear that prior convictions are only to be admitted where dishonesty or false statement is an actual element of the offense in question. This is consistent with the fact that juries do not reach decisions as to how a crime was committed unless such is an element of the offense, e.g., larceny by false pretenses. In this regard, it is also worth noting that the committee which drafted the proposed Michigan Rules of Evidence "agreed that the Comments [to Rule 609] will urge strict construction of the phrase `dishonesty or false statement ....'" Memorandum of John Reed to the Michigan Rules of Evidence Committee (November 11, 1975).

We also approve of the view expressed in the House Conference Report and nearly all federal cases that "dishonesty" is not demonstrated by a mere willingness to engage in criminal conduct. The term refers specifically to lying, deceit, misrepresentation or a lack of veracity. See *United States v Ashley,* 569 F2d 975 (CA 5, 1978);*United States v Fearwell,* 193 US App DC 386; 595 F2d 771 (1978); *Government of Virgin Islands v Toto,* 529 F2d 278 (CA 3, 1976); *United States v Smith,* 179 US App DC 162; 551 F2d 346 (1976); *United States v Barnes,* 622 F2d 107 (CA 5, 1980); *United States v Entrekin,* 624 F2d 597 (CA 5, 1980); *United States v Yeo,* 739 F2d 385 (CA 8, 1984); *United States v Glen,* 667 F2d 1269 (CA 9, 1982); *United States v Lane,* 708 F2d 1394 (CA 9, 1983);*United States v Mansaw,* 714 F2d 785 (CA 8, 1983); *United States v Bay,* 762 F2d 1314 (CA 9, 1984); *United States v McClintock,* 748 F2d 1278 (CA 9, 1984); *United States v Hans,* 738 F2d 88 (CA 3, 1984).

[16] This bright-line rule is, in essence, based upon our view that impeachment through reference to crimes for which false statement or dishonesty is an element is inherently more probative than prejudicial. Therefore, defendants who are so impeached may not claim that such impeachment violates MRE 403. That rule requires that the probative value of the evidence be "substantially outweighed" by prejudice. Since we find that as a matter of law prior convictions of crimes involving dishonesty or false statement are more probative than prejudicial, it obviously cannot be argued that the probative value is "substantially outweighed" by prejudice.

This view has been accepted in every federal Court of Appeals which has addressed the question, and six federal circuits now bar exclusion of prior convictions involving dishonesty or false statement on FRE 403 grounds. *United States v Kuecker,* 740 F2d 496 (CA 7, 1984); *United States v Wong,* 703 F2d 65 (CA 3, 1983);*United States v Kiendra,* 663 F2d 65 (CA 1, 1981); *United States v Leyva,* 659 F2d 118 (CA 9, 1981); *United States v Coats,* 209 US App DC 205; 652 F2d 1002 (1981); *United States v Toney,* 615 F2d 277 (CA 5, 1980).

[17] Where a theft crime includes an element of dishonesty or false statement, e.g., larceny by false pretenses, it will be treated as an automatically admissible prior offense.

[18] The exclusion of classes of relevant evidence is the effect of many evidentiary rules including MRE 404, as well as the rules excluding: evidence of subsequent remedial measures (MRE 407); evidence of withdrawn guilty or nolo contendere pleas (MRE 410); evidence of the existence of liability insurance (MRE 411); opinion testimony by lay witnesses (MRE 701); hearsay (MRE 802).

[19] The following states have adopted the federal approach: Arkansas (ARE 609); Delaware (DRE 609); Minnesota (MRE 609); Nebraska (NRE 609); New Mexico (NMRE 609); North Dakota (see *State v Eugene,* 340 NW2d 18, 30 [ND, 1983]); Ohio (ORE 609); Oklahoma (OEC 2609); Oregon (OEC 40.355); Tennessee (see *State v Morgan,* 541 SW2d 385 [Tenn, 1976]); Utah (URE 609); Washington (see *State v Anderson,* 31 Wash App 352; 641 F2d 728 [1982]); Wyoming (WRE 609).

[20] The states permitting automatic admission of evidence of all or nearly all prior convictions are: Louisiana (La Stat Ann — Rev Stat 15:495); Mississippi (see *Sanders v State,* 352 So 2d 822 [Miss, 1977]); Missouri (Mo Ann Stat, § 491.050); Rhode Island (see *State v Lombardi,* 113 RI 206; 319 A2d 346 [1974]) (the trial court may exclude a prior conviction only on the basis of remoteness in time); Indiana (see *Ashton v Anderson,* 258 Ind 51; 279 NE2d 210 [1972]) (prior convictions are automatically admissible if they involved dishonesty or false statement or were for treason, murder, rape, arson, burglary, robbery, kidnapping, forgery, or wilful perjury).

[21] The states allowing for automatic admission of certain types of prior conviction evidence of a witness-accused are: Alabama (Ala Code 12-12-162); Colorado (§ 13-90-101, CRS 1973); District of Columbia (DC Code Ann, § 14-305); Florida (Fla Stat Ann 90.610); Maryland (Md Code 10-905); Nevada (Nev Rev Stat 50.095); North Carolina (NC Gen Stat 609); Virginia (see *Hackman v Commonwealth,* 220 Va 710; 261 SE2d 555 [1980]; *Sadoski v Commonwealth,* 219 Va 1069; 254 SE2d 100 [1979]).

[22] The three states allowing impeachment providing the prior convictions bear some relevance to credibility are: California (see *People v Miles,* 153 Cal App 3d 652; 200 Cal Rptr 553 [1984]); Idaho (Idaho R Civ P 43[b][6]); South Carolina (see *Taylor v State,* 258 SC 369; 188 SE2d 850 [1972]).

[23] The states barring any impeachment of a criminal defendant by prior convictions are: Georgia (Ga Code Ann, § 38-415) (prior convictions are admissible only if defendant first puts his character in evidence or where prior felonies have been "alleged in the indictment as provided by law"); Hawaii (see *State v Santiago,* 53 Hawaii 254; 492 P2d 657 [1971]) (prior conviction impeachment of a criminal defendant violates his due process right to testify); Kansas (Kan Stat Ann 60-421); Montana (MRE 609).

[24] In *State v McAboy, supra* at 508, the West Virginia Supreme Court limited prior conviction impeachment of criminal defendants to convictions for perjury or false swearing as "[c]onviction of these crimes goes directly to the credibility of the defendant...." See also *State v Clements,* ___ W Va ___; 334 SE2d 600 (1985).

[25] The jurisdictions which completely reject the probative/prejudice balancing approach are: California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho,

Indiana, Kansas, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nevada, North Carolina, Rhode Island, South Carolina, and Virginia.

[26] The states in which trial judges employ the probative/prejudice balancing whenever prior convictions impeachment of a witness-accused is sought are: Alaska (see *Frankson v State,* 645 P2d 225, 227 [Alas, 1982]); Arizona (ARE 609); Connecticut (see *State v Bitting,* 162 Conn 1; 291 A2d 240 [1971]); Illinois (see *People v Montgomery,* 47 Ill 2d 510; 268 NE2d 695 [1971]); Iowa (IRE 609); Kentucky (see *Cotton v Commonwealth,* 454 SW2d 698 [Ky, 1970]); Maine (see *State v Grover,* 518 A2d 1039, 1049 [Me, 1986]); Massachusetts (Mass Ann Laws, ch 233, § 21); New Hampshire (see *State v Staples,* 120 NH 278; 415 A2d 320 [1980]); New Jersey (NJSA 2A.81-12); New York (see *People v Sandoval,* 34 NY2d 371; 314 NE2d 413 [1974]); Pennsylvania (see*Commonwealth v Bighum,* 452 Pa 554; 307 A2d 255 [1973]); South Dakota (SD Codified Laws Ann, § 19-14-12); Texas (TRE 609); Vermont (VRE 609); Wisconsin (WRE 906.09).

[27] These five states are Alaska, Connecticut, Kentucky, Pennsylvania, and Vermont.

[28] Compare *People v Crawford* with *People v Kelly.* See *ante,* pp 585-593.

[29] While the dissenters claim they prefer to leave MRE 609 jurisprudence unchanged, their disposition of the instant cases demonstrates their view that the credibility-contest factor should predominate over the effect-on-the-decisional-process factor.

In *Gray,* Chief Justice RILEY'S opinion states: "Standing alone, evidence of convictions of carrying a concealed weapon and possession of heroin may not be highly probative of an individual's credibility. However, the value of such evidence to the truth-seeking process was critical because the trial had boiled down to a swearing contest between two opposing witnesses." (*Post,* pp 641-642.) And in *Allen,* Chief Justice RILEY'S opinion states: "The similarity of the prior offense and the fact that it is not an offense like perjury which bears directly on credibility weigh against its admission. Nevertheless, the rationale underlying our decision in *Gray, supra,* is similarly applicable here where the question of guilt or innocence rests on the credibility of opposing witnesses." (*Post,* p 648.)

[30] The dissent's emphasis on the numbers of criminal defendants who are convicted indicates an approach to rulemaking based upon probabilistics methods and mathematical techniques. This approach is utilized by the dissent most pointedly and erroneously in its analysis of the Kalven & Zeisel materials cited *ante,* p 568, n 8.

The dissent states that the Kalven & Zeisel study "assumed" that the judges' findings as to guilt or innocence of defendants were correct. However, the study did not make any such assumption. It instead compared judge and jury decisions and attempted to discern the reasons for the differences. The only assumption made was that the judges were able to accurately explain why they and the juries disagreed. Never in the work did the authors make the assumption that the judges' evaluations of the defendants' guilt were correct.

Even assuming that the statistical analysis is correct, it represents no more than a conclusion that such a number represents the difference in judge and jury conviction rates where the same prejudicial material is made known to each. The fact that judges may also have difficulty ignoring the prejudicial aspects of this evidence does not run counter to our analysis. In other words, some of what the dissent terms "the most significant observations in *The American Jury*" (*post,* p 695 were not, in fact, observed by its authors.

Even more important, however, is that apart from the accuracy of the dissent's statistics, it proposes that in order to gauge the effectiveness of procedural rules we must first and foremost consider what percentage of defendants are guilty. However, as pointed out by Professor Tribe:

[O]nce one is precise and calculating about rulemaking, one can no longer so easily enjoy the benefits of those profoundly useful notions — like the "presumption of innocence" and "acquittal in all cases of doubt" — that [are] threatened by mathematical proof. After deciding in a deliberate and calculated way that it is willing to convict twelve innocent defendants out of 1000 in order to convict 800 who are guilty — because that is thought to be preferable to convicting just six who are innocent but only 500 who are guilty — a community would be hard pressed to insist in its culture and rhetoric that the rights of innocent persons must not be deliberately sacrificed for social gain. [Tribe, *Trial by mathematics: Precision and ritual in the legal process,* 84 Harv L R 1329, 1390 (1971).]

The dissent, in essence, argues that rules should be determined in the context of the fact that according to its statistics, at least ninety-four percent of all defendants are guilty (not *found* guilty, but *are* guilty). While the dissent does not by any means suggest the altering of the presumption of innocence in any given case, this approach would create a general presumption of guilt where the drafting of procedural and evidentiary rules are concerned. Carried to its logical consequences, this approach would result in less protective rules, more convictions, and therefore a self-fulfilling stronger presumption of guilt suggesting even less protective rules. Such a focus on trial outcome entails dangers for innocent defendants and for society at large.

[R]ules of trial procedure in particular have importance largely as [expression of certain ends and values] and only in part as means of influencing independently significant conduct and outcomes. Some of those rules, to be sure, reflect only "an arid ritual of meaningless form," but others express profoundly significant moral relationships and principles — principles too subtle to be translated into anything less complex than the intricate symbolism of the trial process. Far from being either barren or obsolete, much of what goes on in the trial of a lawsuit — particularly in a criminal case — is partly ceremonial or ritualistic in this deeply positive sense, and partly educational as well; procedure can serve a vital role as conventionalized communication among a trial's participants, and as something like a reminder to the community of the principles it holds important. The presumption of innocence, the rights to counsel and confrontation, the privilege against self-incrimination, and a variety of other trial rights, matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but

also as affirmations of respect for the accused as a human being — affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are. [*Id.,* pp 1391-1392.]

We agree with the dissenters that the integrity of the fact-finding process is fundamental to rulemaking. However, we do not agree that the integrity of that process is to be measured by conviction rates.

[31] The amendment we adopt today bars impeachment by a prior conviction not punishable by more than one year's imprisonment unless dishonesty or false statement was an element of that prior offense.

[32] We continue the ten-year cutoff for the use of any prior convictions. In addition, for those theft convictions occurring less than ten years prior to the relevant case, the vintage of the prior conviction and the defendant's behavior subsequent to that conviction are relevant to probativeness. Contrary to the dissent's assertion, as recently as *People v Wakeford,* 418 Mich 95; 341 NW2d 68 (1983), we indicated that the vintage of the prior conviction is a proper consideration.

[33] Even though the only crimes falling within the balancing test under the new rule are theft crimes and we have indicated that theft crimes are more probative of credibility than most other prior convictions, the determination of probative value must still be made in each case governed by the balancing test. We are not prepared to say that all theft crimes are of equal probativeness. In addition, the vintage of convictions will vary from case to case.

[34] We note that application of the bright line mandating admission may be improper where the witness is an accomplice of the defendant and impeachment is sought upon the basis of conviction for crimes growing out of the events for which defendant is on trial. *People v Lytal,* 415 Mich 603; 329 NW2d 738 (1982).

[35] FRE 609 allows the trial judge to consider only prejudice "to the defendant" when a prior conviction is introduced. We note that while this phrase is not included in the Michigan rule, its absence is not reported in the committee note to MRE 609, as are other differences from the federal rule, indicating that the original intent of the Michigan rule may not have differed in this regard from its federal counterpart.

[36] While crimes having an element of theft are probative of veracity, we recognize that there are variations within this category (see n 33) and that the probative value of a particular prior conviction may be insignificant and so it should not be admitted.

[37] An independent problem may arise where the witness was an accomplice of the defendant. See n 34.

[38] The clarified balancing test shall not apply where an initial and direct appeal has been concluded.

[39] After March 1, 1988, only theft crimes will fall within the balancing test. See n 33.

[40] The dissent points out that retroactive application of this decision cannot, "in good faith, be justified by rule-making authority." (*Post,* p 661.) We agree, and we do not rely on such authority. The sole portion of this opinion which has retroactive effect is the clarification of the existing balancing test. This portion resolves a split in the lower courts and does not require amendment of MRE 609.

[41] We note that application of the bright-line tests would have resulted in the same dispositions in these cases. In *Allen, Smith,* and *Gray,* the admission of the prior convictions would have been deemed error, since criminal sexual conduct, the carrying of a concealed weapon, and possession of heroin are not theft crimes, nor do they involve dishonesty or false statement. They therefore would have been excluded pursuant to the amended MRE 609(a).

In *Pedrin* and *Brooks,* since the prior convictions were theft offenses, we would have applied the balancing test just as we have today.

However, in both *Brooks* and *Smith,* the error would still have been held to be harmless.

[1] 422 Mich 972, 973 (1985).

[2] Morgan admitted that she initially lied to the police and told them that Carter had been over to her house on the night in question, that she fed him two hot dogs, that they were drinking Crown Royal, and that he left her house on foot. She stated that she lied to the police out of fear. She subsequently recanted that story and told the police substantially the same facts that she testified to in court.

[3] MRE 609(b) provides:

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

[4] See *Wong Sun v United States,* 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963); *People v Kachar,* 400 Mich 78; 252 NW2d 807 (1977).

[5] Before the trial began, Minkler pled guilty of two counts of criminal sexual conduct (the degree is not clear from the record). Panik also pled guilty of criminal sexual conduct (the degree or number of counts is similarly not clear on the record).

[6] Earlier that day, Panik, Minkler, and Smith drank some whiskey, smoked marijuana, and ingested some "crystal" (PCP). Panik testified that they originally left Smith's house with a general intention of perpetrating a burglary. Minkler testified that they intended to steal tape decks out of cars.

[7] Other evidence showed that the term "crystal" and "tea" are slang for the controlled substance phencyclidine which is also referred to as "PCP."

[8] See n 2.

[9] The response to which the defendant objected arose during the following colloquy which occurred after it was established that the deputies were approximately thirty to thirty-five feet from the defendants' vehicle when they looked at it.

Q. [*Prosecuting Attorney*]: When they got that close to you — you said you were smoking, is that right?

A. [*Panik*]: Yeah.

Q. Did you let the joint stay out so that they could see it?

A. No.

Q. What did you do?

A. We had beer, you know, we was all on parole, we didn't need them to come up to the car.

Q. All right. So, you didn't act in a way that would attract attention?

A. No.

Q. All right. Did you say anything to the officers?

A. No.

Q. Was anybody struggling, or moving around, or doing anything in the car?

A. No.

Q. Did they come over to the car?

A. No.

Q. They just went into the store?

A. Yeah.

Q. You remember them, because they were police officers, and you were on parole, is that right?

[10] FRE 609(a) provides:

General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

MRE 609(a) modified the federal rule by inserting the word "theft" before the phrase "dishonesty or false statement," and by requiring a determination that probative value outweighs prejudicial effect "as a condition of admissibility as to all convictions used for impeachment." Note to MRE 609(a). Effective May 14, 1980, MRE 609(a)(2) was amended to require that the trial court "articulate[] on the record the factors considered in making [that] determination."

[11] *Id.*

[12] *People v Hughes,* 411 Mich 517; 309 NW2d 525 (1981); *People v Crawford,* 83 Mich App 35, 39; 268 NW2d 275 (1978).

[13] "Requiring that a defendant testify in order to preserve Rule 609(a) claims, ... will also tend to discourage making such motions solely to `plant' reversible error in the event of conviction." *Luce, supra,* 469 US 42.

See also *People v Owens,* 131 Mich App 76, 82-83; 345 NW2d 904 (1983); *People v Sanders,* 130 Mich App 246; 343 NW2d 513 (1983); *People v Casey,* 120 Mich App 690; 327 NW2d 337 (1982); *People v Wilson,* 107 Mich App 470; 309 NW2d 584 (1981).

[14] See *People v Collins,* 228 Cal Rptr 899; 722 P2d 173 (1986); *People v Brewer,* 720 P2d 583 (Colo App, 1985);*Vaupel v State,* 708 P2d 1248 (Wy, 1985); *State v Allie,* 147 Ariz 320; 710 P2d 430 (1985); *State v Means,* 363 NW2d 565 (SD, 1985); *State v Glenn,* 285 SC 384; 330 SE2d 285 (1985); *State v Harrell,* 199 Conn 255; 506 A2d 1041 (1986); *State v Garza,* 109 Idaho 40; 704 P2d 944 (1985); *State v Whitehead,* 203 NJ Super 509; 497 A2d 548 (1985); *People v Hartfield,* 137 Ill App 3d 679; 484 NE2d 1136 (1985); *People v Redman,* 141 Ill App 3d 691; 490 NE2d 958 (1986).

See also *Jimenez v State,* 480 So 2d 705 (Fla App, 1985); *State v Chapman,* 496 A2d 297 (Me, 1985); *State v White,* 43 Wash App 580; 718 P2d 841 (1986); *State v Banner,* 717 P2d 1325 (Utah, 1986); *McBride v State,*unpublished opinion of the Texas Court of Appeals, decided August 28, 1986 (Docket No. 01-85-0301-CR); *Page v State,* 725 P2d 1082 (Alas App, 1986).

Contra *State v McClure,* 298 Or 336; 692 P2d 579 (1984); *State v Ford,* 381 NW2d 30 (Minn App, 1986);*Commonwealth v Richardson,* 347 Pa Super 564; 500 A2d 1200 (1985).

[15] In *United States v Johnson,* 767 F2d 1259, 1270 (CA 8, 1985), the court, citing *Luce, supra,* declined to review defendants' contention that the trial court erred in denying their motions in limine to exclude evidence of other crimes (FRE 404[b]) the government indicated it intended to introduce during cross-examination and in rebuttal if the defendants testified. In *United States v Weichert,* 783 F2d 23, 25 (CA 2, 1986), the court held that defendant failed to preserve for review the correctness of the trial court's ruling in limine that the government could impeach him under FRE 608(b) due to his failure to testify.

Similarly, in *Spell v McDaniel,* 606 F Supp 1416 (ED NC, 1985), the court ruled that *Luce* precluded review of defendant's contention that the court's advisory ruling that plaintiff

could not be impeached with a prior narcotics conviction was erroneous because defendant failed to call plaintiff as a hostile witness. See also *United States v Sebetich,* 776 F2d 412 (CA 3, 1985) (implying that a party's objection to failure to allow impeachment of a witness with hearsay statements was not preserved due to failure to call the witness).

[16] This Court initially suggested that these were the relevant factors in *People v Jackson,* 391 Mich 323, 333; 217 NW2d 22 (1974), citing *Gordon v United States,* 127 US App DC 343; 383 F2d 936 (1967). Although *Jackson*preceded the March 1, 1978, effective date of the Michigan Rules of Evidence, it is well established that these factors continue to be the appropriate criteria relevant to the balancing required by MRE 609(a)(2). See *People v Hughes,* 411 Mich 517, 520; 309 NW2d 525 (1981).

[17] The trial judge initially indicated that Morgan could also be impeached with her prior record to show that neither the defendant nor the witness had "clean slates." However, it was later discovered that Morgan's prior record consisted primarily of misdemeanor convictions of accosting and soliciting which were suppressed because that offense does not involve theft, dishonesty, or false statement. A 1969 conviction of preparation to burn was also suppressed because it fell outside the ten-year time limit. See MRE 609(b).

[18] In addition to emphasizing the centrality of the credibility issue, the court also considered the lack of similarity between the prior convictions and the charged offense. The fourth factor, the effect of the court's ruling on the decisional process if the accused does not testify out of fear of impeachment, is not relevant because the defendant testified.

[19] CJI 3:1:08 provides:

(1) There is evidence that the defendant has [a] prior criminal conviction[s].

(2) This evidence is to be considered by you only insofar as it may affect the defendant's credibility [believability] as a witness. It must not be considered by you as evidence of his guilt of this crime, nor should it be considered by you as increasing the probability of his having committed the crime.

[20] The Court of Appeals has held that a trial court is not required, sua sponte, to give a limiting instruction regarding use of a defendant's prior record for impeachment. *People v Haukom,* 56 Mich App 244, 245; 223 NW2d 648 (1974).

[21] See MRE 613.

[22] See n 3.

[23] Entry into a private home without a warrant to effect the arrest of a defendant is justified either by consent or exigent circumstances. *Steagald v United States,* 451 US 204; 101 S Ct 1642; 68 L Ed 2d 38 (1981).

[24] Defendant specifically objects to the admission of four slides of the victim's neck wound that were photographed by the treating physician prior to suturing and three photographs which depict the victim's neck and face after the wound was treated.

[25] See n 7.

[26] *Redmon* was decided subsequent to defendant's conviction.

[1] While I have focused the first two sections of this dissent on bright-line exclusion because of its potential effect on factual accuracy, I wish to state at the outset that I also do not regard bright-line rules of inclusion as wise policy for our jurisprudence. Both rules artificially restrict the appropriate functions of juries and trial judges, see part II(3).

[2] The Court posits a deficiency in the current application of Rule 609 and proceeds to remedy it despite the facts that we have a standing committee on the Rules of Evidence and that we have just completed the comment phase of our rulemaking process with regard to other amendments. The Court has thus interdicted the expression of other views and the self-education that the rulemaking process contemplates.

[3] Some of the analysis in the majority opinion is apparently the result of the failure to understand the distinct purposes of MRE 404 and MRE 609. MRE 404(a) prevents the use of character evidence as substantive proof of guilt. Where the evidence is sufficient to survive a motion for directed verdict, MRE 404(a) interests have been served, the rule of exclusion has been satisfied, and the general rule of admission of relevant evidence again obtains (subject to MRE 403 considerations). Properly understood, there is no basis for a contention that there is a "practical contradiction" between MRE 404(a), which applies to the use of character evidence for the substantive purpose of proving guilt and MRE 609, which governs the use of evidence offered to impeach credibility.

[4] The majority seems to suggest that the favored view among the states is to restrict the admission of criminal conviction impeachment evidence. Careful examination of the relevant statutes and rules of evidence points to a contrary conclusion. In fact, it appears that the federal rule and the rule in forty-five states permit the type of impeachment the majority here precludes, Beaver & Marques, *A proposal to modify the rule on criminal conviction impeachment,* 58 Temple L Q 585 (1985). With narrow exceptions, the clear majority of states employing bright-line rules favor the admission of prior conviction evidence. When viewed in the aggregate, the overwhelming majority of states have favored bright-line tests of inclusion or have left to the discretion of the trial judge the task of probative/prejudice balancing.

[5] The majority view has also failed to consider the effect of "bright line" rules on the system which, as we have seen with the rule in *People v Kreiner,* 415 Mich 372; 329 NW2d 716 (1982), and the rape shield statute, MCL 750.520j; MSA 28.788(10), frequently have the effect of compelling the judiciary to evade the harshness of a "bright line" rule that smacks of injustice in a particular application to reality.

[6] Justice BRICKLEY appears to take issue with the assumption that ninety percent of those charged are guilty of some offense related to the facts upon which they are

charged. Judge Frankel's observation that the "preponderant majority" are guilty does not stand alone. In one study of the attitudes of public defenders, Mather,*Some determinants of the method of case disposition: Decision-making by public defenders in Los Angeles,* 8 Law & Society 187, 209-210 (1973), they reported that, "`[m]ost of the cases we get are pretty hopeless — really not much chance of an acquittal.'" These cases were described as "deadbang," that is, no credible defense could even be devised.

In the most recent compilation of national data from thirty-seven urban jurisdictions, including three counties in Michigan, Wayne, Ingham, and Kalamazoo, Boland & Sones, *The prosecution of felony arrests, 1981,* US Dep't of Justice (July, 1986), for every one hundred felony arrests disposed of in felony court, seventeen are dismissed, two are diverted, sixty-eight result in a guilty plea, and thirteen go to trial. Of the trials alone, nine are convicted and four are acquitted. *Id.,* p 2.

Of critical importance is the explanation of the dismissals. Dismissals occur not only on the basis of insufficient evidence, but primarily because a plea was taken on another case, the complainant refused to prosecute, referral for different charges on the same case, evidence was illegally seized, and there were witness problems in general. *Id.,* pp 12-19.

Of all cases after screening which reach the adjudicative level of determining the guilt of the defendant, that is,*the very cases with which we are dealing in this opinion,* eighty-four percent of all defendants admit their guilt, and ninety-five percent are found guilty by trial or plea.

Nor is the data significantly different for Detroit Recorder's Court which handles a vastly disproportionately higher percentage of criminal cases than other jurisdictions within this state. Attached is a table compiled from the published annual reports of that court. (See appendix A.) The table would have been carried forward, but official publicly published reports are not available after 1979.

As the table clearly indicates, in Recorder's Court, over a ten-year reporting period, eighty-six percent of all defendants at the adjudicative stage admit their guilt and ninety-four percent of all defendants at that stage are found guilty. The local data do not vary from the national data.

One can only speculate from studying the table as to why the percentage of persons pleading guilty, the conviction rate at trial, and the overall conviction rate tended to drop over the ten years. Perhaps, judicial intervention at the "policy making" level changes the fulcrum of values for decisionmaking by defense counsel, see Boland & Sones, *supra,* p 27.

One thing is clear. "Deadbang" cases become less "deadbang" as a result of today's decision. A "credible" defense can always be devised in a jury trial if the defendant is allowed to present it and the jury is deprived of truthful evidence by which to test his credibility.

Today's decision portends the following consequences: the percentage of persons pleading guilty will decline, the percentage opting for a jury trial over a bench trial will increase, the percentage found guilty by a jury will decline, and the overall percentage of persons found guilty will decline, all of which has nothing to do with whether defendants are guilty or not, and, in the face of national and local data, that at least ninety-four percent of those charged at the adjudicative level are guilty.

[7] Justice BRICKLEY has rewritten history by reading Rule 609 as if it were a rule of exclusion. In 1974, the Court had indicated in *People v Jackson,* 391 Mich 323; 217 NW2d 22 (1974), that it was disposed to limit the admission of prior convictions. In the atmosphere created by *Jackson,* this Court's committee, on which I served, clearly refused to limit admissibility and promulgated a rule of general admission giving authority for the evidentiary decision to the trial judge to be tested on review by an abuse of discretion standard. Justice BRICKLEY'S insistence that the rationale in *People v Kelly,* 66 Mich App 634; 239 NW2d 691 (1976), cannot be squared with Rule 609 thus rests on his incorrect view of 609 as a rule of limitation.

[8] *People v Kelly* focused resolution of the impeachment issue on the effect on the truth-seeking process itself, "not merely the prospects for acquittal," *People v Wakeford,* 418 Mich 95, 116-117 (1983).

The focus of *Kelly* and *Wakeford* is not the effect on the defendant if the defendant is impeached, but the effect on the jury if it does not hear all that it can properly be told in a one-to-one credibility situation. While the majority states that it is not the defendant's need for the evidence that is to be evaluated in the new balancing process, it is apparent from the majority's analysis of the cases before us that that is the definition of "effect on the decisional process." Indeed, while purportedly resolving a split in the Court of Appeals on the propriety of impeachment in a *one-to-one* credibility situation, the majority's resolution of these cases in fact reveals that this rule is far more than a clarification of the existing balancing test. Error is found, not only in the *one-to-one*credibility situation *(Gray),* but also where there are two defense witnesses against one complainant *(Allen),* and where there are four prosecution witnesses against the defendant (*Brooks* and *Smith*). What the trial court judge is apparently to conclude from these results is that the effect on the decisional process is defined by a defendant's need for the testimony.

[9] This approach becomes even more problematic given the majority's failure to agree on adoption of the *Luce*rule, *Luce v United States,* 469 US 38; 105 S Ct 460; 83 L Ed 2d 443 (1984). As Justice RYAN noted in *People v Wakeford,* 418 Mich 117,

In the absence of some indication as to what the defendant's testimony would have been, we can only speculate as to how the trial would have been different and the "decisional process" affected ... had the defendant testified.

[10] The majority also appears to overrule two prior pronouncements of this Court establishing the parameters for impeachment of nondefendant witnesses. *People v Atkins #2,* 406 Mich 958 (1979); *People v Tait,* 136 Mich App 475; 356 NW2d 33 (1984). The question of the proper rule for nondefendant witnesses has neither been briefed nor

argued here. Like the rule adopted by the Court today for criminal defendants, the rule adopted for nondefendant witnesses is informed by the rare air of the appellate forum rather than an understanding of the reality of the trial court arena.

[11] In fact, if we are to look for guidance to the behavioral sciences, lying is one of the diagnostic characteristics of persons classified as having antisocial (criminal) personalities.

The diagnosis of antisocial personality disorder is reserved for persons whose behavior is said to demonstrate a persistence into adult life of a pattern of childhood antisocial behaviors. These behaviors include lying, stealing, fighting, and resisting authority; they are behaviors any moderately observant mother should be able to identify. In adulthood, the person with antisocial personality is described as having [among many other characteristics] an inconsistent work performance, an inability to maintain interpersonal attachments, . .. unlawful behavior, [and] lying.... [Kaplan & Sadock, *Comprehensive Textbook of Psychiatry* (4th ed, 1985), p 1866.]

It is true that people engaging in these behaviors may be useful and even successful citizens. The fact remains that the medical approach to understanding crime supports the intuitive lay sense that there is a relationship between the behaviors, Halleck, *Sociopathy: Ethical aspects of diagnosis and treatment,* 20 Current Psychiatric Therapies 167 (1981).

The Diagnostic and Statistical Manual of Mental Disorders (3d ed) (DSM III R) of the American Psychiatric Association also lists among the diagnostic criteria "(2) fails to conform to social norms with respect to lawful behavior, as indicated by repeatedly performing antisocial acts that are grounds for arrest (whether arrested or not), e.g., destroying property, harassing others, stealing, pursuing an illegal occupation, (3) is irritable and aggressive, as indicated by repeated physical fights or assaults (not required by one's job or to defend someone or oneself) including spouse- or child-beating ..., (b) has no regard for the truth, as indicated by repeated lying, use of aliases, or `conning' others for personal profit or pleasure." Diagnostic and Statistical Manual of Mental Disorders (3d ed), (Washington, DC: American Psychiatric Association, 1987), p 345.

[12] Indeed, existing rules of procedure, including MCR 2.610 — Motion for Judgment Notwithstanding the Verdict and MCR 2.611 — New Trials, provide the accused with protection against erroneous conviction. See, also, Proposed Michigan Court Rule 6.412(A), 422A Mich 170 (no time limit on motions for new trial based on newly discovered evidence). These rules stand not merely as surplusage to the rules of evidence, but rather as additional shields to the wrongfully convicted.

[13] If, generically, a class of evidence has no probative value to attack credibility, the absence of the identical class of evidence has no probative value in support of credibility. Of course, the majority's observation that perfect symmetry (read fairness to both sides) cannot be obtained can in a future case explain why absence of conviction is relevant to support credibility, but proof of conviction is not relevant to impeach credibility.

[14] The flaw in the majority's faith in bright-line rules is already evidenced in the opinion that creates the rules. The majority adopts a bright-line rule which by definition excludes trial court evaluation of the issue. At the same time, the majority is forced to recognize in ns 34 and 37 the existence of an "independent problem" trial courts will be required to resolve without guidance from this Court. To formulate a rule based on the principle that there are no exceptions and to recognize in the same opinion that there may be some exceptions is to reveal the ultimate fallacy of bright-line tests. The noted problem itself demonstrates that "always" cannot mean always and "never" cannot mean never. The problem noted is direct evidence that bright-line rules should not be adopted.

[15] Trusting the jury to follow instructions which limit the use of the prior convictions accords with what Justice Scalia, in *Richardson v Marsh,* 107 S Ct 1707, has recently described as "the almost invariable assumption of the law that jurors follow their instructions...."

As Justice Rehnquist observed, if it is pointless to give a jury limiting instructions, it is "pointless for a trial court to instruct a jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed." *Parker v Randolph,* 442 US 62, 73; 99 S Ct 2132; 60 L Ed 2d 713 (1979). See, also,*Cruz v New York, supra.*

[16] If the studies were deemed to be reliable by the majority, they would no doubt form the basis for the conclusion that there is an "overwhelming probability" for jurors to misuse prior conviction evidence. If they are not reliable, they do not deserve consideration and should not be cited. In fact, they appear to have been included because, as the majority observes, they "support our view." Indeed, as the majority ultimately acknowledges, the conclusion that there is an "overwhelming probability" that jurors misuse evidence rests solely on the majority's "perception" of the "obvious."

The statement that the "standard of appellate review prevents correction of error" itself refutes the majority's "perception" of the obvious. Prejudicial misuse is defined by the majority as a "likelihood" of conviction of the innocent. The standard of review permits reversal when after a review of the other evidence of guilt, the appellate court can say the conviction constituted a miscarriage of justice. *People v Robinson,* 386 Mich 551; 194 NW2d 709 (1972). The standard of review establishes that, apart from the "error," the conviction is supported by other evidence, sufficient to convince the reviewing tribunal that a conviction of an innocent person has not occurred.

I do not suggest that jurors universally avoid improper consideration of prior-conviction evidence. Rather, what I suggest is that it is not sound policy to impose this burden on the legal system given the existing protection of the innocent and the effect on the truth-finding function.

[17] Since the majority defines low probative value and strong potential for prejudice by reference to whether the factfinder is able to understand a permissible consideration by first recognizing the impermissible consideration, it should logically follow that any evidence admitted for a limited purpose will have low probative value and strong

potential for prejudice. If this result does not follow, it must be because there is a distinction between direct mediation and indirect mediation that the majority has as yet not explained.

[18] The majority quotes at length from this study, *ante,* pp 575-576. Forty-eight persons were individually approached in and around various public buildings. Each was read a four-hundred-word description of a case of breaking and entering. Each was asked, "How likely do you think it is that he is guilty?" Each was asked to respond on a scale that ran from one (definitely guilty) to seven (definitely not guilty). Points three and five were labeled as "probably guilty" and "probably not guilty," respectively.

Twelve persons read the case and rated (Group 1); twelve persons read, in addition, that the defense attorney decided not to put his client on the stand because there was no purpose (Group 2); twelve persons were told that the defendant testified "but did not give any important evidence" and that the defendant was impeached with five prior felonies for breaking and entering an occupied dwelling and twice for possession of stolen property (Group 3); and twelve persons were told, in addition to the convictions, the limiting instruction of the judge (Group 4). The results were:

Average Ratings of Guilt Group 1 4.00 Group 2 4.33 Group 3 3.25 Group 4 3.00

The study concludes on the basis of the data that the presence of a record has a dramatic effect. I would expect that random disagreement in so small a sample could account for all of the difference, but, regardless, this study can hardly be urged as support for the majority's result.

There is simply no real basis for comparison between the methodology of this study and that of the courtroom. These are forty-eight individual ratings without a trial, evidence, voir dire, argument, witnesses, instructions, or deliberation, and the prior conviction evidence is overwhelming and unrepresentative.

[19] This study, in one respect, comes closer to reality. It has four-person groups actually deliberate. In all other respects, it shares the defects of the other studies: No voir dire, no live witnesses to evaluate, no evidence as we understand the term, no cross-examination, no argument, no instructions — in a word, no trial. It is difficult to analytically measure effects of evidence in a trial when there is no trial.

The description of the case for individual jurors and four-person groups was as follows. A woman's home had been broken into and two-hundred dollars had been stolen. As the woman arrived home, she saw the burglar fleeing through the back yard. While the time was brief, she saw the burglar turn around while he was on the fence giving her a view of his face. She immediately reported the crime and the defendant's description. The police arrested a man in the vicinity of the crime who matched the description and who had two-hundred dollars in the glove compartment of his car. The woman positively identified the man in a line-up.

The survey participants were told that, at the trial, the defendant and his girlfriend testified that they were at the movies at the time of the burglary. Half of the subjects

received the fact that the defendant had previously been convicted of burglary and a limiting instruction.

The results of both individual and group "verdicts" are as follows, p 243:

PERCENTAGES OF GUILTY VERDICTS IN EACH OF THE FOUR CONDITIONS Individual Group verdict verdict Record condition 45% 40% (N = 20) (N = 15 groups) _____ No Record condition 40% 0% (N = 20) (N = 15 groups) _____

The study analyzes this data as well as tapes of deliberations and concludes that what is a "*weak* manipulation (one prior conviction) in the individual verdict condition proves to be a *strong* manipulation in the group verdict condition." It concludes that there is little doubt that knowledge of a previous conviction biases a case against the defendant.

What the data above illustrates is that conviction rates fall as between individual verdicts and group verdicts regardless of record or no record condition, that is, the jury is more disposed as a group to acquit than individuals are.

Second, the data suggest that on the facts given, hardly a weak case, all four-person groups will acquit absent a record and that tapes of their deliberations reflect distortions of fact unrelated to the evidence.

Third, on the evidence and the criminal record, only forty percent of the four-person groups convicted, a percentage likely to drop substantially where unanimous twelve-person groups are required.

[20] I would not make reference to a study based on a two-page summary for formulation of a rule interdicting trial court discretion. Since the majority does, the study should be explained.

Eighty persons received an auto theft case, and eighty persons received a murder case. For each crime, the groups were subdivided into groups of twenty for tabulation of four different record conditions: 1) no record, 2) previous conviction of the same crime, 3) previous conviction of a dissimilar crime (murder in the auto theft case and auto theft in the murder case), and 4) previous conviction of perjury.

The subject would read the two pages and answer, essentially, whether the defendant was guilty or not, why he had reached that verdict, and whether the defendant's prior conviction had influenced his guilty/not guilty verdict.

The results were as follows:

CONVICTION RATE CASE PRIOR CONVICTION AUTO THEFT MURDER None 35% (7 of 20) 50% (10 of 20) Same 80% (16 of 20) 70% (14 of 20) Dissimilar 70% (14 of 20) 35% (7 of 20) Perjury 70% (14 of 20) 50% (10 of 20)

Thus, in all auto theft cases under a variety of prior record conditions, eighty persons split fifty-one to twenty-nine for conviction, and, in all murder cases under similar conditions, eighty persons split forty-one to thirty-nine for conviction.

The study's disclaimer (see *ante,* p 568) is an enormous understatement. These are not mock jurors. This is a public opinion survey.

There was no trial, no evidence, no witnesses, no voir dire, no instructions, no deliberation, and, most importantly, no adverse effect on a living person.

If the study produced reliable results, it suggests that impeachment by a perjury conviction in a murder case means nothing, but, in an auto theft case, it doubles the conviction rate. It suggests that use of a conviction of auto theft in a murder trial lowers the conviction rate by a third. That these surprising results are selectively ignored by the majority underscores the paucity of the relied upon data.

In truth, this study has no value for policymaking in this area. The number in the sample is so low, the margin for error so high, and the conditions so removed from those in an actual jury trial, that the majority cannot be serious in placing any reliance on this slender reed.

[21] While the study does indicate that the rate of conviction of defendants who either were impeached with a prior conviction or did not take the stand is higher than that of those who were not impeached either because they had no record or because their record was suppressed (see n 23), the missing element in this analysis, as in all juror research, is obvious: How many of the defendants were, in fact, guilty? Various estimates of this number exist. Assuming that ninety percent are guilty of the offense charged or a related offense, see n 6, these results are, in fact, an argument against the majority result. Read in the light of that assumption, what the statistics prove is that jurors deprived of evidence that bears on credibility are twice as likely (forty-two percent to twenty-five percent) to acquit a guilty defendant. Moreover, if twenty-five percent of juries who heard former conviction evidence acquit, the presumption of prejudice espoused by the majority is refuted. This figure demonstrates that jurors do require the prosecution to present proof beyond a reasonable doubt. The Kalven & Zeisel study does not support the conclusion that juries convict the innocent.

[22] The Kalven & Zeisel study does not in terms state that it assumes that the trial judge's verdict is correct, that is, that all defendants found guilty by a judge were, in reality, guilty. It does proceed from the assumption that judges follow the law and assess the facts with a degree of competence that calls for examination of the reasons for the difference between judge and jury. Thus, as the authors observe "as a matter of both theoretical interest and methodological convenience, we study the performance of the judge as a baseline.... The result is a systematic view of how often the jury disagrees with the judge, of the direction of such dissent, and an assessment of the reasons for it," *id.,* p 10. Of course, if, as the majority suggests, we are now to reject the assumption that judges have special competence in applying the law to the facts, there is no empirical measure for evaluating the likely accuracy of jury verdicts since neither mock studies nor Kalven & Zeisel provide meaningful information on the question. These

studies are used by the majority to the extent they "support" the majority view and are rejected where they do not.

I did not introduce them into this discussion, and I do not rely on them. I have undertaken this critique only because the majority has asserted that the studies deserve consideration, in the hope that close analysis would prompt the majority to a more rigorous examination of the premises and the potential consequences of its new rules.

[23] First, the purpose of table 52, p 160, and the companion table, p 162, was not to demonstrate erroneous reliance on impeachment evidence. The authors of the study used both tables as evidence that "the jury by and large does understand the case and get it straight...." *Id.,* p 162.

The table distributes all trials in sample II (1191) into nine cells by strength of the prosecution's case vertically and by balance of contradictions horizontally. Thus, the weakest case for the prosecution is in the upper left cell and the strongest is in the bottom right cell. Each cell is further subdivided by the factor "No record/stand" and "Record/no stand." The two groups are composed of the following: 1) The first group is comprised of all cases in which the defendant took the stand and had no record or had his record suppressed plus those cases in which the defendant did not take the stand but the jury learned that he had no prior criminal record. 2) The second group is comprised of all cases in which the defendant did testify and was impeached with his record *or* did not take the stand at all.

This grouping blunts the effectiveness of drawing conclusions on the basis of impeachment alone. Moreover, the total differential acquittal rate is forty-two percent versus twenty-five percent on the basis of all cases in the cells.

By comparing the jury acquittal rate with the judge acquittal rate, in no cell does the jury convict at a higher rate than the judge even where the jury learns of a prior criminal record. See appendix B.

Finally, the study concludes its examination of the defendant's credibility as affected by the absence of a record or by its suppression by concluding that twenty-three percent of all disagreements between a jury and a judge (a jury acquittal versus a judge conviction) are due to the jury's attachment of weight to an unblemished record. *Id.,*p 180.

On the second point, *ante,* p 568, n 8, the majority places reliance upon the data which reflect that while ninety-one percent of all defendants without a record testify, only seventy-four percent of those with a record do so. The majority mistakenly attributes the difference to the existence of the record alone. If the value or need for the defendant's testimony were as great as the majority assumes and the damage of impeachment so great, one would expect a significantly greater differential.

It must be assumed that all factors which operate in the matrix of values for decisionmaking which keeps record-free defendants off the stand similarly operate for

those with records. Thus, the existence of a prior record is a cumulative factor whose value is not arithmetically deducible by simple subtraction.

[24] The majority's resort to the accusation that I have resorted to statistics, n 30, is ironic. Unable to find support in law for what it does, the majority introduces statistics. When confronted with the fact that the studies either do not withstand scrutiny or refute the majority's premises, the majority responds by asserting that trial judges are as corrupted by the taint of the evidence as it assumes juries are. When challenged to consider the impact on the fact-finding process in light of the protections surrounding the competing value at stake, the majority retreats to the proposition that its view advances the integrity of fact finding. The majority thus ultimately reveals its only basis — the conviction that its views should be imposed on the system.

[25] *Id.,* pp 160, 162, and 389.

[26] While it is a hallowed principle of our system that it is better that ten guilty persons go free than that one innocent person is convicted, it is another matter entirely to formulate policy on a basis that suggests that 999 guilty persons should go free rather than one innocent person be convicted.

[27] It may be legitimately observed that imposition of a minimum penalty is scant comfort to an innocent defendant. It must be remembered, however, that *The American Jury* study was conducted before the United States Supreme Court held that evidence sufficient to support a verdict of guilty beyond a reasonable doubt in the case in chief was constitutionally required, see discussion, § II(1), *ante,* pp 668-669. Thus, the current law provides the accused with additional protection against erroneous conviction. Moreover, our current rules of procedure, MCR 2.610 and MCR 2.611, provide for postconviction relief, which, assuming the good faith of our trial judiciary, stand as additional barriers against even the arguably incorrect jury verdict. See also Proposed Michigan Court Rule 6.412(A), 422A Mich 170 (no time limit on motions for new trial based on newly discovered evidence).

[28] In fact, if the majority premise is correct that Rule 609 presents a "likelihood" that innocent persons are convicted, it should logically follow that all prior convictions for impeachment should be eliminated. As Judge Weinstein observed in commenting on a proposal to limit impeachment to those crimes which indicate a direct tendency to falsify,

While this approach possibly ensures that the conviction will have a higher probative value re credibility, it does nothing to lessen prejudice to the defendant who is being tried for a crime involving an element of falsehood, since the jury may well assume that he is guilty again. [3 Weinstein, Evidence, ¶ 609[02], pp 609-62 to 609-63.]

There are only two wholly logical alternatives to this approach, all in or all out. Thus, if it is "absurd to suggest that jurors will be able to avoid improper consideration of a defendant's criminal character once it has become known to them," it is "absurd" to permit the introduction, with limiting instructions, of bright-line inclusions or theft

offenses, since a jury presumably is, in these cases, equally unlikely to follow instructions, and thus, equally likely to convict innocent defendants.

That the majority apparently finds the logical consequence of its own rationale too great a burden to impose on the system underscores the arbitrary nature of the "solution" that today replaces trial court discretion.

[29] The intuitive sense that jurors may misuse evidence, like the presumption that jurors follow instructions, makes the rule of trial court discretion a sometimes uneasy compromise, rooted finally in the belief "that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process," *Richardson v Marsh,* 481 US ___, ___; 107 S Ct 1702, 1709; 95 L Ed 2d 176 (1987).

Until today, however, only the courts of Hawaii and West Virginia have had such confidence in the wisdom of their perceptions that they would create a policy that systemically skews factual accuracy and prevents the trial court from protecting a defendant against undue prejudice.

The issue at last comes down to this: Assuming a *potential* for prejudice from misuse of prior conviction evidence, what law, data, studies, or experience, support the proposition that there is an "overwhelming probability" that jurors misuse the evidence to "convict innocent persons?" The majority's assertion that "it is absurd to suggest that jurors will be able to avoid improper consideration" is, in fact, a rhetorical substitute for a lack of substance both in its premise (that there is an "overwhelming probability" that jurors misuse evidence) and its conclusion (that innocent persons are convicted); a proposition the majority tautologically proves by resort to its perceptions.

[30] The majority accuses me of having argued that rules should be formulated on the basis of statistics. What has been suggested is, that if the majority opts to resort to scientific data to support its new rules, that mode of analysis, which I would not adopt, should at the least accord consideration to the current operation of the system (including both the existing data, and the existing legal protections against misuse of evidence). It would seem more logical to determine rules in the context of what we know about our own system, rather than on the basis of three studies of simulated jurors or alternatively, on unsupported perceptions. I have not suggested that we should "first and foremost" consider what percentage of defendants are guilty. I have advanced the modest proposition that procedural rules should be formulated with concern for the burden on factual accuracy, see *ante,* p 604.

[31] MRE 609(a) as originally proposed to this Court provided as follows:

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) General rule.

(1) Criminal defendants. For the purpose of attacking the credibility of a witness-accused in a criminal case, evidence that he has been convicted of a crime shall be

admitted if elicited from him or established by public record during cross-examination but only if

(A) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted or

(B) the crime involved dishonesty or false statement, regardless of the punishment, and

(C) the court determines that the probative value of admitting this evidence on the issue of credibility outweighs its prejudicial effect on the witness-accused.

(2) All witnesses other than criminal defendants. For the purpose of attacking the credibility of any witness other than a witness-accused in a criminal case, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if

(A) the crime was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of admitting this evidence on the issue of credibility outweighs its prejudicial effect or

(B) the crime involved dishonesty or false statement, regardless of the punishment. [399 Mich 987-988 (1977).]

[32] For a discussion of the battle over judicial discretion in relation to FRE 609(a), see note, *Impeachment with prior convictions under Federal Rule of Evidence 609(a)(1): A plea for balance,* 63 Wash U L Q 469, 474-478 (1985).

[33] It should be noted, also, that while the majority has ostensibly created a category of automatically admissible convictions, it has narrowed significantly the admissibility of both felonies and misdemeanors involving dishonesty, or false statement. The majority defines as automatically admissible crimes which involve dishonest or false statements as an "actual element of the offense in question." (*Ante,* p 594, n 15.) No authority is cited in support of the requirement that the dishonesty and false statement category include only those crimes "where dishonesty or false statement is an actual element of the offense...." *Id.* While it is suggested that the federal rule requires dishonesty or false statement as an actual element of the impeaching offense, the meaning of the terms "dishonesty" or "false statement" in FRE 609(a)(2) is an issue that has divided the federal circuits, *United States v Wilson,* 536 F2d 883, 885 (CA 9, 1976); *United States v Smith,* 179 US App DC 162; 551 F2d 348 (1976); Weinstein, Evidence, ¶ 609[04]. The majority has thus imposed additional limitations on impeachment evidence for the avowed purpose of limiting trial court discretion.

[34] The newly announced witness rule is such a clear break with prior jurisprudence that the parties in those cases never thought of nor argued it.

[*] Sample II only.

People v Dalessandro

165 Mich. App. 569 (1988)

419 N.W.2d 609

PEOPLE

v.

DALESSANDRO

Docket No. 86081.

Michigan Court of Appeals.

Decided January 19, 1988.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, *L. Brooks Patterson,*Prosecuting Attorney, *Robert C. Williams,* Chief, Appellate Division, and *Thomas S. Richards,*Assistant Prosecuting Attorney, for the people.

Daniel J. Blank, for defendant on appeal.

Before: HOOD, P.J., and D.E. HOLBROOK, JR., and M. STEMPIEN,[*] JJ.

HOOD, P.J.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and child torture, MCL 750.136a; MSA 28.331(1). Defendant was sentenced to two concurrent 6 1/2 to 10 year terms of imprisonment and appeals as of right. Defendant raises several issues on appeal, two of which require reversal.

Defendant's conviction arose out of the physical abuse of William Cormendy, the ten-month-old son of defendant's girlfriend, Laurie Cormendy. At the time of the incident,

defendant lived with Cormendy, William, and Cormendy's two-year-old son, 572*572 Matthew, in Ferndale. On the evening of February 24, 1984, defendant and Cormendy took William to the emergency room of Providence Hospital. Medical personnel observed a three-inch laceration behind William's left knee, along with bruises in various stages of healing around his eyes and on his face, wrists, buttocks and legs. He was also malnourished and underweight. X-rays revealed six bone fractures, three in his right leg and one in each arm and the left leg. According to medical testimony, the breaks were in various stages of healing, indicating that they had occurred at different times in the past. After a police investigation, defendant and Cormendy were arrested and charged with assault with intent to commit murder, assault with intent to maim, and child torture. At trial, defendant's charge of assault with intent to commit murder was reduced to the charge of assault with intent to inflict great bodily harm less than murder.

Before defendant's trial commenced, Cormendy was tried and convicted of assault with intent to do great bodily harm, assault with intent to maim, and child torture. On August 8, 1986, we reversed her conviction in an unpublished per curiam opinion, on the ground that the court erred in admitting testimony by Cormendy's mother that Cormendy had considered aborting William. (Docket No. 82261). On February 3, 1987, the Supreme Court reversed and reinstated Cormendy's conviction on the ground that no objection to the admission of the evidence had been made. 428 Mich 858 (1987).

Defendant in the instant case first argues that he was denied the effective assistance of counsel at trial. After defendant's trial, defendant moved for 573*573 and was granted by this Court a *Ginther*[1] hearing to be held in the trial court. At this hearing, defense counsel testified along with an attorney, James Feinberg, claimed to be an expert in the field of conducting criminal trials. At the end of the *Ginther* hearing, the trial judge found that defense counsel's performance met the minimal level of performance required by the constitution, although his conduct was in some instances unprofessional and some of the legal theories advanced were "highly questionable at best."

In *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the Supreme Court set forth the test to be used in reviewing claims of ineffective assistance of counsel. First, defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant under the Sixth Amendment. The objective standard of reasonableness must be used in determining whether defense counsel meets this threshold. *Strickland, supra,* pp 687-688. The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.,* p 689. Second, the deficiency must be prejudicial to the defendant. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Id.,* pp 691-692.

Before *Strickland* was decided, Michigan followed the two-part test of *People v Garcia,* 398 Mich 250; 247 NW2d 547 (1976). According to *Garcia,* a defendant was denied the effective assistance of counsel and deserved a new trial where 574*574 defense counsel did not perform at least as well as a lawyer with ordinary training and skill in

the criminal law, conscientiously protecting his client's interests undeflected by conflicting considerations. A defendant was also allowed relief where his trial counsel made a serious mistake, without which defendant would have had a reasonably likely chance for acquittal. *Garcia, supra,* pp 264-266. This Court has stated that *Strickland* is to be applied to claims of ineffective assistance of counsel brought under the United States Constitution, and *Garcia* is to be applied to claims brought under the Michigan Constitution, until the Michigan Supreme Court states otherwise. *People v Vicuna,*141 Mich App 486, 498; 367 NW2d 887 (1985); *People v White,* 142 Mich App 581, 588-89; 370 NW2d 405 (1985), lv den 422 Mich 968 (1985). However, we now conclude that the*Strickland* test is the proper test to be applied in either instance, since *Strickland* was decided after *Garcia.* In *Michigan v Long,* 463 US 1032; 103 S Ct 3469; 77 L Ed 2d 1201 (1983), the United States Supreme Court held that it would not review a decision from a state supreme court if the state court decision indicates clearly and expressly that it is based on separate, adequate and independent state grounds. *Long, supra,* p 1041. The Court stated that when a state court decision fairly appears to rest primarily on federal law or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court would accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. On the other hand, if the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent 575*575 state grounds, the Court would not review the decision. *Long, supra,* p 1041. We interpret this to mean that unless a state court decision specifically states that it is based on separate, adequate, and independent state grounds, it is overruled by an opposing decision of the United States Supreme Court. The first prong of the *Garcia* test was taken from a federal case, *Beasley v United States,* 491 F2d 687 (CA 6, 1974). The second prong was taken from a Michigan case,*People v Degraffenreid,* 19 Mich App 702; 173 NW2d 317 (1969). However, a review of*Degraffenreid* reveals that it relied primarily on federal law in establishing its test. Thus, the*Garcia* two-part test fairly appears to be interwoven with federal law, and the Court did not state that it was basing its decision on separate, adequate, and independent state grounds. This leads to the conclusion that *Strickland* has overruled *Garcia,* and is the test which must be applied. We now agree with Judge MICHAEL HARRISON who adopted this view in *People v Dalton,* 155 Mich App 591, 601-603; 400 NW2d 689 (1986) (M.G. HARRISON, J., concurring).

Defendant's first allegation of ineffective assistance of counsel involves defense counsel's decision to call Cormendy to the stand as a witness for defendant.[2] Cormendy testified upon direct examination that the laceration on William's leg occurred accidently when she was holding William and a butter knife while arguing with her mother about laundry, and that William's bruises resulted from Matthew's throwing toys at him. She testified that she had never seen defendant be mean to William and that defendant was a good father to him. Upon cross-examination, the prosecutor impeached Cormendy by introducing a written statement 576*576which Cormendy had made to an officer of the Ferndale Police Department after she was arrested. In this statement, Cormendy stated that defendant was very mean to William, that defendant pushed her down while she was holding William, that defendant called William names,

and that defendant would only give William milk when defendant wanted to. The prosecutor also introduced a tape-recorded statement Cormendy made to Oakland County Assistant Prosecutor Lawrence Kozma on December 12, 1984. The recording was played to the jury. In it, Cormendy accused defendant of causing the laceration on William's leg, of picking William up the wrong way, of calling William a "retard," of twisting William's arms and legs, of yelling at William, and of encouraging Matthew to throw toys at William. Before the tape was played, defense counsel elicited from Cormendy that a family friend had told her to call Kozma and implicate defendant. Cormendy also stated that she made the written statement while she was scared and upset. These prior inconsistent statements were the only incriminating evidence against defendant at trial.

Defense counsel testified at the *Ginther* hearing that he knew that Cormendy would be impeached by these incriminating statements. Nevertheless, he chose to put Cormendy on the stand for three reasons. First, he wanted to counter any negative inference that had occurred when, after Cormendy initially refused to testify when called by the prosecutor, the prosecutor waved a tape before the jury, asking Cormendy whether at the time her statement had been recorded by Kozma she had agreed to testify. Second, defense counsel wanted someone to testify that defendant was innocent. Third, he wanted to have someone testify in exoneration of defendant without having to call defendant. 577*577 He realized defendant was a special education student in high school, and he did not want defendant to have to match wits with the prosecutor upon cross-examination. Nor did he want to subject defendant to impeachment by the use of defendant's prior convictions for larceny over $100 and attempted felonious assault.

We feel that calling Cormendy to the stand, and subjecting her to impeachment by the only incriminating evidence against defendant, was so serious an error that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. This error clearly prejudiced defendant. Defense counsel admitted that there was no testimony implicating defendant other than Cormendy's statements. The only other evidence suggesting that defendant harmed William was Cormendy's mother's testimony that Cormendy informed her that defendant was always yelling at Cormendy and the children and that he called William a "retard." If Cormendy had not been called to testify, Cormendy's prior inconsistent statements would not have been revealed to the jury. Without the statements, there probably was no case against defendant. Because of the presumption of innocence and the burden of proof that a defendant must be found guilty beyond a reasonable doubt, the jury probably would not have found sufficient evidence to convict defendant. The jury's request to have the recorded statement replayed is indicative of their reliance on it. While the trial judge instructed the jury that the statements were for impeachment purposes only, the jury may have ignored the instruction, given the emotion-packed subject matter of the case and the obvious relevance of the statement.

We do not agree with the trial judge's conclusion that defense counsel's decision to call Cormendy 578*578 did not constitute ineffective assistance of counsel since it was a matter of trial strategy. Although defense counsel presented reasons for his action, his actions were not*sound* trial strategy, as required by *Strickland.* At the *Ginther* hearing,

attorney Feinberg testified that defense counsel should not have called Cormendy to the stand. He felt that the recorded statement was damaging since it solidified the prosecution's entire case. We cannot ignore defense counsel's error on the basis that it was trial strategy when defendant would likely have been acquitted but for the strategy.

Although calling Cormendy to the stand was the major mistake committed by defense counsel, another serious mistake was committed when defense counsel failed to object on any of the three occasions in which the prosecutor referred to the fact that Cormendy had already been convicted. The prosecutor made these statements during his opening argument, cross-examination of Cormendy, and closing argument. Defense counsel did not object. In fact, defense counsel himself questioned Cormendy as to whether she had already been convicted of child torture. The conviction of another person involved in the criminal enterprise is not admissible at the defendant's separate trial. *People v Lytal,* 415 Mich 603, 612; 329 NW2d 738 (1982).

We also feel a new trial is warranted because of the prosecutor's improper closing argument. Initially, we note that defendant did not object to the prosecutor's closing argument. Appellate review of alleged improprieties in a prosecutor's closing argument is precluded, absent an objection at trial, unless failure to consider the issue would result in a miscarriage of justice.*People v Duncan,* 402 Mich 1, 15-16; 260 NW2d 58 (1977); *People v Viaene,* 119 Mich App 690, 697; 326 NW2d 607 579*579 (1982). We find that it would be a miscarriage of justice not to review this issue.

During the prosecutor's closing argument, the prosecutor made the following comments:

> *This is a sham. This evidence presented by the Defense is a sham meant to mislead you. It's a bunch of lies, just like the testimony that Gene Dalessandro had nothing to do with the injuries to this child. It's disreputable really to come in front of you thirteen people and sit on that witness stand and say, "Yes, I swear to tell the truth, the whole truth and nothing but the truth," and, "Yes, these albums are albums I put together in December of '83 before William went to the hospital, and they show our loving, warm relationship."*
>
> *They're Defense exhibits meant to convey an impression for you thirteen of this man, proffered by the Defense and brought before you and said, "Here's our facts; look at how wonderful we are."*
>
> *But you see what they did with them? They're lies. They're damnable lies. They're demonstrative lies. They're fabrications of evidence. That's the way this whole thing has been run.*

During rebuttal closing arguments, the prosecutor made the following comments:

The Defense brings you lies.

> *This exhibit, Mr. Perrotta [defense counsel] holds it up for you, "This is an exhibit; this was found in the house right after they were arrested." Yeah, like this photograph album? Was it found then, or was it written last week? Does it have the same evidentiary value as the*

album they put in? Does it have the same truth? Does it have the same meaning to deceive you? He talks about red herrings, he's brought a whole boat load of them in this case. He's thrown them out here in bushel baskets.

In *People v Wise,* 134 Mich App 82, 101-102; 351 580*580 NW2d 255 (1984), lv den 422 Mich 852 (1985), we stated:

> *The prosecutor may not question defense counsel's veracity.... When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence.... Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality.*

In the instant case, the prosecutor's argument attacked defense counsel and suggested to the jury that defense counsel was intentionally trying to mislead the jury. Such argument was improper. The people cite *People v Charles,* 58 Mich App 371; 227 NW2d 348 (1975), lv den 397 Mich 815 (1976), and *People v Belen Johnson,* 62 Mich App 63; 233 NW2d 188 (1975), for the proposition that such argument is not improper. However, *Charles* and *Johnson* are distinguishable. In those cases, this Court held that an argument was not improper where the prosecutor suggested that defendant or a certain witness was lying. In the instant case, however, the prosecutor was arguing that the whole defense was "a pack of lies," thus chastising defense counsel and defendant's entire defense.

During closing argument, the prosecutor also made the following comments:

> *Their intent is shown by what they did. The kid was starved. He was mistreated. He was left to lay on his head, on the back of his head until it was flat, a flattened head. Look at the pictures of this little innocent baby. Look at the terror on his face, the sadness in those eyes. You'll draw the conclusion what these pictures show. They show a beaten, abused child. The intent of Gene Dalessandro 581*581and Laurie Cormendy is evidenced by what they did to him.... We've shown injuries in this case that are revolting, that are sickening. They shouldn't happen to a dog, let alone a ten month old baby. They shouldn't happen to anything. No person and no thing should be treated this way.*
>
> *If [defendant] was going to go running off to the hospital, as he would have you believe, because he saw a little bit of blood that was as big as the end of your finger, he would have taken this kid to the hospital when he first started screaming out in agony when he had a broken arm, like any of you or an innocent person would do when this little babe, totally innocent little baby was crying out in pain.*
>
> *He was in so much pain, it's a wonder he could eat. William was in so much pain from what Gene Dalessandro did to him, it's a wonder he could eat. It's a wonder he lived. It's a wonder he lived.*
>
> *Now, it's important because, in a way, that's this pitiful little ten month old child'sonly way of telling the world what was being done to him by this person, Gene Dalessandro.*

It is improper for the prosecutor to appeal to the jury to sympathize with the victim. *Wise, supra,* p 104. By constantly referring to "the poor innocent baby," the prosecutor was injecting the element of sympathy for William into the case. While the prosecutor did not specifically state that the jury should sympathize with William, the prosecutor's statements were obviously intended to elicit just that emotional response.

In addition, during his closing argument, the prosecutor referred to the written and recorded statements made by Cormendy. This was improper, as the evidence was used solely for impeachment. A prosecutor may not argue facts material to the case which are not in evidence. *People v Dane,* 59 Mich 550, 552; 26 NW 781 582*582 (1886); *People v Partee,* 410 Mich 871 (1980). Cormendy's prior inconsistent statements were the only incriminating evidence against defendant. By referring to them in the manner in which he did, the prosecutor suggested that the statements were substantive evidence against defendant.

Since we reverse on the issues of ineffective assistance of counsel and improper closing argument, we need only briefly address the remaining issues which may resurface in defendant's new trial.

Although it was error for the prosecutor to mention Cormendy's conviction during opening and closing argument and during cross-examination of Cormendy, *Lytal, supra,* this error standing alone would not require reversal as defendant did not object and defense counsel himself referred to the fact that Cormendy had been convicted of child torture. *People v Buckey,* 424 Mich 1, 18; 378 NW2d 432 (1985); *People v Meier,* 47 Mich App 179, 196; 209 NW2d 311 (1973).

It was not error requiring reversal for the trial court to permit Cormendy to testify against defendant's wishes. The decision to call a witness is a matter of trial strategy. *Viaene, supra,* p 693. We are not willing to set forth a rule that every time defense counsel places a witness on the stand against a defendant's wishes error requiring reversal occurs.

We do not feel that two statements made by the trial judge impermissibly shifted the burden of proof onto defendant. Both statements occurred during instances in which the prosecutor had raised relevancy objections and the judge was questioning defense counsel as to how his line of questioning related to the case. When the statements are read in the context in which they were made, it is apparent that the judge was merely 583*583 stating that defense counsel's line of questioning was irrelevant unless it tended to establish that defendant did not commit the offenses. The judge's use of the word "prove" was obviously not intended to infer that defendant bore the burden of proving his innocence. The judge clearly instructed the jury that defendant was presumed innocent until proven guilty beyond a reasonable doubt and that the people bore the burden of proving defendant's guilt. Defendant's argument that the judge failed to properly instruct the jury on the burden of proof is also without merit. The judge's instruction clearly and properly informed the jury that defendant was presumed innocent and that the people bore the burden of proof.

Contrary to defendant's assertion, we find that the trial court did not err in denying defendant's motion for a directed verdict made at the conclusion of the prosecutor's proofs. We find that there was sufficient evidence from which a rational trier of fact could find the elements of the crimes proven beyond a reasonable doubt. *People v Hampton,* 407 Mich 354, 368; 285 NW2d 284 (1979), cert den 449 US 885; 101 S Ct 239; 66 L Ed 2d 110 (1980).

The trial court did not err in ordering the court reporter to play back his backup tape of Cormendy's tape-recorded statement after the jury asked the trial court if they could rehear the tape. Such action is allowed by *People v White,* 144 Mich App 698; 376 NW2d 184 (1985).

The prosecutor did not question Cormendy in a manner which encouraged Cormendy to invoke the Fifth Amendment and refuse to testify. While it is true that a prosecutor may not intimidate a witness in or out of court, *People v Pena,* 383 Mich 402, 406; 175 NW2d 767 (1970); *People v Crabtree,* 87 Mich App 722, 725; 276 NW2d 478 (1979), there 584*584 was no such intimidation in the instant case. The prosecutor merely inquired whether Cormendy understood her rights and the effect her decision to testify might have on her own case. While it may have been unfortunate that the jury was present when Cormendy refused to testify, her decision was not the result of intimidation on the part of the prosecutor.

Although the court did err in denying defendant's motion to sequester the witnesses, this error does not require reversal since defendant was not prejudiced. Most of the witnesses were medical witnesses, and William's condition was not in issue. The primary issue at trial was whether defendant was responsible for the injuries, and the fact that the witnesses were not sequestered did not prejudice defendant in this area.

The court did not err in allowing Cormendy's mother to testify that William cried every time defendant came near him. The testimony was relevant in that it tended to show that William feared defendant. MRE 401. The testimony was not more prejudicial that probative. MRE 403. Defendant was free to explain away the testimony by evidence that William cried whenever anyone approached his crib, as evidenced by Dr. Lucas's testimony, or that the mere fact that William cried did not mean that defendant physically abused the child, or that there were other reasons for William's crying.

The prosecutor's vague reference to other "incidents" involving defendant did not constitute error requiring reversal. In the first reference, defendant's neighbor merely stated, in response to a question by the prosecutor, that he had met defendant in 1982 "in another incident." In the second reference, defense counsel's objection to reference 585*585 to an "incident" was sustained and the incident was not further mentioned. We fail to see how these slight references prejudiced defendant.

Finally, error requiring reversal did not occur when the prosecutor asked the protective services worker on redirect examination whether he believed Cormendy's statement made to the worker that everything was fine in their home. The worker was not impermissibly commenting on Cormendy's credibility; rather, he was stating whether he, himself, thought that everything was fine in the home.

Because we find that defendant did not receive the effective assistance of counsel and that defendant was denied a fair trial because of the prosecutor's improper closing argument, we reverse defendant's conviction and remand for a new trial consistent with this opinion.

[*] Circuit judge, sitting on the Court of Appeals by assignment.

[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

[2] Earlier, the prosecutor called Cormendy to the stand, but Cormendy invoked the Fifth Amendment and refused to testify.

People v Dobben

440 Mich. 679 (1992)

488 N.W.2d 726

PEOPLE

v.

DOBBEN

Docket No. 91150, (Calendar No. 1).

Supreme Court of Michigan.

Argued April 7, 1992.

Decided September 15, 1992.

Frank J. Kelley, Attorney General, *Gay Secor Hardy,* Solicitor General, *Tony Tague,*Prosecuting Attorney, and *Kevin A. Lynch,* Senior Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *P.E. Bennett*) for the defendant.

BOYLE, J.

We granted leave to appeal to decide whether the Court of Appeals correctly held that an independent expert's testimony was inadmissable because it violated § 1028(3) of the Mental Health Code, MCL 330.2028(3); MSA 14.800(1028)(3)[1].

682*682 At issue is whether the statute limits testimony by an independent psychiatric examiner offered pursuant to § 20a(3) of the Code of Criminal Procedure, MCL 768.20a(3); MSA 28.1043(1)(3).[2] Specifically, we resolve the question whether an independent expert may consider information contained in prior competency evaluations in forming an opinion regarding criminal responsibility.[3]

We hold that the Court of Appeals erred in accepting the premise that § 1028(3) limits the foundation for expert testimony regarding criminal responsibility. The statutes involving competency to stand trial and the defense of insanity do not conflict with each other or the Michigan Rules of Evidence. An independent psychiatric examiner 683*683 may rely on historical information contained in reports of prior competency evaluations in reaching an opinion regarding criminal responsibility. We reverse the decision of the Court of Appeals and reinstate the defendant's convictions.

I

The defendant, Bartley James Dobben, was found guilty but mentally ill of two counts of first-degree murder. MCL 750.316; MSA 28.548. He was sentenced to two concurrent terms of life imprisonment without parole.

The Court of Appeals reversed the conviction on appeal. It held that because the people's psychiatric expert, Dr. Abraham Halpern, who had examined the defendant for competency to stand trial, was not an examining qualified clinician, and because Dr. Halpern did not examine the defendant for criminal responsibility pursuant to a court order, the admission of his testimony at trial violated MCL 330.2028(3); MSA 14.800(1028)(3), and was error that required reversal. 187 Mich App 462, 471; 468 NW2d 527 (1991). We granted leave to appeal. 437 Mich 1047 (1991).

II

On Thanksgiving Day, November 26, 1987, Dobben killed his two young children. Dobben, who had a history of religious preoccupation and bizarre behavior, had been diagnosed as suffering from paranoid schizophrenia and was hospitalized for two months in 1985. On the day in question, Dobben was employed as a foundry ladle operator at the Cannon of Muskegon Foundry.

The defendant, his wife, Susan Dobben, and the children were to eat Thanksgiving dinner at the684*684 home of the defendant's parents. Rather than going directly to his parents' home, Dobben drove to the foundry, ostensibly to retrieve his Bible, which he had left there. He also indicated that he wanted to show his sons where he worked. Upon entering the foundry, which was shut down for Thanksgiving, he chatted with the security guard, making small talk about the holiday. He also explained that he wanted to show his sons where he worked, and he signed the visitor's log sheet. His wife stayed in the car.

Dobben walked to the area where he worked in the foundry. He placed the children into the foundry ladle and "played with them like they were in the sandbox.[He] told them that the slag was just like dirt." He then got out of the ladle, placed the lid on top, lit the torch, and returned to the guard station at the entrance of the plant. The children died of asphixiation.

III

At Dobben's November 27, 1987, arraignment he refused, or failed, to respond to the court's questions. Testimony indicated that he had been unresponsive since his arrest the day before. On a motion by the people, the court ordered Dobben committed to the Center for Forensic Psychiatry in Ypsilanti, to be evaluated for competency to stand trial and to participate in his preliminary examination.

Dobben was first evaluated for competency to stand trial from December 1, 1987, through December 14, 1987, by Moses L. Everett, Ph.D., a certified forensic examiner.[4] Dr. Everett concluded 685*685 that "Dobben did not meet the statutory criteria[5] for incompetency to stand trial," and recommended to the court that he be "adjudicated as competent to stand trial."

Defendant's mental state deteriorated while incarcerated, 686*686 and he was again evaluated for competency to stand trial. The second evaluation was performed by Harley V. Stock, Ph.D., the associate director of the evaluation unit at the center. Dr. Stock recommended that Dobben be adjudicated incompetent to stand trial but also stated that, with medication, Dobben should be able to regain competency. The court adjudicated Dobben incompetent to stand trial on April 11, 1988.

In July, another competency evaluation was conducted. The examiner recommended that Dobben be adjudicated competent to stand trial.

A notice of insanity defense was filed by defense counsel pursuant to MCL 768.20a(1); MSA 28.1043(1)(1).[6] The court ordered Dobben to undergo examination for criminal responsibility. Dr. Stock, who had previously evaluated Dobben for competency, and Lynn Blunt, M.D., the Clinical Director of the Center for Forensic Psychiatry, conducted the evaluation at the forensic center. It was their opinion that Dobben was mentally ill at the time of the killings and "because of that mental illness, he was unable to appreciate the wrongfulness of his conduct and conform his conduct to the requirements of law."

An order was entered allowing the defendant and the prosecutor each to obtain two expert witnesses, and the prosecutor notified the defendant, pursuant to MCL 768.20a(3); MSA 28.1043(1)(3), of the two independent experts he intended to call at trial.[7] He arranged for Dobben to be seen by 687*687 Abraham Halpern, M.D., of Port Chester, New York. Dr. Halpern met with the defendant, reviewed the defendant's prior medical and psychological records, police reports, reports compiled by the center regarding the defendant's competency, and the criminal responsibility report prepared by the defendant's experts, Drs. Stock and Blunt. These were essentially the same records that Drs. Stock and Blunt had reviewed. Although Dr. Halpern agreed with Drs. Stock and Blunt that Dobben was mentally ill,[8] he did not agree that Dobben "lacked capacity, let alone substantial capacity, either to appreciate the wrongfulness of his conduct on November 26, 1987, or to conform his conduct to the requirements of law."

A

At trial, the critical disputed issue was the defendant's mental state at the time of the offense. The principal focus of the dispute was whether defendant was not guilty by reason of insanity, or guilty but mentally ill. On several occasions, defense counsel, citing § 1028(3) as the basis for his objections, sought to prevent the people's expert from testifying because his opinion was based in part on the evaluations for competency performed by the center's staff. On appeal, the Court of Appeals agreed and held that admission of the testimony was error requiring reversal.[9]

688*688 Comparing § 1028(3) with a superseded provision of the Code of Criminal Procedure,[10] the Court of Appeals reasoned that the enactment of § 1028(3),[11] was intended to remove the harsh prohibition of the former Code of Criminal Procedure barring expert testimony regarding the issue of insanity on the basis of the opinions and information contained in competency evaluations. The Court correctly concluded that § 1028(3) authorized the "examining qualified clinician" who examines a defendant for competency to testify regarding criminal responsibility. However, apparently assuming that experts other than those conducting competency examinations were barred from rendering opinions regarding criminal responsibility in part on the basis of information gained from prior competency evaluations, the Court further concluded that removal of the barrier against testimony regarding criminal responsibility by forensic center clinicians did not extend to other experts.

IV

For the reasons that follow, we hold that the 689*689 Legislature did not intend to preclude an expert witness who testifies regarding the issue of criminal responsibility from relying on historical information developed during an examination for a competency determination.

A

To clarify the discussion, we again set forth the text of § 1028(3) of the Mental Health Code. MCL 330.2028(3); MSA 14.800(1028)(3) provides:

> *The opinion concerning competency to stand trial derived from the examination may not be admitted as evidence for any purpose in the pending criminal proceedings, except on the issues to be determined in the hearings required or permitted by [MCL 330.2030; MSA 14.800(1030)] and [MCL 330.2040; MSA 14.800(1040)]. The foregoing bar of testimony shall not be construed to prohibit the examining qualified clinician from presenting at other stages in the criminal proceedings opinions concerning criminal responsibility, disposition, or other issues if they were originally requested by the court and are available. Information gathered in the course of a prior examination that is of historical value to the examining qualified clinician may be utilized in the formulation of an opinion in any subsequent court ordered evaluation.*

The fallacy in the Court of Appeals opinion is the assumption that because the last sentence of § 1028(3) does not affirmatively authorize admission of the disputed evidence, it is not admissible. Thus, because Dr. Halpern was not both the competency examiner and the examiner for determining criminal responsibility, "his testimony was not authorized under this portion of the statute." 187 Mich App 471. However, the Court did not consider 690*690 the significance of the related provision of the Code of Criminal Procedure, MCL 768.20a; MSA 28.1043(1). Examination of the entire statutory scheme, the systemic effect of the Court of Appeals opinion, and the Michigan Rules of Evidence, demonstrates the error of the Court's conclusion.

The original historical limitation of the bar regarding testimony of the competency examiner was not a general limitation of the scope of testimony by an independent expert, but a legislative judgment,[12] followed and refined by case authority,[13] that it was unfair to permit the state to involuntarily commit a defendant for a competency examination and subsequently use that examination as a basis for an opinion that the defendant was criminally responsible.

Thereafter, a series of decisions expanding the definition of mental illness for the purposes of the defense of criminal responsibility and narrowing both the conditions for civil commitment and for commitment following a finding of not guilty by reason of insanity, led to a legislative overhaul of the Mental Health Code and the Code of Criminal Procedure. See *People v McQuillan,* 392 Mich 511; 221 NW2d 569 (1974); *People v Martin,* 386 Mich 407; 192 NW2d 215 (1971); *Bell v Wayne Co General Hosp,* 384 F Supp 1085 (ED Mich, 1974). See also Boyle & Baughman, *The mental state of the* 691*691 *accused: Through a glass darkly,* 65 Mich B J 78, 79-80 (1986).

Mental illness was redefined, the verdict of guilty but mentally ill was established, and the Center for Forensic Psychiatry, formerly responsible only for competency evaluations and disposition of persons found not guilty by reason of insanity, was given the responsibility for evaluating and reporting on both competency to stand trial and criminal responsibility.[14] These new statutes also gave the forensic center the responsibility to evaluate and file reports where civil commitment is sought subsequent to a finding of not guilty by reason of insanity.[15] Indeed, the only exception to the center's responsibility under the statutory revisions is the disposition and treatment of persons found guilty but mentally ill.

The Legislature's expansion of the role of the forensic center to encompass evaluation of both competency and criminal responsibility eventually led to adoption of the current form of § 1028(3), expressly authorizing the clinician to offer "opinions concerning criminal responsibility" and expanding 692*692 the permissible scope of testimony by members of the center to permit the use of historical "[i]nformation gathered in the course of a prior examination." At the same time, the Legislature amended the Code of Criminal Procedure to provide the first legislative recognition of the right to independent expert evaluation regarding the issue of criminal responsibility.

Sections 1028(3) and 20a were enacted in their present form and tie-barred by 1975 PA 179 and 1975 PA 180 to ensure that neither would become law unless the other did. Taken together, the provisions clearly reveal a comprehensive scheme authorizing expanded use both of forensic center clinicians and independent experts.

B

Section 1028(3) is directed to "examining qualified clinician[s],"[16] not independent experts. It specifically lifts the former bar to the use of information by members of the forensic center, precluding only "the *opinion* concerning competency" from admission as evidence for any purpose in any criminal proceeding. (Emphasis added.) The plain language of the statute indicates the legislative intent to create a dominant role for the center regarding all issues involving the mental state of a defendant. To that end, § 1028(3) authorizes a clinician who examines a defendant for competency to stand trial to testify regarding other issues at the criminal proceeding. Thus, if the criminal responsibility expert is the same clinician who examined a defendant for competency, the clinician may use information that is of historical693*693 value and that has been gathered in prior examinations as a basis of his opinion regarding criminal responsibility. However, nothing in the language or history of § 1028(3) suggests that*only* the clinician who examined the defendant for competency may rely on historical information.

In short, there is simply nothing in the language of § 1028(3), or its historical context, indicating a legislative purpose to preclude an independent examiner from relying on historical data as a basis for his opinion. The purpose of § 1028(3) is to enhance the central role of the forensic center in evaluating a defendant's competency and criminal responsibility.

C

Neither § 1028(3) nor prior law, as the Court of Appeals assumed, barred the use of historical evidence by independent experts testifying regarding the issue of criminal responsibility. Contrary to the assumption of the Court of Appeals, testimony by experts other than the "examining qualified clinician" is addressed in § 20a of the Code of Criminal Procedure. Balancing the expansion of the role of the government-employed or certified clinician, the Legislature, in § 20a, addressed the procedure for raising the issue of criminal responsibility and, for the first time, gave legislative sanction to the appointment of independent experts. This statute now sets forth the procedure for filing a notice of an insanity defense, mandates an examination by the center upon

receipt of a notice of intention to assert the defense, and provides for an independent psychiatric evaluation when requested either by the defendant or the prosecuting attorney. Section 20a makes no reference to any limitation in the testimony of such an expert, 694*694 other than that "[s]tatements made by the defendant ... shall not be admissible ... on any issues other than ... mental illness or insanity at the time of the alleged offense."[17] Nor does § 20a require appointment of a specific independent examining psychiatrist.

Construing the statutes in pari materia, it is clear that the Legislature has comprehensively addressed the questions of competency and criminal responsibility, and expanded the roles both of the clinician and the independent examiner. Thus, it is not only anomalous, but contrary to this intent to require that an independent examiner perform an evaluation pursuant to a court order before the examiner may rely on the same reports and information relied on by the forensic center examiners.[18]

Finally, the systemic effect of restricting the scope of the basis for the opinion of the independent examiner reveals the fallacy of the conclusion. Forensic clinicians and independent experts more typically take the following positions in criminal trials: The forensic center's expert testifies that the defendant is criminally responsible, and the independent expert testifies that he is not criminally responsible. In this configuration, if the Court of Appeals analysis is correct, § 1028(3) would preclude a defense expert from examining historical material of significance to the government's expert witness, a conclusion that would raise concerns regarding both confrontation and the defendant's right to fundamental fairness. We695*695 are persuaded that the Legislature did not intend to limit the foundation for the opinion of the independent examiner.[19]

V

So construed, the statutes are also consistent with the policy expressed in the Michigan Rules of Evidence and specifically the rule governing expert testimony, MRE 703. The underlying assumption of the Rules of Evidence is that the reliability of the truth-finding process is enhanced by the admission of all probative evidence. See MRE 102. MRE 703 provides that an expert may base his opinion on "facts or data ... perceived by or made known to him at or before the hearing. The court may require that underlying facts or data essential to an opinion or inference be in evidence." Thus, a witness who is qualified as an expert may state his opinion of a person's mental condition on the basis of observation, a hypothetical question, or the testimony of other witnesses. 3 Wharton, Criminal Evidence (14th ed), § 570, pp 334-341.[20] An expert witness may also base his opinion on hearsay 696*696 information or on the "findings and opinions of other experts."[21]

Indeed, limitation of the basis of an opinion regarding criminal responsibility to firsthand information would

> *require[] a medical expert to ignore, as best he can, data which from the scientific viewpoint is highly relevant and proper to take into account, namely, the history of the case as related to the doctor by the patient and his relatives, and reports, charts, records and other data prepared by other medical men. In psychiatry, the patient's past medical*

and social history is of prime importance. A psychiatrist hesitates to make a diagnosis without the illumination afforded by what he calls a "longitudinal study of behavior." But often he learns the history of a patient's aberrant behavior only at second or third hand from friends or relatives, perhaps through a psychiatric social worker. Where the law forbids the psychiatrist to rest his diagnosis on such hearsay material, it requires him to base his diagnosis on what from the scientific viewpoint are incomplete data — or run the risk of having his entire testimony thrown out. Even where the psychiatrist has made a personal examination, if he admits on cross-examination that his diagnosis rests in part on such second or third hand reports, he may be chagrined to hear the judge order his testimony stricken because based on hearsay.

*[An] exclusionary rule overlooks the safeguards the law provides: (1) the fact that the expert is an expert in diagnosis and in appraising the value of the statements made to him; (2) the discretion of the trial court to exclude statements not necessary for diagnosis; (3) the opportunity of contradicting 697*697 by cross-examination and by other witnesses, thus demolishing the expert's opinion. [Weihofen, Mental Disorder as a Criminal Defense, p 287.]*

The Court of Appeals conclusion that the independent expert may not base an opinion on historical information is therefore inconsistent with MRE 703[22] and with the policy underlying the rule. *People v Anderson,* 166 Mich App 455; 421 NW2d 200 (1988).[23]

Uncovering the facts and circumstances on which an expert's opinion is based is essential to enable other experts to determine whether the opinions expressed by the witness are correct, and to contradict them if wrong. Most importantly, without examination of the foundation of the opinion, the factfinders' evaluation of the relative value of the opinions offered is necessarily circumscribed and the reliability of its ultimate determination correspondingly compromised.

Simply stated, the "probative value of an opinion of sanity depends on the facts upon which it is based." *People v Murphy,* 416 Mich 453, 465; 331 NW2d 152 (1982).[24]

698*698 CONCLUSION

A person qualified to testify as an independent expert may, consistent with the Mental Health Code, the Code of Criminal Procedure, and the Michigan Rules of Evidence, rely on historical data, including information and opinions contained in prior competency evaluations, when forming an opinion regarding a defendant's criminal responsibility. Sections 1028(3) and 20a do not limit the information an independent expert may use as the basis of an opinion regarding criminal responsibility.

We therefore reverse the decision of the Court of Appeals and reinstate the convictions of guilty but mentally ill.

BRICKLEY, RILEY, GRIFFIN, and MALLETT, JJ., concurred with BOYLE, J.

699*699 LEVIN, J. (*dissenting*).

We read § 1028(3) of the Mental Health Code[1] as designed to protect the accused's Michigan and federal constitutional rights providing that no person shall be compelled in a criminal case to be a witness against himself.[2]

I

The United States Supreme Court has held that statements uttered by a defendant during a competency examination present no Fifth Amendment issue where relied on solely to ensure "that respondent understood the charges against him and was capable of assisting in his defense," but that the Fifth Amendment privilege is implicated where it is sought to rely on such statements during the guilt or penalty phases of a prosecution.[3]

The statute provides that a defendant must make himself available for a competency examination and that he may be committed without a hearing if he fails to do so.[4] The statute further provides that the examining psychiatrist shall consult with defense counsel who shall make himself available for that purpose.[5]

Section 1028(3), in providing that the opinion concerning competency to stand trial may not be admitted as evidence for any purpose in a pending criminal proceeding, except on the issue of competency to stand trial, seeks to protect the accused's right to remain silent and to avoid self-incrimination. This Court has said: "In Michigan, the results 700*700 of competency examinations may not be used at trial as evidence of a defendant's guilt, obviating Fifth Amendment concerns regarding self-incrimination."[6]

II

The third sentence of § 1028(3), permitting information gathered in the course of a competency examination that is of historical value to be utilized in the formulation of an opinion in any "subsequent court ordered evaluation," refers to a second or subsequent competency examination, not to an examination respecting criminal responsibility.

No court is empowered to order an accused person to submit to an evaluation concerning his criminal responsibility. To be sure, an accused must, if he wishes to offer expert testimony respecting his criminal responsibility, permit the people's expert witnesses also to examine him, but such an examination is not pursuant to court order. If an accused fails to permit an examination by the people's expert, the people's remedy is to seek to bar the accused from offering expert testimony in support of an insanity defense. The remedy is not to seek or obtain a court order directing the defendant to submit to an examination concerning his criminal responsibility.

III

Dobben sought to bar Dr. Halpern from relying on his statements during the course of the competency examination in formulating his opinion concerning Dobben's criminal responsibility. His motion was denied. While Dobben's expert witnesses 701*701 may also have relied on Dobben's statements during the competency examination, it appears that they may have been able to render their opinions independently of

Dobben's statements during the competency examination; they did not testify until the court had ruled adversely to Dobben.

We would remand to the Court of Appeals to determine whether Dobben waived his statutory and Fifth Amendment privileges when his expert witnesses testified concerning his criminal responsibility, possibly in partial reliance on what he said during the course of the competency examination.[7]

The majority reinstates the defendant's convictions of guilty but mentally ill, thereby ignoring that there are other issues raised by Dobben on appeal in the Court of Appeals, partially dealt with in its opinion, which require remand for further proceedings in the Court of Appeals.

CAVANAGH, C.J., concurred with LEVIN, J.

[1] MCL 330.2028(3); MSA 14.800(1028)(3) provides:

The opinion concerning competency to stand trial derived from the examination may not be admitted as evidence for any purpose in the pending criminal proceedings, except on the issues to be determined in the hearings required or permitted by [MCL 330.2030; MSA 14.800(1030)] and [MCL 330.2040; MSA 14.800(1040)]. The foregoing bar of testimony shall not be construed to prohibit the examining qualified clinician from presenting at other stages in the criminal proceedings opinions concerning criminal responsibility, disposition, or other issues if they were originally requested by the court and are available. Information gathered in the course of a prior examination that is of historical value to the examining qualified clinician may be utilized in the formulation of an opinion in any subsequent court ordered evaluation.

[2] MCL 768.20a(3); MSA 28.1043(1)(3) provides:

The defendant may, at his or her own expense, or if indigent, at the expense of the county, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. The defendant shall notify the prosecuting attorney at least 5 days before the day scheduled for the independent evaluation that he or she intends to secure such an evaluation. The prosecuting attorney may similarly obtain independent psychiatric evaluation. A clinician secured by an indigent defendant shall be entitled to receive a reasonable fee as approved by the court.

[3] The examination for determining criminal responsibility is concerned with the defendant's mental state at the time the defendant committed the offense. Boyle & Baughman, *The mental state of the accused: Through a glass darkly,* 65 Mich B J 78 (1986). The focus is on the defendant's "blameworthiness." *Id.* If, as a result of mental illness, defined as "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life," MCL 330.1400a; MSA 14.800(400a), or mental retardation, a "person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to

conform his conduct to the requirements of law," MCL 768.21a(1); MSA 28.1044(1)(1), that person is legally insane, and thus not criminally responsible for his conduct.

[4] Qualifications for the title certified forensic examiner are found in 1988 AACS, R 330.10056, which provides:

(1) An applicant for certification as a certified forensic examiner shall demonstrate to the examining facility attainment of the following educational, licensing, and experiential requirements:

* * *

(b) For psychologists, both of the following:

(i) A master's degree or Ph.D. in psychology from an accredited program in a curriculum substantially clinical in nature.

(ii) A State of Michigan license or limited license as a psychologist.

* * *

(d) Familiarity with relevant literature and federal and Michigan cases pertaining to incompetency to stand trial.

(e) Knowledge of the court system, legal process, mental health law, and criminal law.

(f) Knowledge of relevant clinical and ethical issues pertinent to expert witness testimony and forensic practice.

(g) Observation and discussion of 5 examinations related to the issue of incompetency to stand trial with a certified or consulting forensic examiner.

(h) Performance of 5 examinations related to the issue of incompetency to stand trial conducted under the direct supervision of a certified or consulting forensic examiner, including attorney contacts, analysis of collateral material, and preparation of the cosigned court report.

(i) Observation and discussion of expert testimony presented by a certified or consulting forensic examiner.

(j) Performance in a mock trial as an expert witness under the observation and critique of a certified or consulting forensic examiner.

(k) Performance in court as an expert witness under the observation and critique of a certified or consulting forensic examiner.

(2) The examining facility may allow substantially similar experience to meet all or any of the requirements in subdivisions (g) to (k) of subrule (1) of this rule.

[5] A defendant "shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." MCL 330.2020(1); MSA 14.800(1020)(1).

[6] Under MCL 768.20a; MSA 28.1043(1), if a defendant intends to assert the defense of insanity, the defendant must notify the court and the prosecutor of this intent in writing. The court must order the defendant to undergo an evaluation either by personnel at the Center for Forensic Psychiatry or by other persons qualified to perform examinations for criminal responsibility.

[7] Although a letter from defense counsel to the prosecutor acknowledged two experts, only one, Dr. Abraham Halpern, was eventually used by the prosecutor.

[8] Dr. Halpern did, however, disagree with Drs. Stock and Blunt about just what type of mental illness Dobben suffered. Dr. Halpern diagnosed Dobben as delusional (paranoid) disorder, DSM-III-R 297.10. Drs. Stock and Blunt diagnosed Dobben as schizophrenic.

[9] Dobben also argued that because Dr. Halpern's report did not comply with the requirements of the Code of Criminal Procedure, MCL 768.20a(6)(b); MSA 28.1043(1)(6)(b), Dr. Halpern should not have been allowed to testify. Although the Court of Appeals declined to address the issue, we have reviewed the claim. Assuming arguendo that the Legislature intended to preclude the testimony of an expert where the form of the report did not comply with the statute, any defect in the report did not prejudice the defendant. Dr. Halpern's report was supplemented before trial by interviews of the witness by defense counsel. Defense counsel extensively cross-examined Dr. Halpern, had access to the same background psychological information as Dr. Halpern, and received Dr. Halpern's notes.

We also find no merit in the claim that the cumulative effect of a series of erroneous evidentiary rulings denied defendant a fair trial. *People v Robinson,* 386 Mich 551; 194 NW2d 709 (1972); MCL 769.26; MSA 28.1096; MCR 2.613(A).

[10] The predecessor statute, MCL 767.27a(4); MSA 28.966(11)(4) provided:

The diagnostic report and recommendations shall be admissible as evidence in the hearing [adjudicating competency to stand trial], but not for any other purpose in the pending criminal proceedings.

[11] 1975 PA 179.

[12] The current statute, MCL 330.2028(3); MSA 14.800(1028)(3), is the result of several revisions by the Legislature. In its original form, the statute prohibited the use of diagnostic reports and recommendations as evidence in the criminal trial. MCL 767.27a(4); MSA 28.966(11)(4).

[13] The statutory prohibition was interpreted not only to prevent introduction of the reports and recommendations concerning competency, but also to preclude the psychiatrist who examined the defendant for competency from testifying regarding

criminal responsibility in the criminal trial if the defendant objected to the testimony. See *People v Martin,* 386 Mich 407; 192 NW2d 215 (1971), cert den sub nom *Lewis v Michigan,* 408 US 929 (1972). See also*People v Schneider,* 39 Mich App 342; 197 NW2d 539 (1972).

[14] See 1974 PA 258; 1975 PA 179; 1975 PA 180. In initially adopting the statute in this form, the Legislature expressly recognized this Court's interpretation in *Martin, supra,* and the Court of Appeals interpretation in*Schneider, supra,* of MCL 767.27a(4); MSA 28.966(11)(4), the statute that 1974 PA 258 replaced.

As enacted by the Legislature in 1974 PA 258, the former version of MCL 330.2028(3); MSA 14.800(1028)(3) provided:

Information gathered in the course of the examination and opinions derived from the examination may not be admitted as evidence for any purpose in the pending criminal proceedings, except on the issues to be determined in the hearings required or permitted by [MCL 330.2030; MSA 14.800(1030)] and [MCL 330.2040; MSA 14.800(1040)]. The foregoing bar of testimony shall not be construed to prohibit an individual who did not participate in the examination or rely upon information or opinions resulting from the examination from testifying on other issues in the pending criminal proceedings.

[15] See 1974 PA 258, MCL 330.2050; MSA 14.800(1050).

[16] There are currently twenty-one examiners, statewide, qualified to examine a defendant only for competency to stand trial. There are an additional thirty-four examiners qualified to examine a defendant both for competency*and* criminal responsibility.

[17] MCL 768.20a(5); MSA 28.1043(1)(5).

[18] Indeed, as the Court of Appeals has correctly observed, the independent evaluation provided for in MCL 768.20a(3); MSA 28.1043(1)(3) and the subsequent exchange of the evaluators' reports should occur "without the need for judicial intervention." *People v Sorna,* 88 Mich App 351, 359; 276 NW2d 892 (1979).

[19] The "subsequent court ordered evaluation" mentioned in MCL 330.2028(3); MSA 14.800(1028)(3) refers not to a specially court-ordered evaluation, as the Court of Appeals found, but to the court-ordered evaluation for criminal responsibility, mandatory under MCL 768.20a(2); MSA 28.1043(1)(2).

In 1983, the Legislature amended MCL 768.20a; MSA 28.1043(1) to allow other persons qualified to perform evaluations of criminal responsibility to perform such examinations. See 1983 PA 42; see also 1988 AACS, R 330.10055-10059 (Department of Mental Health Regulations for qualification of forensic examiners and forensic centers). The amendment allowed clinicians at the Detroit Recorder's Court Clinic to evaluate defendants to determine criminal responsibility in addition to the competency evaluations they had been performing. HB 4091, Substitute H-1, First Analysis, March 2,

1983. The Legislature recognized that "a defendant will often undergo both types of evaluations at the same time." *Id.*

[20] See also *People v Hawthorne,* 293 Mich 15; 291 NW 205 (1940); *People v Drossart,* 99 Mich App 66, 73; 297 NW2d 863 (1980).

[21] *People v Anderson,* 166 Mich App 455, 465; 421 NW2d 200 (1988), lv den 432 Mich 858 (1989); *Thomas v McPherson Community Health Center,* 155 Mich App 700, 709; 400 NW2d 629 (1986); *Swanek v Hutzel Hosp,*115 Mich App 254, 259-260; 320 NW2d 234 (1982); anno: *Admissibility on issue of sanity of expert opinion based partly on medical, psychological, or hospital records,* 55 ALR3d 551.

[22] We do not lightly presume that the Legislature intended a conflict, calling into question this Court's authority to control practice and procedure in the courts. Const 1963, art 6, § 5; *Perin v Peuler,* 373 Mich 531, 541; 130 NW2d 4 (1964); *Buscaino v Rhodes,* 385 Mich 474, 478-480; 189 NW2d 202 (1971).

[23] The Court in *Anderson* held that MRE 703 allows an expert's opinion that a defendant was not mentally ill or insane to be based on a review of a report filed by the defendant's expert and on consultation with another rebuttal expert.

[24] Analogous federal law and the federal Rules of Evidence are consistent with this construction. The extant federal statutes regarding competency to stand trial, 18 USC 4241, and criminal responsibility, 18 USC 4242, contain provisions similar to the statute at issue. 18 USC 4241(f) provides in relevant part:

A finding of the court that the defendant is mentally competent to stand trial ... shall not be admissible as evidence in a trial for the offense charged.

18 USC 4242(a) provides that when the defendant intends to rely on the defense of insanity,

the court shall order that a psychiatric or psychological examination of the defendant be conducted....

Under 18 USC 4241, it is only the finding of competency to stand trial that is not admissible at the later criminal trial. The federal statutes contain "no absolute bar to the psychiatrist who conducts the competency examination testifying also on the issue of sanity." *People v Garland,* 393 Mich 215, 226-227, and n 7; 224 NW2d 45 (1974) (LEVIN, J., concurring).

Not only may a clinician who examined a defendant regarding competency to stand trial also testify regarding the defendant's sanity at the time of the alleged offense, but under the federal Rules of Evidence, the trial expert may also base his opinion on reports compiled by others. See, e.g., *United States v Bramlet,* 820 F2d 851, 855-856 (CA 7, 1987), cert den 484 US 861 (1987) (an opinion regarding criminal responsibility may be based on reports and observations of others under FRE 703); *United States v Lawson,* 653 F2d 299, 301-302 (CA 7, 1981), cert den 454 US 1150 (1982) (an opinion based in part on reports by others is admissible on an issue of the defendant's sanity); *United*

States v Phillips, 515 F Supp 758, 762-763 (ED Ky, 1981) (an expert's opinion is admissible where based in part on nurses' notes and reports of the institution where the defendant was previously hospitalized).

[1] MCL 330.2028(3); MSA 14.800(1028)(3).

[2] US Const, Am V; Const 1963, art 1, § 17.

[3] *Estelle v Smith,* 451 US 454, 462, 465; 101 S Ct 1866; 68 L Ed 2d 359 (1981).

[4] MCL 330.2026; MSA 14.800(1026).

[5] MCL 330.2028; MSA 14.800(1028).

[6] *People v Wright,* 431 Mich 282, 286; 430 NW2d 133 (1988).

[7] See *People v Garland,* 393 Mich 215, 232-233; 224 NW2d 45 (1974).

People v Ginther

390 Mich. 436 (1973)

212 N.W.2d 922

PEOPLE

v.

GINTHER

No. 5 May Term 1973, Docket No. 54,099.

Supreme Court of Michigan.

Decided December 18, 1973.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, and *Harvey Koselka,* Prosecuting Attorney *(Thomas R. Lewis* and *James D. Hunter,* of counsel), for the people.

State Appellate Defender Office (by *Stuart M. Israel [Martin Reisig,* of counsel]), for defendant on appeal.

LEVIN, J.

Herbert Eugene Ginther was convicted on his plea of guilty of the offense of breaking and entering with intent to commit larceny. MCLA 750.110; MSA 28.305. The Court of Appeals affirmed. *People v Ginther,* 39 Mich App 113; 197 NW2d 281 (1972).

Ginther contends that his guilty plea should be set aside because the judge erred in failing to440*440 disqualify himself and in failing to grant Ginther's request, made before he pled guilty, for a substitute lawyer, and because a combination of coercive factors influenced him to plead guilty: the rejected motions for disqualification of the judge and for substitution of another lawyer, Ginther's ignorance of an intoxication defense, the harshness of jail conditions, a confession obtained in violation of *Miranda* and *Escobedo* rights.

Ginther also contends that the judge failed to inform him adequately of his right against self-incrimination during the bench questioning at the time the plea was offered and accepted; and that the minimum 7 year term of the 7 to 10 years sentence should be reduced to 6-2/3 years on the rationale of *People v Tanner,* 387 Mich 683; 199 NW2d 202 (1972).

I

It has been said that an accepted plea of guilty "is itself a conviction. Like a verdict of a jury it is conclusive." *Kercheval v United States,* 274 US 220, 223; 47 S Ct 582; 71 L Ed 1009 (1927). Similarly, see *People v Wolff,* 389 Mich 398; 208 NW2d 457 (1973).

The authorities are legion that a plea of guilty waives error committed by a judge in rulings on defense motions made before the plea is offered and accepted.[1]

441*441 Why an accepted plea of guilty should cure errors that a guilty verdict or finding would not cure has not been adequately explained. In a case where the plea of guilty is to a lesser included or lesser added offense, waiver by the defendant of judicial error might be deemed part of the agreed-upon consideration. Putting aside the legitimacy of such consideration,[2] all pleas are not bargained pleas. In this case Ginther pled guilty to the charged offense.

The posture of this case makes it unnecessary to decide whether the plea-waiver doctrine precludes consideration of the errors here assigned; the record on appeal does not factually support Ginther's claims that he is entitled to have his plea set aside.

II

An indigent defendant, entitled to the appointment of a lawyer at public expense, is not entitled to choose his lawyer. He may, however, become entitled to have his assigned lawyer replaced upon a showing of adequate cause for a change in lawyers.[3]

When a defendant asserts that his assigned 442*442 lawyer is not adequate or diligent or asserts, as here, that his lawyer is disinterested, the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion.

A judge's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that a conviction following such error be set aside. Here, in contrast with *People v Williams,* 386 Mich 565; 194 NW2d 337 (1972),[4] and *People v Wilson,*43 Mich App 459; 204 NW2d 269 (1972), the record does not show that the lawyer assigned to represent Ginther was in fact inattentive to his responsibilities. *Cf. People v Holcomb,* 47 Mich App 573, 588; 209 NW2d 701 (1973).

Ginther couples his claim that the judge should have substituted another lawyer with a claim that, in failing to advise Ginther of a possible intoxication defense, the assigned lawyer failed to represent him adequately.[5] Whether Ginther had a viable intoxication defense and whether the representation he received from his assigned lawyer was adequate depends on facts not of record. "A convicted person who attacks the adequacy of the 443*443 representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately." *People v Jelks,* 33 Mich App 425, 431; 190 NW2d 291 (1971).

III

If the record made before a defendant is convicted does not factually support claims he wishes to urge on appeal, he should move in the trial court for a new trial or, where the conviction is on a plea of guilty, to set aside the plea, and seek to make a separate record factually supporting the claims. See *People v Taylor,* 387 Mich 209, 218; 195 NW2d 856 (1972).[6] Without record evidence supporting the claims, neither the Court of Appeals nor we have a basis for considering them.

Although Ginther would have us reverse his conviction, until he establishes the factual substantiality of the claims that the judge should have disqualified himself, that another lawyer should have been substituted and that the plea of guilty was impermissibly induced, the only relief we could properly grant would be to require an evidentiary hearing concerning those claims.

A defendant who wishes to advance claims that depend on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claims with evidence as a precondition to invoking 444*444 the processes of the appellate courts except in the rare case where the record

manifestly shows that the judge would refuse a hearing; in such a case the defendant should seek on appeal, not a reversal of his conviction, but an order directing the trial court to conduct the needed hearing.

IV

These general principles must, however, yield to still another factor present in this case.

Ginther was sentenced on February 26, 1971. He timely requested, on April 14, 1971, assigned counsel for post-conviction proceedings. The State Appellate Defender was appointed on May 14, 1971 to represent him. Claim of Appeal was timely filed on June 29, 1971.

While both the request for assignment of appellate counsel and the claim of appeal were timely filed, a motion to withdraw guilty plea could not have been filed by assigned appellate counsel as the 60-day period after sentencing for filing such a motion had expired before appellate counsel was appointed.[7]

445*445 Ginther's appellate counsel moved in the Court of Appeals on August 3, 1971 for an order remanding the case to the trial court so that Ginther could file "a motion for a new trial". The motion showed the need for remand and should have been granted.

The motion alleged that the grounds on which a "new trial" was sought were such that they "should be presented to the trial court prior to determination by this court"; the motion enumerated the grounds: denial of effective assistance of counsel, refusal to substitute another lawyer after Ginther had asserted that the appointed lawyer "was not pursuing his case with the vigor demanded by the law", his plea of guilty was coerced, the judge's failure to disqualify himself, failure to read the *Miranda* warning.

Accordingly, since Ginther did not have a lawyer to move to withdraw his guilty plea within the time period for filing such a motion and his appellate lawyer timely sought and the Court of Appeals improperly denied a remand to the trial court for the purpose of making such a motion, we remand to the trial court for that purpose.

V

The trial judge's inquiry of Ginther during the bench questioning when his plea of guilty was offered and accepted, "You understand in that trial you can either take the witness stand or not take the witness stand as you desire?," adequately informed Ginther of his right against self-incrimination.[8]

446*446 VI

In a large number of cases the Court of Appeals has applied the rule stated in *People v Tanner,*387 Mich 683, 690; 199 NW2d 202, 204-205 (1972), providing that the minimum term of an indeterminate sentence may not exceed two-thirds of the maximum term, "to any case in which an appeal was pending on July 26, 1972, and the *Tanner* issue was briefed at any time during pendency of the appeal" *(People v Alvin Reed,* 43 Mich App

556, 558; 204 NW2d 319, 320 [1972]), including cases, as in *Reed,* where the "defendant filed a supplemental brief" raising the *Tanner* issue. See, also, *People v Knopek,* 47 Mich App 530, 534; 209 NW2d 722, 725 (1973); *People v Montgomery,* 43 Mich App 205, 208-209; 204 NW2d 82 (1972). We accept that construction of *Tanner.* The minimum term of Ginther's sentence is reduced to 6-2/3 years.

Remanded to the trial court for further proceedings consistent with this opinion; the judgment of conviction and sentence shall in all events be amended to reduce the minimum sentence to 6-2/3 years. We do not retain jurisdiction.

T.E. BRENNAN, T.G. KAVANAGH, and SWAINSON, JJ., concurred with LEVIN, J.

T.M. KAVANAGH, C.J. *(concurring in part and dissenting in part).*

I concur in the reasoning and remand written by Justice LEVIN except on the *"Tanner* issue". In writing the opinion for the Court in *People v Tanner,* 387 Mich 683; 199 447*447 NW2d 202 (1972), I concluded at page 690 as follows:

"Based upon the principles analyzed and discussed in *People v Hampton,* 384 Mich 669 [187 NW2d 404] (1971), we hold that the decision herein is prospectively limited to those cases in which sentence is to be or has been imposed after date of filing of this opinion and to those cases which on date of filing of this opinion are pending on appeal and which have properly raised and preserved the issue for appeal. Sentences imposed prior to date of this decision and not pending on appeal upon properly preserved specific issue shall not be affected by the rule herein adopted."

This opinion was signed by Justices ADAMS, T.G. KAVANAGH, SWAINSON and WILLIAMS.

It was represented to us by then members of the Court that the limitation as to the effect of the opinion would not be upheld when subsequent cases were brought to our attention. I vote to uphold it.

The *Tanner* opinion was rendered July 26, 1972. In the instant case claim of appeal to the Court of Appeals was timely filed on June 29, 1971. However, the *Tanner* issue was not raised at the trial of this case, nor was a brief filed with the Court of Appeals properly raising this issue prior to July 26, 1972. Any brief, supplemental brief, or amended brief, filed with the Court of Appeals after July 26, 1972 which for the first time raises the *Tanner* issue does not entitle the case upon which it is filed to the benefit of the *Tanner* holding unless sentencing was imposed after July 26, 1972. Cases upon which such briefs are filed are not cases then "pending on appeal upon *properly preserved specific issue". Ginther* is such a case.

In *Ginther,* the Court of Appeals rendered its 448*448 decision on February 29, 1972. Delayed application for leave to appeal to this Court was made April 28, 1972, leave being granted July 6, 1972. Nowhere in the entire record, including the briefs filed with this Court, is the *Tanner*issue raised. It is hardly necessary to further point out that this issue was not preserved for appellate review prior to July 26, 1972. *Ginther* is not entitled to the *Tanner* holding.

I dissent from that portion of the opinion remanding this case for resentencing under the *Tanner*holding.

WILLIAMS and M.S. COLEMAN, JJ., concurred with T.M. KAVANAGH, C.J.

[1] *See People v Wickham,* 41 Mich App 358, 360; 200 NW2d 339 (1972); *People v Harvey,* 24 Mich App 363, 364; 180 NW2d 316 (1970); *People v Catlin,* 39 Mich App 106, 107-108; 197 NW2d 137 (1972).

See, generally, 1 Wright, Federal Practice & Procedure, § 175, pp 378-382.

It does not, however, waive all defenses. In *Haynes v United States,* 390 US 85; 88 S Ct 722; 19 L Ed 2d 923 (1968), the United States Supreme Court ruled in effect that a plea of guilty does not waive a previous claim that the statute under which the defendant was charged violates the constitutional privilege against self-incrimination.*See* A Model Code of Pre-Arraignment Procedure, § SS 290.1(4)(b), pp 89, 215; 1 Wright, *op cit,* pp 381-382; California Penal Code, § 1538.5(m); McKinney's Consolidated Laws of New York Annotated, Book 11A, Criminal Procedure Law, § 710.70, ¶ 2.

[2] *Cf. People v Harrison,* 386 Mich 269, 276; 191 NW2d 371 (1971).

[3] "[I]f the defendant for substantial grounds asks that counsel be replaced, successor counsel should be appointed." American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, § 5.3. *See, also,* accompanying commentary, pp 50-51.

Similarly, see commentary accompanying Standards Relating to Criminal Appeals, § 3.2, pp 82-83; *United States v Thomas,* 146 US App DC 308, 309; 450 F2d 1355, 1356 (1971); *State v Kane,* 52 Hawaii 484, 487-488; 479 P2d 207, 209-210 (1971).

[4] The record showed "an irreconcilable bona fide dispute" between the defendant and his lawyer over whether to call alibi witnesses.

[5] Pertinent is *Tollett v Henderson,* 411 US 258; 93 S Ct 1602; 36 L Ed 2d 235 (1973), where the United States Supreme Court ruled that it was incumbent upon a defendant, who seeks to have his guilty plea set aside because of misadvice of his lawyer, to show that the advice rendered was outside the "range of competence demanded of attorneys in criminal cases". Three justices dissented on the ground that the record showed that the lawyer had failed to investigate and inform the accused concerning a possible constitutional challenge.

In this case the record is silent whether Ginther's lawyer was aware or should have been aware of the possible intoxication defense; we, therefore, need not reach the question decided in *Tollett.*

A less stringent standard applies where the defendant waives counsel. *See Fontaine v United States,* 411 US 213; 93 S Ct 1461; 36 L Ed 2d 169 (1973).

[6] *Similarly, see People v Miller,* 30 Mich App 254, 255; 186 NW2d 25 (1971); *People v Morrison,* 46 Mich App 138, 140; 207 NW2d 411 (1973).

[7] We are considering an amendment of the court rule to correct this anomaly. The present rule reads:

"Appeal to the Court of Appeals as of right in civil cases shall be taken not later than 20 days after the entry of the judgment or order appealed from, or within 20 days after the entry of an order denying a motion for a new trial or rehearing, provided such motion is made and served (a) within 20 days after the entry of the judgment or order appealed from, or (b) with such further time as may be allowed by the trial court during such 20 day period. In criminal proceedings, appeal as of right shall be taken not later than 60 days after the entry of the judgment or order appealed from or after the entry of an order appointing appellate counsel for an indigent defendant pursuant to sub-rule 785.4(1), or within 60 days after the entry of any order denying a motion for new trial, provided such motion is made and served (a) within 60 days after the entry of judgment or order appealed from, or (b) within such further time as may be allowed by the trial court during such 60-days period. The time herein provided is jurisdictional in appeals as of right." GCR 1963, 803.1.

[8] GCR 1963, 785.7, effective June 1, 1973, requires the judge to inform the defendant and determine that he understands, before accepting a guilty plea, that he has "the right to remain silent or to testify at his trial, as he may choose, and that at trial no inferences adverse to him may be properly drawn if defendant chooses not to testify." "The procedure and practice under sub-rule 785.7 is mandatory and failure to comply therewith constitutes reversible error."

People v Hackett

421 Mich. 338 (1984)

365 N.W.2d 120

PEOPLE

v.

HACKETT

PEOPLE

v.

PAQUETTE

Docket Nos. 67291, 69249. (Calendar Nos. 2, 3).

Supreme Court of Michigan.

Argued January 4, 1984.

Decided December 28, 1984.

Released February 1, 1985.

Frank J. Kelley, Attorney General, *Louis J. Caruso,* Solicitor General, *John D. Foresman,*Prosecuting Attorney, in *Hackett,* and *G. Scott Stermer,* Prosecuting Attorney, in *Paquette,*and *Michael A. Nickerson,* Assistant Attorney General, for the people.

Graff & Hunt (by *Rex O. Graff, Jr.)* for defendant Hackett.

Mason & Mason (by *Michael A. Mason)* for defendant Paquette.

344*344 BOYLE, J.

We granted leave to consider the constitutionality of the rape-shield statute, MCL 750.520j; MSA 28.788(10), as applied in these two cases. We hold that application of the statute in the cases at bar did not violate defendant's procedural or substantive rights. We affirm the judgment of the Court of Appeals in *Paquette* and reverse in *Hackett.*

I

Defendants in both cases challenge the trial court's application of the rape-shield statute, MCL 750.520j(1); MSA 28.788(10)(1), in excluding evidence of the victim's prior sexual conduct with persons other than the defendant as violative of their Sixth Amendment right of confrontation and cross-examination.

The same constitutional attack against this statute was recently addressed by this Court in*People v Arenda,* 416 Mich 1; 330 NW2d 814 (1982), where we upheld the validity of the statute on its face and as applied under the facts of that case. In determining the statute's facial constitutionality, the majority stated:

"The right to confront and cross-examine is not without limits. It does not include a right to cross-examine on irrelevant *issues.* It may bow to accommodate other legitimate interests in the criminal trial process, see *Mancusi [v Stubbs,* 408 US 204; 92 S Ct 2308; 33 L Ed 2d 293 (1972)], and other social interests, see *United States v Nixon,* 418 US 683; 94 S Ct 3090; 41 L Ed 2d 1039 (1974).

* * *

"The rape-shield law, with certain specific exceptions, was designed to exclude evidence of the victim's sexual conduct with persons other than defendant. Although such evidence was admissible at common law in relation 345*345 to certain issues, this practice has repeatedly been drawn into question. The courts, with increasing frequency, have recognized the minimal relevance of this evidence, see Anno: *Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for unchastity,* 90 ALR3d 1300, and Anno: *Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts,* 94 ALR3d 257.

"The prohibitions contained in the rape-shield law represent a legislative determination that, in most cases, such evidence is irrelevant. This determination does not lack a rational basis and is not unreasonable. In fact, it is consistent with the results reached

by the judiciary in resolving this issue, see *State ex rel Pope v Mohave Superior Court,* 113 Ariz 22; 545 P2d 946 (1976).

"The prohibitions in the law are also a reflection of the legislative determination that inquiries into sex histories, even when minimally relevant, carry a danger of unfairly prejudicing and misleading the jury. Avoidance of these dangers is a legitimate interest in the criminal trial process, see MRE 403. The prohibition indirectly furthers the same interests by removing unnecessary deterrents to the reporting and prosecution of crimes.

"At the same time, the prohibitions protect legitimate expectations of privacy. Although this interest may not be as compelling as those mentioned above, it is entitled to consideration, see *Branzburg v Hayes,* 408 US 665; 92 S Ct 2646; 33 L Ed 2d 626 (1972).

"The interests protected and furthered by the rape-shield law are significant ones. Given the minimal relevance of such evidence in most cases, the prohibitions do not deny or significantly diminish defendant's right of confrontation." (Emphasis in original.) *People v Arenda, supra,* pp 8-11.

In *Arenda,* defendant sought to admit evidence of the eight-year-old victim's possible sexual conduct with others to explain the victim's ability to describe the sexual acts that allegedly occurred 346*346 and to dispel any inference that this ability resulted from experiences with the defendant. Balancing the potential prejudicial nature of this evidence, in view of the legislative purposes behind the rape-shield law, against the minimal probative value of the evidence, the Court found that the application of the rape-shield law in precluding such evidence did not infringe on defendant's right of confrontation. The Court noted that other means were available by which the defendant could cross-examine the minor victim as to his ability to describe the alleged conduct. The Court, however, left for future case-by-case determinations the question whether under different sets of facts the rape-shield statute's prohibitions would be unconstitutional as applied. *Id.,* p 13. The proper method by which such a determination would be made by the courts was not addressed by the majority opinion.

II

We are here faced with the task of determining the constitutional application of the rape-shield statute in two different factual circumstances. Before deciding this question, however, we find it necessary to further explicate our decision in *Arenda.*

The statute and its parallel provisions in the Michigan Rules of Evidence, MRE 404(a)(3), constitute a policy determination, that sexual conduct or reputation as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant. McCormick, Evidence (1st ed), § 155. The protection of inquiry into privileged communication, the preclusion of hearsay, and the limitation of prior bad act evidence, MRE 404(b), are familiar examples of instances in which the 347*347 admissibility of probative evidence is restricted because of a competing and superior policy. Indeed, the preclusion of specific acts of conduct, reputation or opinion as circumstantial evidence that the person whose character is sought to be shown engaged in the same conduct at

the time in question was not received at common law because of its potential for prejudice, time consumption, and distraction of the factfinder from the issues. McCormick, p 325. Stated otherwise, neither the Sixth Amendment Confrontation Clause, nor due process, confers on a defendant an unlimited right to admit all relevant evidence or cross-examine on any subject. See *Dutton v Evans,* 400 US 74; 91 S Ct 210; 27 L Ed 2d 213 (1970).*Cf. People v Hayes,* 421 Mich 271; 364 NW2d 635 (1984).

It is equally clear that while the extent of cross-examination is within the discretion of the trial court there is a dimension of the Confrontation Clause that guarantees to defendant a reasonable opportunity to test the truth of a witness' testimony. *Alford v United States,* 282 US 687; 51 S Ct 218; 75 L Ed 624 (1931).[1]

By enacting a general exclusionary rule, the Legislature recognized that in the vast majority of cases, evidence of a rape victim's prior sexual 348*348 conduct with others, and sexual reputation, when offered to prove that the conduct at issue was consensual or for general impeachment is inadmissible. *People v Arenda, supra,* 416 Mich 10. The first purpose is simply a variation of character evidence as circumstantial evidence of conduct. The second is a collateral matter bearing only on general credibility as to which it has been held that cross-examination may be denied, *United States v Cardillo,* 316 F2d 606 (CA 2, 1963). The fact that the Legislature has determined that evidence of sexual conduct is not admissible as character evidence to prove consensual conduct or for general impeachment purposes is not however a declaration that evidence of sexual conduct is never admissible. We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted.*Commonwealth v Joyce,* 382 Mass 222; 415 NE2d 181, 185-186 (1981); see also *Davis v Alaska,* 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974). Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. *State v Jalo,* 27 Or App 845; 557 P2d 1359 (1976); *State v Howard,* 121 NH 53; 426 A2d 457 (1981). Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. *People v Werner,*221 Mich 123, 127; 190 NW 652 (1922); *People v Mikula,* 84 Mich App 108, 115-116; 269 349*349NW2d 195 (1978); *State ex rel Pope v Mohave Superior Court, supra,* 113 Ariz 29.

The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.

III

The procedure to be employed by the trial court in evaluating the admissibility of evidence of the complainant's prior sexual conduct is found in the rape-shield statute's provision for *in camera*hearings. The relevant provision reads as follows:

"(2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. *The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).* If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)." MCL 750.520j(2); MSA 28.788(10)(2). (Emphasis added.)

Whether we construe this provision to permit the extension of *in camera* hearings to include consideration of evidence outside the scope of subsection (1) where a defendant's confrontation right 350*350 has been implicated,[2] or whether we ground the broadened scope of such hearings on this Court's constitutional authority to establish rules of practice and procedure,[3] we conclude that the hearing procedure will best accomplish the required balancing. A hearing held outside the presence of the jury to determine admissibility promotes the state's interests in protecting the privacy rights of the alleged rape victim while at the same time safeguards the defendant's right to a fair trial. Furthermore, this procedure establishes a record of the evidence for appellate review of the trial court's ruling.

The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. 351*351 *Alford v United States, supra,* 282 US 694. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury. See MRE 403;*People v DerMartzex,* 390 Mich 410, 415; 213 NW2d 97 (1973); *People v Oliphant,* 399 Mich 472, 489-490; 250 NW2d 433 (1976). We again emphasize that in ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation.

IV

In the two cases at bar, there was no *in camera* evidentiary hearing conducted. However, because the record established on the defendant's offer of proof in each case is adequate for purposes of appellate review, we need not remand these cases for such a hearing to be held. We therefore examine each case separately under the constitutional standard set forth herein.

A. *Hackett*

Prior to trial, defendant made an offer of proof to admit evidence of complainant's reputation for homosexuality for the dual purposes of impeaching his credibility and as bearing on the defense of consent. In addition, defendant sought to introduce specific instances of the complainant's prior homosexual conduct with prisoners of the same race as defendant to circumvent the inference that it would be improbable that a white male prisoner would consent to sodomy by a black male prisoner.

352*352 On appeal, defendant argues, in addition to the purposes advanced at the trial level, that the proffered evidence of complainant's homosexuality was relevant to show his bias and motive to get back at the defendant. Because these purposes were not specified in defendant's offer of proof, they are not properly preserved for our review. MRE 103(a)(2); *People v Arenda, supra,*416 Mich 14.

As to the proffered evidence of the complainant's reputation for homosexual unchastity to impeach his credibility as a witness, we observe generally that there is no logical nexus between a complainant's reputation for unchastity, whether it involves heterosexual or homosexual activity, and the character trait for truthfulness or untruthfulness. See *People v Williams,* 416 Mich 25, 45; 330 NW2d 823 (1982). Defendant argues that this evidence was necessary to rebut the complainant's trial testimony that he knew nothing about anal sex and his preliminary examination testimony where he denied being a homosexual. We note that the complainant at trial did not deny being a homosexual and the problem of rebuttal on this point never materialized as anticipated by defendant.

Defendant also claims that evidence of the complainant's reputation for, or specific acts of, homosexual conduct, with black male prisoners in particular, should have been admitted as necessary to establish his defense of consent. Defendant argues that such evidence would have made it more probable for the jury to believe that the complainant, a white male prisoner, consented to or solicited the act of sodomy with the defendant, a black male prisoner.

In *People v Williams, supra,* this Court found that proffered evidence on the sexual assault victim's 353*353 alleged status as a prostitute was irrelevant to the issues of consent and credibility. 416 Mich 40-46. Like prostitution, the fact that a person is a homosexual, standing alone, has little or no logical relevance between the excluded prior sexual acts evidence and the issues of consent or credibility. Thus, to the extent defendant sought to introduce evidence as to complainant's reputation as a homosexual or to specific acts of homosexuality for the purpose of bolstering his defense of consent, we find such evidence is irrelevant and the trial court properly excluded it.

However, a closer question is presented where such evidence was sought to dispel the assumption that most jurors would believe such an act, especially given the interracial element, is not likely to occur voluntarily. Nevertheless, we do not believe defendant was denied his constitutional right to confrontation since he had a reasonable opportunity to introduce evidence which would have permitted a discriminating appraisal of complainant's possible consent. Evidence of a specific instance of alleged homosexual conduct between complainant and a black male inmate occurring three days before the incident in question was brought out at trial as well as evidence of two stains of seminal fluid which may have been from more than one person. The defendant was not denied his right to confrontation since he was given the opportunity, even through limited in fashion, to expose to the jury the complainant's past homosexual encounter with a prisoner of the same race as defendant as tending to show his consent in this instance.

B. *Paquette*

At trial, defendant sought to introduce evidence concerning complainant's reputation for unchastity, a specific instance of complainant's prior 354*354 sexual conduct in which she allegedly met a man in a bar and left with him for consensual sexual relations in a motel, and, finally, evidence of a statement made by complainant that she was not getting enough sexual satisfaction from her husband for the sole purpose to show consent.

We find defendant's offer of proof is inadequate to have even met the minimal threshold of relevancy, a prerequisite to invoking the constitutional standard. As we stated in *Arenda, supra,*the Sixth Amendment right to confrontation requires only that the defendant be permitted to introduce relevant and admissible evidence. 416 Mich 8. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

As a general rule, evidence of a complainant's prior sexual unchastity, in the form of reputation evidence or a specific instance of conduct, has little or no relevancy to the issue of complainant's consent with defendant as to the incident in question. The rationale for this rule was cogently expressed in a recent federal court decision involving a right to confrontation challenge to rule 412 of the Federal Rules of Evidence, the federal counterpart to Michigan's rape-shield statute, as follows:

"The constitutional justification for excluding reputation and opinion evidence rests on a dual premise. First, an accused is not constitutionally entitled to present irrelevant evidence. Second, reputation and opinion concerning a victim's past sexual behavior are not relevant indicators of the likelihood of her consent to a specific sexual act or of her veracity. *Privacy of Rape Victims: Hearings on H.R. 14666 and other Bills Before the Subcomm. on Criminal Justice of the Committee on the Judiciary,* 94th Cong, 2d Sess 14-15 (1976). Indeed, 355*355 even before Congress enacted rule 412, the leading federal case on the subject, *United States v Kasto,* 584 F2d 268, 271-272 (CA 8, 1978), stated that in the absence of extraordinary circumstances:

"`evidence of a rape victim's unchastity, whether in the form of testimony concerning her general reputation or direct or cross-examination testimony concerning specific acts with persons other than the defendant, is ordinarily insufficiently probative either of her general credibility as a witness or of her consent to intercourse with the defendant on the particular occasion ... to outweigh its highly prejudicial effect.'

"State legislatures and courts have generally reached the same conclusion. We are not prepared to state that extraordinary circumstances will never justify admission of such evidence to preserve a defendant's constitutional rights. The record of the rule 412 hearing in this case, however, discloses no circumstances for deeming that the rule's exclusion of the evidence classified in items 1-5 is unconstitutional." *Doe v United States,* 666 F2d 43, 47-48 (CA 4, 1981).

Therefore, absent extraordinary circumstances,[4] a complainant's reputation for unchastity or specific instances of complainant's past sexual conduct with third persons is ordinarily irrelevant and inadmissible to show consent.

In the present case, there are no extraordinary circumstances disclosed in the record to take this case out of the general rule of inadmissibility. The fact that complainant may have consented to sexual activity at some time in the past with a man 356*356 other than the defendant, whom she met in a bar and accompanied to a motel, is not sufficiently similar to the facts at hand to be relevant to the issue of consent. Here, the simultaneous sexual acts between complainant and two strangers, one of whom was the defendant, occurred in the cab of a truck after the strangers had picked up the complainant on the road near her car which had run out of gas. Moreover, complainant's alleged reputation for engaging in consensual sexual relations in the past, does not tend to prove that she did so with defendant at the time in question.

We find that the trial court's exclusion of this proffered evidence of complainant's prior sexual conduct with persons other than the defendant, either as reputation or specific instances of conduct, did not deprive defendant of his right to confrontation because this right does not extend to cross-examination on irrelevant matters.

The remaining proffered evidence concerned the complainant's statement of her sexual dissatisfaction at home due to the physical condition of her husband. We agree with Justice KAVANAGH'S observation that this evidence does not fall within the terms of the rape-shield statute since technically it is not evidence of prior sexual conduct. The Court of Appeals correctly found no abuse of the trial court's discretion in excluding this evidence on the ground of irrelevancy because the complainant was separated from her husband at the time of the offense in question.

V

Having examined each of the two cases before us in light of the constitutional standard set forth herein, we conclude that the application of the rape-shield statute by the trial court under the357*357 particular facts in these cases did not violate the defendants' right to confrontation.

Accordingly, in *Hackett,* we reverse the decision of the Court of Appeals and reinstate the defendant's conviction; whereas, in *Paquette,* we affirm the decision of the Court of Appeals.

WILLIAMS, C.J., and RYAN, BRICKLEY, and CAVANAGH, JJ., concurred with BOYLE, J.

KAVANAGH, J.

I

Defendant Charles R. Hackett was convicted of assault with intent to commit sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). The offense was alleged to have occurred in a barracks bathroom while the defendant and complainant were inmates at Camp Pugsley, a facility operated by the Michigan Department of Corrections. Ricky R. Vanhohenstein testified that at 2 a.m. on August 28, 1979, the defendant sat on the edge of complainant's bunk, pressed a pair of scissors against his neck and ordered him to the bathroom. In a toilet stall, testified the complainant, the defendant compelled complainant to submit to an attempt at anal intercourse. The theory of the defense was that the incident never happened or that, if it did, complainant solicited and consented to the act. The defense argued that defendant was being set up by the complainant in retaliation over an incident involving a picture. Defendant did not testify.

Prior to trial, defense counsel moved to admit evidence of the complainant's reputation for homosexual unchastity and of specific instances of the complainant's sexual conduct at Camp Pugsley. 358*358 Defense counsel offered to prove that the complainant, a white person, was a homosexual who enjoyed associations of a sexual nature with black inmates in particular and that he maintained close physical contact with inmates by touching and embracing them. Counsel also offered to prove that complainant traded homosexual favors within the prison for benefits such as marijuana. Such evidence was said to be relevant to the probability that complainant would consent to or solicit sexual contact with defendant. The evidence was also needed, argued defense counsel, to circumvent an assumption that it would be improbable that a white male prisoner would consent to sodomy by a black male prisoner. Lastly, defense counsel argued that evidence of complainant's reputation for homosexual unchastity was admissible for the purpose of impeaching his credibility because of his anticipated testimony that he had not previously engaged in sexual contact with other inmates.

In the second case before the Court, James Paquette and another individual were convicted of criminal sexual conduct in the first-degree, MCL 750.520b; MSA 28.788(2). The transaction giving rise to the charges occurred when the defendant and his friend picked up the complainant on a road near her car, which had run out of gas. The complainant, defendant, and his friend all testified to sexual acts occurring in the cab of a truck. The complainant, however, testified that she was compelled to submit to the sexual acts by physical force and threats of personal injury. The defendant and his friend testified that the complainant initiated the sexual acts and consented.

During trial, the issue was raised whether defense counsel could introduce testimony that the complainant had a reputation for unchastity. He also sought to introduce testimony of what he said 359*359 was a circumstance similar to the one for which defendant was on trial, that shortly before the incident alleged, the complainant had met a man in a bar and left with him to enjoy sexual relations that night in a motel. Lastly, counsel wished to introduce testimony that the complainant had made a statement that she had received insufficient sexual attention from her husband. The proffered evidence was argued to be relevant to the probability of the complainant's consent to the sexual acts.

II

In both cases, defense counsels' proffered evidence was excluded by the trial courts under different interpretations of MCL 750.520j(1); MSA 28.788(10)(1). The statute, which is part of the criminal sexual conduct act, 1974 PA 266, MCL 750.520a *et seq.;* MSA 28.788(1) *et seq.,*provides:

"Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

"(a) Evidence of the victim's past sexual conduct with the actor.

"(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

The trial court excluded the evidence of reputation and of specific instances of prior conduct in*Hackett* apparently on the grounds of the proscription of MCL 750.520j(1); MSA 28.788(10)(1). The 360*360 applicability and constitutionality of MCL 750.520j(1); MSA 28.788(10)(1) and MRE 404(a)(3) were argued by the prosecution and the defense at a hearing on the motion, but the trial court did not state the authority of its ruling. In an unpublished opinion per curiam, the Court of Appeals concluded that exclusion of evidence of the complainant's reputation for unchastity denied the defendant a fair trial. The Court said that evidence should have been admitted on the facts of this case because of the defense theory that defendant was set up and because of one witness' testimony that the defendant was propositioned by the complainant, who denied other homosexual activity. We granted leave to appeal. 417 Mich 1043 (1983).

The trial court in *Paquette* read the statute as affording discretion to admit or exclude the proffered evidence once he determined whether it was more probative than prejudicial. At a hearing outside the presence of the jury, during trial, the court concluded that the proffered evidence was irrelevant to the issue of consent and prejudicial to the prosecution's case. The Court of Appeals affirmed, *People v Paquette,* 114 Mich App 773; 319 NW2d 390 (1982), holding irrelevant as insufficiently similar to the allegations evidence of the complainant's meeting a man in a bar. Evidence of complainant's alleged reputation for unchastity, the Court concluded, had low probative

value, outweighed by the state's interest in encouraging the prosecution of rapists and protecting victims from humiliation. Further, evidence of the statement attributed to complainant that she received insufficient sexual attention from her husband was irrelevant because she was separated from her husband at the time the offense was said to have been 361*361 committed. We granted leave to appeal. 417 Mich 1041 (1983).

III

On appeal, the validity of MCL 750.520j(1); MSA 28.788(10)(1) is challenged on constitutional grounds. The defendants maintain they offered to introduce relevant evidence, which was prohibited by the statute, in contravention of their rights to confrontation under US Const, Am VI, and Const 1963, art 1, § 20. The prosecutors argue that the evidence excluded by the statute is always logically or legally irrelevant, and therefore does not contravene constitutional rights.

As a rule of evidence, the statute has been permitted life under MRE 101:

"A statutory rule of evidence not in conflict with these rules or other rules adopted by the Supreme Court is effective until superseded by rule or decision of the Supreme Court."

The function of establishing the rules of practice and procedure for the courts of this state is committed by the constitution, Const 1963, art 6, § 5, exclusively to the Supreme Court. See also MCL 600.223(2); MSA 27A.223(2). It is "a function with which the legislature may not meddle or interfere save as the Court may acquiesce and adopt for retention at judicial will."*Perin v Peuler,* 373 Mich 531, 541; 130 NW2d 4 (1964).

In view of our constitutional duty to govern the practice and procedure of the courts of Michigan, we have concluded that MCL 750.520j(1); MSA 28.788(10)(1) must give way to a more realistic accommodation of the rights of defendants in criminal cases. Accordingly, we hold that MRE362*362 404(a)(3) supersedes MCL 750.520j(1); MSA 28.788(10)(1). We believe this will accomplish the salutary goals of the statute without sacrificing the right to present relevant evidence.

MCL 750.520j(1); MSA 28.788(10)(1) absolutely prohibits the admission of evidence of sexual conduct between the victim and any person other than the defendant except to show the source or origin of semen, pregnancy, or disease. The statute applies only to offenses tried under MCL 750.520b-750.520g; MSA 28.788(2)-28.788(7).

Ordinarily, all relevant evidence is admissible. See MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact in issue to the action more or less probable than it would be without the evidence. See MRE 401. Relevant evidence may nonetheless be excluded from trial "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

In support of MCL 750.520j(1); MSA 28.788(10)(1), the plaintiffs contend that the evidence excluded by the statute is usually irrelevant. As we noted in *People v Arenda,* 416 Mich 1, 10; 330 NW2d 814 (1982), the statute represents a "legislative determination that, *in most cases,*such evidence is irrelevant." (Emphasis added.)

There are two problems with this contention which militate against our continued acquiescence in this statute. First, even if in most cases the excluded evidence is irrelevant, the statute excludes it in all cases. Such categorical exclusion is not warranted simply because the excluded evidence is relevant in only a few cases.

Secondly, the relevancy of whole classes of evidence cannot be determined *a priori,* at least363*363 without knowing the purpose for which such evidence is offered. "The relevancy of evidence depends on the issue to be tried." *White v Bailey,* 10 Mich 155 (1862). Not until the issues are framed at trial can it be known whether evidence of prior sexual conduct is relevant, as the Legislature recognized in the statute under consideration. Evidence of prior sexual conduct to show the source or origin of semen, pregnancy, or disease is admissible under the statute, but only if it "is material to a fact at issue in the case" and is more probative than prejudicial.

However, say plaintiffs, even in those cases where the excluded evidence is logically relevant, it is always outweighed by its prejudicial effect, and for that reason is inadmissible.

The plaintiffs' argument reflects a misunderstanding of the inquiry. Relevant evidence may be excluded if its probative value is "substantially outweighed" by its prejudicial effect. MRE 403. Since the relevancy of evidence cannot be determined until the issues are known, the probative value of the evidence *a fortiori* cannot be known until then. Accordingly, it cannot be said categorically that the prejudicial effect of prior sexual conduct evidence always substantially outweighs its probative value.

Moreover, plaintiffs misperceive the nature of the prejudice needed to overwhelm the probative value of evidence. Plaintiffs assert that the admission of evidence of prior sexual conduct deters victims from prosecuting. While that is a significant problem of social policy, it is not the sort of prejudice which weighs against the probative value of evidence.

Since the enactment of MCL 750.520j(1); MSA 28.788(10)(1), the Court has adopted MRE 404(a)(3), which provides:

364*364 "Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

* * *

"In a prosecution for criminal sexual conduct, evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease."

Under this rule, evidence of a person's prior consensual sexual conduct is not admissible for the purpose of proving that the person consented to sexual conduct on the occasion of the offense charged. Such evidence is admissible, however, if it involved the defendant or if offered for the purpose of showing the source or origin of semen, pregnancy, or disease.

MRE 404(a)(3) is a more sophisticated approach to the question of the admissibility of prior sexual conduct evidence. Unlike the statute, MRE 404(a)(3) focuses on the purpose for which such evidence is offered. The statute simply excludes all evidence of prior sexual conduct with third persons unless offered to show the source or origin of semen, pregnancy, or disease. Moreover, MRE 404(a)(3) has the incidental benefit of correcting the discredited use to which evidence of prior sexual conduct has been most frequently put, which is what aroused the Legislature originally to enact MCL 750.520j(1); MSA 28.788(10)(1).

A rule of evidence which excludes a whole category of evidence on the grounds that some of it may be irrelevant is one which we, as the overseers of the rules of evidence in our courts, would not adopt and cannot accept.

365*365 IV

In *Hackett,* the defendant offered to admit evidence of the complainant's prior sexual conduct, in the form of reputation and specific instances of conduct, for several purposes. From the record, it appears that the trial court felt bound by the flat proscription of MCL 750.520j(1); MSA 28.788(10)(1).

Under these circumstances, we are compelled to remand the case for a hearing before the trial court. The court must exercise discretion to determine whether the evidence offered by defendant is admissible under MRE 404(a)(3). If it is, defendant's conviction must be set aside, his sentence must be vacated, and a new trial must be had.

In *Paquette,* defense counsel proffered evidence of the complainant's alleged reputation for unchastity and of a specific instance of prior sexual conduct. Rather than interpreting the statute as absolutely prohibiting the admission of such evidence, the trial court exercised discretion to determine that the evidence was more prejudicial than probative. We are not persuaded that the court abused its discretion. Proffered evidence of a statement attributed to complainant that she received insufficient sexual

attention from her husband was viewed in the same light and excluded. Although evidence of the statement was not evidence of prior sexual conduct within the terms of MCL 750.520j(1); MSA 28.788(10)(1), we are not convinced that the trial court abused its discretion in excluding the evidence.

The judgment of the Court of Appeals in *Hackett* should be reversed, and the case should be remanded for further proceedings consistent with this opinion.

The judgment of the Court of Appeals in *Paquette* should be affirmed.

LEVIN, J. *(dissenting).*

Defendant Charles R. 366*366 Hackett, a black man, was convicted of assault with intent to commit sexual penetration.[1] At the time of the offense, both Hackett and the complainant, a white man, were residents at a facility operated by the Michigan Department of Corrections. The complainant testified that Hackett awakened him one night at 2 a.m., placed a pair of scissors against his throat and ordered him to the barracks bathroom where, in a toilet stall, Hackett attempted an act of anal intercourse.

Hackett did not testify at trial. Several witnesses were called on his behalf, however, to testify in support of his theory that the alleged act never occurred or, if it did, that it was consensual and solicited by the complainant. Expert testimony demonstrated that the rear panel of the complainant's shorts contained the seminal fluid of more than one person. Other defense witnesses testified that it was the complainant who had asked Hackett to accompany him to the barracks bathroom, that the complainant and Hackett had been seen together often and that the complainant and a black inmate had been observed "humping" in the complainant's bunk.

Prior to trial, Hackett filed a written offer of proof that the complainant had an "established reputation as a homosexual among inmates at Camp Pugsley" and that he had "several close associations of a sexual nature" with black inmates. Hackett also offered to prove that the complainant traded homosexual favors for "benefits" such as marijuana. Hackett's written motion for admission of the evidence asserted that it was relevant to show that the complainant would be likely to consent to or solicit sexual contact with Hackett, to rebut the assumption that a white 367*367 man would not consent to or solicit sodomy by a black man, and to impeach the complainant's preliminary examination testimony denying that he was a homosexual.

The circuit judge denied Hackett's motion for admission without conducting an *in camera* hearing pursuant to § 520j(2) of the Penal Code.[2] It appears that the circuit judge considered § 520j(1)[3] as an absolute bar to the admission of the proffered evidence. The jury found Hackett guilty of assault with intent to commit sexual penetration. The Court of Appeals reversed and remanded for a new trial.

Defendant James Paquette and a codefendant were convicted of first-degree criminal sexual conduct.[4] The complainant, a married woman who was approximately five months pregnant at the time of the alleged rape, testified that, while driving alone, she ran out of gas on a state highway. Paquette and the codefendant stopped to push the

complainant's car to the side of the highway. The two men had an empty gallon jug in their truck and offered to take the complainant to a service station and then return her to her car. She testified that on the way to the service station, the two men could not find ten dollars that they had left in the truck. The men began to accuse her of stealing the ten dollars. After gasoline was dispensed into the truck and the gallon jug, the complainant was not returned to her car; rather, Paquette's codefendant began driving along various roads in the area. Paquette was seated on the passenger side of the cab and the complainant was seated between the two men.

The complainant testified that Paquette, apparently 368*368 not satisfied that she had not taken the ten dollars, began to "help" her remove her clothing. Then, according to the complainant, Paquette grabbed her head and forced her to perform fellatio. She complied because of threats made upon her and her unborn child. Subsequently, she was forced to perform fellatio on the codefendant and submit to sexual intercourse with both men. She was then allowed to dress and leave the truck. The complainant walked to a nearby house and was permitted to use the telephone. She called relatives who came to pick her up. The police were notified of the incident and the complainant was taken to a hospital for a physical examination.

Defendant Paquette testified at trial. He confirmed that the complainant had engaged in fellatio and sexual intercourse with both men, but testified that such activity was initiated by her. Paquette testified that, after the gasoline was obtained, the complainant directed the codefendant to drive along certain roads in the area. The complainant unzipped Paquette's trousers and commenced an act of fellatio. She did the same to the codefendant and both men subsequently had sexual intercourse with her. Although offered a ride back to her car, the complainant got out of the truck to walk to her uncle's house, which she said was just down the road.

At trial, but out of the presence of the jury, Paquette sought to introduce evidence of the complainant's reputation for unchastity, that she had engaged in consensual sexual relations with a stranger that she had met in a bar, and that she had made a statement to the effect that she was not obtaining sexual satisfaction from her husband. The evidence was offered as relevant on the issue of consent. The circuit judge ruled that the evidence was inadmissible under § 520j. No *in* 369*369 *camera* hearing was conducted. The jury found Paquette guilty of first-degree criminal sexual conduct and the Court of Appeals affirmed.

I

The successful prosecution of criminal sexual offenders — and indeed all criminal offenders — is a vital state interest. Rape victim shield laws, such as § 520j, have been justified as a means of protecting victims from harassing cross-examination[5] and embarrassing or humiliating revelation of prior sexual history,[6] thereby encouraging victims to cooperate in the prosecution of offenders. The defendants in the instant cases insist, however, that application of the statute must yield to their fundamental rights to confrontation of opposing witnesses[7] and compulsory process for obtaining witnesses.[8]

A

The exclusion of the evidence proffered in the instant cases cannot be justified as a means of protecting the complaining witnesses from brutal or harassing cross-examination.

In *Hackett,* the defendant's motion for the admission of evidence was introduced and denied before trial. In *Paquette,* the defendant's offer of proof was made out of the presence of the jury.

370*370 The defendants in both cases were prepared to prove prior sexual history with the testimony of other witnesses; presentation of evidence was not dependent on cross-examination of the complaining witnesses. Thus a societal interest in protecting complaining witnesses from harassing cross-examination is not implicated in these cases.

B

Neither can the exclusion of the proffered evidence in the instant cases be justified on the ground that it will protect the complaining witnesses from exposure of embarrassing or humiliating prior sexual history to a spouse, relatives, friends, or the general public. The nature of a jury trial is such that when potential evidence is offered, albeit out of the jury's presence, it becomes a matter of public record. The defendant has an absolute right to make an offer of proof and, if the judge refuses an oral offer, the defendant might make a written offer of proof. The court file and transcript are public records that cannot be suppressed from publication by the media.[9] Thus whether offers of proof of prior sexual history become a matter of public notoriety depends on who happens to be in the courtroom and on the media rather than on a rule of law.

II

Generally, all relevant evidence is admissible.[10] Prior sexual history generally is irrelevant. It may be assumed that most persons beyond their early teens are sexually experienced in one form or 371*371 another. There is no need to tell a jury that a man or woman beyond a certain age is likely to have had sexual partners and sexual relations. Evidence that demonstrates only prior sexual experience is generally irrelevant and properly excluded.

The question is whether evidence of prior sexual history that shows more than sexual experience should be admissible. The people seek to exclude the evidence in the instant cases not because it is irrelevant or offensive but because the jury may misuse it. If the evidence were truly irrelevant and offensive, the people would probably not be harmed by its admission because the defendant, by offering harassing evidence, would lose the jury; the evidence would "boomerang."

What is the misuse that the prosecution seeks to avoid? It is concerned that the jury in*Paquette* will conclude that this married, pregnant woman is a "loose woman" and, in

Hackett, that this white man favors homosexual relations with black men and, on that basis, reject the charges of forcible nonconsensual sexual relations. The premise of the argument for exclusion is thus that the jury cannot be trusted not to characterize the complaining witness as a loose woman or consenting homosexual if they hear the evidence of sexual history, and that the jurors will incorrectly *assume* that if the complaining witness consented to sex in those circumstances, they cannot find beyond a reasonable doubt that she or he did not consent to sex with the defendants.

The defendants must fear the same kind of superficial thinking on the part of the jury that the prosecutor fears. The defendants are properly concerned that the jurors will see the complaining witnesses as persons who are not likely to have consented to the sexual acts, not because they are chaste persons — chastity and unchastity being generally 372*372 irrelevant and therefore evidence thereof being generally inadmissible — but because, albeit not chaste, the charged sexual behavior is, in the jurors' experience, "aberrant." It is "aberrant" for a married, pregnant woman to be looking for casual sex and it is "aberrant" for a white man to solicit or consent to a sexual relationship with a black man. At least that is what most jurors will think.

Without regard to whether the prosecutor in *Paquette* asked the jury[11] to view the complainant as a married, pregnant woman and to draw the inference that it was improbable that she would be seeking impromptu, casual sexual relations or, in *Hackett,* that a white man does not consent to a homosexual relationship with a black man, the typical juror may so *assume* and draw those inferences. The defendant has at least the same need to have the evidence of prior sexual history admitted to counter juror assumption and characterization of the complaining witnesses as being unlikely to consent to "aberrant" sexual behavior the defejdants 373*373 claim was consented to as the people may have need to exclude such evidence to avoid the jury assuming and concluding that because the complainant has engaged in "aberrant" consensual sexual behavior consent was given in the instant case, or at least that it cannot be said beyond a reasonable doubt that consent was not given.

III

The procedures in the instant cases violated the defendants' rights to confrontation and compulsory process and denied them fair trials and due process of law.

In *Hackett,* the proffered evidence was relevant to rebut jury assumption and inference that a white man would not solicit or consent to an act of sodomy by a black man.[12] The decision of the Court of Appeals reversing and remanding for a new trial should be affirmed.

In *Paquette,* the evidence was relevant to rebut jury assumption and inference that a married, pregnant woman does not seek to engage in casual sexual relations. Also, the proffered evidence of the complainant's statement that she was not obtaining sexual satisfaction from her husband is not evidence of prior sexual conduct and is not within the terms of the rape victim shield law. The evidence of the statement is relevant as tending to make it more probable that the complainant consented to sexual activity

than it would be 374*374 without such evidence.[13] The decision of the Court of Appeals should be reversed and the cause remanded for a new trial.

CAVANAGH, J., took no part in the decision of *Paquette.*

[1] Implicit in our holding in *Arenda* that the rape-shield statute was constitutional on its face was the presumption that the Legislature intended in enacting this statute that it not conflict with constitutional requirements. See *People v McQuillan,* 392 Mich 511, 536; 221 NW2d 569 (1974). Prior to enactment of the statute, *Davis v Alaska,* 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974), and *Alford v United States, supra,* had both held that a defendant must have some opportunity to show bias on the part of a prosecution witness and a long line of Michigan authority in accord with that of other state courts, held that interest or bias of a witness in a criminal case is material and may be proved, *People v Field,* 290 Mich 173; 287 NW 422 (1939); Wigmore, Evidence (2d ed), § 1368. Given this background, we consider it unlikely that either the Legislature or the drafters of the Michigan Rules of Evidence intended to "scuttle entirely" the evidentiary availability of cross-examination for bias, *Luce v United States,* 469 US ___; 105 S Ct 460; 83 L Ed 2d 443 (1984).

[2] Other states with analogous rape-shield statutes have similarly interpreted their respective statutes to provide for an *in camera* evidentiary hearing to afford the defendant an opportunity to offer evidence of a complainant's prior sexual conduct with third persons where it is constitutionally required. *State v Howard, supra,* 121 NH 59;*State v McCoy,* 274 SC 70, 71; 261 SE2d 159 (1979); *State v Jalo, supra,* 27 Or App 857 (Fort, J., *concurring in part and dissenting in part).*

[3] Const 1963, art 6, § 5.

[4] In *United States v Kasto,* 584 F2d 268, 271, fn 2 (CA 8, 1978), the court gave the following examples of circumstances which would enhance the probative value of this evidence:

"Such circumstances might include where the evidence is explanative of a physical fact which is in evidence at trial, such as the presence of semen, pregnancy, or the victim's physical condition indicating intercourse, or where the evidence tends to establish bias, prejudice, or an ulterior motive surrounding the charge of rape. Sexual history might also be relevant where the victim has engaged in a prior pattern of behavior clearly similar to the conduct immediately in issue." (Citations omitted.)

[1] MCL 750.520g(1); MSA 28.788(7)(1).

[2] MCL 750.520j(2); MSA 28.788(10)(2).

[3] MCL 750.520j(1); MSA 28.788(10)(1).

[4] MCL 750.520b; MSA 28.788(2).

[5] See Berger, *Man's trial, woman's tribulation: Rape cases in the courtroom,* 77 Colum L R 1, 12-13 (1977).

[6] See Tanford & Bocchino, *Rape victim shield laws and the Sixth Amendment,* 128 U Pa L R 544 (1980).

[7] Const 1963, art 1, § 20; US Const, Am VI, applicable to the states under the Fourteenth Amendment, *Pointer v Texas,* 380 US 400; 85 S Ct 1065; 13 L Ed 2d 923 (1965).

[8] Const 1963, art 1, § 20; US Const, Am VI, applicable to the states under the Fourteenth Amendment,*Washington v Texas,* 388 US 14; 87 S Ct 1920; 18 L Ed 2d 1019 (1967).

[9] See *Globe Newspaper Co v Superior Court,* 457 US 596, 610; 102 S Ct 2613; 73 L Ed 2d 248 (1982).

[10] MRE 402.

[11] Prior sexual history is relevant and should be admitted when sexual history is first raised by the prosecution. See Tanford & Bocchino, *Rape victim shield laws and the Sixth Amendment,* fn 6 *supra,* p 583. If the prosecution offers evidence of the complainant's chastity to show the improbability of consent, the defendant should be permitted to respond with competent and probative evidence.

There is a similar right to respond where the jury may infer improbability of consent apart from testimony or prosecutorial comment. *Cf. People v Seaman,* 107 Mich 348, 358-359; 65 NW 203 (1895) (similar acts of defendant held admissible to show guilty knowledge and intent):

"Upon principle and authority, it is clear that where a felonious intent is an essential ingredient of the crime charged, and the act done is claimed to have been innocently or accidentally done, or by mistake, or when the result is claimed to have followed an act lawfully done for a legitimate purpose, *or where there is room for such an inference,* it is proper to characterize the act by proof of other like acts producing the same result, as tending to show guilty knowledge, and the intent or purpose with which the particular act was done, *and to rebut the presumption that might otherwise obtain."* (Emphasis supplied.)

[12] The Court declares that since the defendant was permitted to present some evidence of a past homosexual encounter between the complainant and a black prisoner, the right to confrontation was not denied. It is not proper, however, to exclude relevant evidence because other evidence tending toward the same factual conclusion has been admitted, unless the evidence is excluded as "needless presentation of cumulative evidence." MRE 403. Because of the reasonable doubt standard, evidence tending to rebut an element — non-consent in this case — of a charged offense will rarely be "needless" or "cumulative."

[13] MRE 401.

People v Hoskins

403 Mich. 95 (1978)

267 N.W.2d 417

PEOPLE

v.

HOSKINS

Docket No. 58137.

Supreme Court of Michigan.

Decided July 17, 1978.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Robert F. Leonard,*Prosecuting Attorney, and *Donald A. Kuebler,* Chief Appellate Division, for the people.

State Appellate Defender (by *Kathleen M. Cummins)* for defendant.

PER CURIAM:

Originally charged with murder, James E. Hoskins pled guilty of manslaughter over the prosecutor's objection in 1972. He received a 7 1/2 to 15-year prison sentence.

After a complaint was filed by the prosecutor's office, this Court, in *Genesee Prosecutor v Genesee Circuit Judge,* 391 Mich 115; 215 NW2d 145 (1974), granted an order of superintending control and remanded for trial on the information. A jury convicted defendant of second-degree murder on May 8, 1974, and he was sentenced seven weeks later to 20 to 35 years in prison.

Throughout the trial the defendant's attorney argued that the killing was done in self-defense. Defense counsel's timely request for an instruction on self-defense was denied by the trial judge, however, on the ground that insufficient evidence 97*97 had been presented to justify the requested instruction. The trial court added that it could not instruct the jury on self-defense unless the defendant had taken the stand and testified to his state of mind at the time the killing occurred.

The Court of Appeals, in an unpublished per curiam opinion which cited *People v Williams,* 118 Mich 692; 77 NW 248 (1898), affirmed because the panel found no evidence in the case to support a theory of self-defense.

We have considered the defendant's delayed application for leave to appeal and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we reverse the Court of Appeals and remand the case to the trial court for further proceedings. Our careful review of the record discloses that there was evidence in this case pointing to the conclusion that the defendant had acted in self-defense; the sufficiency of this evidence was for the jury to determine under proper instructions on self-defense. The right to assert a theory of self-defense is, of course, not contingent on a waiver of the privilege against self-incrimination.

I

Testimony at trial revealed that the victim and the defendant were drinking with friends at Frederick Bridges' house when the victim asked the defendant to repay a seven-dollar debt. Defendant asked Victor Doan, another guest, to drive him to the home of defendant's mother to get money. Doan agreed to do so as soon as he finished his drink. The victim went to the bathroom and the defendant went outside to wait. The victim returned from the bathroom and went outside. Bridges and Doan both testified that they then heard a shot. Both men went to the window and 98*98 observed the victim staggering back against Doan's car. They both then observed the defendant fire a second shot at the victim.

Wayne Bachman, another guest at the party, stated that at the time of the shooting he and Tom Harrington were backing out of Bridges' driveway in Harrington's car, preparing to leave. Like Doan and Bridges, Bachman observed the second shot but was not in a position to observe what had happened between the defendant and the victim before the first shot was fired. The three witnesses, Doan, Bridges and Bachman, characterized the discussion between the victim and the defendant as a request for money rather than an argument, although Bridges was impeached with the testimony he gave at the preliminary examination two years earlier that the victim was raising his voice and was "hot under the collar" while requesting the seven dollars from the defendant.

Since Tom Harrington was found to be unavailable, his previous testimony at defendant's preliminary examination was admitted as an exhibit and read to the jury. Harrington described the discussion between the victim and the defendant as an "argument", not a "conversation". The argument prompted Harrington to leave because

he did not want to be around if something "developed". The witness recalled the victim telling the defendant that he would "whip" the defendant.

Harrington was the only witness to the events leading up to the shooting other than the defendant, who did not testify, and the victim. Harrington said that as he and Bachman were leaving, he saw the victim advance toward the defendant "with his hands up" and that "the defendant stepped into him and right then I heard a shot". Harrington said that the two men were talking to 99*99 each other just before the shooting, but he could not hear what they were saying.

Defense counsel advanced his theory of self-defense from his initial voir dire of and opening remarks to the jury through his closing argument. Harrington's testimony, defense counsel argued, demonstrated that before the actual shooting, a potentially violent situation was building up between the defendant and the victim in which the victim was the aggressor. Defendant's reaction to this situation was conciliatory, and once outside the house the victim made the first move toward the defendant.

The trial court explained its denial of defense counsel's request for an instruction to the jury on self-defense in this way:

"*The Court:* * * * There is no question in my mind, I think he [defendant] should have taken the witness stand. I advised him of his rights. He chose not to. But I think that's a mistake that he made. He could have then developed the theory, and I would have instructed on the theory of self-defense had he taken the witness stand and given anything that I could use as a factual basis. And, that's why I denied your instruction on self-defense, because I could not make — I don't believe, as I stated before, you — you can utilize the self-defense without the defendant showing his state of mind and how he felt at the time, if he felt his life was in danger and he had no other choice but to take the life. And, absent that, I could not do it. But I just like to throw it in while I'm thinking about it."

Thus the trial judge found that there was insufficient evidence to justify giving the requested instruction, an insufficiency the trial judge apparently believed was created by the defendant's failure to take the stand and testify as to "his state of 100*100 mind and how he felt at the time [of the shooting]".

II

If supported by the evidence, defendant's theory of the case must be given. See *People v Reed,*393 Mich 342, 350; 224 NW2d 867 (1975); GCR 1963, 516.7, 785.1; and 1 Michigan Criminal Jury Instructions (Ann Arbor: Institute of Continuing Legal Education), ch 7, § 4, Commentary, pp X-XX-X-XX. Here, there was some evidence of self-defense, as distinguished from the situation in *Williams* where there was no evidence of self-defense. The testimony of Tom Harrington supports the inference that the shooting was preceded by a potentially violent situation during which the victim was aggressive and the defendant was conciliatory, and that the defendant shot the victim as the victim moved towards him with his hands raised after the defendant had withdrawn from the

site of the argument. The sufficiency of this theory was for the jury to decide under proper instructions on self-defense from the trial judge.

A defendant need not take the stand and testify in order to merit an instruction on self-defense. Because of the absence of direct evidence, the prosecutor in the instant case was forced to use circumstantial evidence in his attempt to prove that the defendant had the requisite state of mind at the time of the shooting to support a conviction of second-degree murder. Similarly, a defendant may show his state of mind by circumstantial evidence to establish that he acted in self-defense. A ruling to the contrary compromises a defendant's privilege against self-incrimination and his right to have the prosecutor prove beyond a reasonable doubt that he was not acting in self-defense. 101*101 See US Const, Am V; CJI 7:9:06. By refusing to instruct the jury on self-defense, the trial court deprived the defendant of his primary defense.

Reversed.

KAVANAGH, C.J., and WILLIAMS, LEVIN, COLEMAN, FITZGERALD, and BLAIR MOODY, JR., JJ., concurred.

RYAN, J. *(dissenting).*

I dissent from the Court's decision to review the judgment of the Court of Appeals in this case and its consequent reversal of the defendant's eight-year-old conviction of manslaughter.

The record evidence is that the defendant shot and killed his victim, Stanley Bolds, on October 13, 1971. Charged with murder, the defendant was permitted to plead guilty to the lesser charge of manslaughter, albeit over the objection of the prosecuting attorney who wished to proceed on the murder charge. Following the plea of guilty of manslaughter and entry of a judgment thereon, the prosecuting attorney appealed the trial court's decision to allow the guilty plea to the lesser charge. After obtaining an unsatisfactory result in the Court of Appeals, the prosecutor succeeded in obtaining an order from this Court reversing the defendant's plea-based conviction and returning the matter for further proceedings. *Genesee Prosecutor v Genesee Circuit Judge,* 391 Mich 115; 215 NW2d 145 (1974).

On May 8, 1974, following a jury trial on the charge of murder, the defendant was convicted of second-degree murder and sentenced to serve 20 to 35 years in prison. Again appeal was taken to the Court of Appeals and on December 10, 1975 the second-degree murder conviction was affirmed in an unpublished per curiam opinion. Thereupon, 102*102 claiming indigency, the defendant requested the appointment of counsel for a further appeal to this Court. His request was granted and counsel was appointed on August 13, 1976.

It was not until 12 months later, on August 19, 1977, that appointed appellate counsel got around to filing, in this Court, a delayed application for leave to appeal the decision of the Court of Appeals.

The general court rule governing the time within which an application for leave to appeal from a decision of the Court of Appeals may be filed is GCR 1963, 853.2(1) which in relevant part provides:

"Application for leave to appeal to the Supreme Court shall be filed with the clerk of the Supreme Court within 20 days after mailing by clerk of the Court of Appeals of notice to counsel of entry of the order of the Court of Appeals or the denial of an application for rehearing timely filed."

On the record before us, the last day for filing an application for leave to appeal was December 31, 1975.

For cases in which the plain mandate of the foregoing rule is not met, subsection (3) of subrule .2 of Rule 853 authorizes limited delayed appeals in the following language:

"Delayed application for leave to appeal may be filed upon a showing by affidavit *of facts* that the delay was not due to appellant's culpable negligence *but no such application shall be filed later than six months after the decision of the Court of Appeals.*"

Plainly, two requirements must be met before a delayed application for leave to appeal may even 103*103 be filed in the Michigan Supreme Court, to say nothing of affording predicate for relief.

First, the application must be accompanied by an affidavit reciting *facts* that the delay was not due to the culpable negligence of the appellant and second, the application must be filed not later than six months after the decision of the Court of Appeals.

The appellant before the Court in the instant case has not complied with either of these conditions.

Ignoring the provision of subsection (3) of the rule which requires the filing of an affidavit of facts, the State Appellate Defender filed instead an affidavit containing no facts whatever, but merely the conclusionary assertion that the delay in filing the application was not due to the appellant's culpable negligence.

Further ignoring the command of the rule that "no such application shall be filed later than six months after the decision of the Court of Appeals", counsel for the appellant, nevertheless, filed the application for delayed appeal 12 months after the appointment of counsel by the trial court and 20 months after the decision of the Court of Appeals.[1]

In fairness to counsel from the State Appellate Defender's Office, it should be observed here that she is fortified in her disregard of our court rule 104*104 by the consistent record of this Court similarly disregarding the court rule by refusing to enforce it in innumerable cases in years past, as well as today.

This Court, recognizing that justice delayed is justice denied for the people of this state as well as for the defendants in criminal cases, and presumably subscribing to the notion that all litigation should come to an end someday, adopted GCR 1963, 853.2(3) in language which directs unmistakably and unambiguously that no delayed application

for leave to appeal may be filed in this Court more than six months after the decision of the Court of Appeals.

Since each of our rules is to be construed not only in accordance with the plain meaning of the words used, but insofar as possible in harmony with related rules, it is reasonable to calculate the period of delay in this case as running from the date upon which the trial court appointed appellate counsel at our invitation. As indicated, that was done on August 13, 1976. Consequently, even by that generous construction of the rule, the last day upon which a delayed application for leave to appeal could have been filed properly in this Court was February 13, 1977 and not August 19, 1977 as was the case.

The wisdom of a rule which fixes some day as the time after which an appeal may not be taken, and after which we shall not review untimely appeals, is no better illustrated than in this case.

The killing in question for which the defendant attempted to plead guilty the first time around is now 7-1/2 years old. When the case was brought to trial in May of 1974, the key witness for the prosecution, Tom Harrington, had disappeared and his preliminary examination testimony was the 105*105 best the prosecution had to use at trial. Now, four more years have passed. While it is unknown whether other witnesses have died, disappeared, or left the jurisdiction, it is clear that, even if available, they will be required to call upon eight-year-old memories of the events in question.

The wisdom and fairness of a third trial aside, it is clear that obedience to the command of our own rules mandates a denial of leave in this case. When we begin to demonstrate a willingness to vote obedience to the law as it governs our own authority to review a case brought here, we can begin to expect corresponding obedience from the State Appellate Defender and others upon whom our rules are meant to be binding.

[1] Our court rules did not explicitly accommodate our practice, at the time here in question under then effective Administrative Order 1975-9, 395 Mich xliii, of appointing counsel for indigent criminal defendants for the purpose of preparing and filing applications for leave to appeal to this Court. Appellant should not, it is clear, be "charged with" the entire 20 months that elapsed between the decision of the Court of Appeals and the filing of the application for leave to appeal. Appellant's request for the appointment of counsel, filed with this Court on February 11, 1976, was not granted until July 14, 1976 and, as stated above, appointment was not made by the trial court until August 13, 1976. Here, *12* additional months passed before the application was filed.

People v Jackson

633 N.W.2d 825 (2001)

465 Mich. 390

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Michael T. JACKSON, Defendant-Appellant.

No. 117594.

Supreme Court of Michigan.

September 25, 2001.

Rehearing Denied and Opinion Modified November 8, 2001.

826*826 Michael T. Jackson, defendant, in propria persona.

PER CURIAM.

In 1985 the defendant was found guilty following a bench trial of first-degree murder, and his conviction was affirmed on appeal. In 1998, he filed a motion for relief from judgment under MCR subchapter 6.500. Relief was denied by the circuit court, and the Court of Appeals denied leave to appeal. Defendant has filed an application for leave to appeal to this Court. In addition to arguing the substantive issues, he maintains that the limitations on relief provided by MCR 6.508(D) should not apply to him because his conviction predated the effective date of the rule. He claims that it would constitute a due process violation to apply the rule retroactively to his case.

We conclude that the subchapter 6.500 procedures do apply to convictions before the effective date of the rule and that there is no constitutional impediment to doing so. On the facts of this case, the defendant has not established entitlement to relief as required by MCR 6.508(D), and the order of the circuit court denying relief is affirmed.

827*827 I

On December 13, 1983, a fourteen-yearold girl was beaten to death in her Saginaw County home. Attention focused on the defendant when it was learned that he had been there that day. Defendant was then sixteen years old, and thus proceedings began in the probate court. After several days of waiver hearings, the juvenile division of the probate court waived jurisdiction on August 20, 1984, and the defendant was bound over on a charge of first-degree (premeditated) murder.

Defendant waived a jury and presented an insanity defense, making no effort to dispute that he killed the victim. The circuit judge found him guilty as charged on April 18, 1985, and imposed the mandatory life sentence on May 31, 1985. Defendant's motion for a new trial was denied in an opinion issued November 21, 1986.

Defendant appealed, but the Court of Appeals affirmed on September 7, 1988.[1] We denied leave to appeal on April 25, 1989.[2] In his direct appeal, among other issues, the defendant raised claims regarding the waiver of jurisdiction by the juvenile division of the probate court and the admissibility of his confession.

In July 1998, the defendant filed a motion for relief from judgment in the Saginaw Circuit Court, once again challenging the waiver of juvenile court jurisdiction and the admissibility of his confession. He also argued that MCR 6.508(D) should not be applied retroactively to his case.

The circuit court's consideration of the motion took place in several stages. First, on August 12, 1998, the court[3] issued an opinion and order dealing with the issues regarding admissibility of the defendant's statement.

The court noted that the voluntariness of the defendant's statement had been tested in both the juvenile court and the circuit court with evidentiary hearings under *People v. Walker,* 374 Mich. 331, 132 N.W.2d 87 (1965), and resolved against the defendant. Further, on his initial appeal, the defendant raised for the first time the question of police compliance with former Juvenile Court Rule 3.3. The Court of Appeals held that no miscarriage of justice would result from failure to review the objections, but went on to say that despite the police failure to carry out their duties under JCR 3.3, defendant's statement was properly admitted under the totality of the circumstances.

Finally, the circuit court addressed the defendant's new claim that the confession was inadmissible as the product of an illegal arrest. The court discussed the issue at length, finding no error. It said:

While it is true that only a short time elapsed between defendant's seizure and statement, he was, during that period, twice advised of his *Miranda*[4] rights. Nor does

the Court find the police conduct in this case particularly flagrant or of such character as to justify the remedy sought. It is undeniable the police lacked probable cause to arrest defendant at his residence. They did, however, clearly have a right and need to question him about his presence at the victim's home and any knowledge he may have had of the killing. In this 828*828 regard, the entire purpose of taking him into custody was not to place him under arrest, but to hold him until he could properly be questioned in the presence of his father. Although there apparently was a failure to comply with all appropriate procedures governing questioning of a minor, the officers were at least aware that different procedures and rules applied and did their best to comply with them. There is nothing in this case to suggest that their actions were part of some illegal plan or scheme or product of improper motivation. As noted above, no attempt was made to question defendant until his father was present. Mr. Jackson was contacted as soon as possible, arriving at the post a short time after his son. Both of them were given *Miranda* warnings and the defendant made his statement. As noted by the Court of Appeals, there is nothing in the record to suggest that the father was not fully able to exercise his free will and protect the rights and interests of his son. Under the circumstances, the Court finds that any taint of initial police misconduct was sufficiently purged and the statement admissible under the Fourth Amendment. It follows that any neglect of trial or appellate counsel in failing to raise this issue was of no consequence. For the same reasons, it also follows that any consent obtained from the defendant and his father to search the premises in question was voluntary and otherwise proper, and that any evidence seized as the result of that consensual search was properly admitted at trial.

The court then turned to the other issue raised in the motion regarding the juvenile court's waiver of jurisdiction. The circuit court said that from the motion and supporting brief it could not say that the issue raised was without merit and that defendant was plainly not entitled to relief. Accordingly, the court ordered the prosecutor to respond to the motion.

Following the response, the court issued a second opinion and order on May 28, 1999, rejecting the defendant's claim. After reviewing the testimony, as well as the applicable legal principles, the court concluded:

Having reviewed the testimony presented, this Court is not left with any firm and definite conviction defendant was improperly waived to the adult system. Although there was sufficient indication that Michael was amenable to treatment and that the juvenile system could provide the type of treatment required, the evidence and testimony clearly supports the conclusion that there simply was not enough time to sufficiently resolve the underlying psychological problems that helped trigger this tragic event before Michael reached nineteen and juvenile jurisdiction ended, and that he would likely remain a danger to the public if released at that time. Nor does the Court find, as suggested by defendant, that the Probate Judge ignored key testimony or otherwise misinterpreted the evidence. In this regard, the Court notes that while Michael could have been placed in Yorkwood and then transferred to the adult unit at Ypsilanti State Hospital at age eighteen, there would be no way to ensure continued treatment after age nineteen except through a petition for involuntary commitment and

hospitalization. Although Judge Barber made no mention of Yorkwood in his opinion, he apparently found, and this Court agrees, that the scenario envisioned by defendant was neither likely [n]or viable. In summary, the Court finds the decision to waive jurisdiction to be supported by substantial and credible evidence on the record.

> *829*829 It follows that any claim of ineffective assistance of counsel must also fall.*

Defendant filed a delayed application for leave to appeal. The Court of Appeals denied the application, "for failure to meet the burden of establishing entitlement to relief under MCR 6.508."[5]

II

Subchapter 6.500 of the Michigan Court Rules, containing the procedure for motions for relief from judgment, was added by order of March 30, 1989, and was effective October 1, 1989. It was part of an overall revision of the rules governing criminal procedure. The amendments adopted at that time included several related provisions applicable to criminal appeals, including the addition of MCR 7.205(F)(2), limiting a criminal defendant to a single appeal by right or leave from a conviction, and the amendment of MCR 7.205(F)(3) to make the eighteen-month limit[6] on granting delayed application for leave to appeal applicable to criminal cases.

The rules themselves, and the order adopting them, did not say anything about the applicability of the rules to cases that had already been commenced or cases involving crimes committed before the effective date of the amendments. The general provision of the Michigan Court Rules regarding the application of the rules to pending actions is MCR 1.102, which provides:

> *These rules take effect on March 1, 1985. They govern all proceedings in actions brought on or after that date, and all further proceedings in actions then pending. A court may permit a pending action to proceed under the former rules if it finds that the application of these rules to that action would not be feasible or would work injustice.*

Those principles have been applied not only to the initial adoption of the rules, but also to later adopted or amended rules. See *Reitmeyer v. Schultz Equipment & Parts Co.,* 237 Mich.App. 332, 337, 602 N.W.2d 596 (1999). Subchapter 6.500 has been consistently applied in cases involving convictions and appeals concluded before October 1, 1989, by both this Court and the Court of Appeals. See, e.g., *People v. Reed,* 449 Mich. 375, 535 N.W.2d 496 (1995); *People v. Carpentier,* 446 Mich. 19, 521 N.W.2d 195 (1994); *People v. Ross,* 242 Mich.App. 241, 618 N.W.2d 774 (2000); *People v. Watroba,* 193 Mich.App. 124, 483 N.W.2d 441 (1992).[7]

III

MCR 6.508(D) provides the standards for determining whether a defendant is entitled to relief:

> *(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion*
>
> *(1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;*

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this 830*830 subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

> *(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates*
>
> *(a) good cause for failure to raise such grounds on appeal or in the prior motion, and*
>
> *(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,*
>
> *(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;*
>
> *(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;*
>
> *(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;*
>
> *(iv) in the case of a challenge to the sentence, the sentence is invalid.*

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

The requirements of showing good cause for failure to raise the issue on direct appeal and prejudice from the alleged error to entitle a defendant to relief are derived from United State Supreme Court decisions involving federal habeas corpus challenges to state convictions and collateral review of federal ones. See *Wainwright v. Sykes,* 433 U.S.

72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *United States v. Frady,* 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982); *Davis v. United States,* 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). The provision of subrule (D)(2) regarding issues that were decided against the defendant in a prior appeal state familiar principles drawn from the doctrines of res judicata and law of the case.

Before the adoption of subchapter 6.500 and the related appellate procedure provisions, our rules were silent on the matter of delayed motions for new trial. We had said that the courts do not look with favor on such long delayed motions, *People v. Barrows,* 358 Mich. 267, 272, 99 N.W.2d 347 (1959), but there was no bar to repeated filings of such motions without any limitation period. *Id.,* p. 273, 99 N.W.2d 347; *Reed, supra* at 388, 535 N.W.2d 496.[8]

IV

The defendant makes no claim that on their face the provisions of subrule (D)(3) are unconstitutional. Such a claim would be futile in light of the United States Supreme Court's recognition of those standards. Rather, the defendant argues that it constitutes a denial of due process to apply MCR 6.508 to him, because his crime, conviction, and direct appeal occurred before the effective date of 831*831 the rule. He relies principally on *Rogers v. Howes,* 144 F.3d 990 (C.A.6, 1998).

Rogers was a habeas corpus proceeding under 28 U.S.C. 2254. The defendant had been convicted of first-degree murder in 1965. In 1992, he filed a motion for relief from judgment, which the trial court denied on the ground that the defendant failed to raise the claims on direct appeal and did not establish good cause for the failure to do so. The defendant filed a habeas corpus petition in United States District Court, which held that because the issues raised were procedurally defaulted under Michigan law, it could not review the claims. However, the United States Court of Appeals for the Sixth Circuit reversed, concluding that the MCR 6.508(D)(3) procedure was not "a firmly established and regularly followed rule of the Michigan courts at the time of petitioner's conviction...." *Id.* at 995. Thus, it did not constitute "an adequate and independent state ground" barring review of petitioner's habeas petition in federal court. *Id.*

Defendant's reliance on *Rogers* is misplaced. *Rogers* did not hold that the defendant is denied due process by application of MCR 6.508(D)(3) to his motion. Rather, *Rogers* must be understood in the context of federal habeas corpus review of state court convictions. The federal courts will not review a habeas corpus petition where the state prisoner has not first presented his federal claims to the state courts and exhausted all state court remedies available. See, e.g., *Rust v. Zent,* 17 F.3d 155, 160 (C.A.6, 1994). Further, when a habeas corpus petitioner is denied the opportunity to present a federal claim in state court because of failure to comply with state procedural rules, that decision may

preclude habeas corpus review where the state procedural rule constitutes an "independent and adequate state procedural ground" for the decision. *Wainwright, supra* at 87, 97 S.Ct. 2497. Under federal law, a procedural bar does not operate to preclude federal habeas corpus review unless it is (1) independent of the federal claim at issue, (2) serves as an adequate basis for barring review, and (3) was "firmly established and regularly followed" at the time to which the rule is to be applied. See *Ford v. Georgia,* 498 U.S. 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). In *Rogers,* the Sixth Circuit concluded that MCR 6.508 was not such a firmly established and regularly followed rule at the time of the petitioner's conviction and appeal, and thus the federal court was not barred from considering the habeas corpus petition.

Thus, viewed in context, *Rogers* does not constitute authority that Michigan courts may not apply MCR 6.508(D) retroactively, but only that our decision to do so will not restrict the federal courts in exercise of their authority under 28 U.S.C. 2254.

V

That leaves the question whether application of MCR subchapter 6.500 to the defendant's conviction denies due process. The principles are similar to those regarding retroactive application of statutes that are alleged to impair vested rights. In general, an act relating to remedies or modes of procedure may be given retroactive effect. As we said in *In re Certified Questions (Karl v. Bryant Air Conditioning Co.),* 416 Mich. 558, 572, 331 N.W.2d 456 (1982):

[R]etrospective application of a law is improper where the law "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past".

> *832*832 Hughes [v. Judges' Retirement Bd., 407 Mich. 75, 85, 282 N.W.2d 160 (1979)].*
>
> *"Statutes related to remedies or modes of procedure which do not create new or take away vested rights, but only operate in furtherance of a remedy or confirmation of rights already existing will, in the absence of language clearly showing a contrary intention, be held to operate retrospectively and apply to all actions accrued, pending or future, there being no vested right to keep a statutory procedural law unchanged and free from amendment." [Quoting Hansen-Snyder Co. v. General Motors Corp., 371 Mich. 480, 124 N.W.2d 286 (1963) (headnote no. 1).]*

See also *Romein v. General Motors Corp.,* 436 Mich. 515, 531, 462 N.W.2d 555 (1990), aff'd.503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992).

On the related question whether retroactive procedural statutes violate the constitutional prohibition on ex post facto laws, we have explained that not every enactment that works to the detriment of a party constitutes such a violation. See *People v. Russo,* 439 Mich. 584, 592-593, 487 N.W.2d 698 (1992):

> *The United States Supreme Court has consistently held that the Ex Post Facto Clause, U.S. Const, art I, § 10, cl 1, was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit legislative control of remedies and procedure that do not affect matters of substance. In Dobbert v. Florida, 432 U.S. 282, 292-293, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), the Court stated:*
>
> *"It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which, was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.*

* * *

> *"Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto. For example, in Hopt v. Utah, 110 U.S. 574, [4 S.Ct. 202, 28 L.Ed. 262] (1884), as of the date of the alleged homicide a convicted felon could not have been called as a witness. Subsequent to that date, but prior to the trial of the case, this law was changed; a convicted felon was called to the stand and testified, implicating Hopt in the crime charged against him. Even though this change in the law obviously had a detrimental impact upon the defendant, the Court found that the law was not ex post facto because it neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict. Id. at 589, 4 S.Ct. 202."*
>
> *An enactment will not escape a court's scrutiny under the Ex Post Facto Clause merely because a legislature has given it a procedural label. However, legislation will not be found violative of the clause simply because it works to the disadvantage of the defendant.*[9]

We can discern no theory upon which the defendant can be said to have a vested right in the procedures—or lack thereof— for bringing long delayed challenges to criminal convictions extant before the 833*833 adoption of MCR subchapter 6.500. In 1989, the defendant had been convicted, that judgment had been affirmed by the Court of Appeals, and we denied leave to appeal. At that point, the judgment was final. The defendant had no due process or other constitutional right to further review of his convictions. See *Pennsylvania v. Finley,* 481 U.S. 551, 556-557, 107 S.Ct. 1990, 95 L.Ed.2d

539 (1987); *McKane v. Durston,* 153 U.S. 684, 687-688, 14 S.Ct. 913, 38 L.Ed. 867 (1894). There being no vested right in such procedures, there is no due process impediment to subjecting the defendant to the new subchapter 6.500 procedure.

The federal courts have faced similar questions regarding the limitations on second or successive petitions recently adopted as part of the Antiterrorism and Effective Death Penalty Act. PL 104-132, 110 Stat 1214 (1996). Those restrictions have been applied even where the petitioner's first petition preceded the effective date of the statute. See, e.g., *Pratt v. United States,* 129 F.3d 54, 58 (C.A.1, 1997):

> *The filing dates of Pratt's two section 2255 petitions straddle AEDPA's effective date. On this basis, Pratt maintains that the question whether the statute applies to his second petition must be answered in the negative because doing so would place an impermissible retroactive burden on his petition. We disagree.*
>
> *We begin our analysis by remarking the obvious: applying a statute to a pleading that was filed after the statute's effective date is not really a "retroactive" application in the classic sense. Here, moreover, we know on the best of authority that Congress intended that AEDPA apply to all section 2255 petitions filed after its effective date (April 24, 1996). See Lindh v. Murphy, 521 U.S. 320, 325-326, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997).*
>
> *We know, too, that the Supreme Court recently and uncritically applied AEDPA to a prisoner's second habeas petition even though the prisoner had filed his first petition prior to AEDPA's enactment. See Felker [v. Turpin, 518 U.S. 651, 656-657, 116 S.Ct. 2333, 135 L.Ed.2d 827 (1996)]. Several courts of appeals have followed suit. See, e.g., In re Medina, 109 F.3d 1556, 1561-62 (C.A.11, 1997);Roldan v. United States, 96 F.3d 1013, 1014 (C.A.7, 1996); Hatch v. Oklahoma,92 F.3d 1012, 1014 (C.A.10, 1996). This approach is sound not only from a legal perspective but also from the standpoint of common sense. After all, if pre-AEDPA jurisprudence somehow attached to an entire course of post-conviction proceedings by virtue of a prisoner's having filed a preenactment petition at some point along the way, then the Court's opinion in Felker would be drained of all meaning.*

VI

Defendant also maintains that, concerning his claim regarding improper waiver of jurisdiction by the juvenile division of the probate court, he is not required to show good cause for failure to raise the matter on appeal or actual prejudice. MCR 6.508(D)(3) expressly excepts "jurisdictional defects." He maintains that the circuit court never properly obtained subject matter jurisdiction, entitling him to review of the issue.

Regardless of whether this claim is a jurisdictional one within the meaning of MCR 6.508(D)(3), the defendant is not entitled to relief. Pursuant to MCR 6.508(D), "[t]he defendant has the burden of establishing entitlement to the relief requested." The circuit judge's second opinion discussed the merits of the juvenile 834*834 court waiver issue and found it to be without merit. Accordingly, the defendant failed to establish his entitlement to relief. Thus, the defendant has not been deprived of review of that issue by the operation of subrule (D)(3).

VII

In addition to his arguments regarding the applicability of MCR 6.508, the defendant argues that he had shown good cause for failing to raise the issues in his appeal of right because of prior counsel's ineffectiveness in dismissing the juvenile waiver appeal and in failing to raise the police violation of JCR 3.3. As noted earlier, the circuit judge carefully reviewed and discussed the merits of these claims, finding them without merit. This, in effect, amounts to a determination that defendant failed to establish the prejudice aspect of the MCR 6.508(D)(3) standard. That made it unnecessary for the court to address the good cause question. See*Reed, supra* at 400-401, 535 N.W.2d 496.

We find no error in the judge's analysis of the prejudice question and therefore affirm.

CORRIGAN, C.J., and CAVANAGH, WEAVER, KELLY, TAYLOR, YOUNG, and MARKMAN, JJ., concurred.

[1] 171 Mich.App. 191, 429 N.W.2d 849 (1988).

[2] 432 Mich. 896 (1989).

[3] The circuit judge who presided at trial had retired, and the motion was assigned to his successor.

[4] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[5] Unpublished order, entered July 18, 2000 (Docket No. 225416).

[6] Since shortened to twelve months.

[7] In addition, we have cited MCR 6.508 in numerous orders denying leave to appeal from denial of motions for relief from judgment. E.g., *People v. Davis,* 440 Mich. 866, 486 N.W.2d 722 (1992); *People v. Dunham-Bey,* 441 Mich. 855, 489 N.W.2d 766 (1992); *People v. Yousif,* 444 Mich. 878, 511 N.W.2d 683 (1993); *People v. Selby,* 452 Mich. 874, 552 N.W.2d 176 (1996).

[8] We reiterate the principle stated in *Barrows* that long-delayed motions seeking relief from convictions are disfavored. See *People v. Ward,* 459 Mich. 602, 611-614, 594 N.W.2d 47 (1999).

[9] For a similar analysis of the retroactive effect of the new federal limits on habeas corpus relief, see *Libby v. Magnusson,* 177 F.3d 43, 46-47 (C.A.1, 1999).

People v Kimble

684 N.W.2d 669 (2004)

470 Mich. 305

PEOPLE of the State of Michigan, Plaintiff-Appellant,

v.

Richard A. KIMBLE, Defendant-Appellee.

Docket No. 122271. Calendar No. 1.

Supreme Court of Michigan.

Argued January 13, **2004**.

Decided June 29, **2004**.

670*670 Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, Michael E. Duggan, Prosecuting Attorney, Timothy A. Baughman, Chief of Research, Training, and Appeals, and Janet A. Napp and Jeffrey Caminsky, Assistant Prosecuting Attorneys, Detroit, MI, for the **people**.

Craig A. Daly, P.C., Detroit, MI, for the defendant.

MARKMAN, J.

We granted leave to appeal to consider whether defendant is entitled to resentencing where the trial court improperly scored offense variable 16 (OV 16), M.C.L. § 777.22(1). Defendant's minimum sentence, as a result, exceeds the appropriate sentencing guidelines range, and the trial court did not articulate a substantial and compelling reason for this departure. Defendant did not argue that OV 16 should not be scored until filing his application for 671*671 leave to appeal with the Court of Appeals. The Court of Appeals concluded that defendant is entitled to resentencing because the scoring of OV 16 was plain error. We affirm the decision of the Court of Appeals.

I. FACTS AND PROCEDURAL HISTORY

Defendant shot and killed the victim so he could steal the car she was driving for its wheel rims. Following a bench trial, defendant was convicted of second-degree murder and possession of a firearm while committing or attempting to commit a felony (felony-firearm). The trial court sentenced defendant to consecutive prison terms of thirty to seventy years for the second-degree murder conviction and two years for the felony-firearm conviction. The issue here pertains only to defendant's sentence for second-degree murder.

At sentencing, defendant argued that OV 16, which considers the "property obtained, damaged, lost or destroyed," should be scored at one point because the stolen car had a value of $200 or more, but not more than $1,000, while the prosecutor argued that OV 16 should be scored at five points because the stolen car had a value of $1,000 or more, but not more than $20,000. The trial court scored OV 16 at five points. Without the five points, the appropriate minimum sentence range would have been 180 to 300 months, but, with the five points, the minimum sentence range was 225 to 375 months.[1] The trial court sentenced defendant to a minimum term of 360 months for second-degree murder.

Defendant appealed, arguing that OV 16 should not even have been scored because it is only to be scored in crimes against the person if the offense is home invasion. M.C.L. § 777.22(1). The prosecutor agreed that it should not have been scored, but argued that defendant waived the error.

The Court of Appeals unanimously affirmed defendant's convictions, but, in a split decision, remanded for resentencing.[2] We granted the prosecutor's application for leave to appeal and held defendant's cross-application in abeyance.[3]

II. STANDARD OF REVIEW

This case presents an issue involving the interpretation of a statute and a court rule, which is a question of law that we review de novo. ***People*** *v. Petit,* 466 **Mich**. 624, 627, 648 N.W.2d 193 (2002).

III. ANALYSIS

Under the statutory sentencing guidelines, the trial court must score the applicable offense and prior record variables to determine the appropriate range for the minimum sentence. When the sentencing offense is a "crime against a person," as in this case, OV 16 is to be scored only where the sentencing offense is home invasion or attempted home invasion. M.C.L. § 777.22(1). The sentencing offense in this case is second-degree murder. Therefore, the trial court clearly erred in scoring OV 16. Although defendant argued at sentencing that OV 16 should be scored at one point instead of five points, defendant did not raise the argument that OV 16 should not have been scored at *all* until he filed his application for leave to appeal with the Court of Appeals. An objection based on one ground is usually considered insufficient to preserve an appellate 672*672 attack based on a different ground. ***People*** *v. Bushard,* 444 **Mich**. 384, 390 n. 4, 508 N.W.2d 745 (1993).

M.C.L. § 769.34(10) provides:

> *If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.*

The Court of Appeals majority concluded that § 34(10) precludes appellate review if the sentence is within the appropriate guidelines range and the party failed to raise the issue at sentencing, in a motion for resentencing, or in a motion to remand. However, § 34(10) does not preclude appellate review if the sentence is outside the appropriate guidelines range, even if the party failed to raise the issue at sentencing, in a motion for

resentencing, or in a motion to remand. Accordingly, the majority concluded that appellate review is not precluded in this case because the sentence here is outside the appropriate guidelines range.

The Court of Appeals dissent, on the other hand, concluded that a scoring error resulting in a sentence that is outside the appropriate guidelines sentence range is not appealable under § 34(10) unless it was raised at sentencing, in a motion for resentencing, or in a motion to remand. By contrast, a sentence that is outside the appropriate guidelines sentence range because inaccurate information was relied upon is appealable even if it was not raised at sentencing, in a motion for resentencing, or in a motion to remand.

We agree with the Court of Appeals majority that there is no basis in the statute for treating these two types of challenges differently. We also agree with the Court of Appeals majority that, pursuant to § 34(10), a sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. However, if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.

Under the Court of Appeals dissent's view and the view of the dissenting justices of this Court, a scoring error that results in a sentence that is outside the appropriate guidelines sentence range would not be appealable unless it was preserved in one of the ways listed in the second sentence of § 34(10). We respectfully disagree. The first sentence of § 34(10) provides that a sentence that is within the appropriate guidelines sentence range is not appealable unless there was a scoring error or inaccurate information was relied upon. The necessary corollary of this statement is that a sentence that is *outside* the appropriate guidelines sentence range *is*appealable.

The second sentence of § 34(10) provides that, even though a sentence that is within the appropriate guidelines sentence range can be appealed if there was a scoring error or inaccurate information was 673*673 relied upon, it can only be appealed if the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand. In other words, the second sentence simply describes *how* a party must preserve a challenge to a sentence that is within the appropriate guidelines sentence range; it says nothing about a challenge to a sentence that is outside the appropriate guidelines sentence range.[4]

Because defendant's sentence is outside the appropriate guidelines sentence range, his sentence is appealable under § 34(10), even though his attorney failed to raise the precise issue at sentencing, in a motion for resentencing, or in a motion to remand. However, because defendant failed to raise the argument that OV 16 is not applicable at all until his application for leave to appeal with the Court of Appeals, defendant must satisfy the plain error standard set forth in ***People*** *v. Carines,* 460 **Mich**. 750, 763, 597 N.W.2d 130 (1999). That is, defendant must show that

> *1) error ... occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [Id. at 763, 597 N.W.2d 130.]*

In addition, defendant must show that the "error resulted in the conviction of an actually innocent defendant" or that the "error `seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings....'" *Id.* (citation omitted).

First, as explained above, there was clearly error in this case and the prosecutor concedes that the trial court erred in scoring OV 16. Second, the error was plain and the prosecutor concedes that the error was plain. M.C.L. § 777.22(1) could not be more clear that OV 16 is simply not to be scored where the sentencing offense is second-degree murder. Third, defendant was clearly prejudiced by this error. As a result of the error, defendant received a sentence five years in excess of that permitted by the properly scored sentencing guidelines. Finally, this error "seriously affect [ed] the fairness, integrity [and] public reputation of judicial proceedings." *Id.* It is difficult to imagine what could affect the fairness, integrity and public reputation of judicial proceedings more than sending an individual to prison and depriving him of his liberty for a period longer than authorized by the law.[5] Accordingly, defendant is entitled to resentencing under § 34(10).

674*674 The Court of Appeals dissent concluded that even if § 34(10) does not preclude relief, MCR 6.429(C) does. MCR 6.429(C) provides:

> *A party may not raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party has raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Any other challenge may be brought only by motion for relief from judgment under subchapter 6.500.*

We agree with the Court of Appeals dissent that, under this court rule, a scoring error is not appealable unless it was raised at or before sentencing, regardless of whether the resulting sentence is inside or outside the appropriate guidelines sentence range, except by way of a motion for relief from judgment under subchapter 6.500.

Although defendant did not raise the precise scoring error at or before sentencing, defendant is clearly entitled to relief under MCR 6.508(D)(3). In order to be entitled to relief under MCR 6.508(D)(3), both "good cause" and "actual prejudice"[6] must be established. "Good cause" can be established by proving ineffective assistance of counsel. ***People*** *v. Reed,* 449 **Mich**. 375, 378, 535 N.W.2d 496 (1995). To demonstrate ineffective assistance, it must be shown that defendant's attorney's performance fell below an objective standard of reasonableness and this performance prejudiced him. ***People*** *v. Pickens,* 446 **Mich**. 298, 338, 521 N.W.2d 797 (1994). At oral argument, the prosecutor conceded that defendant would be entitled to relief on the basis of ineffective assistance of counsel and defendant's appellate counsel, who was also his trial counsel, admitted that OV 16 was scored where it obviously should not have been, that he failed to bring this error to the court's attention, and that this failure ultimately

resulted in a minimum sentence that exceeds the upper limit of the appropriate guidelines sentence range by five years. Under these circumstances, it is clear that both "good cause" and "actual prejudice" have been established.

Because we find that defendant is entitled to relief under both the statute and the court rule, it is unnecessary for us to decide whether the court rule or the statute controls.[7]

IV. CONCLUSION

We affirm the decision of the Court of Appeals and remand this case to the circuit court for resentencing.

MICHAEL F. CAVANAGH, MARILYN J. KELLY and TAYLOR, JJ., concurred with MARKMAN, J.

WEAVER, J. (*concurring in part and dissenting in part*).

I concur in the majority's conclusion that a scoring error is not appealable under MCR 6.429(C) as currently drafted unless it was raised at or before sentencing, regardless of whether the resulting sentence was inside or outside the appropriate guidelines sentence range. However, I dissent from the majority's interpretation 675*675 of M.C.L. § 769.34(10) and its order remanding this case for resentencing on the basis of MCR 6.508(D)(3).

I agree with the Court of Appeals dissent by Judge GRIFFIN and would hold that M.C.L. § 769.34(10) requires that defendant preserve alleged errors in the scoring of offense variables and that the plain error doctrine does not justify reversal of defendant's conviction in this case. I would affirm defendant's sentence.

It is undisputed that offense variable 16 (OV 16) is not applicable to this case. The question before the Court is whether defendant can challenge the scoring of the offense variable when he failed to raise the issue at sentencing, in a motion for resentencing, or in a motion to remand filed in the Court of Appeals. Regarding this question, M.C.L. § 769.34(10) provides:

> *If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.*

The first sentence of the statute governs when the Court of Appeals may remand for resentencing when a minimum sentence is within the appropriate guidelines sentence range. Those circumstances are limited to where there is an "error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence."

The second sentence of the statute shifts the focus to when a party is permitted under M.C.L. § 769.34(10) to raise on appeal an issue "challenging the scoring of the sentencing guidelines or the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range...." The second sentence provides that neither issue can be raised "unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals."

This case involves a scoring error that caused a sentence to fall outside the appropriate guidelines sentence range. Thus, we consider whether the Legislature intended to limit appeals of scoring errors regardless of whether the sentence was within or outside the appropriate guidelines sentence range.

The majority concludes that there is no basis in the statute to conclude that the Legislature intended to limit appeals of scoring errors differently from challenges to the accuracy of the information relied on in determining a sentence. The majority bases this conclusion, however, on its interpretation of the first sentence of the statute, not the second sentence at issue in this case. The majority reasons:

> *The first sentence of § 34(10) provides that a sentence that is within the appropriate guidelines sentence range is not appealable unless there is a scoring error or inaccurate information is relied upon. The necessary corollary of this statement is that a sentence that is outside the appropriate range is appealable. [Ante at 672 (emphasis in original).]*

I respectfully disagree with the majority's logic. As noted above, the first sentence of the statute addresses when the Court of Appeals may remand for resentencing, 676*676 not when a party may appeal. The first sentence allows the Court of Appeals to remand for resentencing scoring errors if a minimum sentence is within the appropriate guidelines sentence range. However, the plain language of the second sentence reveals that the only scoring errors that the Legislature intended the Court of Appeals to review at all are those that were preserved by a party "at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." As reasoned by Judge GRIFFIN'S Court of Appeals dissent in part:

> *There are two disjunctive phrases — "challenging the scoring of the sentencing guidelines" and the "challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range" — that establish two distinct and separate situations to which the statute applies. Only the former circumstances apply herein, where defendant is "challenging the scoring of the sentencing guidelines...." ...*
>
> *In the present case, the alleged scoring error issue has been forfeited because defendant failed to "raise[ ] the issue at sentencing, in a proper motion for resentencing, or in a*

proper motion to remand filed in the court of appeals." M.C.L. § 769.34(10). [252 ***Mich****.App. at 285-286, 651 N.W.2d 798.]*

Thus, I would hold that pursuant to M.C.L. § 769.34(10), defendant cannot challenge the scoring of OV 16 because he did not raise the issue as required by the statute. I also agree with Judge GRIFFIN'S conclusion that the scoring error does not qualify as plain error that seriously affected the fairness, integrity or public reputation of judicial proceedings under***People*** *v. Carines,* 460 **Mich**. 750, 597 N.W.2d 130 (1999).

The majority also premises its decision to order resentencing on its conclusion sua sponte that defendant is entitled to relief from judgment under MCR 6.508(D)(3). The majority's eagerness to serve as advocate, trial judge, and appellate court is unnecessary and inappropriate. First, it cannot be assumed that defendant will file a motion for relief from judgment. Second, there is no guarantee that defendant would carry the burden of establishing entitlement to the relief requested under MCR 6.508(D). Without the benefit of argument and briefing, I would not step into the shoes of the trial court and decide an issue that has not even been raised by a party. Third, the possibility that defendant could successfully file a motion for relief from judgment does not necessitate concluding that defendant would in this case, because the defendant is free to file such a motion regardless of how the question of statutory interpretation is resolved.

In conclusion, I concur in the majority conclusion that a scoring error is not appealable under MCR 6.429(C) as currently drafted unless it was raised at or before sentencing, regardless whether the resulting sentence was inside or outside the appropriate guidelines sentence range.

However, I dissent from the majority's interpretation of M.C.L. § 769.34(10) and its order remanding this case for resentencing on the basis of MCR 6.508(D)(3) and *Carines.* I would hold that M.C.L. § 769.34(10) requires that defendants preserve alleged errors in the scoring of offense variables and that the plain error doctrine requires no other result. I would affirm defendant's sentence.

CORRIGAN, C.J., and YOUNG, J., concurred with WEAVER, J.

[1] If OV 16 were scored at one point, as defendant argued at sentencing, the minimum sentence range would have been 180 to 300 months.

[2] 252 **Mich**.App. 269, 651 N.W.2d 798 (2002).

[3] 468 **Mich**. 870, 659 N.W.2d 231 (2003).

[4] The dissenting justices argue that the first and second sentences of the statute address two totally different issues: the first sentence addresses under what circumstances the Court of Appeals may remand for resentencing, while the second sentence addresses under what circumstances a party may appeal. *Post* at 675-676. The first sentence states that "the court of appeals shall affirm that sentence and shall not remand for resentencing...." § 34(10). The second sentence states that "[a] party shall

not raise on appeal...." *Id.* If the Court of Appeals must affirm the sentence, pursuant to the first sentence, the appellant will not enjoy relief. Likewise, if the appellant is unable to raise appellate issues, pursuant to the second sentence, the appellant will not enjoy relief. Although these sentences are worded differently, they both pertain to the same issue, namely, the circumstances under which a person may obtain sentencing relief.

[5] The dissenting justices conclude that "the scoring error does not qualify as plain error that seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings...." *Post* at 676. We respectfully disagree, and believe that sending a person to prison for a term several years in excess of what is permitted by the law sufficiently constitutes a plain error that seriously affects the fairness, integrity or public reputation of a judicial proceeding.

[6] Pursuant to MCR 6.508(D)(3)(b)(iv), with reference to a sentence, actual prejudice means that the sentence is invalid. Here, the sentence is invalid because it is five years in excess of the properly scored sentencing guidelines and devoid of any finding of substantial and compelling reasons to deviate from the properly scored guidelines range.

[7] Effective immediately, this Court has amended MCR 6.429(C) to conform with M.C.L. § 769.34(10).

People v Kohler

113 Mich. App. 594 (1981)

318 N.W.2d 481

PEOPLE

v.

KOHLER

Docket No. 53859.

Michigan Court of Appeals.

Decided November 23, 1981.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Michael W. LaBeau,* Prosecuting Attorney, and *James G. Petrangelo,* Assistant Prosecuting Attorney, for the people.

596*596 *Nora J. Pasman* and *John Nussbaumer,* Assistant State Appellate Defenders, for defendant on appeal.

Before: T.M. BURNS, P.J., and M.F. CAVANAGH and R.A. BENSON,[*] JJ.

PER CURIAM.

Defendant appeals as of right his June 12, 1980, convictions by a jury of manslaughter, MCL 750.321; MSA 28.553, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). On July 25, 1980, defendant was sentenced to a term of 2 to 15 years imprisonment for the manslaughter conviction and given a consecutive 2-year sentence for the felony-firearm conviction.

On the night of the shooting, defendant was staying at the home of his girlfriend. The deceased, Leroy Miller, was an old boyfriend of the defendant's girlfriend. The defendant knew that Miller was currently being sued by another man for injuries suffered as the result of a physical beating inflicted by the deceased.

On the evening of the shooting, Miller pushed his way into the home of the defendant's girlfriend and dumped beer on the defendant, his girlfriend, and one of their guests. He removed a television set from the apartment while it was playing and tried to make

numerous other forcible entries. After the victim left, the defendant retrieved a shotgun from his car and notified the police of the incident.

After the police left, the defendant's girlfriend locked the apartment's outer storm door and secured both the regular bolt lock and the chain lock on the inner door. She and the defendant went to 597*597 bed in the master bedroom adjacent to the front door.

Shortly after going to bed, the couple heard the front door being pulled open. The defendant put his pants on and grabbed his gun. They then heard the inner door being forced open and flying across the room. The defendant testified that as he heard the door fly open, he saw parts of the door moulding fly into his bedroom. The defendant then saw Miller and "pulled the trigger".

The defendant had his girlfriend call the police and an ambulance. The police found Miller lying on the floor breathing and defendant sitting on the bed in the bedroom. The defendant admitted shooting Miller. The police noticed that the inside door had been damaged with the entire board on one side of the door ripped off the wall. The lock mechanism and striker plate from the wall had been torn loose and were scattered on the floor.

Defendant raises three issues on appeal. He first argues that as a matter of law Miller's forcible entry gave defendant the right to shoot him. An unlawful entry into another person's home without any right to do so does not *ipso facto* give rise to a right on the part of the occupant to shoot the intruder. *People v Sizemore,* 69 Mich App 672, 676; 245 NW2d 159 (1976). In order for the occupant to make out a claim of self-defense, he must show that he had an honest and reasonable belief that he was in imminent danger of death or great bodily harm. *Id.,* 677. Deadly force cannot be used by an occupant of a dwelling to repel an entry if the occupant "can otherwise arrest or repel the assailant". *Pond v People,* 8 Mich 150, 177 (1860). Defendant's contention that a violent breaking and entering is sufficient in and of itself to justify shooting the intruder as a matter of law is erroneous. 598*598 The defendant's use of deadly force must have been "absolutely necessary" and without alternative. Accord, *Pond,* 177, *People v Oster (On Resubmission),* 97 Mich App 122, 132; 294 NW2d 253 (1980). Defendant was not, therefore, innocent as a matter of law.

The defendant next argues that the trial court erred in instructing the jury that the defendant had no right to shoot Miller without a further assault by Miller subsequent to the entry. The jury was instructed that in order for the defendant to have acted in self-defense, he must have acted out of a fear of death or serious bodily harm due "to an assault upon him by Leroy Miller". The judge restated the need for a finding of an assault by Miller upon the defendant to justify the use of deadly force and added that an illegal entry does not itself give the defendant a right to shoot the intruder.

These instructions may have misled the jury. They require a separate assault "upon the defendant" over and above the forcible entry. Such a requirement is not the law in Michigan. An occupant in fear of death or serious bodily harm may use deadly force to prevent or repel a forcible entry if no other alternative is available. *Pond, supra,* 177. There is no requirement that a separate subsequent assault be committed "upon the

defendant" when the intruder enters forcibly. The actual forcible entry can be enough in and of itself to put the occupant in fear of death or serious bodily harm. The trial court's instructions that the jury had to find the defendant "was assaulted by Leroy Miller" and that an illegal entry "does not by itself give that person the right to shoot the intruder" imposed the requirement of a separate assault subsequent to the entry. An illegal entry, 599*599 when forcible, is enough in and of itself to justify the use of deadly force when the occupant fears for his safety and there is no alternative means of preventing entry. The occupant need not wait for the intruder to commit a separate "assault upon him" and the jury should have been so instructed.

Although the defendant did not object to the improper instructions at trial, the error is not waived when the trial judge improperly instructed the jury on the law of the case. *People v Cooper,* 73 Mich App 660, 662; 252 NW2d 564 (1977), *People v Lenkevich,* 394 Mich 117, 123; 229 NW2d 298 (1975).

Defendant finally argues that the trial judge erred by not giving curative instructions after the prosecutor argued to the jury that hearsay statements used to impeach a witness could be used as substantive evidence of guilt.

Inconsistent out-of-court statements of a witness are admissible only for impeachment purposes and, since they would otherwise be hearsay, cannot be used as substantive evidence of the truth of the matter asserted. *People v White,* 401 Mich 482, 510; 257 NW2d 912 (1977). When a prior inconsistent statement has been admitted in order to impeach a witness, the trial judge should instruct the jury that the prior statement, not made under oath during the trial, cannot be used as substantive evidence of guilt. See CJI 4:5:01; MRE 801(d).

In *People v Eagger,* 4 Mich App 449; 145 NW2d 221 (1966), and in *People v Lamson,* 22 Mich App 365; 177 NW2d 204 (1970), this Court ruled that failure of a trial court to give such an instruction *sua sponte* is reversible error. This position was modified in *People v Mathis,* 55 Mich App 694, 697; 223 NW2d 310 (1974), where the Court added a three-part qualification to the automatic reversal rule of *Eagger* and *Lamson:*

600*600 "Where * * * there is no request for a limiting instruction, where there is no demonstration or likelihood of prejudice and where neither the court nor the prosecutor has suggested to the jury that the prior inconsistent statement could be used as substantive evidence, the trial judge's omission does not require a reversal."

The instant case, however, does not satisfy this three-part exception to the automatic reversal rule. Although there was no request for a limiting instruction, the prosecutor did comment to the jury that the prior inconsistent statement was substantive evidence of guilt. Accordingly, the failure of the trial court to instruct the jury that it could not use the impeachment evidence as substantive evidence of guilt requires reversal.

Reversed and remanded for a new trial.

[*] Circuit judge, sitting on the Court of Appeals by assignment.

People v Martin

100 Mich. App. 447 (1980)

298 N.W.2d 900

PEOPLE

v.

MARTIN

Docket No. 43993.

Michigan Court of Appeals.

Decided October 6, **1980**.

Frank J. Kelley, Attorney General, *Robert A. Derengoski,* Solicitor General, *Edward J. Grant,*450*450 Prosecuting Attorney, and *John L. Wildeboer,* Chief Appellate Attorney, for the **people**.

Susan Jane Smith, Assistant State Appellate Defender, for defendant on appeal.

Before: M.J. KELLY, P.J., and D.F. WALSH and BEASLEY, JJ.

D.F. WALSH, J.

Defendant, Ricky **Martin**, was convicted, in a nonjury trial, of prison escape. MCL 750.193; MSA 28.390. He was also found guilty of being a second felony offender. MCL 769.10; MSA 28.1082. He was sentenced to a prison term of one year and four months to seven years and six months, to be served consecutively to the sentence which was being served by him on the day of his escape.

Prior to trial the prosecution filed a motion *in limine* to exclude evidence of the anticipated defense of medical necessity. Defendant, another inmate, and the prison's

medical records administrator testified at the hearing on the motion. At the close of proofs, the trial court ruled that defendant would not be allowed to present the defense of medical necessity to a jury. The court's ruling was based on its evaluation of the evidence in light of the requirements set forth in***People*** *v Hocquard,* 64 **Mich App** 331, 337-338; 236 **NW2d** 72 (1975), *lv den* 397 **Mich** 833 (1976). Because of the court's ruling, defendant waived trial by jury. The defense presented no opening statement, no witnesses and no closing argument. The court found defendant guilty of prison escape.

The Supreme Court has recently reiterated the right of a criminal defendant, in a jury trial, to have the trier of fact instructed on a defense theory when there is a request for the instruction451*451 and evidence to support it. ***People*** *v Frederick Lester,* 406 **Mich** 252; 277 **NW2d** 633 (1979). Once the defendant has presented some supporting evidence, it is for the jury to determine, under proper instructions, its sufficiency. ***People*** *v Hoskins,* 403 **Mich** 95; 267**NW2d** 417 (1978).

In our judgment, the trial court in the instant case impermissibly invaded the province of the jury in prohibiting introduction of evidence of the defense of medical necessity. While we express no opinion as to the sufficiency of the evidence to justify an acquittal based thereon, our examination of the record convinces us that defendant presented some evidence on each of the following requisite elements.

I. There must be present, imminent and impending compulsion of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Threat of future injury is not sufficient. ***People*** *v Hocquard, supra,* 337.

Defendant testified that he had had problems with his feet and eyes. With particular reference to the latter, he testified that on the day he left the prison farm he had blacked out and had almost been run over by a hi-lo. According to defendant he had "a great fear of losing [his] eyesight".

II. There is no time to complain to the authorities or there is a history of futile complaints making any result from such complaints illusory. *Id.,* 337.

Defendant testified that he had complained several times about his eyes and the troublesome bunions on his feet. He had also complained of migraine headaches. According to defendant, an examination at the infirmary had revealed his 452*452 need for glasses. He did not receive the glasses until after the alleged escape. The two days preceding his leaving the prison farm, he had gone to the infirmary about his feet but had not been able to see a doctor. On the day he left, he complained to the foreman of migraine headaches and his feet.

III. There is no time or opportunity to resort to the courts. *Id.,* 337.

Defendant testified that he had not attempted to go to court for a writ of mandamus or other legal action to force the prison to give him medical treatment. He further testified, however, that he had a tenth grade education, he had never before been in legal trouble, there was no legal counselor at the prison farm, and he did not know what a

writ of mandamus was. According to defendant, he was not aware of any legal action which may have been available to him.

IV. There is no evidence of force or violence used towards prison personnel or other innocent persons in the escape. *Id.,* 337-338.

That this element was established is beyond dispute.

V. The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat. *Id.,* 338.

Defendant left the prison farm around 10 p.m. and was picked up by the police, on the road near another prison farm, at 10 a.m. the next day. According to defendant, his intention had been to seek medical help inside the main prison where he would have priority access to the infirmary. The sole prison hospital was also there.

We find that defendant presented some evidence in support of each of the elements of the defense of necessity. Except in "all but the clearest cases", ***People*** *v Harmon,* 53 **Mich App**482, 486; 220 453*453 **NW2d** 212 (1974), *aff'd* 394 **Mich** 625; 232 **NW2d** 187 (1975), the defense of necessity, like the analogous defense of duress, is a question for the jury. See ***People*** *v Luther,* 394 **Mich** 619, 622-623; 232 **NW2d** 184 (1975). Because defendant presented some competent evidence in support of his anticipated defense, the court erred in ruling that the defense could not be submitted to a jury. We reverse, therefore, and remand for a new trial.

Defendant also challenges his habitual offender conviction in several respects. His argument that it is impermissible to charge a prison escapee as an habitual offender has been rejected by the Supreme Court, ***People*** *v Shotwell,* 352 **Mich** 42; 88 **NW2d** 313 (1958), *cert den* 356 US 976; 78 S Ct 1141; 2 L Ed 2d 1149 (1958). Defendant's constitutional challenges have also been rejected. ***People*** *v Shastal,* 26 **Mich App** 347; 182 **NW2d** 638 (1970), ***People*** *v Potts,* 55**Mich App** 622, 634-638; 223 **NW2d** 96 (1974), *lv den* 396 **Mich** 826 (1976).

Defendant's final claim is that delay in filing the supplemental information precludes conviction on that charge. The original information charging defendant with prison escape was filed on June 23, 1978. The supplemental information charging him as an habitual offender was not filed until October 4, 1978. Defendant was tried and convicted on the escape charge on October 12, 1978. It is not disputed that the supplemental information was filed as a direct result of defendant's refusal to plead guilty to the escape charge.

In ***People*** *v Fountain,* 407 **Mich** 96; 282 **NW2d** 168 (1979), *reh den* 407 **Mich** 1152 (1979), the Supreme Court ruled that a prosecutor who has knowledge of a defendant's prior felonies must file habitual offender charges "promptly" if at all. *Fountain, supra,* 98. The Supreme Court cited two 454*454 purposes for the rule: the first was to provide fair notice to the accused; and the second was to avoid even the appearance of prosecutorial impropriety. *Fountain, supra,* 99.

With respect to the fair notice aspect of the *Fountain* decision, *Fountain* probably merely restates prior law. In ***People*** *v Stratton,* 13 **Mich App** 350; 164 **NW2d** 555 (1968), the proper procedure for the timing of the filing of the supplemental information was clearly described.

"Thus, as we now read sections 10, 11, 12 and 13, they contemplate 2 separate situations and procedures to be followed when the prosecutor desires to make possible the meting out of an increased penalty pursuant to the habitual criminal sections of the code of criminal procedure. The procedure set forth in section 13 is to be followed whenever it appears to the prosecutor `*after* conviction' of the current charge that the felon has a prior felony record. However, where it appears to the prosecutor before conviction of the current charge that the accused person is a prior felon, the accused person is to be informed against as a prior offender prior to conviction on the current charge; the procedure set forth in section 13 need not be followed." *Stratton, supra,* 356. (Footnote omitted.)

This procedure was approved by the Supreme Court in ***People*** *v Hatt,* 384 **Mich** 302; 181**NW2d** 912 (1970). In ***People*** *v Marshall,* 41 **Mich App** 66; 199 **NW2d** 521 (1972), however, this Court ruled that the *Stratton/Hatt* procedure was not mandatory at least in the sense that failure to follow it would not preclude a prosecutor from proceeding on a supplemental information when there was some legitimate reason for not following the procedure and there was no showing that any substantial prejudice resulted to the defendant from the delay. The prosecutor would be precluded from 455*455 proceeding on the supplemental information if delay for which there was no good reason substantially prejudiced the defendant.

"Clearly, the prosecutor has discretion to file a supplemental information under the habitual criminal act after conviction, and is not limited to filing such supplemental information prior to conviction of a current charge, where he has knowledge of the previous conviction." *Marshall, supra,* 72-73.

However,

"* * * where no good reason exists for the delay in filing a supplemental information charging the defendant as a subsequent offender, and the delay on the part of the prosecutor substantially prejudices defendant's rights, the filing of that supplemental information clearly denies defendant his right to due process of law." *Marshall, supra,* 74.

In ***People*** *v Hendrick,* 398 **Mich** 410; 247 **NW2d** 840 (1976), the Supreme Court cited *Marshall*without disapproval and ruled that the prosecutor's need to verify information contained in a rap sheet as to defendant's prior felonies was a legitimate reason for not following the *Stratton/Hatt*procedure. In his dissent in *Hendrick,* Justice LEVIN disagreed that verifying a rap sheet was a legitimate reason for delaying the filing of a supplemental information. He went on to describe forcefully the substantial prejudice which always results to a defendant who is required to go to trial on a criminal charge, or enter a plea of guilty, without notice that conviction on that charge will result in the filing of a supplemental information charging him as an habitual offender and

increasing the severity of the possible consequences of conviction on the original charge.

456*456 "While the habitual offender provisions of the Code of Criminal Procedure do not create a separate offense, providing rather for enhanced punishment for the current offense, fairness requires notice to the offender that he may face enhanced punishment where the prosecutor is aware, in advance of the trial on the current offense, of the offender's prior record.

"The severity of the potential punishment that may be imposed is often reflected in the processing and disposition of charges against offenders. Minor offenders often are not cited; if cited they may be permitted to dispose of the matter informally, paying a predetermined fine. Accused persons aware that they will be placed on probation often plead guilty without appointment of counsel or offering a defense. Counsel need not be appointed for indigent offenders who are charged with minor offenses not subject to incarceration.

"Increased resources are generally devoted to the prosecution and defense of persons charged with serious offenses carrying long sentences. The law recognizes in many ways that the amount of process required by ordinary notions of fairness depends in part on the potential impact on the accused of the conviction.

"The nature of the accused's response, the care with which he prepares to defend himself, will often depend on the severity of the potential punishment. It is overwhelmingly important to an accused whether upon conviction of a fourth felony, say of carrying a concealed weapon, the maximum sentence is five years or life.

"In this connection, it is noteworthy that persons sentenced as habitual offenders are not eligible for parole before the expiration of the minimum term without the sentencing judge's approval." *Hendrick, supra,* 423-424 (LEVIN, J. dissenting). (Footnotes omitted.)

If requiring a defendant to go to trial on a principal offense without notice that he will be charged as an habitual offender in the event of conviction on that offense is always substantially prejudicial to that defendant, as Justice LEVIN 457*457 suggests in his *Hendrick* dissent, then*Stratton, Hatt, Marshall* and *Hendrick* are all reconcilable with *Fountain* and reveal the pre-*Fountain* rule of law relative to the timing of the filing of a supplemental information charging the defendant as an habitual offender to be as follows:

(1) When the prosecutor had knowledge of a defendant's prior convictions, a supplemental information charging the defendant as an habitual offender was to be filed prior to the conviction of the defendant on the current charge. When the prosecutor learned of the defendant's prior convictions only after the conviction of the defendant on the current charge, the information charging the defendant as an habitual offender could be filed after conviction on the current charge *(Stratton/Hatt);*

(2) Failure to follow the *Stratton/Hatt* procedure would not preclude a prosecutor from proceeding on a supplemental information charging a defendant as an habitual offender unless

(a) no good reason existed for the delay in filing the supplemental information, and

(b) the delay substantially prejudiced the defendant's rights *(Marshall);*

(3) The need to verify information contained in a rap sheet was a "good reason" for delaying the filing of a supplemental information until after a defendant's conviction on the current offense*(Hendrick* — majority opinion);

(4) Requiring a defendant to go to trial on a criminal charge, or to enter a plea of guilty, without notice that upon conviction on that charge a supplemental information would be filed increasing the severity of the possible consequences of conviction was always substantially prejudicial to that defendant *(Hendrick* — LEVIN, J., dissent).

458*458 The decision of the Supreme Court in ***People*** *v Fountain, supra,* is consistent with the pre-*Fountain* rule which evolved from *Stratton, Hatt, Marshall* and *Hendrick.* Both Fountain and Jones were convicted of the current offenses with which they were charged prior to the filing of the informations charging them as habitual offenders. Since both were required to go to trial without proper notice of the severity of the possible consequences of conviction, both were substantially prejudiced, and prosecution of both habitual offender informations would have been precluded under the pre-*Fountain* rule.

In the case before us here, however, the supplemental information was filed a week prior to the trial of the defendant on the prison escape charge. It provided fair notice to the defendant of the severity of the possible consequences of conviction on that charge. Therefore, with respect to the accomplishment of the first purpose for the *Fountain* rule, to provide fair notice to the accused, we conclude that the supplemental information was filed "promptly".

It is with respect to the accomplishment of the second purpose of the *Fountain* rule, to avoid even the appearance of prosecutorial impropriety, that the *Fountain* decision changes the prior law relating to the timing of the filing of the supplemental information charging a defendant as an habitual offender.

Prior to *Fountain* the use of a potential habitual offender charge as a plea bargaining tool was not objectionable. *Bordenkircher v Hayes,* 434 US 357; 98 S Ct 663; 54 L Ed 2d 604 (1978),***People*** *v Roderick Johnson,* 86 **Mich App** 77, 78; 272 **NW2d** 200 (1978), ***People*** *v Sanders,*91 **Mich App** 737, 741; 283 **NW2d** 841 (1979), ***People*** *v Jones,* 83 **Mich App** 559, 569; 269**NW2d** 224 (1978). Therefore, 459*459 delay in filing the supplemental information until after plea negotiations terminated unsuccessfully, as happened in this case, would not have precluded a prosecutor from proceeding on an habitual offender charge as long as the defendant had fair notice of the prosecutor's intent to supplement prior to going to trial or entering a plea or was not otherwise prejudiced by the delay.

After *Fountain,* however, an habitual offender information will not be considered "promptly" filed unless it is filed at least prior to the initiation of any plea negotiations. Use of the threat of supplementation in plea negotiations will always, it seems to us, carry with it the appearance at least of an attempt by the prosecutor to coerce a guilty plea which may not otherwise have been offered. *Fountain* changes the previous law, therefore, in that in order to avoid even the appearance of prosecutorial impropriety it makes the *Stratton/Hatt* procedure mandatory in the sense that failure to follow it will preclude the prosecution from proceeding on an habitual offender charge even absent a showing of prejudice to the defendant resulting from delay in filing the supplemental information.

We have ruled, however, that this aspect of the *Fountain* decision should be applied prospectively only. ***People*** *v Taylor,* 99 **Mich App** 673; 299 **NW2d** 9 (**1980**). Since the defendant in this case was convicted prior to the date on which *Fountain* was decided, the prosecutor will not be precluded from again proceeding on the supplemental information in the event that the defendant is convicted of prison escape on retrial.

Defendant's convictions are reversed. The case is remanded for a new trial at which the defendant shall be permitted to present the defense of necessity.

People v Mateo

551 N.W.2d 891 (1996)

453 Mich. 203

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Raul I. MATEO, Defendant-Appellant.

Docket No. 96079, Calendar No. 9.

Supreme Court of Michigan.

Argued October 12, 1995.

Decided July 31, 1996.

892*892 Frank J. Kelley, Attorney General, Thomas L. Casey, Solicitor General, Richard Thompson, Prosecuting Attorney, Joyce F. Todd, Chief, Appellate Division, and Thomas R. Grden, Assistant Prosecuting Attorney, Pontiac, for the people.

State Appellate Defender by Robyn B. Frankel, Detroit, for defendant.

Donald Martin, President, John D. O'Hair, Prosecuting Attorney, and Timothy A. Baughman, Chief, Research, Training and Appeals, Lansing, for Amicus Curiae, Prosecuting Attorneys Association of Michigan.

David A. Moran, Detroit, for Amicus Curiae, Criminal Defense Attorneys of Michigan.

OPINION

BOYLE Justice.

We granted leave in this case to determine the standard of review on appeal of preserved error that does not involve a constitutional claim. We hold that M.C.L.A. §

769.26; M.S.A. § 28.1096 does not impinge on this Court's authority to determine practice and procedure and does not require a literal definition of miscarriage of justice. On direct review, the reviewing court is not to apply the standard for preserved constitutional error of harmless beyond a reasonable doubt,*People v. Anderson* (*After Remand*), 446 Mich. 392, 521 N.W.2d 538 (1994).

The statute is consistent with the view of the Court in *Kotteakos v. United States,* 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Under our statute, as under federal law, a reviewing court is not to find nonconstitutional preserved error harmless simply because it concludes the jury reached the right result. Disregarding errors that do not affect substantial rights, the reviewing court is to examine the record as a whole and the actual prejudicial effect of the error on the factfinder in the case at hand. *People v. Lee,* 434 Mich. 59, 450 N.W.2d 883 (1990). Where the error asserted is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of the other evidence.

Because in this case the Court of Appeals correctly found overwhelming evidence of guilt, it does not affirmatively appear that there has been a miscarriage of justice. *People v. Straight,*430 Mich. 418, 424 N.W.2d 257 (1988). Given that the evidence of guilt was overwhelming, it is unnecessary to reach the question of the level of confidence the reviewing court must have in the harmlessness of preserved error. The government has briefed only the *Kotteakos* standard, and the defendant has briefed only the *Chapman* standard. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). While the highly probable standard may represent the appropriate test for the reasons discussed below, on an issue of such overriding importance to the jurisprudence of the state, formal adoption of this standard should not be undertaken without further assistance from the bench and bar.[1] The decision of the Court of Appeals is affirmed.

893*893 I

On the date the events giving rise to this case took place, defendant, Raul Mateo, was living with Alva Lulgjurfij's and their three children. Jose Cantu, Lulgjurflj's brother and the victim in this case, was temporarily living with them at the time.

Cantu testified that he and defendant got into an argument in the early morning hours on January 12, 1990. Cantu had apparently made a comment regarding whether defendant was going to move out of the house and defendant took offense. After a brief verbal exchange, defendant left the room and returned with a pistol, placed it against Cantu's head, and threatened to "blow [his] brains out." Cantu managed to knock the pistol from defendant's hand and pushed him out of the room. Defendant soon returned with a knife in each hand and repeatedly slashed Cantu in the head and arm.

Cantu managed to escape and ran to a nearby gas station. Maria Cantu, Jose Cantu's mother, testified that her son called her, told her that Mateo had cut him, that she picked him up from the gas station and took him back to her home and then to the hospital. The fact that the victim was cut was also supported by the hospital records. Two police officers also testified without objection that Cantu's sister had identified Mateo as the assailant.

Defendant was charged with assault with intent to murder,[2] felonious assault,[3] and as a second felony offender.[4]

At trial, defendant presented an alibi through Crystal Blair, a former girlfriend, who testified that defendant was with her during the time the attack took place. Defendant did not testify. The prosecutor cross-examined Blair about certain phone conversations Blair had with another former girlfriend of defendant, Jennifer Brecht. Blair denied having conversations about defendant with Brecht. The prosecutor then called Brecht who, over objection, testified that Blair had called her and warned her that defendant was "very violent."

Defendant was convicted as charged. Defendant appealed, alleging that Brecht's testimony was improper rebuttal on a collateral issue. The Court of Appeals agreed. In spite of the error, however, the Court went on to conclude that the evidence against defendant was "overwhelming" and that any error in admitting Brecht's testimony "was harmless beyond a reasonable doubt."[5]

Defendant, in propria persona, filed a delayed application for leave to appeal with this Court. The application was initially held in abeyance for *People v. Dunn,* 446 Mich. 409, 521 N.W.2d 255 (1994). Following release of that case, we granted leave, limited to "(1) whether the trial court erred in permitting witness Brecht to testify as a rebuttal witness, (2) what is the appropriate standard for determining when nonconstitutional error in admitting evidence is reversible, and (3) whether any error in the admission of the testimony of witness Brecht was error requiring reversal."[6]

We agree with the Court of Appeals that, in these circumstances, extrinsic evidence of defendant's assaultive behavior was error. While the nature of Blair's relationship with the defendant was relevant to her credibility, and she had testified on direct examination that their relationship was good, it is unclear how any assaultive behavior in that relationship bore on Blair's credibility. *People v. Figgures,* 451 Mich. 390, 547 N.W.2d 673 (1996). The prosecutor does not argue that Blair's testimony was prompted by fear of the defendant, but, rather, contends that the testimony was directed to revealing facts of favoritism toward the defendant.894*894 *United States v. Abel,* 469 U.S. 45, 52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984). While the scope of rebuttal is within the trial court's discretion, we find that extrinsic evidence of defendant's assaultive behavior was error. 1 McCormick, Evidence (4th ed), § 40, p. 137.

Finding preserved nonconstitutional error, we now discuss the proper standard for assessing the effect of the error.

A

The legislative framework for appellate resolution of this question has guided appellate review in criminal cases for almost fifty years. It is consistent with the Court's authority to regulate practice and procedure. Const. 1963, Art. 6, §§ 1, 5.[7]

We are not required to decide whether our harmless error statute is a legislative attempt to supplant the Court's authority.[8] Correct construction of the statute does not dictate a literal reading of the term "miscarriage of justice." The legislative history of the former federal statute, 28 U.S.C. § 391, adopted in the same time frame as the Michigan statute, indicates that review is to be rendered "`without presuming that any error which may appear had been of necessity prejudicial to the complaining party.'" *United States v. Lane,* 474 U.S. 438, 458, 106 S.Ct. 725, 736, 88 L.Ed.2d 814 (1986), quoting H.R. Rep. No. 913. This reflects the view of Secretary of War Taft that "`no judgment of the court below should be reversed except for an error which the court, after hearing [sic] the entire evidence, can affirmatively say would have led [the jury] to a different verdict.'" *Id.* Likewise, our statute should not be construed to require actual innocence, but, rather, it should be viewed as a legislative directive to presume the validity of verdicts and to reverse only with respect to those errors that affirmatively appear to undermine the reliability of the verdict.

Given that there is no inherent conflict between the statute and the standard we create today for appellate review, we should (1) affirm that reversal is not required unless an error is harmful, and (2) clarify which of the conflicting standards used in past decisions by our state courts is correct.

B

In Michigan, the harmless-error rule is primarily embodied in statute,[9] with additional statements of the doctrine in our court rule[10] and evidentiary rule.[11] The "miscarriage 895*895 of justice" language in our statute, as well as the date of enactment,[12] supports the conclusion that it was part of a general movement in state courts to adopt the approach of the English Judicature Act, rejecting reversals for technical errors. 3 LaFave & Israel, Criminal Procedure, § 26.6(a), pp. 257-258. The Judicature Act provided that the Court of Appeal was not to order a new trial on the basis of "the improper admission or rejection of evidence" or a misdirection of the jury "unless ... some substantial wrong or *miscarriage* has thereby been occasioned." Traynor, The Riddle of Harmless Error, (Ohio

State Univ. Press, 1970), p. 10 and n. 22 (emphasis added). As Professors LaFave and Israel point out, "American appellate courts recognized that the newly adopted harmless error legislation,... had a different frame of reference as to different types of rights." *Id.,* p. 258. With regard to error of the type covered by the English Judicature Act, the American legislation remained concerned with whether the error had resulted in a "miscarriage of justice," *id.,* p. 258, e.g., whether an error had a sufficient bearing on the whole trial proceeding to require reversal. The intent of the miscarriage-of-justice standard used in such harmless-error legislation to encompass the English approach is evidenced by legislative directive to examine the entire record. *Id.,* p. 259. Thus, the Legislature's directive to examine the entire record to find whether it "affirmatively appear[s] that ... a miscarriage of justice" has occurred supports the conclusion that, for the evidentiary error here alleged, reversal should be predicated by evaluating the error against the remaining evidence. "It was in the tradition of testing an evidentiary error against the remaining evidence (both for effect and relevance) that an examination of the full record was most likely to be needed." LaFave & Israel, p. 259. Thus, as further noted, (and as reflected in numerous cases decided under our statute):

> *As for some types of error, such as the erroneous admission or exclusion of evidence, overwhelming evidence of guilt will ordinarily lead to the conclusion that the error was harmless. It would take evidence of an extraordinary quality to conclude that its erroneous admission or exclusion may have contributed to the verdict where the government had before the jury other evidence that could clearly and positively establish guilt. [Id., § 26.6(b), p. 269.]*

The statute and court rules employ different articulations of what constitutes a harmful error___"miscarriage of justice," "inconsistent with substantial justice," "affecting substantial rights." Each conveys, however, a need for a determination of prejudice.

> *[T]he rule always in effect in Michigan, both before and after enactment of the mentioned statutes and unaffected thereby, has been and is that the question of reversal is controlled by determination of whether the error was prejudicial. [People v. Nichols, 341 Mich. 311, 332, 67 N.W.2d 230 (1954).]*

Any reliance on earlier cases for the proposition that the statutory test is whether the defendant was actually guilty, see *Soltar v. Anderson,* 340 Mich. 242, 244, 65 N.W.2d 777 (1954); *People v. Bigge,* 288 Mich. 417, 421, 285 N.W. 5 (1939), is incorrect. We have since recognized, in accord with the precedent of all sister states and federal courts, LaFave & Israel, § 26.6, p. 258, that the statute and rules are merely "different 896*896 articulations of the same idea: appellate courts should not reverse a conviction unless the error was prejudicial." *People v. Robinson,* 386 Mich. 551, 562, 194 N.W.2d 709 (1972).[13]

Simply stated, and employed in both federal rule and case law and state statute and court rule, reversal is only required if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. See, e.g., *People v. Peterson,* 450 Mich. 349, 377-378, 537 N.W.2d 857 (1995), amended 450 Mich. 1212, 548 N.W.2d 625 (1995); *People v. Straight, supra* at 427,

424 N.W.2d 257; *People v. Young (After Remand),* 425 Mich. 470, 505, 391 N.W.2d 270 (1986); see also, e.g., *Kotteakos, supra* at 764-765, 66 S.Ct. at 1247-1248; *Lane, supra* at 455-460, 106 S.Ct. at 735-738 (Brennan, J., concurring in part and dissenting in part).[14]

II

A

The view that preserved nonconstitutional error should be reviewed under the harmless beyond a reasonable doubt standard is incompatible with the history and purpose of the statute and court rules. As noted above and explained in *Kotteakos, supra* at 759-760, 66 S.Ct. at 1245-1246, the harmless-error statute analyzed in that case,[15] as well as state laws such as those enacted and currently in force in Michigan, were aimed at curbing "the general course of appellate review in American criminal causes" to reverse decisions because of the occurrence of inconsequential, technical errors. *Id.* at 759, 66 S.Ct. at 1245. The purpose of these statutes was stated in *Kotteakos:*

> *To substitute judgment for automatic application of rules; to preserve review as a check upon arbitrary action and essential unfairness in trials, but at the same time to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, will engender and reflect in a printed record. [Id. at 760, 66 S.Ct. at 1245].*

The triumph of judgment over technicality described above and incorporated in our own statute provides no basis for raising the bar of confidence in the harmlessness of an error to "beyond a reasonable doubt." The fundamental protections of individual liberties embodied in constitutional rights are not at issue when the error is not of constitutional dimension.

The United States Supreme Court in *Chapman, supra* at 24, 87 S.Ct. at 828, expressly limited its holding to federal constitutional errors, and the federal courts have continued to maintain a distinction in the standard of review of constitutional and nonconstitutional errors. *United States v. Pirovolos,* 844 F.2d 415, 425 (C.A.7, 1988). Justice Cavanagh fails to provide a persuasive reason for requiring this Court to proceed on a different course.

B

Courts have historically and correctly employed the miscarriage of justice standard 897*897 by evaluating the nature of the error in light of the entire record. See, e.g., *Peterson, supra* at 377-379, 537 N.W.2d 857 (holding that errors did not affect the jury's decision to convict, and thus did not result in a miscarriage of justice); *People v. Pickens,* 446 Mich. 298, 334, 521 N.W.2d 797 (1994) (holding that error did not prejudice the defendant under the statutory miscarriage-of-justice standard); *Straight, supra* at 427, 424 N.W.2d 257 (applying the harmless-error statute, and finding proper direction in its inquiry from *Kotteakos,* the Court held that it could not "safely conclude" that the erroneously admitted evidence did not have a substantial influence on the jury's result); *Young, supra* at 505, 391 N.W.2d 270 (holding that error in admission of evidence was not harmless, quoting from *Kotteakos* for a statement of proper appellate inquiry); *People v. Wilcox,* 303 Mich. 287, 296, 6 N.W.2d 518 (1942) (in affirming the defendant's conviction, the Court disposed of "some slight errors" alleged by the defendant, concluding that "even if there is any merit to them, they could not have affected the result or resulted in a miscarriage of justice"); *People v. Lahnala,* 193 Mich. 144, 163, 159 N.W. 352 (1916) (Ostrander, J.)(reversing and granting a new trial for prejudicial error, and concluding that "[i]n my opinion, that is, and must always be, a miscarriage of justice").[16]

III

There remains an issue of the level of assurance an appellate court on direct review must have that a preserved, nonconstitutional error was not prejudicial and thus harmless.

A

The *Kotteakos* test, as articulated by the prosecutor, does not definitively settle on this question.[17] Thus, as previously noted, federal courts have variously adopted tests

described as a highly probable, more probable than not, and a reasonable likelihood that the error affected substantial rights. See n. 10.

After rejecting the rigid *Chapman* test,[18] former Chief Justice Traynor's book on harmless error discusses two possible tests. The first test assesses whether it is *highly probable* that the challenged evidence did not contribute to the verdict.[19] The second test asks whether it is*more probable than not,* i.e., a preponderance of the evidence, that the error did not affect the verdict.[20]

After analyzing the above tests, Chief Justice Traynor argues that the highly probable test is most appropriate.

> *The nebulous test of reasonableness is unlikely to foster uniformity either in the application of standards, should there be any, or in the pragmatic exercise of discretion. Discretion is at least under better control within tests that focus on the degree of probability as more probable than not, highly probable, or almost certain. I should welcome a test of high probability for harmlessness. Given an error that affected a substantial right, the judgment 898*898 below is suspect. Unless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse.*
>
> *Any test less stringent entails too great a risk of affirming a judgment that was influenced by an error. Moreover, a less stringent test may fail to deter an appellate judge from focusing his inquiry on the correctness of the result and then holding an error harmless whenever he equated the result with his own predilections.*
>
> *There are objections also to the two tests that are more stringent than that ofhigh probability. If the test were the mere presence of error, appellate courts could reverse, as many did in the nineteenth century, for any error, no matter how trivial. The end result was public disaffection with the judicial process. Almost as stringent is a test that would require reversal unless the court was almost certainthat the error did not affect the judgment. [Traynor, The Riddle of Harmless Errorsupra, pp. 34-35.]*

While Justice Traynor suggests that the highly probable test strikes the appropriate balance between protecting both the public and defendants' interests in fair trials, the prosecutor has not briefed or argued the question of the level of assurance that a proper construction of*Kotteakos* requires, and the defendant has briefed and argued only that the level of assurance should be harmless beyond a reasonable doubt. Given the absence of such input, it is unwise for this Court to unilaterally adopt a definitive standard. Further, it is unnecessary to do so. The Court of Appeals properly concluded that the evidence against the defendant was overwhelming.[21] By definition, the error was harmless under any standard other than the*Chapman* standard rejected here as unwarranted for nonconstitutional error.[22]

In summary, (1) M.C.L.A. § 767.29; M.S.A. § 28.1096 is not a legislative usurpation of this Court's authority and miscarriage of justice must affirmatively appear on review of nonconstitutional preserved error. (2) Those courts analyzing preserved error in terms of their view regarding whether the defendant is guilty have been wrong. The defendant's right to a fair trial by jury requires that preserved error be reviewed in

terms of its effect on the factfinder. (3) Those courts analyzing nonconstitutional error for harmlessness beyond a reasonable doubt have proceeded in error. (4) Those courts denying relief because the preserved error had only slight or negligible influence on the verdict have proceeded correctly.

Defendant's conviction is affirmed.

BRICKLEY, C.J., and RILEY, MALLETT and WEAVER, JJ., concurred with BOYLE, J.

WEAVER, Justice (*concurring*).

I have signed Justice Boyle's opinion because I believe that it is essential for this Court to establish a clear, workable standard of review for preserved, nonconstitutional error.

I write separately to state my position that M.C.L.A. § 769.26; M.S.A. § 28.1096 has established a presumption that this error is harmless. M.C.L.A. § 769.26; M.S.A. § 28.1096 provides that a judgment shall not be overturned "unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." Thus, I would place the burden of showing why the judgment should be overturned on the defendant. This approach is consistent with the rule that after conviction a defendant is no longer presumed innocent. *People v. Fritch,* 161 Mich. 111, 115, 125 N.W. 785 (1910).

899*899 This allocation of the burden of proof has been recognized by our Courts in the past:

"After a man has been convicted, the presumption of innocence, of which so much is made in our practice, attends him no longer. He has been convicted by a jury, and he has the burden of convincing ... that the record upon which he stands convicted is open to serious question...."*Id.* at 115, 125 N.W. 785.

"After lawful conviction a defendant is no longer presumed innocent. He then has the burden of satisfying the reviewing court that the record upon which he was convicted discloses reversible error." *People v. Rowell,* 14 Mich.App. 190, 196, 165 N.W.2d 423 (1968).

When a defendant has pleaded guilty and appeals arguing that "the facts elicited from defendant at the arraignment [do not] support a finding of guilty, ... defendant has the burden of showing a miscarriage of justice." *People v. Davis,* 24 Mich.App. 304, 305, 180 N.W.2d 285 (1970).

MICHAEL F. CAVANAGH, Justice (*concurring in part and dissenting in part*).

I concur with my colleagues that the rebuttal testimony was erroneously admitted. However, I believe that the harmless error standard for preserved nonconstitutional error should remain harmless beyond a reasonable doubt. I further believe that the error in this case was not harmless under any "lesser" standard. Nevertheless, in order to provide the bar with one standard adopted by a majority of this Court, I would concur with the standard proposed by Justice Levin in his separate opinion.

I

Today, by distinguishing nonconstitutional error from constitutional error, this Court has added yet another category to the labyrinth of harmless error in Michigan. It has done so without explaining why, or how, the uniform standard that this Court adopted in *People v. Robinson,*386 Mich. 551, 194 N.W.2d 709 (1972), is unsatisfactory.[1] *Robinson* restated the longstanding definition of harmless error:

> *The appropriate considerations are described in People v. Wichman, 15 Mich. App. 110, 116 [166 N.W.2d 298] (1968):*

"Where it is claimed that error is harmless, two inquiries are pertinent. First, is the error so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless? See *People v. Bigge,* 288 Mich. 417, 421 [285 N.W. 5] (1939); *People v. Berry,* 10 Mich. App. 469, 474 [157 N.W.2d 310] (1968); *People v. Mosley,* 338 Mich. 559, 566 [61 N.W.2d 785] (1953). See also *Chapman v. California,* 386 U.S. 18, 23, 24, (87 S.Ct. 824 [827-828, 828], 17 L.Ed.2d 705 (1967)), rehearing denied 386 U.S. 987, (87 S.Ct. 1283, 18 L.Ed.2d 241) [1967]. Second, if not so basic, can we declare a belief that the error was harmless beyond a reasonable doubt? See *People v. Liggett,* 378 Mich. 706, 716, 717 [148 N.W.2d 784](1967); *Chapman v. California, supra.*" 900*900 [*Robinson,* 386 Mich. at 562-563, 194 N.W.2d 709.]

This Court later unanimously applied the *Robinson* standard in a case with strong similarities to the instant case. *People v. Belenor,* 408 Mich. 244, 247, 289 N.W.2d 719 (1980). The *Belenor*Court held that error, like that which occurred here, was to be judged under the *Robinson*harmless beyond a reasonable doubt standard. *Id.* at 247, 289 N.W.2d 719. The Court did not engage in any discussion of whether this improper impeachment evidence was nonconstitutional error or constitutional error (perhaps as prosecutorial misconduct or as a violation of the right to a fair trial). Again, the *Belenor* Court must be presumed to have been aware of the distinction between nonconstitutional error and constitutional error and have concluded that the *Robinson* harmless error standard applied to all error that was amenable to harmless error analysis. See also *People v. Howe,* 392 Mich. 670, 678, 221 N.W.2d 350 (1974)(jury request to reread testimony).

Even if we were writing on a clean slate today, I would adopt a uniform harmless error standard for all errors that are subject to harmless error analysis.[2] The line between evidentiary error and constitutional error is rarely clear. One prominent example is the case law involving the statement against penal interest exception to the hearsay rule. MRE 804(b)(3). That particular "evidentiary" rule's outer parameters are directly determined by the constitutional ramifications. For instance, if the statement is used to *inculpate* the accused, the defendant's constitutional right of confrontation is implicated.

People v. Poole, 444 Mich. 151, 506 N.W.2d 505 (1993). In contrast, if the statement is used to *exculpate* the accused, the defendant's constitutional right to present a defense is implicated. *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). When the issue is whether a hearsay statement should be admitted under MRE 804(b)(3), the *constitutional* concerns are *inseparable* from the determination whether the trial court erred in its *evidentiary* ruling. *People v. Barrera,* 451 Mich. 261, 279, 547 N.W.2d 280 (1996).

Additionally, by holding today that there is a difference between nonconstitutional error and constitutional error, this Court is opening the doors to increasing litigation, by adding yet another issue to an appellate court's analysis. This Court today telegraphs that there must be a significant difference between the harmless error standards for constitutional error and for nonconstitutional error and that the difference between the two standards will be *outcome-determinative*— for if the difference is *not* outcome-determinative, then this Court has no need today to distinguish a separate standard. After today, if the Court of Appeals applies the wrong standard, and my colleagues have yet to agree on the right standard, a remand, if not reversal,*by definition,* will be required because the *difference* between the standards is outcome-determinative. Likewise, if the defense counsel erroneously argues that the error falls within the wrong category, there will be an additional, and *meritorious,* claim of ineffective assistance of counsel. My colleagues have failed to explain persuasively why this nebulous maze is necessary.

Moreover, I believe that the adoption of a "lesser" standard with respect to nonconstitutional error implicitly threatens constitutional rights. I believe that for those errors that are amenable to harmless error analysis, the harmless error standard should remain: the nontainted evidence was so overwhelming and the error was so *relatively* insignificant, that the appellate court is led to the conclusion that the actual jury would have convicted *regardless* of the error because there is no reasonable possibility that the error could have contributed to the verdict. In other words, the error was harmless beyond a reasonable doubt.

The most basic justification commanding this uniform standard is that the constitution requires that *every* factual element of guilt be proven beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072-1073, 25 L.Ed.2d 368 (1970). In sharp contrast, under my colleagues' views, something 901*901 short of proven beyond a reasonable doubt will be sufficient. This inherently translates into an appellate court impermissibly directing a verdict for the prosecution, violating the defendant's right to a jury trial.

Starting with that axiom, I note that I am not the first to believe that a uniform standard must be applied, and I quote below the persuasive reasoning of two courts that have adopted such a standard, expressly rejecting the federal approach. The Pennsylvania Supreme Court stated in*Commonwealth v. Story,* 476 Pa. 391, 406-409, 383 A.2d 155 (1978):

Several considerations persuade us that the "beyond a reasonable doubt" standard is the proper standard to apply in determining the harmlessness of anycriminal trial error. First, this standard is commensurate with the standard of proof in criminal trials__that an accused cannot be convicted unless the trier of fact is convinced beyond a reasonable doubt that the accused is guilty as charged. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In order to maintain the integrity of this standard, appellate courts should utilize a comparable standard in determining whether an error was harmless. Professor Saltzburg has observed:

"It would make little sense to adopt the Winship standard, which is designed to prevent criminal convictions if there is even a reasonable doubt in the minds of jurors as to the guilt of the person charged, and then on appeal to emasculate that evidentiary standard when the trial court has violated evidentiary rules which might have influenced the jury by creating the requisite doubt.... [C]onvictions must be reversed where the appellate court cannot arrive at a conclusion about the impact of an error on the jury verdict with the same degree of certainty demanded at trial." Saltzburg, The Harm of Harmless Error, 59 Va. L. Rev. 988, 992 (1973).12

12Accord, *Commonwealth v. Davis,* 452 Pa. 171, 177, 305 A.2d 715, 719 (1973) (citations omitted):

"This reasonable doubt standard reflects a fundamental belief that once ... error has been established, it is far worse to conclude incorrectly that the error was harmless than it is to conclude incorrectly that the error was reversible."

Second, there are sound reasons for applying the same standard for determining harmless error whether the error violates state or federal law. State rules often implicate constitutional values, and the violation of a state rule may rise to the level of a federal constitutional violation. The protection of constitutional rights, as well as the development of a coherent doctrine of harmless error, militate in favor of the application of the same standard for constitutional and non-constitutional errors. Because it may be unclear whether a well established state rule is also constitutionally mandated, separate harmless error standards might prove to be unworkable. Moreover, a more relaxed harmless error standard for errors perceived as violations of state rules, but which might also be violations of the federal Constitution, would leave constitutional values inadequately protected.

Third, it is irrelevant whether an error is constitutional or non-constitutional in determining whether the error is prejudicial to the accused. Constitutional errors are not inherently more injurious to an accused than errors under state law. There is no reason why a state court should apply a stricter harmless error standard to federal constitutional rules than to state rules, especially since the purpose of most state rules is to assure a fair trial.

Finally, there is the danger that a lenient harmless error rule may denigrate the interests and policies which both constitutional and non-constitutional rules promote. We are convinced that the "beyond a reasonable doubt" standard reaches the proper balance of competing considerations implicated in the harmless error rule.... We believe

that the "beyond a reasonable doubt" standard reaches the most reasonable balance between the consideration of judicial economy and the important policies which underlie constitutional and non-constitutional rules.

... Having articulated the proper standard of proof in determining whether an 902*902 error is harmless, we must now address the proper definition of harmlessness, for any theory of harmless error must include both the standard of the degree to which an appellate court must be convinced that an error is harmless and the definition of harmlessness. We adopt the standard that an error cannot be held harmless unless the appellate court determines that the error could not have contributed to the verdict. Whenever there is a "`reasonable possibility'" that an error "`might have contributed to the conviction,'" the error is not harmless. [Citations omitted.]

Similarly, the Maryland Court of Appeals explained in *Dorsey v. State,* 276 Md. 638, 657-658, 350 A.2d 665 (1976):

> *As we see it, there is no sound reason for drawing a distinction between the treatment of those errors which are of constitutional dimension and those other evidentiary, or procedural, errors which may have been committed during a trial. Although the Amendments to the United States Constitution are commonly considered a source of fair judicial procedure, other nonconstitutional evidentiary and procedural rules, signifying state policy with respect to judicial fairness, are often a defendant's primary source of protection. An evidentiary or procedural error in a trial is bound, in some fashion, to affect the delicately balanced, decisional process. The abnegation of a particular rule upon which the defense intended to rely may often inflict more damage than initially apparent; a meritorious line of defense may be abandoned as a result; an important witness may not be called; strategies are often forsaken. The future course of the trial inevitably must be changed to accommodate the rulings made. It is the impact of the erroneous ruling upon the defendant's trial and the effect it has upon the decisional process which is of primary concern, not whether the error is labelled as constitutional or nonconstitutional. Invariably, a number of constitutional rights, be they of federal or state origin, are inexorably intertwined with state rules of evidence and procedure. Regardless of the generic nature of the error, we believe that upon appellate review, a uniform test should be applied in all criminal cases to determine the effect the error may have had on the verdict. [Citation omitted.]*

Later, the court noted:

> *We think it worthwhile to repeat here the caveat set forth in Younie v. State [272 Md. 233, 248, 322 A.2d 211 (1974)], that the harmless error rule "has been and should be carefully circumscribed for the reasons given in People v. Jablonski,38 Mich.App. 33, 39, 195 N.W.2d 777, 780 (1972), where it is said that:*
>
> *'Continued expansion of the harmless error rule will merely encourage prosecutors to attempt to get such testimony in, since they know that, if they have a strong case, such testimony will not be considered to be reversible error, yet if they have a weak case, they will use such testimony to buttress the case to gain a conviction and then hope that the issue is not raised on appeal.' " [Dorsey, 276 Md. at 661, 350 A.2d 665.]*

For all of these reasons, I would maintain the *Robinson* course in Michigan of using a uniform harmless error standard for preserved errors that are subject to harmless error analysis.

II

Although Justice Boyle declines to adopt a standard, and consequently the remainder of her opinion is dicta, she does hint at her view of what that standard should and should not be.

I do not disagree with Justice Boyle that where a reviewing court affirmatively[3] finds that a preserved, nontechnical error did not prejudice the defendant it should not reverse. Nor do I disagree that where a reviewing court affirmatively finds that such error did prejudice the defendant it must reverse. However, Justice Boyle and I disagree with respect to the cases that fall in between those two extremes.

903*903 The issue then becomes, on which side should the reviewing court land. In those cases where the reviewing court is not sure whether the error was harmful or harmless, I believe that the constitutional guarantees to the defendant leave the reviewing court no choice but to err on the side of caution and reverse. In contrast, Justice Boyle seems to suggest that the reviewing court may affirm a conviction even if it cannot affirmatively say that the error was harmless. This is not correct. The question always must be whether an error was *harmless.*

The reviewing court should start its analysis from the premise that a preserved error *requires*reversal *unless* it finds under the requisite level of confidence that the error was harmless. It should not start from the premise that reversal is *not* required *unless* it finds that such error was harmful. Justice Boyle's statements suggest that, when in doubt, the reviewing court should side with the prosecutor. This is a misreading of the harmless error standard advocated by Justice Traynor to which Justice Boyle alludes.[4]

I believe that a test for *harmful* error violates the constitutional guarantees to the defendant of having guilt proven beyond a reasonable doubt and of having a fair trial. Accordingly, I would reject any such approach.

III

Turning now to the instant case, I agree with the separate opinion that under the *Robinson*harmless beyond a reasonable doubt standard, the error here was not harmless. Accordingly, I would reverse the conviction. However, even under a "lesser" standard, I believe that the error was not harmless.

The separate opinion states that if "the whole record" consisted of the testimony of the victim Jose Cantu, the defense witness Crystal Blair, and the improper rebuttal testimony of Jennifer Brecht, it would hold that the error required reversal. Op. at 916-917. However, by adding in the hearsay statement of the victim's sister Elva Lulgjurflj, the separate opinion finds that the error becomes harmless. I cannot agree with this latter conclusion.

Cantu testified that he had been staying temporarily with Lulgjurflj. Defendant Mateo was also living there, as well as Lulgjurflj's and Mateo's three children. At around 12:15 a.m. on the night of the assault, Cantu brought home a friend, Darrell Wilder, to play cards. Cantu alleged that after playing cards for up to three hours, he heard Mateo arrive home. Cantu then asked his friend to leave.

Cantu testified that (while he was brushing his teeth in a bathroom,) Mateo instigated an exchange with him about when he would be moving out. Mateo then retrieved a small silver gun from a nearby bedroom and threatened Cantu by placing the gun next to his chin. Cantu then slapped the gun out of Mateo's hand, and it landed under the sink or on the floor. (Police officers recovered the gun from the sink.) Cantu testified that he pushed Mateo out of the bathroom and closed the door. Mateo quickly returned with a steak knife in each hand and proceeded to knock the door down. Cantu sustained several cuts in the ensuing attack until he was able to escape out the front door of the house and run down the street to a gas station.

Mateo's defense was alibi, presenting the testimony of Blair who stated that Mateo was with her at the time of the assault.

My colleagues properly find sufficient evidence that Cantu was assaulted by someone. However, I cannot agree with the separate opinion that the straw that tips the scales in favor of the prosecution can be the hearsay statement of Lulgjurflj. Even if a reviewing court *can*properly consider unobjected-to hearsay statements—and I emphasize that this issue of first impression was neither briefed nor argued by the parties in this case—a hearsay statement that fails to fit within an exclusion or exception to the hearsay rule remains hearsay. It is inherently 904*904 unreliable evidence.[5] Moreover, on the facts in this case, the statement is especially unreliable.

Foremost, we should note that the officers did not attempt to retrieve fingerprints from the gun. They recovered it from the sink, although Cantu testified that it fell under the sink or on the floor. More importantly, the officers did not conduct a thorough search of the scene and never recovered any bloody knives___and, in fact, probably never entered the kitchen, where the last part of the assault allegedly occurred, even though it was only about ten feet from the bathroom. In sum, there was no physical evidence to identify Mateo as the assailant.

Additionally, the officers did not write down Lulgjurflj's statement, even though it was customary to do so. Their only notes with respect to her statement were that she confirmed Cantu's story. Their express testimony is informative.

Officer Wendy Keelty testified:

Q. And who did [Cantu] say did this to him?

A. He said__he stated his sister's boyfriend, Raul.

Q. And did the sister confirm that also?

A. Yes, she did.

Officer Eulalio Reyes testified:

Q. And did you also see his sister, by the name of Alva [sic], at the mother's home?

A. Yes, I did.

* * * * * *

Q. And did she tell you who did this?

A. Yes, she did.

Q. And who did she say?

A. Raul Mateo.

On redirect Officer Reyes further testified:

Q. And what did you put in your police report in regards to his sister?

A. That she stated the same as the victim and that she was the girlfriend of the responsible.

Q. So you put two things, that she stated the same thing as the victim did about the incident?

A. Correct.

Q. And that she was the girlfriend of Raul Mateo?

A. Correct.

Q. And those are the only two things you put in the report, is that correct?

A. Yes, it is.

Further, the detective in charge of the case, Santiago Serna, testified that Lulgjurflj refused to cooperate in the investigation.

Q. Did you also attempt to contact his sister, Alva?

A. Yes.

Q. And did you want her to make a statement, a written statement?

A. I wanted to meet with her. And the only time I met with her is when I served the subpoena. She did not want to cooperate with me at all.

I could not get her to talk to me about anything.

Q. Now at that time were you aware that she had children by the defendant?

A. Yes, I was.

Q. Now how many times did you serve a subpoena on Alva?

A. Yesterday ... was the fourth time that I served the subpoena....

*905*905 Q. Did she ever appear in court pursuant to any of the subpoenas that you've served upon her?*

A. No, she has not.

Moreover, the separate opinion fails to note that Cantu himself testified that Lulgjurflj could not have seen the stabbing during the assault because she was shut in another room. Most importantly, the trial judge, who was listening first-hand to the parties involved, did not believe that Lulgjurflj's testimony would assist the prosecutor:

The Court: Certainly. And you think she would testify for the People ...

[The Prosecutor]: If she was here ...

The Court: It doesn't sound like it from what the detective said. And [after] all of your investigation, she refuses to come in.

Lulgjurflj was the mother of three of Mateo's children. The trial testimony revealed that he had other girlfriends during their time together. Lulgjurflj's mother's testimony clearly indicated that this was no secret. If Cantu had a motive to lie, as implicitly recognized by the separate opinion, I believe that Lulgjurflj may have had an even stronger motive to lie. Perhaps Lulgjurflj was angry with Mateo on the night in question and had a retaliatory motive in identifying him as the assailant. Or perhaps, Lulgjurflj did not see the assault at all and out of loyalty to her brother merely repeated what her brother had related to her.

Nevertheless, the reliability of Lulgjurflj's statement was not tested through cross-examination. Further, in light of the fact that it was not reduced to written form, there is a likely possibility that at the time of the trial the officers did not completely remember her statement, which had been spoken to them six months earlier.

The bottom line is that this particularly unreliable hearsay statement cannot and should not be the outcome-determinative fact in this case. I believe that the separate opinion is focusing on an incorrect premise. There was not overwhelming evidence of the defendant's guilt. The only evidence identifying the *defendant* as the assailant was Cantu's testimony and the police officers' testimonies restating Cantu's and his sister's statements. In contrast, the defendant presented his alibi witness. If the sister's statement was cumulative or merely derivative of Cantu's statement, a jury confronted with two opposing versions of the events at issue would obviously be swayed by improper and highly prejudicial rebuttal testimony that both painted the alibi witness as a liar and painted Mateo's character as one prone to assaultive violence.[6] Absent eyewitness *testimony* from a third party or corroborating physical evidence of identity, this Court cannot, under any standard, say that the erroneously admitted testimony did not affect the jury's decision and influence the result.

In sum, I would reverse.

LEVIN, Justice (*separate opinion*).

I am in substantial agreement with the majority concerning the harmless error standard for preserved nonconstitutional error.

I would, however, decide the question of the level of assurance that an appellate court must have that the error was not prejudicial and thus harmless, a question that the majority puts off until another day.

Further, I would not reformulate "miscarriage of justice" to preserve some legitimacy for the statutory standard, but, rather, would declare a harmless error standard for preserved error applicable on direct review of judgments in criminal and civil cases alike. I would do so in the exercise of the Court's authority under the constitution, which confers the "judicial power of the state" on "one court of justice" headed by this Court,[1] and which confers on this Court "appellate jurisdiction as provided by rules of the supreme court,"[2] and which provides that "[t]he supreme court shall by general rules establish, 906*906 modify, amend and simplify the practice and procedure in all courts of this state."[3]

I

I agree with the majority that the standard on review for nonconstitutional error is not whether the error is harmless "beyond a reasonable doubt." I further agree that the harmlessness of preserved error should be "reviewed in terms of its effect on the factfinder,"[4] and that a reviewing court should engage "in a comparative analysis of the likely effect of the error in light of the other evidence,"[5] and that the judgment entered by the trial court should be affirmed if the "error had only slight or negligible influence on the verdict...."[6]

Although the majority speaks of error that is harmful[7] as well as error that is harmless, it is clear, I think, that the majority and I are in agreement that if the error affects a substantial right of a defendant in a criminal case, and was prejudicial to the defendant and affected the verdict, that the error was harmful and hence not harmless.

As I read the majority opinion,

> *• "affirmatively appears" means what the reviewing court has found from an examination of the whole record;*
>
> *• there has been "miscarriage of justice" if the error affects a substantial right of the defendant, and was prejudicial or harmful to the defendant;*
>
> *• The reviewing court should find that the error is prejudicial or harmful to the defendant unless it can state that it affirmatively appears from an examination of the whole record that the error did not affect the factfinder's decision.*[8]

I would, reaching the level of confidence or assurance question, hold that

> *• While the harmless error inquiry for preserved constitutional error is whether the error is harmless beyond a reasonable doubt, that is not the inquiry when the issue is whether preserved nonconstitutional error is harmless.*
>
> *• The core concept is whether the defendant was prejudiced. If he was prejudiced, the error was harmful to him__and thus not harmless__and is error requiring reversal.*
>
> *• The inquiry is whether the error was harmless, not whether it was harmful.*
>
> *• Whether the accused was prejudiced is to be determined on the basis of the effect or influence of the error on the trier of fact, rather than on whether it appears that an actually innocent defendant has been convicted, or whether, on a retrial, following reversal of the defendant's conviction because the error was not harmless, another jury would assuredly convict him.*[9]

• Whether error had an effect or influence on the jury is to be determined upon examination of the totality of the record.[10]

*907*907 • The inquiry on appellate review should not focus alone on the sufficiency of the evidence that supports the verdict finding the defendant guilty, but rather on all the evidence in the whole record, both the untainted evidence tending to show guilt and the evidence tending to create a doubt concerning guilt.*

• On direct review, a preserved error that affects substantial rights is prejudicial to the defendant, and hence harmful to the defendant__and thus not harmless__unless the reviewing court finds that it affirmatively appears from a review of the whole record that it is highly probable that the error did not affect the factfinder's decision.

II

We granted leave to appeal to consider and decide what is the appropriate standard for determining when preserved nonconstitutional error in admitting evidence requires reversal.[11] We should adopt wholeheartedly the approach of the United States Supreme Court in *Kotteakos v. United States,* 328 U.S. 750, 759, 66 S.Ct. 1239, 1245, 90 L.Ed. 1557 (1946), applicable in determining whether nonconstitutional error in a trial in a federal court is harmless.

We should conclude, in agreement with the prosecutor and amicus curiae Prosecuting Attorneys Association of Michigan, that the appropriate standard is not the *Chapman*[12] standard, whether the error was harmless "beyond a reasonable doubt," but, rather, the standard set forth in *Kotteakos.*

As stated in *Kotteakos,* "a conviction cannot stand" unless the reviewing court can say

• "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [jurors'] judgment was not substantially swayed by the error," or

• "the conviction is sure that the error did not influence the jury, or had but very slight effect...."

If the reviewing court is "*left in grave doubt*" whether the jurors' judgment was "substantially swayed by the error" or whether the error did substantially "influence the jury or had but very slight effect" the conviction cannot stand.[13] (Emphasis added.)

Most recently, in *O'Neal v. McAninch,* 513 U.S. ___,___ _ ___, 115 S.Ct. 992, 994 995, 130 L.Ed.2d 947, 952 (1995), the United States Supreme Court held, in explication of the "grave doubt" component of the *Kotteakos* standard, that a defendant seeking relief

from conviction in a criminal case does not have the burden of establishing whether error was prejudicial. Declining to phrase the 908*908 issue in terms of burden of proof, the Court declared that if the reviewing court "is in grave doubt" about whether the error had *"substantial and injurious effect or influence in determining the jury's verdict,"* the error is not harmless.

The three dissenting justices in *O'Neal* had no "quarrel with the majority's conclusion that once an error has been shown on *direct appeal,* the government must demonstrate that it was harmless if the conviction is to stand."[14] (Emphasis added.)

III

Mateo was convicted of assault with intent to murder,[15] felonious assault,[16] and of being an habitual offender, second offense.[17]

We agree with the Court of Appeals[18] that the trial court erred in permitting Jennifer Brecht to testify over objection as a rebuttal witness to the testimony of Crystal Blair, a witness for Mateo. The Court of Appeals found that the error was "harmless beyond a reasonable doubt."

A

Mateo was living with Elva Lulgjurflj and their three children. Lulgjurflj's brother, Jose Cantu, was living with them temporarily. Cantu testified that he and Mateo became involved in an argument early in the morning concerning whether Cantu would be moving out. Cantu said that Mateo threatened to blow Cantu's brains out with a pistol and slashed him repeatedly with a knife. Hospital records verified the slashes.

Cantu's testimony identifying Mateo as his assailant was supported by hearsay testimony, for which no objection was raised, by two police officers who indicated that Lulgjurflj told them shortly after the assault that Mateo was the person who assaulted Cantu.

B

Mateo did not testify. He presented an alibi through Crystal Blair, who said that Mateo was with her when the assault was alleged to have taken place.

The prosecutor cross-examined Blair concerning conversations with Jennifer Brecht, who also had been a girlfriend of Mateo. Blair denied having conversations with Brecht about Mateo. Blair said she only spoke with Brecht when she telephoned to talk with Mateo when Mateo was living with Brecht. The prosecutor then called Brecht who, over objection, testified that Blair had telephoned Brecht and warned that Mateo was "very violent."

C

The Court of Appeals held that Brecht's testimony was improper because it impeached Blair on a collateral matter rather than a material issue.[19] The Court added that the prosecutor may not elicit a denial from a witness on cross-examination "only to inject a new issue on rebuttal."[20] The Court 909*909 continued that the prosecutor apparently asked Blair about the assault during cross-examination to interject evidence of prior assaultive acts by Mateo and to "set-up" Blair for the purpose of impeaching her credibility with prior inconsistent statements.

I agree with the Court of Appeals that it was error to admit the rebuttal testimony of Brecht, both because it involved impeaching a witness on a collateral matter, and also because the inconsistency was created by eliciting a denial on cross-examination.[21]

D

The Court of Appeals found that the error was "harmless."

> *The victim testified that defendant assaulted him with a knife and a gun. The victim's sister who witnessed the assaults confirmed his version of the events to the investigating*

officers. The victim was treated for multiple lacerations and a handgun was recovered from the bathroom where the assault took place. Further, the officers noted that the bathroom door had been broken.[22] *In light of the overwhelming evidence against defendant, the improper rebuttal testimony was harmless. [Unpublished opinion per curiam, issued February 17, 1993 (Docket No. 134528), slip op, p 1.]*

IV

Mateo contends that a reviewing court should assess the harmlessness of the error under the harmless-beyond-a-reasonable-doubt standard announced by the United States Supreme Court in *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The Court there held that "before a *federal constitutional error* can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt" (emphasis added), and that the repeated references to the defendants' failure to testify did not constitute harmless error.[23]

In the instant case, the error in admitting Brecht's statements was not federal constitutional910*910 error.[24] While, as Mateo contends, this Court has employed the *Chapman* harmless-beyond-a-reasonable-doubt formulation in cases in which the error did not constitute federal constitutional error,[25] in none of those cases did this Court consider that the *Chapman*standard enunciated by the United States Supreme Court is not applied by that Court when the error is not of constitutional dimension.

A

Over twenty years before *Chapman* was decided, the United States Supreme Court, in*Kotteakos,* construed the federal harmless-error statute[26] applicable in reviewing error occurring during the course of a federal civil or criminal trial.

The Michigan harmless-error statute,[27] first enacted in 1915, and the federal harmless-error statute, first enacted in 1919, have a common history.[28] The United States Supreme Court, in*Kotteakos,* said that it was "not necessary to review in detail the history of the abuses which led to the agitation or of the progress of the legislation" resulting in the enactment of the federal harmless-error statute, and that "anyone familiar with it knows that" that legislation *"and similar state legislation* grew out of widespread and deep conviction over the general course of appellate review in American criminal causes."[29] (Emphasis added.)

911*911 B

The Michigan harmless-error statute[30] and court rule[31] express, as stated in *People v. Robinson,* 386 Mich. 551, 562, 194 N.W.2d 709 (1972), essentially the same concept. This Court observed in *Robinson* that the "strictures" of the statute and the court rule are but "different articulations of the same idea," and stated that "same idea" as follows:

> *[A]ppellate courts should not reverse a conviction unless the error was prejudicial. As stated in [People v.] Nichols [341 Mich. 311, 67 N.W.2d 230 (1954)] "... the rule always in effect in Michigan, ... has been and is that the question of reversal is controlled by determination of whether the error was prejudicial." [Id., at p. 562,194 N.W.2d 709 (emphasis added).]*

In *Nichols,* the case cited in *Robinson,* the prosecutor had urged that "the entire record is persuasive of defendant's guilt." The Court responded, citing a civil case, *Soltar v. Anderson,*340 Mich. 242, 65 N.W.2d 777 (1954), where, as stated in *Nichols,* this Court had held that "the rule always in effect in Michigan, both before and after the enactment of the mentioned statutes *and unaffected thereby,* has been and is that the question of reversal is controlled by determination of whether the error was prejudicial...." [*Id.,* at p. 332, 67 N.W.2d 230 (emphasis added).][32]

In *People v. Bigge,* 288 Mich. 417, 421, 285 N.W. 5 (1939), this Court said respecting the provision of the 1927 statute concerning harmless error in a criminal case (which has not been changed by subsequent legislation, see n. 27):

> *The responsibility of maintaining the right of fair trial and due process of law is placed with the judicial branch and cannot be otherwise by legislative permission. We are not concerned with the guilt or innocence of the accused, for we are not triers of the facts and must apply the law to the case as tried.*

The foregoing statements of this Court over forty years ago in *Nichols, Soltar,* and *Bigge* find support in the following statement by the United States Supreme Court in *Kotteakos:*

> *[I]t is not the appellate court's function to determine guilt or innocence. Nor is it912*912 to speculate upon probable reconviction.... [Id., at p. 763, 66 S.Ct. at p. 1247 (citations omitted; emphasis added).]*

V

Having in mind the Michigan pre-*Chapman* harmless-error standard—whether the error was prejudicial—and the common history of enactment of the federal and Michigan harmless-error statutes, I am persuaded that the harmless-error standard announced in *Kotteakos* by the United States Supreme Court in the construction of the federal harmless-error statute should be adopted by this Court as the harmless-error standard to be applied when appellate courts of this state review preserved nonconstitutional error.

As stated at the outset of this opinion, I would adopt the harmless-error standard stated in*Kotteakos,* that a finding or verdict of guilty is required to be set aside and a new trial granted unless the reviewing court can say

> • *"with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [jurors'] judgment was not substantially swayed by the error," or*
>
> • *"the conviction is sure that the error did not influence the jury, or had but very slight effect."*

If the reviewing court is *"left in grave doubt"* whether the jurors' judgment was "substantially swayed by the error" or whether the error did substantially "influence the jury or had but very slight effect" the conviction cannot stand.[33] (Emphasis added.)

Recently, in *Brecht v. Abrahamson,* 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993),the United States Supreme Court held that the use of the accused's post-*Miranda* warning silence for impeachment purposes, while violative of the Due Process Clause, would, because the question arose in a habeas corpus proceeding and not on direct appeal, be reviewed under*Kotteakos* formulation to determine whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[34]

Justice Stevens, concurring in *Brecht v. Abrahamson,* said that *Kotteakos* requires de novo review "in the context of the entire trial record,"[35] and "requires a reviewing court to decide that `the error did not influence the jury,'" and that "the judgment was not substantially swayed by the error...."[36]

913*913 As previously noted, last year, in *O'Neal v. McAninch, supra,* the United States Supreme Court elaborated on the *Kotteakos* formulation,[37] and addressed the "special circumstance in which record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict." The Court elaborated on what constitutes "grave doubt," stating:

> *(By "grave doubt" we mean that, in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.) We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict (i.e., as if it had a "substantial and injurious effect or influence in determining the jury's verdict").*[38]

The Court expressly declined to phrase the issue in terms of burden of proof.

> *[W]e deliberately phrase the issue in this case in terms of a judge's grave doubt, instead of in terms of "burden of proof."*[39]

The dissenting justices in *O'Neal* had no "quarrel with the majority's conclusion that once an error has been shown on *direct appeal,* the government must demonstrate that it was harmless if the conviction is to stand."[40] (Emphasis added.) The dissenters would have required a federal habeas corpus petitioner to bear the burden of persuasion that the challenged actions caused harm___that the "error was harmful"___ and that the error was prejudicial.

Mateo is seeking relief on direct appeal, and the question is whether the error was harmless, not whether it was harmful. The reviewing court should ask whether the error is harmless, not whether it is harmful.

VI

The majority puts off to another day deciding the level of assurance or confidence that a reviewing court must have that a preserved, nonconstitutional error was not prejudicial and, thus, harmless.[41] It states that 914*914 "[t]he *Kotteakos* test, as articulated by the prosecutor, does not definitively settle on this question," and that "federal courts have variously adopted tests described as a highly probable, more probable than not, and a reasonable likelihood that the error affected substantial rights."[42] The majority continues that Chief Justice Traynor, in his book on harmless error, discussed the "highly probable" and "more probable than not" tests, and "suggests that the highly probable test strikes the appropriate balance between protecting both the public and defendants' interests in fair trials."

A

Most circuits that have considered the level of confidence or assurance issue employ the "highly probable" test:

United States v. Cudlitz, 72 F.3d 992, 999 (C.A.1, 1996) ("we are instructed to ask whether it is `highly probable' that the error did not `contribute to the verdict'").

United States v. Tussa, 816 F.2d 58, 67 (C.A.2, 1987) ("in order to find harmless error, we must find it `"highly probable" that the error did not contribute to the verdict' ").

United States v. Quintero, 38 F.3d 1317, 1331 (C.A.3, 1994) ("we must evaluate whether it is `highly probable that the evidence did not contribute to the jury's judgment of conviction.'*Government of Virgin Islands v. Toto,* 529 F.2d 278, 284 [C.A.3, 1976]").

United States v. Ince, 21 F.3d 576, 583 (C.A.4, 1994) ("whether we believe it `highly probable that the error did not affect the judgment'").

United States v. Mackin, 163 U.S.App. D.C. 427, 435, 502 F.2d 429, 437 (1974) ("In reviewing the proceedings this court must decide whether it was `highly probable that the error had substantial and injurious effect or influence in determining the jury's verdict'").

The United States Court of Appeals for the Tenth Circuit in *United States v. Wacker,* 72 F.3d 1453, 1473 (C.A.10, 1995), declared that error is "harmless `unless it has a "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect.'"

The United States Courts of Appeals for the Fifth Circuit and Eleventh Circuit (a split-off of the Fifth) appear to reiterate the *Kotteakos* formulation and then announces a decision.

In *United States v. Neuroth,* 809 F.2d 339, 342 (C.A.6, 1987), the United States Court of Appeals for the Sixth Circuit declared: "An error, not of constitutional dimension, is harmless unless it is more probable than not that the error materially affected the verdict." *Neuroth,* did not refer to *Kotteakos.* Subsequent cases do, and do not include the "more probable than not" formulation. See e.g., *United States v. Dean,* 969 F.2d 187, 197 (C.A.6, 1992), and *United States v. Wiedyk,* 71 F.3d 602, 607 (C.A.6, 1995) (using "fair assurance" language from*Kotteakos*).

The United States Court of Appeals for the Seventh Circuit does not appear to have moved beyond the language of *Kotteakos,* often relying on the "substantial influence" language. *United States v. Grier,* 866 F.2d 908, 920 (C.A.7, 1989). There was a time, however, when the circuit employed a "significant possibility" standard, but that seems

to have been abandoned in favor of reliance on *Kotteakos* itself. *United States v. Marrero,* 486 F.2d 622, 627 (C.A.7, 1973).

The United States Court of Appeals for the Eighth Circuit in *United States v. Nevils,* 897 F.2d 300, 307 (C.A.8, 1990) said: "We must be able to say with `fair assurance' that the error did not sway the jury's verdict."

The United States Court of Appeals for the Ninth Circuit, in *United States v. Hitt,* 981 F.2d 422, 425 (C.A.9, 1992), observed that at times the Circuit had applied a "fair assurance" test and at others a "more probable than not" test, and said:

> *A 55% likelihood that the error was harmless qualifies as "more probable than not," but it's hardly a "fair assurance" of harmlessness.*

Kotteakos contains its own level of confidence and assurance tests, namely, the question is whether the error had "substantial 915*915 influence" on the trier of fact, and if the reviewing court "is left in grave doubt, the conviction cannot stand:"

> *If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. [Id., at pp. 764-765,66 S.Ct. at p. 1248 (citation omitted).]*

It appears that the alternative expressions of the level of confidence or assurance an appellate court on direct review must have before declaring that a preserved nonconstitutional error was not prejudicial and, thus, harmless, are the "substantial influence"/"grave doubt" standard set forth in *Kotteakos* itself, and the alternatives suggested by Justice Traynor of "highly probable," adopted in most United States Courts of Appeals, or "more probable than not," not regularly employed in any circuit, the vague "fair assurance" test and the "reasonable likelihood" test, adverted to in footnote 19 of the majority opinion, set forth in *United States v. Hawkins,* 905 F.2d 1489, 1493 (C.A.11, 1990).

This Court is adequately informed concerning the alternatives, and the briefing in this case is more than adequate.

B

Further, the bench and bar have been awaiting a definitive statement from this Court since*People v. Anderson* (*After Remand*), 446 Mich. 392, 407, n. 39, 521 N.W.2d 538 (1994), was decided with the following observation:

> *Accordingly, we save for another day, after full briefing and argument, the distinction between, and the enunciation of, the constitutional harmless error test and Michigan's nonconstitutional harmless error test.*

On the same day that *Anderson* was decided, this Court decided *People v. Dunn,* 446 Mich. 409, 521 N.W.2d 255 (1994), where this Court concluded that the admission of tainted evidence was not harmless, but did so without reference to this Court's harmless error jurisprudence in deference to the decision reflected in *Anderson* to save until another day, after full briefing and argument, the elucidation of the standard for reviewing preserved nonconstitutional error. Also on the same day that *Anderson* and *Dunn* were decided, this Court decided *People v. Stanaway,* 446 Mich. 643, 521 N.W.2d 557 (1994), where, in a separate opinion, a colleague observed:

> *Despite guidance from both our court rules and statute, this Court has yet to fully examine the relevant considerations for nonconstitutional harmless error and certainly has failed to set forth a clear and concise nonconstitutional harmless-error test. Instead, this Court has generally chosen to rely on the harmless-error statute and court rules for the limited guidance provided therein in making this determination. People v. Travis, 443 Mich. 668, 686, 505 N.W.2d 563 (1993). From a plain reading of these rules, however, the vague concept of injustice certainly does not provide any meaningful help to appellate courts in reviewing nonconstitutional error. [Id., at pp. 697-698, 521 N.W.2d 557 (Riley, J., concurring).]*

Lastly, Mateo's application for leave to appeal was held in abeyance pending this Court's decision in *People v. Dunn,* which, for reasons already stated, did not decide the appropriate standard for determining when preserved nonconstitutional error requires reversal. In granting leave to appeal in this case, we asked the parties to brief "what is the appropriate standard for determining when nonconstitutional error in admitting evidence is reversible." See n. 11.

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I would, therefore, complete the task, and decide the level of assurance or confidence question under the circumstances that the alternative possible tests have been considered and discussed in countless cases, the Court is fully informed, both from our own experiences in reviewing literally hundreds, if not thousands, of cases where the harmless error issue permeates the disposition at the Court of Appeals level and at this level, and the more than adequate briefing and independent research as reflected in the majority discussion of Justice Traynor's work on harmless error.

VII

As stated in the concurring opinion in *Stanaway,* "the vague concept of injustice certainly does not provide any meaningful help to appellate courts in reviewing nonconstitutional error."[43]Nothing is gained, and much lost, by preserving the reformulated "miscarriage of justice" formula.

There can be little doubt that it is ultimately this Court's responsibility, and not that of the Legislature, to determine whether it is consistent with the concept of appellate *judicial* review, and the proper exercise of the *judicial* power, and the concept of a fair trial embodied in the Due Process Clause, to ignore events at a trial that taint a conviction or encourage practices that debilitate or undermine the high standards one expects to be observed and enforced in a court of justice.[44]

Continued verbalization of miscarriage of justice as a test is inconsistent with this Court's reaffirmation today that a reviewing court may not affirm a conviction "simply because it concludes the jury reached the right result." [45]

The impropriety of continuing the miscarriage of justice formula then becomes clearer upon consideration of this Court's recent decision in *People v. Grant,* 445 Mich. 535, 520 N.W.2d 123 (1994), where, following the lead of the United States Supreme Court in *United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), this Court recognized that even where the defendant fails to preserve nonconstitutional error, an appellate court may reverse for "plain forfeited error" even though, as stated in *Olano,* there has not been a miscarriage of justice in the sense that the defendant is actually guilty, if the error "seriously affects" the fairness, integrity or public reputation of judicial proceedings.

VIII

Applying[46] the *Kotteakos* standard, applicable to nonconstitutional error, as elaborated in*Brecht* and *O'Neal,* I turn to a consideration, on de novo review of the whole record, whether the error in admitting Brecht's testimony was harmless.

I agree with Mateo, contrary to a statement of the Court of Appeals, that the evidence against him was not "overwhelming." While there was possibly overwhelming evidence that Cantu had been assaulted by someone,[47] no one other than Cantu testified 917*917 that Mateo was the assailant. Cantu clearly was an interested witness, and therefore his credibility could be questioned. Mateo did not testify, but, as a matter of law, that cannot be weighed in evaluating the harmlessness of the error in admitting Jennifer Brecht's testimony that Blair had warned Brecht that Mateo was "very violent," thereby impeaching Blair___who had testified that Mateo was with her when the assault was claimed to have taken place___and who had denied having conversations with Brecht about Mateo.

If that were the whole record, I would be at least in grave doubt whether the error had substantial and injurious effect or influence in determining the jury's verdict. There would only be Cantu's testimony identifying Mateo as the assailant, and Blair's alibi testimony that Mateo was with her at the time of the assault. Brecht's testimony impeaching Blair's testimony and indicating that Mateo was at times a violent womanizer, might very well then have swayed the jury.

Additionally, however, there was the testimony of two police officers that Cantu's sister, Elva Lulgjurflj, had confirmed, at the scene of, and shortly after, the alleged assault, that Mateo was the assailant.

The officers' testimony was hearsay, but Mateo's lawyer failed to object. Cantu's mother's testimony that he identified Mateo as his assailant shortly after the incident, might have been admissible, although hearsay, as an excited utterance or some other basis. But, Mateo's lawyer's failure to object leaves the record silent in that regard. Courts disagree concerning the weight to accord hearsay admitted without objection. The majority view is that hearsay admitted without objection has probative value.[48]

On the same premise that the harmless-error analysis for preserved error differs from that where the error has not been preserved,[49] an appellate court undertaking review for harmlessness should consider, as part of the whole record, unobjected to hearsay___in this case, the hearsay statements identifying Mateo as the assailant.

To be sure, the inquiry in assessing the harmlessness of error is whether the error may have swayed the jury, not the quantity or quality of the other evidence. Nevertheless, in deciding whether the error may have swayed the jury, the reviewing court must

consider the whole record, not for the purpose of itself making a judgment concerning the defendant's guilt or innocence, but rather for the purpose of determining whether the jury might have been swayed by the erroneously admitted testimony.[50]

Cantu's testimony identifying Mateo as the assailant, together with Lulgjurflj's corroboration at the scene shortly after the assault, was opposed by Blair's testimony that Mateo was with her at the time of the assault. It is questionable whether any juror's assessment of the credibility of the opposing testimony was swayed by Brecht's assertion that Blair had, contrary to her denial, conversed with Brecht concerning Mateo disparagingly.[51]

There is a further consideration, however. The concept of harmless error has become part of the equation for the purpose of determining whether there is error at all, as in the assessment of whether a defendant was deprived of the effective assistance of counsel. In *People v. Pickens,*446 Mich. 298, 521 N.W.2d 797 (1994), this Court, again following the lead of the United States Supreme Court, adopted the approach set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which imposes on the defendant the burden of showing that, absent counsel's errors, the fact finder would have had a reasonable doubt 918*918 respecting guilt. This Court said that "under Michigan law, counsel's ineffective assistance must be found to have been prejudicial in order to reverse an otherwise valid conviction." [52]

The Court's analysis in *Grant* and *Pickens* considered whether the unpreserved error in *Grant*and the error of counsel in *Pickens,* might have been outcome determinative.[53]

Clearly, the error would be outcome determinative if the reviewing court would be in "grave doubt" or be unable to declare that it is "highly probable" that the error did not affect the verdict, but for error of counsel that permitted inadmissible evidence to become part of the record that may have influenced or swayed the jury.

No possible trial strategy could have justified Mateo's lawyer's failure to have objected to the inadmissible hearsay. His failure to do so fell below an objective standard of reasonableness in the representation of persons accused of crime.

For the foregoing reasons, I conclude that the error was not harmless, and would remand for a new trial.

The majority asserts that the evidence of Mateo's guilt is "overwhelming." The mantra "overwhelming" ignores the imperative of considering not only evidence tending to establish guilt, but also the evidence tending to refute the evidence of guilt. The Court of Appeals and this Court, on review of the whole record, were and are required to assess not only Cantu's testimony, but also Crystal Blair's alibi testimony tending to show that Mateo could not have been the assailant.

I would reverse and remand for a new trial.

[1] The separate opinion observes that *"Kotteakos* contains its own level of confidence and assurance tests, namely, the question is whether the error had `substantial

influence' on the trier of fact...." Op. at 914. Despite this observation, and explicit language urging this Court to "adopt wholeheartedly the approach of the United States Supreme Court in *Kotteakos,"* Op. at 907, the author claims to adopt the highly probable test, but never applies that test in reaching the ultimate conclusion that Mateo was denied constitutionally effective assistance of counsel. To the contrary, in analyzing the facts of this case, the separate opinion states that it is "[a]pplying the *Kotteakos*standard," Op. at 916, to determine whether the error was harmless.

The separate opinion never establishes the relationship between the *Kotteakos* standard and the highly probable standard. If the two standards are the same, there would seem to be no need to adopt the highly probable test. If the standards are different, the analysis in the application section of the separate opinion sheds no light on how they differ. Thus, the separate opinion itself illustrates the wisdom of further argument regarding whether*Kotteakos* contains its own level of confidence, whether another level of assurance is appropriate, and how various formulations of *Kotteakos* would be applied.

[2] M.C.L.A. § 750.83; M.S.A. § 29.278.

[3] M.C.L.A. § 750.82; M.S.A. § 28.277.

[4] M.C.L.A. § 769.10; M.S.A. § 28.1082.

[5] Unpublished opinion per curiam, issued February 17, 1993 (Docket No. 134528), slip op. at 1.

[6] 448 Mich. 868, 530 N.W.2d 747 (1995).

[7] Moreover, if M.C.L.A. § 769.26; M.S.A. § 28.1096 is not controlling on this Court for harmless error review, what about the language of M.C.L.A. § 768.29; M.S.A. § 28.1052 (duty of a judge at trial) or M.C.L.A. § 722.28; M.S.A. § 25.312(8) (standard of appellate review in child custody cases)? See *Fletcher v. Fletcher,* 447 Mich. 871, 876-882, 526 N.W.2d 889 (1994), *id.* at 890-900, 526 N.W.2d 889 (Levin, J., writing separately). Numerous other examples could be cited.

[8] It is argued that a harmless error rule is procedural. As Judge Traynor observes, the *Morgan* classification of rules of law as substance or procedure are:

"The rules which determine the legal relations between the parties when all the facts are known or assumed are rules of substance." [quoting Morgan, *Rules of evidence: substantive or procedural?* 10 Vand. L. R. 467-468 (1957)] ... Within these terms, a harmless-error rule could hardly be deemed procedural.... Far from being procedural, a harmless-error rule is of a piece with substantive rules, for it too is a mandate to the judge, at this stage the appellate judge, calling for the last word on the legal effect of the findings. [Traynor, The Riddle of Harmless Error (Ohio State Univ. Press, 1970), pp. 39-40.]

[9] No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or

the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. [M.C.L.A. § 769.26; M.S.A. § 28.1096.]

[10] An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice. [MCR 2.613(A).]

[11] (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground for objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

* * * * * *

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting *substantial rights* although they were not brought to the attention of the court. [MRE 103 (emphasis added).]

[12] Our harmless-error statute was originally enacted in 1915 P.A. 89, at the same time that "a substantial number of states adopted such legislation." 3 LaFave & Israel, Criminal Procedure, § 26.6(a), pp. 257-258.

[13] While *Robinson* recognized that the question for harmless-error review was one of prejudice, it erroneously applied the *Chapman* standard to review of nonconstitutional errors. *Id.* at 559-564, 194 N.W.2d 709. In addition, the articulation of the harmless-error test in *Robinson* was dicta. Before engaging in that discussion, the Court reversed and remanded the case for a new trial because of the admission of involuntary statements by the defendant. *Id.* at 559, 194 N.W.2d 709.

[14] Cf. *English v. Caldwell,* 30 Mich. 362, 364 (1874); *Miskiewicz v. Smolenski,* 249 Mich. 63, 74, 227 N.W. 789 (1929) (the plaintiff's allegations of error, even if correct, would not be prejudicial because "had the errors not been made ... the jury's verdict would have been the same").

[15] The harmless-error statute in *Kotteakos* was an earlier version of the current federal rule, 28 U.S.C. § 2111, which now provides:

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

The current and former statutes do not differ in any respect relevant to the issue before us. See *Kotteakos, supra*at 757, 66 S.Ct. at 1244, for text of the version of the rule in effect at the time of that case.

[16] See also *People v. Johnson,* 427 Mich. 98, 115-116, n. 14, 398 N.W.2d 219 (1986) (Boyle, J.) (providing an outline of harmless-error review under the federal rules, and noting that, under the then-proposed Michigan Rules of Criminal Procedure, reversal for nonconstitutional error should only occur where there has been proof that the alleged error prejudiced the defendant).

[17] Federal courts have phrased the inquiry into the harmlessness of nonconstitutional error in a variety of distinctive questions. See, e.g., *Government of Virgin Islands v. Toto,* 529 F.2d 278, 284 (C.A.3, 1976) (assessing whether it is *highly probable* that an alleged error did not contribute to a verdict); *United States v. Neuroth,* 809 F.2d 339, 342 (C.A.6, 1987) (determining harmlessness by asking whether it is *more probable than not,* i.e., a preponderance of the evidence, that the error did not affect the verdict); *United States v. Hawkins,* 905 F.2d 1489, 1493 (C.A.11, 1990) (nonconstitutional errors *"do not* constitute grounds for reversal unless there is a*reasonable likelihood that they affected* the defendant's substantial rights"). (Emphasis added.)

[18] See, e.g., *Commonwealth v. Story,* 476 Pa. 391, 383 A.2d 155 (1978); Saltzburg, *The harm of harmless error,*59 Va. L. R. 988 (1973).

[19] See, e.g., *Government of Virgin Islands v. Toto,* n. 17 *supra* at 284; *United States v. Ladd,* 885 F.2d 954, 957-958 (C.A.1, 1989); *Story,* n. 18 *supra* at 424-426, 383 A.2d 155 (Pomeroy, J., concurring).

[20] See, e.g., *Neuroth,* n. 17 *supra* at 342; *United States v. Rasheed,* 663 F.2d 843, 850 (C.A.9, 1981).

[21] The testimony at trial was unrebutted and was corroborated by the victim's statement to his mother immediately after the incident that defendant was his attacker (testimony, the evidentiary significance of which the separate opinion fails to assess), a handgun found in the bathroom, the broken bathroom door, medical treatment of the slashes, and the statement of Cantu's sister.

If the evidence is overwhelming, the error is harmless, *United States v. Meneses-Davila,* 580 F.2d 888 (C.A.5, 1978); *United States v. Hermandez-Bermudez,* 857 F.2d 50 (C.A.1, 1988).

[22] The separate opinion's conclusion that Mateo's counsel was constitutionally deficient was not raised, briefed, or argued before this Court and is not properly before us for our review.

[1] My colleagues imply that the *Robinson* Court did not understand the significance of citing *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), when it defined its harmless error standard. I disagree. In *Robinson,* there were two primary categories of alleged errors: (1) the admission of an involuntary confession, and (2) evidentiary errors, which were the equivalent of improper bad-acts evidence. *Id.* at 556, 194 N.W.2d 709. The Court reversed the defendant's conviction on the basis of the admission of the involuntary confession, without engaging in *any* harmless error analysis. *Id.* at 559, 194 N.W.2d 709. It was within the discussion of the alleged evidentiary errors, or what would now be termed nonconstitutional errors, that*Robinson* cited *Chapman* for support of the harmless error test.

Given that *Robinson* was decided in 1972, five years after *Chapman* was decided in 1967, and twenty-six years after *Kotteakos v. United States,* 328 U.S. 750, 764, 66 S.Ct. 1239, 1247-1248, 90 L.Ed. 1557 (1946), was decided, we must presume that this Court understood the significance of citing *Chapman* rather than *Kotteakos.* It knew then that the federal harmless error standards were different for constitutional and nonconstitutional error. If this Court had wanted to adopt such a dichotomy, it would have done so. It strains belief that any of my colleagues would suggest that this Court did not recognize what it was doing before now. In reality, my colleagues simply disagree with *Robinson,* which they should openly acknowledge, rather than undermining the work of our predecessor.

[2] Some errors have been held to be "so offensive to the maintenance of a sound judicial process that [they] cannot be regarded as harmless error." *People v. Bentley,* 402 Mich. 121, 124, 261 N.W.2d 716 (1978)(unconstitutional denial of right to counsel).

[3] For the sake of argument, I am assuming that "affirmatively finds," which I interpret as a confident and positive assertion, equates with finding beyond a reasonable doubt.

[4] Justice Boyle quotes from Justice Traynor:

Unless the appellate court believes it highly probable that the error did *not* affect the judgment it should *reverse.*[Boyle, J., Op. at 898 (citation omitted and emphasis added).]

[5] As this Court has held:

A witness' perception of persons and events, the clarity and accuracy of the witness' memory, and the lucidity of the witness' description of persons and events are critical in evaluating the credibility of testimony. The law requires that witnesses be present at trial, take an oath of truthfulness and be subject to cross-examination so that their credibility may be properly evaluated. The admission of hearsay evidence is disfavored because it is difficult, if not impossible, for the trier of fact to assess the reliability of hearsay statements or of the hearsay declarant. The trier of fact is unable to view and evaluate the demeanor and manner of the declarant while making the hearsay statement. The hearsay statement has not been vouched and thus the declarant may not have felt the "special obligation to tell the truth" that results from the taking of an oath. Most importantly, there is no opportunity for cross-examination of the declarant

regarding the content of the hearsay statement. [*Poole,* 444 Mich. at 160, 506 N.W.2d 505.]

[6] Justice Boyle refers to Cantu's statement to his mother. Boyle, J., Op. at 893. However, this statement would still be nothing more than a cumulative restatement of Cantu's version of the events. It was not based on any independent knowledge on his mother's part.

[1] Const. 1963, Art. 6, § 1.

[2] Const. 1963, Art. 6, § 4.

[3] Const. 1963, Art. 6, § 5.

[4] Op., at p. 898.

[5] Op., at p. 892.

[6] Op., at p. 898.

[7] [R]eversal is not required unless an error is harmful. [Op., at p. 894.]

[8] Justice Scalia, writing for a unanimous court in a constitutional error case, said that the harmless error inquiry concerns the effect of the error on the jury that was actually impaneled, not the effect on a hypothetical jury:

The most an appellate court can conclude is that a jury would surely have found petitioner guilty beyond a reasonable doubt___not that the jury's actual finding of guilty beyond a reasonable doubt would surely not have been different absent the constitutional error. That is not enough. See *Yates* [*v. Evatt,* 500 U.S. 391, 403-404, 111 S.Ct. 1884, 1893, 114 L.Ed.2d 432 (1991)] (Scalia, J., concurring in part and concurring in judgment). The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal; it requires an actual jury finding of guilty. See *Bollenbach v. United States,* 326 U.S. 607, 614, [66 S.Ct. 402, 406, 90 L.Ed. 350] (1946). [*Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).]

[9] See n. 4; *Kotteakos v. United States,* 328 U.S. 750, 759, 763, 66 S.Ct. 1239, 1245, 1247, 90 L.Ed. 1557 (1946).

[10] In *Kotteakos,* the Court said:

[T]his does not mean that the appellate court can escape altogether taking account of the outcome. To weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum.... In criminal causes that outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen. And *the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision.* The

crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting....

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how *others might react and not be regarded generally as acting without reason.* This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record. [*Id.,* n. 9 *supra,* at pp. 764-765, 66 S.Ct. at pp. 1247-1248.]

[11] 448 Mich. 868, 530 N.W.2d 747 (1995). Mateo's application for leave to appeal was held in abeyance pending this Court's decision in *People v. Dunn,* 446 Mich. 409, 521 N.W.2d 255 (1994). *Dunn* did not decide the appropriate standard for determining when nonconstitutional error requires reversal. This Court resolved the pending abeyance in this case by entering an order granting leave to appeal, limited to the issues "(1) whether the trial court erred in permitting witness Brecht to testify as a rebuttal witness, (2) what is the appropriate standard for determining when nonconstitutional error in admitting evidence is reversible, and (3) whether any error in the admission of the testimony of witness Brecht was error requiring reversal."

[12] *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[13] *Kotteakos, supra,* at pp. 764-765, 66 S.Ct. at pp. 1247-1248.

[14] *Id.,* 513 U.S. at ___, 115 S.Ct. at 1000, 130 L.Ed.2d at 960.

Amicus curiae Prosecuting Attorneys Association of Michigan agrees, and further agrees that the power to determine the harmless error standard for preserved nonconstitutional error, except where the error alleged is a failure to observe a mandate *created* by statute, is "committed to the judicial branch of government," and thus the literal language of § 26, ch. IX of the Code of Criminal Procedure (see n. 30) is not controlling.

O'Neal, in contrast with the instant case, was not a direct appeal, but rather a federal habeas corpus proceeding, requiring that the petitioner establish a violation of the federal constitution or a federal statute. The dissenters would have required a federal habeas corpus petitioner to bear the burden of persuasion that the error caused harm and that the error was prejudicial.

[15] M.C.L.A. § 750.83; M.S.A. § 28.278.

[16] M.C.L.A. § 750.82; M.S.A. § 28.277.

[17] M.C.L.A. § 769.10; M.S.A. § 28.1082.

[18] Unpublished opinion per curiam issued February 17, 1993 (Docket No. 134528), slip op., p. 1.

[19] The Court of Appeals cited *People v. Holland,* 179 Mich.App. 184, 193, 445 N.W.2d 206 (1989). See n. 18.

[20] *Id.,* slip op., p. 1. The Court again cited *Holland,* n. 19 *supra,* at p. 194, 445 N.W.2d 206. The Court in *Holland*said:

Rebuttal testimony is that used to contradict, repel, explain, or disprove evidence produced by the other party, tending directly to weaken or impeach the same. *People v. Kelly,* 423 Mich. 261, 281, 378 N.W.2d 365 (1985). There are, however, limitations. First, if the evidence should have been introduced in the case in chief, rebuttal is improper. *People v. Losey,* 413 Mich. 346, 351, 320 N.W.2d 49 (1982). Second, rebuttal evidence must be on a material matter, not a collateral issue. *People v. Teague,* 411 Mich. 562, 566, 309 N.W.2d 530 (1981). Third, if the evidence was not raised in the prosecutor's case in chief, the defense must have raised a new issue. The prosecutor is not allowed to elicit a denial from the defendant on cross-examination only to inject a new issue on rebuttal or revive the right to introduce evidence that should have been introduced in the case in chief. *People v. Bennett,* 393 Mich. 445, 449-450, 224 N.W.2d 840 (1975). [*Id.,* at pp. 193-194, 445 N.W.2d 206.]

[21] See *People v. McGillen,* No. 1, 392 Mich. 251, 220 N.W.2d 677 (1974); *People v. Bennett,* n. 20 *supra.*

[22] The Court of Appeals added:

Intent to murder may be inferred from the facts and circumstances. *Id.* The victim testified that defendant held a handgun under the victim's chin and told him that he was going to "blow his brains out." After the victim knocked the gun out of defendant's hand and locked the bathroom door, defendant smashed in the upper door panel and started swinging two steak knives at the victim. When the victim attempted to flee, defendant cut him off and continued swinging the knives, cutting the victim twice in the head and once on the chin and hand, all requiring sutures. [*Id.,* slip op., p. 2.]

[23] The Court said that although the government had presented a reasonably strong `circumstantial web of evidence' against petitioners, [*People v. Teale]* 63 Cal.2d [178, 197; 404 P.2d 209, 220 [45 Cal.Rptr. 729, 740 (1965)], "absent the constitutionally forbidden comments, honest, fairminded jurors might very well have brought in not-guilty verdicts." *Chapman v. California, supra,* at pp. 25-26, 87 S.Ct. at pp. 828-829.

Nearly twenty-five years after *Chapman* was decided, the United States Supreme Court, in *Arizona v. Fulminante,* 499 U.S. 279, 307, 111 S.Ct. 1246, 1263, 113 L.Ed.2d 302 (1991), characterized some constitutional errors as "trial error," subject to harmless-error analysis, and other constitutional errors as "structural defects" that "defy analysis by `harmless-error standards.' " Two years later, in *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the United States Supreme Court ruled, on direct appeal from the Supreme Court of Louisiana, that a constitutionally deficient criminal jury instruction concerning the definition of reasonable doubt, was structural error not amenable to harmless-error analysis.

[24] Mateo and amicus curiae Criminal Defense Attorneys of Michigan argue that the distinction between constitutional and nonconstitutional violation is not easily drawn, and the overlap supports the adoption of a single, beyond-a-reasonable-doubt standard. We are not persuaded that because the task may at times be daunting that it would be responsible to ignore the cost to the administration of justice of so simply cutting the Gordian Knot.

[25] *People v. Liggett,* 378 Mich. 706, 717, 148 N.W.2d 784 (1967); *People v. Robinson,* 386 Mich. 551, 563, 194 N.W.2d 709 (1972); *People v. Cash,* 419 Mich. 230, 249, 351 N.W.2d 822 (1984).

But see the opinion in *People v. Lee,* 434 Mich. 59, 86 (Brickley, J.), 123 (Boyle, J.), 450 N.W.2d 883 (1990);*People v. Straight,* 430 Mich. 418, 427, 424 N.W.2d 257 (1988); *People v. Johnson,* 427 Mich. 98, 115, 398 N.W.2d 219 (1986) (Boyle, J.).

[26] On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, *in any case, civil or criminal,*the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties. [Section 269 of the Judicial Code, 28 U.S.C. § 391, enacted in 1919 (40 Stat. 1181) (emphasis added).]

[27] Four years before the enactment of the federal harmless-error statute, the Legislature enacted the following law:

No judgment or verdict shall be set aside or reversed, or a new trial be granted by any court of this State *in any case, civil or criminal,* on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless, in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a*miscarriage of justice.* [1915 P.A. 89 (emphasis added).]

This provision was codified in the Code of Criminal Procedure, 1927 P.A. 175, ch. IX, § 26, with the substitution of "in any criminal case" for "in any case, civil or criminal." The language so enacted, which has continued to remain in force without amendment to the present, provides as follows:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state *in any criminal case,* on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a *miscarriage of justice.*[M.C.L.A. § 769.26; M.S.A. § 28.1096 (emphasis added).]

The language of the original Michigan harmless-error statute (1915 P.A. 89) was enacted as a section of the Judicature Act of 1915, 1915 P.A. 314, ch. L., § 28, with the substitution of "in any civil case" for "any case, civil or criminal." This language was carried forward through 1948 C.L. 650.28, but was not continued in the Revised

Judicature Act of 1961. Language respecting civil harmless error was continued forward as G.C.R. 1963, 529.1, which is set forth in n. 31.

[28] The Michigan harmless error statute, as first enacted in 1915, applied in both civil and criminal trials. See n. 27 for the text of the 1915 statute.

[29] *Kotteakos, supra,* at p. 759, 66 S.Ct. at p. 1245.

[30] See n. 27 for the text of the original Michigan harmless-error statute, enacted as 1915 P.A. 89, and for the text of the harmless-error statute enacted as part of the Code of Criminal Procedure, as 1927 P.A. 175, ch. IX, § 26, which remains in force without amendment to the present as M.C.L.A. § 769.26; M.S.A. § 28.1096.

[31] G.C.R. 1963, 529.1 was modeled on F.R. Civ. P. 61, and read as follows:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court *inconsistent with* substantial justice. The court at every stage of the proceeding shall construe these rules to secure the just, speedy, and inexpensive determination of every action so as to avoid the consequences of any error or defect in the proceeding which does not affect the *substantial rights* of the parties. [Emphasis added.]

The current civil rule reads as follows:

An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court *inconsistent with substantial justice.* [MCR 2.613(A) (emphasis added).]

The Michigan Rules of Evidence, modeled on the Federal Rules of Evidence, state essentially the same concept:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a *substantial right* of the party is affected, and

* * * * * *

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting *substantial rights* although they were not brought to the attention of the court. [MRE 103 (emphasis added).]

[32] In *Soltar, supra,* at p. 244, 65 N.W.2d 777, it was urged that instructional error in a civil case should not result in reversal because it did not "`affirmatively appear that the error complained of has resulted in a miscarriage of justice'...." The defendant

contended "that an examination of the entire cause discloses the verdict to be in accord with justice." This Court responded:

The statute is ineffective to change the rule always in effect in Michigan, both before and after the enactment, that the question of reversal is controlled by determination of whether the error was prejudicial. (Emphasis added.)

[33] The full text of the paragraph in *Kotteakos* from which the standard I would adopt is derived, reads as follows:

If, when all is said and done, the conviction is sure that the *error did not influence the jury, or had but very slight effect,* the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with *fair assurance,* after pondering all that happened without stripping the erroneous action from the whole, that *the judgment was not substantially swayed by the error,* it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is *left in grave doubt,* the conviction cannot stand. [Emphasis added; citations omitted.]

See also *United States v. Lane,* 474 U.S. 438, 450, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986), in which the United States Supreme Court found that "[i]n the face of overwhelming evidence of guilt shown here" that any error "failed to have any `substantive influence' on the verdict," citing *Kotteakos, supra,* at p. 765, 66 S.Ct. at p. 1248. Justices Brennan's and Stevens' separate opinions are instructive.

[34] See 507 U.S. at 631, 113 S.Ct. at 1718.

The Court said that the *"Kotteakos* [harmless-error] standard is thus better tailored to the nature and purpose of collateral review, and more likely to promote the considerations underlying our recent habeas cases." [*Id.,* at pp. 637-638, 113 S.Ct. at p. 1722.]

[35] *Id.,* at p. 641, 113 S.Ct. at p. 1724.

The majority and the dissenters in *O'Neal v. McAninch, supra,* were in agreement that the reviewing court should study the entire record. The majority said that a record review ordinarily will enable the reviewing court to make up its mind about the harmlessness of the error. And, indeed, the reviewing court has an obligation to review the record in order to make such a judgment.

[36] Justice Stevens continued his exposition of *Kotteakos,* stating:

In a passage that should be kept in mind by all courts that review trial transcripts, Justice Rutledge wrote that the question is *not*

"were they [the jurors] right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have

had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting.

"This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record." [*Id.,* at pp. 642-643, 113 S.Ct. at p. 1724(citations omitted).]

[37] *O'Neal v. McAninch* was a federal habeas corpus proceeding. Although a federal habeas corpus court first must find federal constitutional or federal statutory error, the harmless-error analysis proceeds, by reason of the Court's decision in *Brecht v. Abrahamson,* under the approach set forth in *Kotteakos* and not the *Chapman*beyond-a-reasonable-doubt standard.

[38] *O'Neal,* 513 U.S. at ___, 115 S.Ct. at 994, 130 L.Ed.2d at 951.

[39] *O'Neal,* 513 U.S. at ___, 115 S.Ct. at 994-995, 130 L.Ed.2d at 952.

The Court continued:

The case before us does not involve a judge who shifts a "burden" to help control the presentation of evidence at a trial, but rather involves judges who apply a legal standard (harmlessness) to a record that the presentation of evidence is no longer likely to affect. In such a case, we think it conceptually clearer for the judge to ask directly, "Do I, the judge, think that the error substantially influenced the jury's decision?" than for the judge to try to put the same question in terms of proof burdens (e.g., "Do I believe the party has borne its burden of showing ...?") As Chief Justice Traynor said:

"Whether or not counsel are helpful, it is still the responsibility of the ... court, once it concludes there was error, to determine whether the error affected the judgment. It must do so without benefit of such aids as presumptions or allocated burdens of proof that expedite fact-finding at the trial." R. Traynor, The Riddle of Harmless Error 26 (1970).... [*Id.*]

[40] *Id.,* 513 U.S. at ___, 115 S.Ct. at 1000, 130 L.Ed.2d at 960.

O'Neal, in contrast with the instant case, was not a direct appeal, but rather a federal habeas corpus proceeding, requiring that the petitioner establish a violation of the federal constitution or a federal statute.

[41] Op., at pp. 892 and 898.

[42] Op., at p. 897.

[43] *Stanaway, supra,* at p. 698, 521 N.W.2d 557 (Riley, J., concurring).

[44] See ns. 1-3, 14, and discussing *Nichols, Soltar,* and *Bigge,* n. 32 *supra,* and accompanying text.

[45] Op., at p. 892.

[46] The United States Supreme Court in *O'Neal* did not itself undertake a review of the record to determine whether the error was harmless. It remanded for further proceedings to the United States Court of Appeals for the Sixth Circuit after having stated its conclusion that the Sixth Circuit had erred in stating that the habeas petitioner must bear the burden of establishing whether the error was prejudicial.

In the instant case, in contrast with *O'Neal* at the federal Court of Appeals level, the Michigan Court of Appeals applied at least as high a standard in reviewing for harmlessness as we conclude is applicable. We note, however, Justice Brennan's observation in *United States v. Lane,* n 33 *supra,* at p. 465, 106 S.Ct. at p. 740, that the United States Supreme Court, and, I would add immodestly, this Court, is ordinarily manifestly ill-equipped to undertake harmless-error analysis without the benefit of prior harmless-error analysis by the Court of Appeals.

[47] Cantu testified that he was assaulted with a gun and a knife. As the Court of Appeals observed, Cantu was treated at a hospital for multiple lacerations, and a hand gun was recovered from the bathroom where he claimed the assault took place. Police officers testified that the bathroom door had been broken, thereby confirming that aspect of Cantu's testimony.

[48] 29A Am. Jur. 2d, Evidence, § 1441, pp. 822-823. See *People v. Maciejewski,* 68 Mich.App. 1, 3, 241 N.W.2d 736 (1976).

[49] See *People v. Grant, supra.*

We decline the invitation of the amicus curiae Prosecuting Attorneys Association of Michigan, to expand on what was said in *Grant* respecting review for plain error when the issue has not been preserved for appellate review.

[50] *United States v. Lane,* n 33 *supra,* at pp. 464-465, 106 S.Ct. at pp. 739-740 (Brennan, J.).

[51] None of these witnesses, Cantu, who testified that Mateo assaulted him, Cantu's mother, and Brecht and Blair, former girlfriends of Mateo, were disinterested witnesses.

[52] *Pickens, supra,* at p. 314, 521 N.W.2d 797.

[53] *Grant, supra,* at p. 553, 520 N.W.2d 123; *Pickens, supra,* at p. 312, 521 N.W.2d 797.

People v Pickens

446 Mich. 298 (1994)

521 N.W.2d 797

PEOPLE

v.

PICKENS

PEOPLE

v.

WALLACE

Docket Nos. 91434, 95720, (Calendar Nos. 9-10).

Supreme Court of Michigan.

Argued December 2, 1993.

Decided August 25, **1994**.

302*302 *Frank J. Kelley,* Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,*Prosecuting Attorney, *Timothy A. Baughman,* Chief, Research, Training, and Appeals, and*Joseph A. Puleo* and *Thomas M. Chambers,* Assistant Prosecuting Attorneys, for the **people**.

Joel D. Patterson for defendant **Pickens**.

Martin J. Beres for defendant Wallace.

Amici Curiae:

Joan Ellerbusch Morgan for the Criminal Defense Attorneys of Michigan.

Margaret Chiara, Donald E. Martin, and *Guy L. Sweet* for the Prosecuting Attorney's Association of Michigan.

RILEY, J.

At issue in these consolidated cases is whether the Michigan constitutional guarantee of the effective assistance of counsel provides a criminal defendant with greater protections than its federal counterpart. We hold that the intention underlying the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel. Thus, to find that a defendant's right to 303*303 effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. Accordingly, we affirm the judgment of the Court of Appeals in***People** v Wallace* and reverse the judgment of the Court of Appeals in ***People** v **Pickens***because neither defendant is capable of showing that he was denied effective assistance of counsel.

Also at issue in *Wallace* is whether the denial of independent defense neurological tests by the trial court mandates reversal of defendant's conviction. While the trial court violated MCL 768.20a(3); MSA 28.1043(1)(3) by denying defendant's request for the tests, we affirm the conviction because the error was harmless under the circumstances.

Furthermore, we find that the admission of statements made by Wallace and others regarding the shooting and his past behavior as testified to by the prosecutor's rebuttal witness was not error because the statements were relevant to rebut Wallace's claim of insanity and were not unfairly prejudicial.

Hence, we affirm the judgment of the Court of Appeals in *Wallace* and reverse the judgment of the Court of Appeals in ***Pickens***.

I

A

Defendant Dwayne **Pickens** was charged with selling less than fifty grams of cocaine to an undercover police officer in the City of Detroit. During his opening argument at trial, defense304*304 counsel indicated that Eric Wright would testify that **Pickens** had been with him the day in question and had not delivered cocaine. The trial court, however, barred the introduction of the alibi witness because defense counsel had failed to file a notice of alibi as required by MCL 768.20(1); MSA 28.1043(1).[1]

Pickens was convicted as charged by the jury and sentenced to four to twenty years imprisonment. On appeal, he argued, inter alia, that he had been denied effective assistance of counsel because his counsel failed to file a notice of alibi and had not moved for an adjournment to correct the error. The Court of Appeals remanded for an evidentiary hearing pursuant to ***People*** *v Ginther,* 390 **Mich** 436, 442-444; 212 **NW2d** 922 (1973).

At the *Ginther* hearing, **Pickens**' trial counsel testified that her records did not show that she had failed to file a notice of an alibi defense. She indicated that she intended to call Wright to testify at trial as an alibi witness and that she had discussed that possibility with him and**Pickens** before trial. She could not recall if Wright appeared on the first day of trial, but remembered that he had been subpoenaed by her investigator and did not appear on the second day. She speculated that she did not move for an adjournment because the trial court's ruling precluding Wright was so definite. Following this pattern, **Pickens**' appellate counsel also waived production of Wright at the *Ginther* hearing. The record does not provide any explanation for his failure to testify at trial or the *Ginther* hearing.

After remand, the Court of Appeals found that **Pickens** was prejudiced by his trial attorney's305*305 failure to timely file a notice of an alibi defense or to move for an adjournment.[2]

This Court granted leave to appeal, 443 **Mich** 884 (1993), and consolidated the case with***People*** *v Wallace,* 443 **Mich** 883 (1993).

B

On August 4, 1986, defendant Ralph Wallace shot and killed his estranged wife as she sat across from him at a bar. After a preliminary examination, he was bound over for trial, and he personally retained defense counsel.

Counsel gave notice of Wallace's intent to raise an insanity defense, and the court granted the defense motion for an independent psychiatric evaluation. The court, however, later denied Wallace's request for additional neurological tests, including a CAT scan, that had been recommended by Dr. Rajendra K. Bhama, the independent psychiatric evaluator. In denying Wallace's motion for independent testing, the court reasoned that the trial should not be delayed to permit independent testing when identical tests had already been performed.[3] The court suggested that Dr. Bhama obtain the previous test results.

At trial, the prosecution argued that Wallace premeditated the murder of his wife. Various prosecution witnesses testified that Wallace threatened to kill her at least twice before the fatal shooting.[4] Witnesses to the slaying testified that Wallace, 306*306 sitting across a table from his wife, shot her and, after pausing for almost a minute, fired again after she had fallen and appeared alive. He then stated that the victim was "only his wife" and placed the gun on the counter. After announcing to the crowd not to worry, he went to the restroom and his car, and returned to wait for the police. An officer testified that Wallace spoke coherently, appeared sober, and admitted shooting his wife.[5]

Defense counsel countered that Wallace was mentally ill at the time of the shooting and acted in the heat of passion. Wallace's employer testified that on the day of the murder, Wallace appeared at work explaining that his plans to go fishing had gone awry. After witnessing Wallace ranting and raving with a flushed face, he sent him home. His employer also admitted providing him tranquilizers and antidepressant drugs before the day of the shooting. Other defense witnesses testified that Wallace and his wife often argued, and that on the day of the slaying he was despondent about his children.

Wallace denied intending to murder his wife. He testified that he took a tranquilizer provided by his employer after arriving home from work. He then drank two beers at a tavern and two at home before his wife called. They met at a bar to continue a discussion about his wish to take their six-year-old daughter fishing. He did not recall taking the gun, but admitted that he probably did because it was night and he feared his wife's family, describing earlier altercations with her brother. He testified that at the bar his wife described sexual experiences with her new lover and demanded her wedding rings back. While he did not recall shooting his wife, he described seeing two 307*307 enlarged moving images of her on the wall that appeared to be floating away. He felt as if he were going to explode.

Defendant's main witness for purposes of the insanity defense was his independent psychiatric examiner, Dr. Bhama, who concluded that he suffered from neurocortical damage and cerebellum dysfunction.[6] He theorized that on the day of the shooting, Wallace suffered from mental illness and disorder of thought and judgment. He also stated that Wallace lacked the substantial capacity of appreciating the wrongfulness of his conduct. He concluded that Wallace was legally insane at the time of the shooting.

The prosecution presented two expert rebuttal witnesses: Dr. Dexter Fields, chief psychiatrist at the Recorder's Court Psychiatric Clinic, and Ronald Kolito, senior clinical psychologist at the clinic. Dr. Fields disagreed with the diagnosis of organic brain syndrome, opining that Wallace was in touch with reality and that anxiety could have caused him to believe that his wife was larger than usual.

Kolito testified that Wallace was not psychotic or mentally ill at the time of the shooting. He buttressed his conclusion by testifying about comments made by Wallace about the day of the shooting, as well as observations of Wallace's co-worker about his behavior.[7] Defense counsel objected to much of his testimony as misleading and 308*308 impermissible hearsay. After giving the jury curative instructions, the trial court

admitted the testimony, reasoning that it provided the underlying facts of an expert's opinion.[8]

The jury found Wallace guilty of first-degree murder and of possession of a firearm during the commission of a felony. After denying a motion for new trial, the court sentenced him to the mandatory term of life plus two years for the felony-firearm conviction.

Wallace appealed, and the Court of Appeals granted a remand for a *Ginther* hearing on his claim of ineffective assistance of trial counsel. The Court denied the motion for a new trial and subsequent motions to remand. This Court granted leave to appeal to consider: (1) whether Wallace was denied the effective assistance of counsel, (2) whether the trial court erred when it denied his motion for neurological tests, and (3) whether the trial court erred in admitting the disputed rebuttal testimony.

II

At issue in these consolidated cases is the application of the Michigan Constitution's guarantee of the right to counsel to a claim of ineffective assistance of counsel. Our Court of Appeals has interpreted 309*309 our decision in ***People*** *v Garcia,* 398 **Mich** 250; 247 **NW2d** 547 (1976), as requiring the reversal of a criminal conviction when defense counsel failed to perform as well as a reasonably competent attorney, even if the defendant was not prejudiced by such representation. See, e.g., ***People*** *v White,* 142 **Mich** App 581, 588-589; 370 **NW2d** 405 (1985). In *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), however, the United States Supreme Court found that to prove a claim of ineffective assistance of counsel mandating reversal of a conviction the Sixth Amendment requires not only that counsel's performance fell below an objective standard of reasonableness, but also that the representation so prejudiced the defendant as to deprive him of a fair trial.

At issue in the instant case is whether the Michigan Constitution requires the reversal of a criminal conviction when defense counsel's ineffective assistance did not so prejudice a defendant as to deprive him of a fair trial.

A

1

Michigan law has long held that "[i]t is a maxim that the object of construction, as applied to a written Constitution, is to ultimately ascertain and give effect to the intent of the **people** in adopting it." *Kearney v Bd of State Auditors,* 189 **Mich** 666, 671; 155 NW 510 (1915). This is so because when interpreting the law *"it is the intent of the law-giver that is to be enforced."* 1 Cooley, Constitutional Limitations (8th ed), p 125 (emphasis in original). Because "the constitution does not derive its force from the convention which framed, but from the **people**who ratified it, the intent to be arrived at is that of the **people** ... in the sense 310*310 most obvious to the common understanding...." *Id.* at 143. Often, "to clarify meaning, the circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished may be

considered." *Traverse City School Dist v Attorney General,* 384 **Mich**390, 405; 185 **NW2d** 9 (1971), quoting Cooley, Constitutional Limitations (6th ed), p 81.

Because a "constitutional limitation must be construed to effectuate, not to abolish, the protections sought by it to be afforded," failure to adhere to the purpose and history undergirding the document "is to make the constitutional safeguard no more than a shabby hoax, a barrier of words, easily destroyed by other words." *Lockwood v Comm'r of Revenue,*357 **Mich** 517, 557, 556; 98 **NW2d** 753 (1959). In other words, without understanding both the origin and purpose of a constitutional provision, this Court cannot properly protect the mandate of the **people** because words stripped of their context may be manipulated and distorted into unintended meanings. See, e.g., *Carmen v Secretary of State,* 384 **Mich** 443, 452; 185 **NW2d**1 (1971).[9]

2

As a guarantee of liberty, the phrase "assistance of counsel," by necessity, will not be defined in great detail in the constitution. Nevertheless, it is one of many terms that has "acquired a well-understood meaning, which the **people** must be supposed to have had in view in adopting them. 311*311 We cannot understand these provisions unless we understand their history; and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense." 1 Cooley (8th ed), *supra* at 132. Hence, we must examine the historical and common-law origins of the provision to properly understand its content.

Michigan has long recognized that "[p]erhaps the privilege most important to the person accused of crime, connected with his trial, is that to be defended by counsel." 1 Cooley (8th ed), *supra* at 696. See also Const 1963, art 1, § **20** ("[i]n every criminal prosecution, the accused shall have ... assistance of counsel for his defense ...").[10]

Moreover, Michigan law has well established that "it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of humanity and justice, not to withhold his assistance nor spare his best exertions, in the defense of one who has the double misfortune to be stricken by poverty and accused of crime." 1 Cooley (8th ed),*supra* at 700. More specifically, a court is obliged to intervene when defense counsel "accept[s] the confidence of the accused, and then betray[s] it by a feeble and heartless defense." *Id.* at 704. In other words, Michigan law has long required that defense counsel present a reasonable defense. Because this test is no more protective than the federal standard,[11] we need not determine the exact contours of the Michigan guarantee.

312*312 3

The issue in the instant case, however, is: under what circumstances does the failure to perform that duty mandate reversal of a defendant's conviction? Under federal law, the purpose of the right to counsel "is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland, supra* at 691-692. To

find prejudice, a court must conclude that there is "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695.[12]

Our Court of Appeals, however, has interpreted this Court's decision in *Garcia* as requiring the reversal of a conviction even if defense counsel's ineffective assistance did not prejudice the defendant. While we recognize that the opinion is less than a model of clarity and might be so interpreted, such a procedure is not mandated by federal law. *Garcia* essentially relied on Sixth and Fourteenth Amendment jurisprudence, and did not formulate the standard from the intentions, history, or common law undergirding the Michigan 313*313 Constitution.[13] *Garcia,*therefore, does not stand for the proposition that the Michigan Constitution was intended to grant stronger protections than federal authority with regard to the standards applied to the issue of ineffective assistance of counsel.

Indeed, Michigan constitutional law has long held that "[e]rrors which cannot possibly create any prejudice to the rights of one charged with crime ought not to, and cannot, operate as a ground for a new trial." ***People** v Wade,* 101 **Mich** 89, 91; 59 NW 438 (1894).[14] As Justice COOLEY 314*314 explained, "[i]t is possible to be so nice in such matters as to render a legal conviction of crime practically impossible; and while the court should see to it on the one hand that no wrong shall be done the defendant, so on the other they are not to set aside a conviction obtained on a fair trial ...." *Strang v **People**,* 24 **Mich** 1, 10 (1871). In other words, "[w]e require a fair trial, not a perfect trial." ***People** v Beach,* 429 **Mich** 450, 491; 418 **NW2d** 861 (1988).

Hence, under Michigan law, counsel's ineffective assistance must be found to have been prejudicial in order to reverse an otherwise valid conviction. Thus, we reject defendants' contention that the Michigan Constitution mandates reversal of their convictions because of the ineffective assistance of counsel without a showing of prejudice, and overrule those Court of Appeals cases which so hold.

4

The next crucial issue, however, is the standard by which a defendant may prove that he was prejudiced by ineffective assistance of counsel. The United States Supreme Court has held that a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra*at 694. Nevertheless, at strong variance with Michigan and federal authority, Justice MALLETT would hold "that to show prejudice under the Michigan Constitution, the 315*315 defendant must prove that there is a reasonable probability that his attorney's incompetence deprived him of an otherwise available and likely meritorious defense." *Post* at 341. Noting that we have "decided issues relating to counsel without citing federal authority," and that the Court has at times interpreted the right to counsel to afford greater protections than the federal constitution, Justice MALLETT concludes that "there is historical authority to depart from *Strickland* and to

establish our own standard regarding the applicable definition of prejudice." *Post* at 348.

The Michigan and federal constitutions, of course, may have different meaning. "As a matter of simple logic, because the texts were written at different times by different **people**, the protections afforded may be greater, lesser, or the same." *Sitz v Dep't of State Police,* 443**Mich** 744, 761; 506 **NW2d** 209 (1993).[15] The question of state constitutional adjudication, however, is not whether this Court may interpret our constitution differently than the federal constitution, the issue is whether we must. Unless the constitutional authority exists to interpret the constitution differently, we must not. On the other hand, if constitutional authority directs an interpretation different than federal precedent, we must do so.

In accordance with our time-honored rules of 316*316 constitutional construction, to justify an expansion of the Michigan Constitution beyond federal protections for identically worded phrases and provisions, such protections must be deeply rooted in the document. This Court may not engraft on to constitutional text "more `enlightened' rights than the framers intended."*Id.* at 759. In fact, this Court has been reluctant to find greater protections of individual rights in identically phrased state constitutional provisions without a compelling reason.[16]

Thus, to determine whether the Michigan Constitution provides different or greater protection than the federal constitution, we may examine a variety, but limited, number of pertinent sources. As always, when interpreting a constitutional provision, we begin by examining its specific language. In fact, Michigan constitutional provisions often differ significantly than their federal counterparts.[17] Indeed, differences in language often reflect an intention to deviate from federal law and have an extensive history revealing that intent 317*317 — case law, statutory, or reflected in the convention debates.[18] In the instant case, there exists no textual difference with regard to the right to assistance of counsel between the federal and Michigan provisions. Each uses the same words in the same manner. While this is strong evidence that the provisions grant similar protections, we must also search elsewhere to determine if the contours of the Michigan guarantee are at variance with federal precedent.

Thus, we may examine the circumstances surrounding the adoption of the provision to aid in elucidating the intent underlying the provision. The circumstances surrounding this particular provision provide no evidence to support a finding that at the time of its ratification it was conceived that the constitution would be construed to adopt protections stronger than*Strickland.* The historical understanding of the provision before the 1963 Constitution did not include such a standard. Neither the Address to the **People** nor the Constitutional Convention debates suggest that a heightened standard was understood to be incorporated by the constitution. No evidence has been revealed offering insight into why ratifiers or framers may have envisioned such a standard to have been included in the constitution. Unlike other provisions, the right to assistance of counsel was not heavily debated, there were no alterations to its wording, and no controversies engendered regarding its meaning. No crisis of constitutional dimensions 318*318 existed involving the right. If the convention or ratifiers had

intended to alter the meaning of this provision, we can presume "they would have done so by*express* words...." ***People*** *ex rel Kennedy v Gies,* 25 **Mich** 83, 88 (1872) (emphasis in original). They did not.

The Court has outlined other pertinent factors that might signify that an alternative interpretation of the Michigan Constitution, when compared with the federal constitution, was intended:

• [S]tate constitutional and common-law history

> • *[S]tate law preexisting adoption of the relevant constitutional provision*
>
> • *[S]tructural differences between the state and federal constitutions*
>
> • *[M]atters of peculiar state or local interest. [**People** v Collins, 438 **Mich** 8, 31, n 39; 475 **NW2d** 684 (1991); Sitz, supra at 763, n 14.]*

In the instant case, there exists no structural differences with regard to the right to assistance of counsel between federal and Michigan provisions. Moreover, no peculiar state or local interests exist in Michigan to warrant a different level of protection with regard to the right to counsel in the instant case. Both the federal and state provisions originated from the same concerns and to protect the same rights. Furthermore, Michigan does not have a unique history with regard to the origin of the right to counsel. Michigan statutory law before the adoption of the constitution did not mandate the reversal of convictions because defense counsel may have deprived a defendant of an otherwise available and likely meritorious defense.

Nor does constitutional or common-law history suggest that the design of the Michigan Constitution was to grant greater protections than *Strickland.* 319*319 Strong deference is due contemporaneous and longstanding interpretations of the constitution because they most likely reflect its original understanding. *McPherson v Secretary of State,* 92 **Mich** 377, 383; 52 NW 469 (1892), aff'd 146 US 1; 13 S Ct 3; 36 L Ed 869 (1892). In other words, we should not disregard lightly the "jurisprudential history of this Court...." *Sitz, supra* at 758. No Michigan case before the ratification of the 1963 Constitution had adopted Justice MALLETT's novel interpretation of the right to counsel. Indeed, our jurisprudential history, until *Garcia,* narrowly construed the right to counsel.[19] See, e.g., *In re Elliot,* 315 **Mich** 662; 24 **NW2d** 528 (1946), and authorities cited therein. Most precedent grappling with the issue of the standard of ineffective assistance of counsel did not articulate a standard and applied a very lenient one. See, e.g., ***People*** *v Boyce,* 314 **Mich** 608, 610; 23 **NW2d** 99 (1946); ***People*** *v Lundberg,* 364**Mich** 596, 599-602; 111 **NW2d** 809 (1961).[20] In fact, recently after the adoption of the 1963 Constitution, the Michigan Court of Appeals adopted the permissive "farce and mockery of justice" standard that, at that time, had been adopted by the federal courts. See, e.g., ***People****v Davison,* 12 **Mich** App 429, 434; 163 **NW2d** 10 (1968). This reluctance to reverse convictions based on all but the most egregious errors of counsel is in complete accord with our long history of denying relief to convicted defendants in the absence of actual prejudice. See, e.g.,*Strang, supra* at 9-10; *Wade, supra* at 91; ***People*** *v Hahn,* 214 **Mich** 419, 427; 183 NW 43 (1921); ***People*** *v Horton,* 224 **Mich** 139, 142; 194 NW 486 (1923).

Michigan precedent, 320*320therefore, not only fails to support the proposition that the Michigan Constitution requires a stronger standard of protection than *Strickland,* but compels the opposite conclusion.

The inapplicability of Michigan precedent in the instant case is clearly revealed by the citations of authority to justify an alternative standard. Alaska, Hawaii, and Massachusetts have not been known to adjudicate Michigan constitutional claims, nor is our fundamental document modeled after theirs. Michigan has a very distinct constitutional history, given content by its own constitutional conventions and ratifications in 1835, 1850, 1908, and 1963 and the adjudications arising from them. With all respect, the fact that courts in Hawaii and Alaska, which were admitted as states well over a century after the ratification of Michigan's first constitutional provision on the subject, have interpreted their independent constitutional provisions differently than the United States and Michigan Supreme Courts, proves little. Similarly, while Massachusetts has a long history of constitutional adjudication, it is separate and distinct from our own.

Moreover, those jurisdictions provide weak support for the alternative test. The Alaskan appellate courts, for instance, have recognized that, like *Garcia,* their test of ineffective assistance of counsel is based, at least in part, "upon an analysis of federal constitutional law and that it is possible that the Alaska Supreme Court may wish to reconsider the prejudice test...." *Wilson v State,* 711 P2d 547, 549, n 1 (Alas App, 1985).

In *Commonwealth v White,* 409 Mass 266, 272; 565 NE2d 1185 (1991), quoting *Commonwealth v Saferian,* 366 Mass 89, 96; 315 NE2d 878 (1974), the Massachusetts Supreme Court, stated that prejudice will be found when "counsel's conduct 321*321... `has likely deprived the defendant of an otherwise available, substantial ground of defence.'" That court, however, consistently evaluated the effect of alleged attorney misconduct upon the outcome of the case as determined by the jury. *White, supra* at 275-277.[21] *White,* therefore, is scarce support for deviating from *Strickland.*[22]

The contention that a more protective standard than *Strickland* is justified does find some support in *State v Smith,* 68 Hawaii 304, 309; 712 P2d 496 (1986), in which the court ruled that it would adhere to its prior holding in *State v Antone,* 62 Hawaii 346, 348-349; 615 P2d 101 (1980), that ineffective assistance of counsel could be found if the errors of defense counsel "`resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.'"[23] Unfortunately, the decision is devoid of any discussion of why such a standard fails to meet scrutiny under the Hawaii Constitution.

Not unlike *Smith,* Justice MALLETT reasons that deviation is justified because the *Strickland*standard for prejudice is "unduly burdensome" and that it "places too much emphasis on the reliability of the outcome, instead of considering the defendant's due process right to have a meaningful 322*322 opportunity to affect that outcome." *Post* at 347, 349.

Yet, this Court is to avoid the "unprincipled creation of state constitutional rights that exceed their federal counterparts." *Sitz, supra* at 763.[24] Thus, the scope of the

constitutional provision is not an issue of policy to be decided by a court of law, but is to be determined by proper constitutional authority.[25]

Adherence to time-honored principles of constitutional construction is essential to prevent the unwarranted creation of Michigan constitutional rights. By examining the constitutional text, the structure of our constitution, the circumstances surrounding its adoption, Michigan jurisprudence, and matters of peculiar or local interest, we ensure that constitutional guarantees maintain their vitality without permitting the creation of rights from whole cloth. While this is often a delicate matter, to hold otherwise grants the Court the license to create constitutional law without a principled basis and in derogation of the constitutional order in which the **people**, not this Court, create the fundamental law.[26] If the constitution is unwise,323*323 it is for the **people** to amend it.[27]

Reliance upon Michigan precedent based upon federal cases interpreting federal law, however, is not such authority. While leaving aside the propriety of those prior decisions, no Michigan precedent justifies the expansion of the guarantee in the instant case. Only Michigan jurisprudence that interprets Michigan law may be utilized to find a principled basis to expansively interpret the Michigan Constitution, and no such authority exists to justify a standard more protective than *Strickland.* Similarly, reliance upon foreign authority that has no bearing upon Michigan jurisprudence does not provide a principled basis to discover the intention underlying the Michigan Constitution. As Chief Justice CAVANAGH has observed in a similar context, "[w]here the historical case law" supporting a proposed formulation "constitutes an `arid wasteland,' ... that would seem to be a strong indication that [the formulation] cannot properly be recognized...." *Li v Feldt* (*After Second Remand*), 439 **Mich** 457, 468; 487 **NW2d**127 (1992). Indeed, "[t]he very aridity of the historical case law in this area actually makes it easier to apply" the constitution. *Id.* at 467.[28]

324*324 On the other hand, if the historical origins of the provision at issue reveal that the intention, design, or purpose of our constitutional provision was to mandate a different result, then we must follow that calling.[29] If, for instance, the common-law origins of the provision or the Address to the **People** evidenced stronger protection than that granted by the federal courts, we would be bound to grant it. In *Sitz,* for instance, the Court legitimately found that Michigan historical jurisprudence had interpreted a Michigan constitutional clause that, although identically phrased, embodied different principles of law than its federal counterpart. The precedent cited in *Sitz* involved Michigan case law interpreting the Michigan Constitution. Historical jurisprudence revealed that the Michigan provision intended to provide stronger protection than its federal counterpart with regard to the search and seizure of automobiles on the open highway without individualized suspicion. In the instant case, however, there is no such evidence.[30]

Furthermore, the adoption of the standard formulated by Justice MALLETT would severely undermine the judicial process envisioned by the constitution. Every criminal defense attorney must make strategic and tactical decisions that affect the defense undertaken at trial. Most criminal defense attorneys have a variety of options from

which to choose that affect, if not determine, how 325*325 the jury understands and comprehends the case. Many of these options in a particular case may be contradictory, confusing, incredible, or simply poor. The role of defense counsel is to choose the best defense for the defendant under the circumstances.*Strickland* permits the defense attorney to do so because, unless the attorney abandons a defense that had a reasonable probability of affecting the jury verdict, the attorney may choose the best defense. Defense counsel must be afforded "broad discretion" in the handling of cases, which often results in "taking the calculated risks which still do sometimes, at least, pluck legal victory out of legal defeat." *Lundberg, supra* at 600, 601. A standard more protective than *Strickland,* however, would ensure that many decisions by defense counsel would be subject to attack after a criminal conviction. Convictions would be overturned because convicted criminals could legally argue that defense counsel should have chosen other avenues of defense that, although tenable, did not have a reasonable probability of affecting the jury's verdict. In other words, a criminal defense attorney under such a formulation could be found to have provided ineffective assistance of counsel because he chose the better course.[31]

Furthermore, almost all criminal convictions 326*326 would come under appellate and subsequent civil scrutiny, not only for fundamental deprivations of constitutional rights, but also because of the judicial imposition of an amorphous standard untested by our courts. Not only is such a result an unjustified departure in Michigan constitutional law, but it would engage Michigan courts in an endless quagmire of determining just what is meant by the standard. Instead of relying upon the well-established precedent developed under *Strickland,* our courts would be forced to struggle to craft appropriate rulings under a novel standard never evaluated by Michigan courts. As Judge Learned Hand warned, judgments would come under constant attack, and courts "would become Penelopes, forever engaged in unravelling the webs they wove." *Jorgensen v York Ice Machinery Corp,* 160 F2d 432, 435 (CA 2, 1947).

We are persuaded that, as Justice BRICKLEY has cautioned, we should not find that the Michigan Constitution grants greater protection than the federal constitution with regard to identically worded provisions unless there is a compelling reason founded in history and the intentions of the document to do so. *Nash, supra* at 214. Absent from Justice MALLETT's opinion is the searching analysis found in *Nash, Sitz,* or similar cases. No historical documentation suggests that the constitution was intended to provide any more protective meaning to the Michigan Constitution when compared to the federal constitution with regard to the right to the effective assistance of counsel. That this provision does not mandate such a procedural 327*327 morass is evident from the very uniqueness of the test in Michigan jurisprudence. Michigan courts, therefore, should not be forced to labor under an unprincipled and Court-imposed rule of law, contrary to the first principles of justice and the constitution.

B

Having determined the test to be applied in determining ineffective assistance of counsel claims, we now examine the facts presented in these consolidated cases.

1

In ***Pickens***, defense counsel's failure to properly file notice of an alibi was inexcusable neglect. Her own testimony at the *Ginther* hearing disclosed that she was aware of Wright's potential alibi testimony nearly three months before trial, yet she failed to file a timely notice or move for an adjournment to correct her error. Hence, her performance fell below the professional norm.

Nevertheless, **Pickens** has failed to establish the required showing of prejudice. Although the alibi witness was subpoenaed, he did not testify at the evidentiary hearing. Instead, for unexplained reasons, **Pickens** waived his production. Accordingly, no evidence has been presented to establish that the alibi witness would have testified favorably at trial. In other words, **Pickens** failed to establish that the alibi witness' testimony would have altered the result of the proceeding. Because **Pickens** cannot show that there was a reasonable probability that the evidence would undermine confidence in the outcome of the trial, the decision of the Court of Appeals is reversed.

328*328 2

Similarly, Wallace contends that his constitutional right to effective assistance of counsel was denied because his attorney failed to properly prepare and present an insanity defense, utterly failed to present a diminished capacity defense, and generally was incompetent.

a

The primary defense theory was that Wallace killed his wife because he was insane and provoked. While the record reveals that defense counsel may have more strongly presented the insanity defense, the record just as clearly reveals that the jury's decision to convict was based on the evidence — not counsel's performance.[32] As noted by the trial court when ruling on the ineffective assistance claim at the *Ginther* hearing:

> *The case was a very difficult case, at best, because of two things. One, the facts of the case indicated that eye-witnesses observed Mr. Wallace not only shoot his wife in the bar, but lean over and shoot her as she lay on the floor under a table in the bar, and then walk over to the bar and put the gun down on the bar and say, "Oh, it's just my wife," as though "you all don't have anything to worry about, it's just my wife." In other words, "She's so insignificant I had a right to kill her and she needed killing, anyway."*
>
> *Now that's a very difficult fact for any attorney to have to deal with and present to 12 rational 329*329* ***people*** *and expect them to say, "Oh, well, he's not guilty." That is a very difficult set of facts to deal with, number one.*
>
> *[T]hen he had his client, who had a history of treatment with Dr. Bhama, and since Dr. Bhama was the person who had dealt with Mr. Wallace over a period of time, he was pretty much stuck with Dr. Bhama in terms of his expert as it related to Mr. Wallace's mental problems.*

Furthermore, the *Ginther* hearing failed to reveal how a more seasoned attorney would have salvaged the insanity defense. Review of the *Ginther* hearing reveals that the jury was presented with a large array of expert testimony regarding the insanity defense. Wallace was unable to present additional evidence not presented to the jury that would have altered the outcome of the case. Thus, any ineffective assistance of counsel with regard to the presentation of the insanity defense does not justify reversal of the conviction.

b

Wallace also contends that counsel's choice not to pursue a diminished capacity defense constituted ineffective assistance of counsel. At the *Ginther* hearing, defense counsel explained that he purposefully rejected utilizing a diminished capacity defense because the first section of the diminished capacity instruction might have dissuaded the jurors from finding Wallace insane.[33] Furthermore, counsel explained that because evidence was 330*330 presented refuting that his client was intoxicated at the time of the shooting, a diminished capacity defense instruction would have been detrimental to his client's defense.

As a Court far removed from the passion, dust, and grit of the courtroom, we must be especially careful not to second-guess or condemn with hindsight the decisions of defense counsel. A defense attorney must enjoy great discretion in the trying of a case — especially with regard to trial strategy and tactics. See, e.g., *Lundberg, supra* at 600. After all, the attorney witnessed or conducted voir dire, understood the credibility and demeanor of witnesses and his client, grappled with the evidence and testimony, and sensed the prosecutor's strategy. We only have the cold record.

In the instant case, defense counsel's strategic choice to focus on the insanity defense while down-playing the impaired capacity defense should not be presumed error simply because it was unsuccessful. The evidence of Wallace's guilt was truly overwhelming — Wallace shot his wife point blank at least twice before a room of witnesses and shrugged her death off as if he had squashed a bug. The difficulties of the case made any trial extraordinarily difficult for defense counsel, and counsel carefully determined the best defense available. We cannot conclude, therefore, that in light of all the circumstances his performance was "outside the wide range of professionally competent assistance." *Strickland,* 466 US 690.

Nor does Wallace show that he was prejudiced 331*331 by counsel's failure to pursue the diminished capacity defense. The lack of specific instructions regarding this defense did not preclude development of the theory that Wallace's long-term alcohol and substance abuse contributed to the alleged temporary insanity he experienced at the time that he shot his wife. Hence, because this theory was adequately presented by counsel, and rejected by the jury, a further instruction on diminished capacity would not have aided the defendant. This is also true because a necessary component of the diminished capacity defense is that the defendant was mentally ill. The jury rejected such a finding when it rejected the guilty but mentally ill verdict. Hence, Wallace was not prejudiced by counsel's choice not to pursue the diminished capacity defense.

c

Finally, Wallace assails counsel's general competence. At times, counsel demonstrated a lack of familiarity with basic rules of procedure and basic rules of law. He consulted written notes and reference material to answer questions put to him by appellate counsel on rules of evidence and procedure, and insisted to the jury and the court that second-degree murder was a specific intent crime. He also asked the trial court who was to bring the directed verdict motion, and the order of closing arguments. He, however, explained at the *Ginther* hearing that many of these actions were attempts to gain favor from the court. Furthermore, none of these claimed errors prejudiced Wallace. After all, the trial court properly instructed the jury, a motion for directed verdict would have certainly 332*332 failed, and closing arguments proceeded in the correct order.[34]

While counsel's performance was disturbing at times, the trial court's conclusion when denying the motion for new trial on the ground of ineffective assistance of counsel is unassailable:

> *Under the circumstances, I have to agree that at times [defense counsel] did appear to be confused in terms of the way in which the case was being presented. In looking at the total facts of the case, though, the only conclusion that I could come to at the time was that the confusion was being caused by the factual situation, the complexity of the defense that he was trying to present, and the other problems that were attendant to representing Mr. Wallace....*
>
> * * *
>
> *And under the circumstances, I cannot say that Mr. Wallace's retained counsel represented him ineffectively. I think there were probably things that in hindsight we could all say we should have done or could have done, but I cannot say that there was any serious mistakes that he made that resulted in Mr. Wallace being denied a fair trial or effective assistance of counsel.*

Wallace's bare allegation that he was denied effective assistance of counsel is insufficient to make it so — none of the behavior complained of appears to have affected the outcome of the trial. 333*333 Thus, Wallace has failed to show that he was prejudiced by his counsel's behavior, and that he was denied effective assistance of counsel.

III

A

Wallace also contends that the trial court erred by denying him the opportunity to obtain certain neurological tests as deemed necessary by an independent psychiatric evaluator.

MCL 768.20a(3); MSA 28.1043(1)(3) provides:

> *The defendant may, at his or her own expense, or if indigent, at the expense of the county, secure an independent psychiatric evaluation by a clinician of his or her choice on the issue of his or her insanity at the time the alleged offense was committed. The defendant shall notify the prosecuting attorney at least 5 days before the day scheduled for the independent evaluation that he or she intends to secure such an evaluation. The prosecuting attorney may similarly obtain independent psychiatric evaluation. A clinician secured by an indigent defendant shall be entitled to receive a reasonable fee as approved by the court.[[35]]*

The trial court denied Wallace this right when it denied him independent neurological testing deemed necessary by his privately financed psychiatrist. The request required that Wallace be transported while in custody and a thirty-day delay of the trial. This Court recognizes that the trial court, in an attempt to promote judicial economy and efficiency, sought to deny Wallace's request for independent testing in light of the delay and earlier 334*334 neurological tests that had been performed on the defendant less than a week before. Yet, a general interest in promoting judicial economy and efficiency may not deny the clear mandate of MCL 768.20a(3); MSA 28.1043(1)(3).

While the trial court violated MCL 768.20a(3); MSA 28.1043(1)(3), Wallace's conviction may not be set aside unless the error resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096. Neurological tests had already been administered the day defense counsel filed his motion for independent psychiatric tests.[36] While defense counsel was granted the opportunity to obtain an independent evaluation of these earlier tests and to question the doctor who performed the tests, he did not pursue these options to garner further information. Furthermore, the defense expert testified that defendant was suffering from mental illness in light of the pertinent information he possessed. Thus, Wallace's defense was not prejudiced by the absence of independent tests.

The trial court's error, therefore, did not constitute a miscarriage of justice requiring reversal of Wallace's conviction.

IV

Finally, Wallace contends that his conviction should be reversed because of the admission of statements made by him and others as testified to by a prosecution expert rebuttal witness while explaining how he diagnosed Wallace's mental state.

Generally, evidence underlying the basis of an 335*335 expert opinion is admissible. MRE 703, 705.[37] Furthermore, MCL 768.20a(5); MSA 28.1043(1)(5) allows the introduction of statements made by a defendant to personnel of the Center for Forensic Psychiatry regarding the defendant's mental illness or insanity at the time of the alleged offense. Such evidence is relevant because it places the expert's opinions into a factual context, thereby enabling the trier of fact to determine the weight due an expert's opinion.

In the instant case, the prosecution's rebuttal witness' testimony was relevant for the limited purpose of evaluating the credibility of his conclusion that Wallace was not mentally ill or legally insane at the time of the shooting. See ***People*** *v James Robinson,* 417 **Mich** 661, 664; 340 **NW2d** 631 (1983).

Wallace correctly notes, however, that relevancy is not the sole determinant of admissibility.[38] MRE 336*336 403 requires the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The disputed testimony concerns innuendo of sexual perversion, a statement that Wallace talked to his attorney and "formulated plans," and a recitation of what a police officer told him regarding his statements and actions on the night of the killing. Kolito also related Wallace's statements that he had observed his estranged wife having sex with another man, that his wife alleged that he molested their daughter, and that he slept with their daughter until she was four years old. A curative instruction was read by the trial court after Kolito's testimony.

Applying MRE 403, we do not find that the trial court abused its discretion in admitting Kolito's testimony. There is no doubt that Kolito's testimony was prejudicial to Wallace. The inquiry pursuant to MRE 403, however, is whether the disputed evidence was unfairly prejudicial. After all, presumably all the evidence presented by the prosecutor was prejudicial because it attempted to prove that defendant committed the crime charged. Our Court of Appeals has explained:

> *Obviously, evidence is offered by an advocate for the always clear, if seldom stated, purpose of "prejudicing" the adverse party. Recognizing this, the Supreme Court in adopting MRE 403 identified only unfair prejudice as a factor to be weighed 337*337 against probative value. This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock. [**People** v Goree, 132 **Mich** App 693, 702-703; 349 **NW2d** 220 (1984).]*

In determining that Kolito's testimony was not unfairly prejudicial, we note that the relevancy of the testimony was bolstered by the defense counsel's repeated attacks on Kolito's credibility. The defense "opened the door" to this testimony by calling into question Kolito's conclusion that Wallace was not mentally ill.[39] Furthermore, the background testimony helped explain Wallace's state of mind leading up to the shooting. While the testimony was damaging to Wallace's defense, it was so because it bolstered Kolito's conclusion that he was not mentally ill when he shot his wife.

338*338 Because the testimony was relevant and not unfairly prejudicial, the curative instruction given by the trial court sufficiently removed any potential unfair bias generated from the testimony. Thus, we affirm the admission of the evidence.

V

At issue in these consolidated cases is whether the Michigan constitutional guarantee of the effective assistance of counsel provides a criminal defendant with greater protections than its federal counterpart. We hold that the intention underlying the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance

of counsel. Thus, to find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. Accordingly, we affirm the judgment of the Court of Appeals in***People*** *v Wallace* and reverse the judgment of the Court of Appeals in ***People*** *v* ***Pickens***because neither defendant is capable of showing that he was denied effective assistance of counsel.

Also at issue in *Wallace* is whether the denial of independent defense neurological tests by the trial court mandates reversal of defendant's conviction. While the trial court violated MCL 768.20a(3); MSA 28.1043(1)(3) by denying defendant's request for the tests, we affirm the conviction because the error was harmless under the circumstances.

Furthermore, we find that the admission of 339*339 statements made by Wallace and others regarding the shooting and his past behavior as testified to by the prosecutor's rebuttal witness was not error because the statements were relevant to rebut Wallace's claim of insanity and were not unfairly prejudicial.

Hence, we affirm the judgment of the Court of Appeals in *Wallace* and reverse the judgment of the Court of Appeals in ***Pickens***.

BRICKLEY, BOYLE, and GRIFFIN, JJ., concurred with RILEY, J.

BOYLE, J. (*concurring*).

I have signed Justice RILEY's opinion because I fully agree with her result and with the conclusion that the right to effective assistance of counsel in the Michigan Constitution does not create a higher standard than *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). I write separately simply to observe that, while I feel constitutional analysis should begin with an examination of history, I do not agree that it necessarily ends there. For example, I do not agree with the statement that

> *[u]nless a searching analysis of the understandings of the ratifiers and framers, as well as the historical circumstances surrounding the adoption of a provision, reveal otherwise, the Court must refrain from finding (or creating) such rights. [Ante at 316, n 16.]*

The analytical difficulty, of course, is that the text and surrounding circumstances so rarely reveal otherwise. Nevertheless, when required to answer the question, we must acknowledge other principled lines of inquiry, while acknowledging the primacy of the language of the document.

340*340 CAVANAGH, C.J. (*concurring in part and dissenting in part*).

The purpose of the effective assistance of counsel requirement is to ensure fair trials. Because I believe that the ultimate focus must rest with the fundamental fairness of a trial, on the basis of the totality of the circumstances, and not just with the factual accuracy of a trial's result, I endorse Justice MALLETT's standard as the proper test to be

used to evaluate ineffective assistance of counsel claims. Accordingly, I concur with part I of Justice MALLETT's concurring opinion.

Applying Justice MALLETT's standard to ***Pickens***, I concur with the Court that defendant**Pickens** was provided effective assistance of counsel.

Applying Justice MALLETT's standard to *Wallace,* I agree with Justice LEVIN that, for all the reasons set forth in parts II and III of his dissent, defendant Wallace was indeed denied effective assistance of counsel, and is therefore entitled to a new trial. Accordingly, I concur with parts II and III of Justice LEVIN's dissenting opinion.

Concerning the other two substantive issues raised in *Wallace,* I adopt Justice RILEY's conclusion that neither the trial judge's decision to refuse further neurological testing, nor his decision to admit the disputed rebuttal testimony, taken alone, warrants granting defendant Wallace a new trial. Accordingly, I concur with parts III and IV of Justice RILEY's majority opinion.

MALLETT, J. (*concurring in part and dissenting in part*).

The primary issue in these consolidated criminal cases is what standard should apply in determining if a criminal defendant's conviction should be set aside on grounds of ineffective assistance of counsel. More precisely, we granted leave to consider if we should adopt the two-pronged test for ineffective assistance of counsel as set forth by 341*341 the United States Supreme Court in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Today, we adopt the *Strickland* test that requires a criminal defendant to show: (1) that counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. I write separately because I would hold that to show prejudice under the Michigan Constitution, the defendant must prove that there is a reasonable probability that his attorney's incompetence deprived him of an otherwise available and likely meritorious defense.

Applying this test, I would reverse the decision of the Court of Appeals, affirming the conviction in ***People*** *v* ***Pickens***, and affirm the Court of Appeals affirmance of the conviction in ***People*** *v Wallace.*

I

A

These consolidated cases place squarely before this Court the question what standard for determining ineffective assistance of counsel is to be applied in this state.

Before the United States Supreme Court's decision in *Strickland,* Michigan Court of Appeals panels followed a bifurcated test for ineffective assistance that was alluded to in ***People*** *v Garcia,* 398 **Mich** 250; 247 **NW2d** 547 (1976).[1] This bifurcated 342*342 test allowed defendant a new trial on grounds of ineffective assistance of counsel if he could show: (1) that his trial counsel did not perform at least as well as a lawyer with ordinary training and skill in the criminal law, conscientiously protecting his client's interests

undeflected by conflicting considerations, *or* (2) that his trial counsel made a serious mistake, without which the defendant would have had a reasonably likely chance for acquittal. *Id.* at 264-266.

Pursuant to the *Garcia* test, as long as a criminal defendant could show that his attorney's performance fell below the professional norm, he need not show that he was prejudiced by his counsel's ineffectiveness. Only when his counsel performed with otherwise ordinary skill, but made a serious mistake, did the defendant need to show that he was prejudiced by this mistake.

In *Strickland,* the United States Supreme Court held that to successfully claim ineffective assistance of counsel under the Sixth Amendment the defendant must show *both* that counsel's performance was deficient and that the deficient performance prejudiced the defense so that the trial could not be relied on as having produced a just result. This standard differs from that developed following *Garcia,* because pursuant to *Strickland* a defendant must always prove actual prejudice.

After *Strickland,* Court of Appeals panels have taken differing views on whether a showing of prejudice is required in order for a state conviction to be overturned and a new trial granted on grounds of ineffective assistance of counsel.[2] Today, I join with the majority and follow*Strickland* in 343*343 adopting a two-pronged test as the standard to be applied pursuant to the Michigan Constitution's right to counsel provision, Const 1963, art 1, § **20**, and due process guarantee, Const 1963, art 1, § 17.

1

To successfully claim ineffective assistance of counsel, a defendant must show that his attorney performed below an objective standard of reasonableness under prevailing professional norms. This is the first prong of the *Strickland* test. The Court elaborated that the defendant must overcome a "strong presumption" that his counsel's conduct constituted reasonable trial strategy. *Strickland* at 689. It also provided the following guidance for determining when counsel's performance falls below the level required to ensure a reliable result at trial:

> *[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. [Id. at 690.]*

The approach taken in *Strickland* for determination of the reasonableness of counsel's conduct is consistent with Michigan precedent. In adopting the first prong of the *Strickland* test, the standard for incompetence set forth by this Court in *Garcia,* wherein we determined that defense counsel must perform at least as well as a lawyer with ordinary 344*344 training and skill in the criminal law and must conscientiously protect his client's interests, undeflected by conflicting considerations is reaffirmed. *Garcia* at

264. Action appearing erroneous from hindsight does not constitute ineffective assistance if the action was taken for reasons that would have appeared at the time to be sound trial strategy to a competent criminal attorney. *Id.*at 266.

2

Pursuant to *Strickland,* a showing of incompetency is not enough to successfully challenge a conviction on ineffective assistance of counsel grounds. *Strickland* further requires a defendant to show that his counsel's errors prejudiced the defense so as to deprive the defendant of a fair trial.

The prejudice requirement has constitutional origins, deriving from the fair trial guarantee of the Due Process Clauses of the Fifth and Fourteenth Amendments. As noted in *Strickland:*

> *In a long line of cases that includes Powell v Alabama, 287 US 45 [53 S Ct 55; 77 L Ed 158] (1932), Johnson v Zerbst, 304 US 458 [58 S Ct 1019; 82 L Ed 1461] (1938), and Gideon v Wainwright, 372 US 335 [83 S Ct 792; 9 L Ed 2d 799] (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause....*
>
> * * *
>
> *The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the 345*345 outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution. [Id. at 684-685, 691-692.]*

I read *Strickland* as basing the right to effective assistance on both the Sixth Amendment Right to Counsel Clause and on the Due Process Clauses. I view the right to effective assistance of counsel as involving two components. The first is procedural, the second substantive. The procedural component derives from the right to counsel provision and guarantees the right to a competent attorney. The substantive component has due process origins and provides a right to representation that leads to a fair trial.[3]

A prejudice requirement is also consistent with the harmless error doctrine. Michigan recognizes this doctrine in various contexts. The Legislature has suggested its approval of the doctrine in MCL 769.26; MSA 28.1096, which requires that even upon a demonstration of an error by counsel, there also must be a showing of actual prejudice. Similarly, MCR 2.613(A) recognizes harmless error, defining the rule as follows:

> *An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise*

disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.[Emphasis added.]

In addition, this Court has voiced agreement 346*346 with *Chapman v California,* 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967), holding that constitutional errors committed during trial will not merit automatic reversal. Instead, reversal is warranted only where: (1) the error is so offensive to the maintenance of a sound judicial system that it never can be regarded as harmless, or (2) if not so basic, the error is not harmless beyond a reasonable doubt. ***People*** *v Michael M Robinson,* 386 **Mich** 551, 563; 194 **NW2d** 709 (1972).

In ***People*** *v Mosko,* 441 **Mich** 496, 502-503; 495 **NW2d** 534 (1992), this Court stated:

*Rules of automatic reversal are disfavored, for a host of obvious reasons. The doctrine of harmless error has been adopted by the Legislature and by this Court, and has been applied by this Court in many different contexts. As this Court said in [**People** v] Beach [429 **Mich** 450, 491; 418 **NW2d** 861 (1988)], "We require a fair trial, not a perfect trial."*

Given the value this Court and our Legislature have given to the doctrine of harmless error, it would be inconsistent and make little sense to allow reversal of a conviction on ineffective assistance of counsel grounds without some showing of prejudice.

Furthermore, this Court has cited with approval *Coleman v Alabama,* 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970), wherein the United States Supreme Court applied a harmless error analysis to the denial of the right to counsel at a preliminary examination. ***People*** *v Hall,*435 **Mich** 599, 605-606; 460 **NW2d** 520 (1990). In so doing, this Court has indicated a departure from the Michigan Court of Appeals decisions that rely on *Beasley v United States,*491 F2d 687 (CA 6, 1974), in holding that the harmless error doctrine (or a 347*347 prejudice inquiry) does not apply where the attorney's errors fail the "ordinary skill" test. To the extent that *Garcia* has been interpreted as not requiring a showing of prejudice when an attorney fails to perform at the level of ordinary skill possessed by a competent criminal attorney, it should be overruled.

B

While I find that a prejudice requirement has constitutional underpinnings, comports with the harmless error doctrine, and various policy reasons support such a requirement, I would not adopt *Strickland's* definition of prejudice in its entirety because that standard is unduly burdensome.

In interpreting the Michigan Constitution, this Court is compelled neither to accept nor reject federal interpretations of parallel provisions of the United States Constitution. Instead, "[i]n each instance, what is required of this Court is a searching examination to discover what law `the**people** have made.'" *Sitz v Dep't of State Police,* 443 **Mich** 744, 759; 506 **NW2d** 209 (1993), citing ***People*** *v Harding,* 53 **Mich** 481, 485; 19 NW 155 (1884).

While the text of the state and federal due process and right to counsel provisions are virtually identical, this Court is free to uphold greater protections pursuant to Const

1963, art 1, §§ 17 and **20**, for the citizens of this state if we find a principled basis in the history of our jurisprudence to do so. *Sitz, supra* at 763.

Although the prosecution, citing ***People*** *v Bellanca,* 386 **Mich** 708; 194 **NW2d** 863 (1972), asserts that Michigan has interpreted the state constitutional right to counsel consonant with that set forth in the federal constitution, the *Bellanca* 348*348 decision addressed only the right to discovery and counsel at a preliminary examination. It does not stand for the general proposition that the state right to counsel is entirely coextensive with its federal counterpart.

In other cases, this Court has decided issues relating to counsel without citing federal authority. See ***People*** *v Cavanaugh,* 246 **Mich** 680; 225 NW 501 (1929), and ***People*** *v Lundberg,* 364 **Mich** 596, 599-602; 111 **NW2d** 809 (1961). Furthermore, although not commanding a full majority, in ***People*** *v Wright,* 441 **Mich** 140; 490 **NW2d** 351 (1992), three justices determined that Michigan's Constitution afforded greater protection than did the United States Supreme Court's interpretation of the federal constitution, where a suspect is denied knowledge of the presence of retained counsel and then waives his right to counsel.[4]

Also, in ***People*** *v Jackson,* 391 **Mich** 323, 338-339; 217 **NW2d** 22 (1974), this Court acknowledged that it was announcing a rule applicable to the right to counsel at photographic show-ups that was more expansive than the United States Supreme Court had set forth on the same issue.

Thus, there is historical authority to depart from *Strickland* and to establish our own standard regarding the applicable definition of prejudice.

The prejudice requirement set forth in *Strickland* requires a defendant to show that there is a reasonable probability that, but for counsel's errors, 349*349 the result of the proceeding would have been different. In the context of a criminal trial, the *Strickland* definition of prejudice requires the defendant to show that there is "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland,* 466 US 695.

This definition of prejudice places too much emphasis on the reliability of the outcome, instead of considering the defendant's due process right to have a meaningful opportunity to affect that outcome.[5]

Other jurisdictions have also rejected the *Strickland* standard for determining prejudice. For example, the Massachusetts Supreme Court, while citing *Strickland,* defines the inquiry under the prejudice prong as whether counsel's deficiencies caused "prejudice to the defendant's case." *Commonwealth v White,* 409 Mass 266, 275; 565 NE2d 1185 (1991). That court's analysis continues to rely on the standard it developed before *Strickland,* allowing reversal if the attorney's unprofessional errors "deprived the defendant of an otherwise available, substantial ground of defence." *Commonwealth v Saferian,* 366 Mass 89, 96; 315 NE2d 878 (1974).

Hawaii has also rejected *Strickland's* prejudice test, noting that it has been criticized as unduly difficult for defendants. Hawaii instead requires a defendant to show that counsel's errors or omissions "`resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.'" *State v Smith,* 68 Hawaii 304, 309; 712 350*350 P2d 496 (1986); *State v Antone,* 62 Hawaii 346; 615 P2d 101 (1980). Similarly, Alaska continues to rely on a pre-*Strickland* test for prejudice that requires the defendant to show that his attorney's incompetence "contributed to the conviction." *Wilson v State,* 711 P2d 547, 549 (Alas App, 1985); *Jackson v State,* 750 P2d 821, 824-825 (Alas App, 1988).

The approaches taken by these jurisdictions have in common a refusal to focus entirely on the effect an attorney's errors have on the outcome. Instead, the various tests allow an inquiry into whether a defendant had a meaningful opportunity to have counsel's assistance in presenting a defense. While this is an appropriate inquiry, it must be tempered by the policy concerns underlying the harmless error rule.

I believe that the proper balance is struck by the following proposed standard for prejudice. To successfully claim ineffective assistance of counsel, a defendant must show that his attorney's incompetence has deprived him of an otherwise available and likely meritorious defense.

To meet this standard, a defendant must show either that his attorney's errors precluded putting forth a likely meritorious defense altogether, or that the errors in presenting what would likely have been a meritorious defense were so serious that the defendant was in essence denied the right to have the assistance of counsel as envisioned by Const 1963, art 1, § **20**.

The majority's criticism of my proposed refinement to the *Strickland* prejudice prong reflects a basic misunderstanding of both *Strickland* and my proposed test. The majority contends that under my proposed test, "[c]onvictions would be overturned because convicted criminals could legally argue that defense counsel should have chosen other avenues of defense that, although tenable, 351*351 did not have a reasonable probability of affecting the jury's verdict." *Ante* at 325. It further contends that an attorney could be found ineffective for choosing the "better course." *Id.*Such contentions ignore the first prong of the *Strickland* test. If indeed a defense attorney chose not to pursue a line of defense that did not have a reasonable probability of affecting the jury's verdict, or was in fact the better course, the first prong of the *Strickland* test would not be satisfied.[6] Therefore, the issue of prejudice would not even be reached.

Further, the majority undertakes an excessive "original intent" analysis to criticize my proposed refinement of *Strickland*'s prejudice prong. The analysis is curious in two respects. First, because the concept of ineffective assistance is fairly recent, there is not a lot of history to draw upon in evaluating the appropriate test to apply in Michigan. There is no evidence that*Strickland*'s prejudice standard was thought of until 1984, when the Supreme Court invented it. It was not in the minds of the framers of the United States Constitution or the Michigan Constitution of 1963. Yet, the majority

suggests that without sufficient historical jurisprudence, this Court must blindly adopt, verbatim, the test espoused by the United States Supreme Court.

Second, the majority implies that my proposed standard constitutes "the creation of rights from whole cloth." *Ante* at 322. Rather, my proposed standard is merely a refinement of the*Strickland* test, which as demonstrated by the dissent is capable of differing interpretations. It is appropriate 352*352 for this Court to refine and clarify United States Supreme Court jurisprudence in light of the past history and jurisprudence of this state. Indeed, it is our duty. The majority's narrow application of *Sitz* severely constricts our ability to answer this calling.

II

Having analyzed and described my proposed test, I now turn to the facts presented in these consolidated cases.

While I agree with the Court of Appeals that the performance of Mr. **Pickens**' trial attorney was deficient, his claim cannot succeed because he has not shown that he was prejudiced by his counsel's errors.

Attorney Greenberg indicated to Judge Moore that she intended to call the alleged alibi witness, Mr. Wright. Her own testimony at the *Ginther* hearing disclosed that she was aware of Wright's potential alibi testimony nearly three months before trial. Her failure to file a timely notice of alibi and failure to move for an adjournment in order to correct her error establishes a level of performance falling below the professional norm.

However, Mr. **Pickens** has failed to establish the required showing of prejudice. He was not able to show at the evidentiary hearing that the failure to secure the alleged alibi witness' testimony deprived him of an otherwise available and likely meritorious defense.

Although Mr. Wright was subpoenaed, he did not testify at the evidentiary hearing. Instead, for unexplained reasons, defense counsel waived the witness, stating that he had discussed the matter at length with Mr. **Pickens**. No evidence was ever presented at the evidentiary hearing to establish 353*353 that the alleged alibi witness would have indeed testified favorably to the defense at trial. Because there was no showing that an alibi defense, as might have been provided by Mr. Wright, would likely have been meritorious, the defendant has not shown prejudice. Therefore, the decision of the Court of Appeals should be reversed.

Mr. Wallace's ineffective assistance claim likewise fails under my proposed test. Although he voices numerous complaints about his counsel's performance, for purposes of analysis I will combine them into three categories.

First, defendant Wallace complains that his attorney failed to properly prepare and present an insanity defense. Second, and related to the first complaint, Mr. Wallace claims ineffective assistance because his attorney "failed to recognize, failed to

investigate, failed to file the statutory notice and failed to prepare a diminished capacity defense...."

Attorney Graziotti's alleged deficient performance in preparing and presenting the insanity and diminished capacity defenses overlap to a large degree. I will therefore discuss these two categories together. Diminished capacity is a specialized form of the insanity defense. It focuses on the role of alcohol and substance abuse in the claimed mental illness. While attorney Graziotti abandoned the specific specialized defense, he was still able to present evidence of alcohol and substance abuse in developing the more general insanity defense.

The primary theory of the defense was that the defendant had committed the crime while insane and under provocation. Mr. Graziotti indicated to the court that he did not want the diminished capacity instruction because he felt that the first part of the instruction might dissuade the jurors 354*354 from finding the defendant insane.[7] While the record reveals that Mr. Graziotti could have done a better job of presenting the insanity defense, we cannot determine that his decision not to focus on the alcohol and substance abuse aspect of the insanity defense was not made for reasons of sound trial strategy. Therefore, I cannot conclude that in light of all the circumstances his performance was "outside the wide range of professionally competent assistance." *Strickland,* 466 US 690.

Furthermore, Mr. Wallace's claim of ineffective assistance based on the alleged errors in his attorney's handling of the insanity defense fails because prejudice has not been established.

Nothing new was adduced at the *Ginther* hearing to indicate that counsel's poor presentation of the insanity defense deprived the defendant of a likely meritorious defense. After reviewing the entire transcript of the *Ginther* hearing, I agree with the prosecutor's statement that "the jury heard everything the experts had to say in this case; if there was more the jury should have heard, from Dr. Bhama, or from the prosecution's experts, by way of cross-examination, this `extra' 355*355 information was never brought out at the *Ginther* hearing. In other words, Defendant has not established prejudice."

Likewise, no prejudice resulted from attorney Graziotti's failure to pursue diminished capacity. As already mentioned, lack of specific instructions regarding this defense did not preclude development of the theory that defendant's long-term alcohol and substance abuse contributed to the temporary insanity he experienced at the time that he shot his wife. Because this theory was adequately presented by counsel, and rejected by the jury, a further instruction on diminished capacity would not have aided the defendant.[8]

Finally, defendant complains of his counsel's general incompetence and ignorance of the criminal law. He cites several specific shortcomings. For instance, Mr. Graziotti demonstrated a lack of familiarity with basic rules of procedure and basic rules of law. He had to consult written notes and reference material to answer questions put to him by appellate counsel on basic rules of evidence and procedure. He insisted to the jury

and the court that second-degree murder was a specific intent crime. He asked the trial court who was supposed to bring a directed verdict motion, and what was the order of closing arguments. Mr. Graziotti's explanations at the *Ginther* hearing for these specific examples of alleged incompetence at trial were that he was just trying to engage the court in conversation.

Defendant also complains about attorney Graziotti's untruthfulness, either at the *Ginther*hearing, or during trial, regarding when he obtained 356*356 and reviewed a crucial prosecution expert's report. At trial he stated that he did not know Mr. Kolito's report would be used and had not studied it or discussed it with the defendant until the night before trial. However, when confronted with his trial statements at the evidentiary hearing he explained that he had gotten the report and had immediately studied it with defendant some eleven days before the trial and that his assertions to the court were merely an attempt to "try and lean on the court" for more time.

There is no need to discuss whether these instances of alleged incompetence deprived defendant of the "counsel" envisioned under the Sixth Amendment, *Strickland,* 466 US 687. Again, the defendant has not shown that these complaints resulted in prejudice. As noted by the prosecution, "The trial judge properly instructed the jury on the elements of first- and second-degree murder; a motion for directed verdict would have surely been denied; and closing arguments proceeded in the order they were supposed to."[9]

Because defendant has not shown that his attorney's performance deprived him of an otherwise available and likely meritorious defense, I would find that his ineffective assistance claim must fail.

LEVIN, J. (*concurring in* **Pickens** *and dissenting in* Wallace).

I join in affirming Dwayne **Pickens**' conviction because he was not denied the effective assistance of counsel.

I would hold, however, that Ralph Wallace was 357*357 prejudiced by his lawyer's deficient representation, and would reverse the judgment of the Court of Appeals and remand for a new trial.

I

Judicial vindication of the right to the effective assistance of counsel reduces the risk that an innocent person was convicted, and provides some assurance that a conviction was obtained through fundamentally fair procedures.[1] The standard for determining whether there was ineffective assistance of counsel should seek to secure procedural fairness, and legal representation that enables an accused to meet the charges.

The majority adopts the standard for determining ineffective assistance set forth in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The majority expounds a textual and historical analysis of Michigan's adoption of the substance of the Sixth Amendment, citing state constitutional and common-law history, state law

before adoption, structural differences between the state and federal constitutions, and matters of peculiarly state or local interest.[2]

The issue in *Strickland* concerned federal habeas corpus relief for ineffective assistance rendered at the sentencing phase of a state murder conviction. This Court, in arriving at a fair and workable standard may seek guidance from federal law, but is not bound to do so, as the majority explains.[3]

A federal constitutional standard is necessarily 358*358 a minimum standard. Otherwise, the United States Supreme Court would be imposing its own policy preferences on the fifty states. It is understandably reluctant to do so.

The states are free to apply a standard higher than the federal standard for habeas corpus relief, a standard higher than the standard required by the United States Supreme Court of the least progressive state in the union.

It appears that a few states, Alaska,[4] Hawaii,[5] Massachusetts,[6] have adopted a standard more 359*359 protective of the right to the effective assistance of counsel than the one set forth in*Strickland.*

I would, for reasons stated in part v, adhere to the standard set forth in ***People*** *v Garcia,* 398**Mich** 250; 247 **NW2d** 547 (1976).[7]

II

A reviewing court is obliged to examine the record to determine whether a convicted defendant claiming ineffective assistance was fairly represented by counsel. Such review will not indulge hindsight analysis of strategy, nor require perfect representation. Whatever test is applied, be it*Strickland, Garcia,* or the former "sham and mockery" test,[8] a reviewing court should examine the challenged representation in light of the purpose of the Sixth Amendment. The inquiry should focus on the fundamental fairness of the proceeding.[9]

To justify reversal under the *Strickland* standard, a convicted defendant must show that the lawyer's "performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." The convicted defendant must further show that 360*360 the "deficient performance prejudiced the defense...." This requires "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable."[10]

A

The errors of Wallace's lawyer were objectively unreasonable and prejudicial. The prejudice in this case arose from the failure to present a diminished capacity defense, coupled with cumulative lawyer errors concerning procedural and substantive law. Serious lawyer error pervaded the trial, undermining confidence that the verdict

convicting Wallace of first-degree murder was based on the evidence rather than a "breakdown of the adversarial process."

The defense presented two theories: Wallace was legally insane as a result of long-term alcohol abuse and organic brain syndrome, and Wallace was guilty at most of manslaughter based on legally adequate provocation of marital infidelity.

Before the opening statements, the trial judge asked Wallace's lawyer several times whether he was offering a diminished capacity defense. After the lawyer's evasive and confusing responses to 361*361 the judge's questions, the judge said that, absent direction from the defense, he would not provide an instruction on diminished capacity.

The jury was instructed on first-degree murder, second-degree murder, not guilty by reason of insanity, guilty but mentally ill, and voluntary manslaughter.

The majority concludes that Wallace was not prejudiced because evidence of "guilt was truly overwhelming."[11] The concurring opinion states that the author was unable to determine that the lawyer's decision "not to focus on the alcohol and substance abuse aspect of the insanity defense was not made for reasons of sound trial strategy."[12]

The lead and concurring opinions thus ignore that factual guilt was not an issue. Wallace admitted shooting his wife. The sole issue was the degree of criminal responsibility and the level of culpability.

B

The evidence, both lay and expert, supported a diminished capacity defense.[13] Wallace's psychiatric expert, who was also his treating physician, testified that Wallace suffered from organic brain 362*362 syndrome, brought about by long-term alcohol abuse. Dr. Bhama reported Wallace's IQ as 82, considered dull/normal on the basis of objective medical testing, and corroborated his findings with a CT scan. Dr. Bhama testified that Wallace had suffered hallucinations and blackouts from 1982 to 1983.[14]

Dr. Bhama opined that Wallace suffered from mental illness, a substantial disorder of thought or mood, that prevented him from conforming his conduct to the requirements of the law. The essence of the psychiatrist's opinion was that alcohol abuse syndrome and resultant physical deterioration of the brain over a forty-year period caused the underlying mental illness, rendering Wallace insane at the time of the shooting.

Wallace and his supervisor, Larry Truxal, testified that Wallace had taken a prescription tranquilizer on the day of the shooting, and that Wallace was unusually agitated and incoherent just hours before the murder. Wallace testified regarding an hallucination that occurred moments before the shooting, and that he could not recall the sequence of events immediately before or after his wife's murder.

The lawyer acknowledged that he was aware that Wallace's IQ was in the 80's, of Wallace's history of hallucinations, drug and alcohol abuse, previous inpatient psychiatric hospitalizations, and of his use of Elavil, Tolectin, and Serax, prescription

medications prescribed for another person, and ingestion of two to eight beers shortly before the shooting.

Wallace's lawyer was alerted to the possibility that diminished capacity might provide a defense well in advance of trial. The prosecutor's expert 363*363 psychologist recommended a diminished capacity evaluation at a pretrial hearing on forensic testing two months before trial. At the hearing on Wallace's motion for a private forensic evaluation, his lawyer said that the results of such an evaluation would be delivered to the prosecutor, and referred "specifically to the diminished capacity so that he'll be aware of it, so that he won't overlook that."

During voir dire, Wallace's lawyer informed prospective jurors that they would hear testimony concerning a diminished capacity defense. Although Wallace's lawyer indicated to the judge that he was not advancing a diminished capacity theory, he argued in opening that, at the time of the murder, longstanding alcohol addiction, preexisting mental illness, coupled with prescription medication and an hallucination at the bar where he shot his wife, resulted in his client not functioning at "full capacity," and that he thus was not guilty of first-degree murder.[15]

The prosecutor's expert witnesses testified that while Wallace did indeed suffer from long-term alcohol abuse and had an IQ of 89, he was not legally insane. On the basis of the sequence of events and the eyewitness testimony,[16] it is not 364*364 surprising that the jury rejected the insanity defense and found Wallace sane.

Wallace's lawyer failed to marshal the medical evidence and facts preceding the murder to mount a coherent defense. He erroneously stated at the *Ginther* hearing that insanity and diminished capacity are mutually exclusive defenses. Although the standard jury instruction respecting the diminished capacity defense had been brought to his attention by the judge, and explained by the prosecutor, Wallace's lawyer rejected, without reason, a substantial defense.

The decision of Wallace's lawyer not to pursue a diminished capacity defense cannot be regarded as sound trial strategy. Dr. Bhama's testimony, and Wallace's and Truxal's testimony of alcohol and drug consumption, supported a defense that Wallace was unable to form the requisite specific intent at the time of the murder.

Had the jury been instructed on diminished capacity, the jurors would have deliberated on whether the combined effects of retardation, preexisting mental illness, alcohol abuse syndrome, tranquilizers and the documented psychiatric history rendered Wallace unable to form the specific intent for first-degree murder.

The lawyer said he did not present a diminished-capacity defense because, as he explained at the *Ginther* hearing, "I felt I didn't want to present them. Those I left out, I left out on purpose. I didn't feel they were that good." It appears that 365*365 the lawyer simply was not aware, nor did he understand the significance of the defense. "I want to confess to you that in the case I was arguing here, I thought his instructions were fine. And if he had confusion, the Judge, I added to his confusion. My hope was that confusion would benefit Mr. Wallace."

C

Diminished capacity is in the nature of a mitigation defense, reducing first-degree murder to a lesser offense as a result of a jury finding that specific intent was not established beyond a reasonable doubt. In the instant case, the jury might have accepted, if instructed, a diminished capacity defense, which allows the jury to consider past history of mental illness and retardation coupled with consumption of alcohol and medication. Failure to present mitigation evidence in a capital case is objectively unreasonable and prejudicial to the accused.

State and federal courts, applying a *Strickland* analysis, have accorded special consideration to mitigation claims, at both the guilt and sentencing phases. Counsel's failure to investigate or present evidence of mental illness, or other "humanizing" mitigation factors has been held to constitute ineffective assistance.[17]

The New Jersey Supreme Court reversed a conviction in which the lawyer failed to recognize and pursue a diminished capacity defense, finding error requiring reversal at both the guilt and the 366*366 sentencing phases.[18] With overwhelming evidence of mental disturbance,[19] the lawyer's failure to pursue the defense was found to have materially contributed to the conviction, and that there was a reasonable probability that the result at the guilt phase would have been different. The court vacated the sentence for failure to interview potential witnesses regarding mental state, although the lawyer knew that the defendant was previously hospitalized with a psychiatric diagnosis.

Failure to assert a statutorily available defense supported by evidence was found to be error requiring reversal under a *Strickland* analysis by the Texas Court of Criminal Appeals.[20]Because the jury was precluded from giving effect to the defense, "[t]hat in itself undermines our confidence in the conviction sufficiently to convince us that the result of the trial might have been different had the instruction been requested and given."[21]

In the instant case, the lawyer's failure to assert an available, meritorious defense, with significant factual and legal support, similarly undermines confidence in the verdict, satisfying the prejudice prong of an ineffective assistance claim.

III

A court may find prejudice on the basis of the totality of counsel's errors and omissions.[22] The367*367 failure of Wallace's lawyer to raise the viable diminished capacity defense was only one error among many. Cumulative error is evident in the lawyer's lack of preparation, and ignorance of basic principles of substantive and procedural law.[23]

A

Wallace's lawyer made numerous errors of law. He did not understand the difference between first- and second-degree murder.[24]

368*368 Wallace's lawyer did not know that the trial judge hears a motion to disqualify the judge.[25] He was also unaware that a forensic evaluation was required within sixty days of filing notice of intent to raise an insanity defense. He incorrectly characterized his questions and comments during voir dire as "testimony," and was surprised to learn that the court is required to instruct on second-degree murder in a first-degree murder prosecution.

Wallace's lawyer did not know, until informed by the judge, that a defendant, not the prosecutor, moves for a directed verdict. His ignorance regarding the purpose of opening statement was apparent in his objection to the prosecutor's "telling of the whole story" in his opening statement, and in his request for the same "leeway" when it was his turn for opening statement.

Wallace's lawyer did not understand the Rules of Evidence. He repeatedly offered hearsay testimony and documents that were hearsay during the five-day trial.[26] In responding to numerous hearsay objections, he merely requested "a little latitude from the court," and not once cited a specific exception to the hearsay rule.

He misunderstood MRE 404. On numerous occasions, he sought to introduce irrelevant character evidence concerning the victim.[27] When cautioned by the Court that certain character evidence was prohibited under "404," he asked "Michigan Court Rule?"

369*369 Wallace's lawyer was unaware that an expert can testify about his opinions based on a previously prepared report. He seemed similarly unaware that a trial transcript could be made available to the defense upon request. In closing, he improperly referred to possible punishment for first-degree murder. He made what the judge called a "glaring mistake" — he submitted a proposed jury instruction that requested that Wallace be placed in an institution for treatment of the insane.

B

Wallace's lawyer failed to prepare adequately for trial. He did not provide Dr. Bhama with psychiatric testing data from the Recorder's Court forensic evaluation that Dr. Bhama had requested. This was a serious error of omission, as Wallace's mental state was crucial to the defense.

In a first-degree murder prosecution, with insanity as the central defense, Wallace's lawyer was unable to provide a factual basis for his proposed irresistible impulse theory during a pretrial hearing where he sought authorization for private forensic testing, prompting the court's expression of astonishment at the degree of unpreparedness in a capital case. He admitted at trial to neglecting to read a statement of a prosecution witness that had been provided before trial.

C

Wallace's lawyer's demeanor was unprofessional and provocative. He objected to the prosecutor's "third grade questions," and accused the court of making gestures indicating boredom or displeasure with the defense. He charged the court reporter

370*370 with purposely withholding transcripts, and interrupted the prosecutor's lengthy closing argument by asking for a glass of water so that he could stay awake. On redirect examination of his witness, Dr. Bhama, he asked three times if Dr. Bhama was to be paid for his time in court. He then dismissed his own expert witness saying "You're too expensive to keep here."

Those comments illustrate an appalling lack of respect for the court, and a capacity for self-inflicted damage evident throughout the trial.

D

The cumulative effect of the lawyer's ignorance of basic law critical to his client's case, inadequate factual preparation, and unacceptable use of "confusion" as a trial strategy, undermines confidence in the verdict.

Wallace was prejudiced by his lawyer's deficient performance, for there was a reasonable probability that the conviction of first-degree murder was the result of the lawyer's failure to present and to seek an instruction on a mitigating defense, coupled with the cumulative error at trial.

I would reverse Wallace's conviction, and remand for a new trial.

IV

Pickens was convicted of delivery of less than 50 grams of cocaine in a controlled purchase. His defense was alibi. In her opening statement, **Pickens**' lawyer told the jury that she had an alibi witness. The trial judge refused to permit her to present the alibi witness because she had not filed 371*371 the required statutory notice.[28] The arresting officers testified at trial that the marked $20 bill was found on **Pickens**' person when he was arrested.

The Court of Appeals remanded for a *Ginther* hearing. **Pickens** lawyer was the sole witness. She testified that she knew of the alibi witness two months before the trial, and directed her investigator to interview and subpoena him.

Pickens failed, however, to establish that the deficient representation created a reasonable probability that the verdict was a result of the failure to produce the alibi witness. When the alibi witness failed to appear at an adjourned *Ginther* hearing, **Pickens** waived production of the witness, indicating to the court's satisfaction that he fully understood the consequences. There is no evidence that the alibi witness would have testified favorably.[29] Absent prejudice, and being persuaded that the verdict followed a fundamentally fair trial, I join in affirmance of his conviction.

V

The right of an indigent criminal defendant to the appointment of counsel, as set forth in*Recorder's Court Bar Ass'n v Wayne Circuit Court,* 443 **Mich** 110; 503 **NW2d** 885 (1993), is statutory. Before *Gideon v Wainwright,* 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), circuit judges appointed assigned counsel in appropriate cases at public expense.

The supervision of the administration of justice in this state is confided to this Court under article 6 of this state's constitution. This Court has broad power and responsibility at every level. Lawyers are admitted to practice, and permitted to continue 372*372 to practice, under authority conferred by this Court.

Although a statute confers on the trial bench the authority to appoint a lawyer,[30] that power, like all power confided to trial and intermediate appellate court judges, is subject to the supervisory power of this Court.

Ineffective assistance of counsel is a continuing problem in part because, unfortunately, too many lawyers who accept assignments to represent indigents or accept money as retained counsel to represent persons that become involved in the criminal justice system do not, in fact, perform adequately. Neither the trial bench nor the Court of Appeals nor this Court has put in place a meaningful system for removing inadequate lawyers from the rosters of lawyers eligible to represent defendants in criminal cases.[31]

I do not mean to suggest that the problem is readily solvable. The counties are expected to fund indigent defense. The compensation is generally inadequate. It is difficult to raise standards. But nothing meaningful has been done, although many of us have been talking about it for at least twenty-five years of which I am aware.

The problem is further exacerbated by the continuation of the patronage system in Recorder's Court and many other courts. I do not mean to 373*373 suggest that unqualified lawyers are generally appointed, but rather that far too many unqualified lawyers continue to be appointed.

I find it most difficult to join in a standard for determining ineffective assistance of counsel that places the burden on the defendant — often uneducated, without resources, financial or familial — to show that omissions and errors of a lawyer, licensed by this Court to accept his retainer[32] or public funds for his defense, in fact prejudiced the outcome.

This Court has failed to provide indigent persons with a realistic opportunity to obtain effective legal representation and advocacy in this Court of their claims, although a commitment was made over four years ago to do so.[33]

[1] MCL 768.20(1); MSA 28.1043(1) requires notice of an alibi defense be filed at least ten days before trial.

[2] Unpublished opinion per curiam of the Court of Appeals, issued October 26, 1992 (Docket No. 115477).

[3] Although the record is unclear, it appears that only days earlier a CAT scan and other tests were performed. The record does not indicate who ordered these tests or their results.

[4] In fact, only a few days before the killing, Wallace told several **people** that his wife was having an affair and that they would all be better off if he killed her.

[5] Wallace told another officer that the victim had sex with her boyfriend in front of their young child.

[6] He diagnosed defendant as suffering from organic brain syndrome and from unconscious substitution or confabulation.

[7] For instance, Kolito testified:

He said his wife once woke him up and accused him of child molesting. He also — then he related a story about seeing his estranged wife with a man in a motel. Said his wife had a two bedroom flat and saw them there with each other, and he saw them on three days, the defendant got there at ten o'clock and watched the front for four hours looking through the window. He saw the man sitting at the table. At about two o'clock in the morning he saw the man have sex with his estranged wife. He heard him scream at his daughter. The defendant's daughter slept with him, the defendant, until she was four.

[8] Other prosecution witnesses testified that Wallace acted normally during most of his activities before the shooting. Furthermore, it was explained to the jury that the drug he had taken — Serax — is an anxiety reducing drug that has a calming effect. Moreover, testimony established that defendant drank alcohol and consumed Serax regularly. The prosecution's expert noted that defendant probably possessed an acquired tolerance to these drugs — as opposed to an individual who mixed the drug with alcohol for the first time.

[9] In short, "it is not the prerogative of this Court to change the plain meaning of words in the constitution `as understood by the **people** who adopted it.'" *Regents of Univ of Michigan v Michigan,* 395 **Mich** 52, 74-75; 235**NW2d** 1 (1975), quoting *Bond v Ann Arbor School Dist,* 383 **Mich** 693, 699; 178 **NW2d** 484 (1970).

[10] The Sixth Amendment to the United States Constitution also mandates that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."

[11] See *Strickland, supra* at 687-688 ("When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness").

[12] Furthermore,

an analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him. [*Lockhart v Fretwell,* 506 US ___, ___; 113 S Ct 838; 122 L Ed 2d 180, 189 (1993).]

[13] ***People*** *v Dalessandro,* 165 **Mich** App 569, 575; 419 **NW2d** 609 (1988) ("the *Garcia* two-part test fairly appears to be interwoven with federal law, and the Court did not

state that it was basing its decision on separate, adequate, and independent state grounds"); ***People*** *v Dalton,* 155 **Mich** App 591, 602; 400 **NW2d** 689 (1986) (HARRISON, J., concurring) ("A review of the proceedings of the state constitutional convention of 1961 shows no such indication as to the right to effective assistance of counsel"); ***People*** *v Hampton,* 176 **Mich** App 383, 387-388; 439 **NW2d** 365 (1989) (GRIFFIN, J., concurring) ("Although several panels of this Court have held that*Strickland* governs federal constitutional claims while *Garcia* applies to state claims, this dichotomy is not mandated by the language of the state constitution, Michigan constitutional history, or the holdings in *Garcia* ....*Garcia* does not rest upon separate or independent state constitutional grounds. Rather, it is based upon federal case law which has now been overturned").

The Court primarily relied upon *Beasley v United States,* 491 F2d 687 (CA 6, 1974), a Sixth Amendment case, for the proposition that a defendant did not have effective counsel if his counsel did not perform at least as well as an attorney with ordinary training and skill in the criminal law or he did not conscientiously protect his client's interests. The Court relied upon ***People*** *v Degraffenreid,* 19 **Mich** App 702, 718, n 22; 173 **NW2d** 317 (1969), which in turn was based upon the Due Process Clause of the Fourteenth Amendment for the proposition that ineffective assistance of counsel occurs when but for counsel's error a defendant would have had a reasonably likely chance of acquittal.

Yet, in *Degraffenreid, supra* at 716, the Court of Appeals also found that the Due Process Clause would be violated if "but for [attorney error,] the defendant might not have been convicted...." None of these decisions, however, developed their holdings from sources independent of the federal law.

[14] See also *Strang v* ***People****,* 24 **Mich** 1, 9-10 (1871) (finding that the admission of inadmissible but unprejudicial testimony may not be the basis of a reversal); ***People*** *v Hahn,* 214 **Mich** 419, 427; 183 NW 43 (1921) (finding a reversal unwarranted because the multiple alleged trial errors were harmless); ***People*** *v Horton,* 224 **Mich** 139, 142; 194 NW 486 (1923) (finding that evidence allegedly seized illegally did not warrant reversal).

[15] Chief Justice COOLEY elaborated over a century ago:

And in seeking for its real meaning we must take into consideration the times and circumstances under which the State Constitution was formed — the general spirit of the times and the prevailing sentiments among the **people**. Every constitution has a history of its own which is likely to be more or less peculiar; and unless interpreted in the light of this history, is liable to be made to express purposes which were never within the minds of the **people**agreeing to it. [***People*** *v Harding,* 53 **Mich** 481, 485; 19 NW 155 (1884).]

[16] See, e.g., ***People*** *v Nash,* 418 **Mich** 196, 214; 341 **NW2d** 439 (1983) (opinion of BRICKLEY, J.). Unless a searching analysis of the understandings of the ratifiers and framers, as well as the historical circumstances surrounding the adoption of a provision, reveal otherwise, the Court must refrain from finding (or creating) such rights. See, e.g., *Harding, supra* at 485; *Nash, supra* at 214-215 (opinion of BRICKLEY, J.); *Sitz, supra* at 758-759.

[17] See, e.g., art 1, § 4 ("No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary"); art 1, § 5 ("Every person may freely ... express ... his views"); art 1, § 6 ("Every person has a right to keep and bear arms for the defense of himself and the state"); art 1, § 11 ("The provisions of this section shall not be construed to bar from evidence in any criminal proceeding any narcotic drug, firearm, bomb, explosive or any other dangerous weapon, seized by a peace officer outside the curtilage of any dwelling house in this state"); art 1, § 16 ("cruel or unusual punishment shall not be inflicted"); art 4, § 24 ("No law shall embrace more than one object, which shall be expressed in its title"); art 5, § 19 ("The governor may disapprove any distinct item or items appropriating moneys in any appropriation bill").

[18] See, e.g., ***People*** *ex rel Drake v Mahaney,* 13 **Mich** 481, 495-496 (1865) (explaining the extensive history undergirding the Title-Object Clause [now art 4, § 24], which prohibits legislative practices common in the United States Congress); *Nash, supra* at 209-213 (explaining that art 1, § 11 was intended to permit the introduction of illegally seized narcotics and dangerous weapons in variation with federal law); 1 Official Record, Constitutional Convention 1961, p 478 (comments of Hodges) ("We did broaden [the Michigan parallel to the First Amendment] by adding the word `express,' and I think that to the extent that radio and television can be given freedom, this is done").

[19] As noted, because of its federal foundation, *Garcia* is bereft of any value for Michigan constitutional analysis.

[**20**] In ***People*** *v Gorka,* 381 **Mich** 515, **521**; 164 **NW2d** 30 (1969), the Court utilized an "`adequate and effective' counsel" standard, but the Court apparently referred to the federal constitution.

[21] Specifically, the court found that defense counsel's decision not to interview and call witnesses to testify did not amount to ineffective assistance of counsel because such testimony would have highlighted the defendant's inconsistent position and the consistency of the victim's allegations to the jury. *Id.* at 275. The court also found that another allegation of error by counsel was irrelevant because "even assuming that counsel's failure to do so was manifestly unreasonable, the outcome of the case was in no way affected." *Id.* at 277.

[22] Also, neither is *Saferian* because that case was decided a decade before, and without the benefit of,*Strickland.*

[23] The court reasoned that *Strickland* was "unduly difficult for a defendant to meet," because a defendant would be successful "`only where there is evidence that they should not have been convicted.'" *Id.* at 310, n 7, quoting Genego, *The future of effective assistance of counsel: Performance standards and competent representation,* 22 Am Crim L R 181, 199 (1984).

[24] Indeed, Justice MALLETT agrees that we are "free to uphold greater protections pursuant to Const 1963, art 1, §§ 17 and **20**, for the citizens of this state *if* we find a

principled basis in the history of our jurisprudence to do so." *Post* at 347 (emphasis added).

[25] Justice CHRISTIANCY explained:

The question is not whether the constitution ought to have permitted the exercise of this power; but whether, by a fair construction of the language of the instrument, as framed by the convention, and understood and adopted by the **people**, the power in question has been prohibited. Our province is not to make or modify the constitution, according to our views of justice or expediency, but to ascertain, as far as we are able, the true intent and purpose of the constitution which the **people** have deemed it just and expedient to adopt. [***People*** *v Blodgett,* 13**Mich** 127, 149-150 (1865).]

[26] As Justice POTTER explained:

Changing by judicial construction the settled meaning of words aptly used in the Constitution is more than the exercise of legislative power. It wrests private rights from their moorings, lets down constitutional barriers, and alters the foundation of government. [*James S Holden Co v Connor,* 257 **Mich** 580, 600; 241 NW 915 (1932).]

[27] See Const 1963, art 12, § 1 (outlining the procedure by which the Legislature proposes, and the electorate may approve, a constitutional amendment); art 12, § 2 (outlining the procedure by which the **people** may both propose and approve a constitutional amendment); art 12, § 3 (outlining the procedure by which no later than every sixteen years the **people** may call a constitutional convention to revise the constitution).

[28] In *Li,* the Court determined that the historical precedent before the adoption of the governmental immunity act did not support a public nuisance exception to that act.

[**29**] may not disregard the guarantees that our constitution confers on Michigan citizens merely because the United States Supreme Court has withdrawn or not extended such protection. [*Sitz, supra* at 759.]

[30] Because we find that the Michigan Constitution does not mandate stronger protection than *Strickland* and that Michigan courts are bound to adhere to the minimum guarantees found in *Strickland,* we do not determine the exact nature of the Michigan guarantee. We do note, however, that it may be different, even less, than *Strickland.*

[31] Furthermore, as a constitutional ruling, prior convictions will come under such scrutiny, subjecting past criminal convictions to the new standard.

Similarly, plea bargains would have fallen within the ambit of the standard espoused by the dissent because a defense counsel's failure to formulate a defense, albeit one that would not have had a reasonable probability to affect the outcome of the case, may have led a defendant to accept a plea bargain. Defense counsel may become more reluctant to accept good plea bargains for fear that such decisions will now be subject to attack by a criminal defendant claiming to have had an "otherwise available and likely

meritorious defense" even though defense counsel properly understood that it did not have a reasonable probability of affecting the jury's verdict.*Post* at 341.

Moreover, the inevitable result of such a formulation would be an explosion of civil litigation in which juries would be permitted to award damages to a defendant who by definition has been reliably found guilty simply because defense counsel might have been more effective. That such a perversion of the truth-seeking function of criminal trials was not intended by the Michigan Constitution is beyond question.

[32] Several witnesses testified that defendant acted normally before the shooting, and defendant did not allege any mental illness except at the time of the actual shooting. Also, while defendant had injested a tranquilizer and drank beer the day of the shooting, each activity was not unusual for defendant. Furthermore, defendant brought a gun to the bar and shot his wife in a manner in which the jury could easily determine was premediated.

[33] The jury instruction on diminished capacity provides:

(1) A person who is under the influence of voluntarily consumed [alcohol/(and/or) controlled substances] at the time of the alleged offense is not for that reason alone to be judged legally insane.

(2) However, a person may be mentally ill and intoxicated, with both conditions affecting his actions. It is for you to judge whether, under all of the circumstances, the defendant was mentally ill at the time of the offense, and then to apply the further tests of whether or not the defendant was legally insane. [CJI 7:8:02.]

[34] Wallace also alleges that defense counsel was untruthful, either at the *Ginther* hearing or during trial, regarding when he obtained and reviewed a crucial prosecution expert's report. At trial he stated that he did not know Kolito's report would be used and had not studied or discussed it with Wallace until the night before trial. However, when confronted with these assertions at the evidentiary hearing, he explained that he received the report and immediately studied it with Wallace eleven days before the trial. He explained that his prior assertions were merely an attempt to "try and lean on the Court" for additional time. In any event, Wallace does not explain how this conduct prejudiced his defense.

[35] The United States Supreme Court in *Ake v Oklahoma,* 470 US 68, 83; 105 S Ct 1087; 84 L Ed 2d 53 (1985), specifically left the decision how to implement the right of a defendant gaining access to a competent psychiatrist to the states.

[36] The neurological tests included a CAT scan. The trial judge specifically denied Wallace's request for another CAT scan.

[37] MRE 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.

The court may require that underlying facts or data essential to an opinion or inference be in evidence.

MRE 705 provides:

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

[38] The prosecution's reliance on ***People*** *v Dobben,* 440 **Mich** 679, 693-694; 488 **NW2d** 726 (1992), for the contention that the only limitation on an expert's testimony is that set forth in MCL 768.20a(5); MSA 28.1043(1)(5) is incorrect. In *Dobben,* the Court stated: "Section 20a makes no reference to any limitation in the testimony of such an expert, other than that `[s]tatements made by the defendant ... shall not be admissible ... on any issues other than ... mental illness or insanity at the time of the alleged offense.'" However, this statement was made to address an entirely different issue than that presented here — whether an independent expert may rely on historical evidence in testifying regarding the issue of criminal responsibility, or whether only a government-employed, certified clinician may rely on historical evidence.

[39] The following exchange between the prosecutor, Mr. Kolito, and defense counsel is illustrative:

Q. So then based on all the information that you had did you come to an opinion as to whether or not the defendant was mentally ill on August the 4th of 1986?

A. Yes sir.

Q. What is that opinion?

A. That he was not mentally ill.

Q. Why not?

A. Well, the defendant had functioned at his place of employment that day. The defendant was an electrical inspector. There is no evidence that the defendant was experiencing any systems [sic] of psychosis, any symptoms of delusions ...

[*Defense Counsel*]: Objection, he doesn't know, he wasn't there, he doesn't know what he was experiencing, whether he was experiencing blackouts or anything and he's testifying to this jury that on August the 4th Shorty Wallace was just fine. Where was he on August the 4th? He wasn't around Shorty Wallace.

It was after this exchange that Kolito read his report, which referenced statements made by others who witnessed Wallace's conduct on the day of the shooting.

[1] Although this test is referred to as the "*Garcia* test," this Court's opinion in that case did not fully explain or give a rationale for what the exact test for ineffectiveness

pursuant to Const 1963, art 1, § **20**, should be. Instead, the Court merely explained that the defendant's contention that he was denied a fair trial under either ***People*** *v Degraffenreid,* 19 **Mich** App 702; 173 **NW2d** 317 (1969), or *Beasley v United States,* 491 F2d 687, 696 (CA 6, 1974), was unfounded. *Garcia* at 264-266.

[2] Although, pursuant to Administrative Order No. 1990-6, all Michigan Court of Appeals panels and trial courts were bound by the *Strickland* test as adopted in the "first out" case, ***People*** *v Tommolino,* 187 **Mich** App 14; 466 **NW2d** 315 (1991), this Court had yet to definitively state that *Strickland* is the governing standard.

[3] See Gilles, *Effective assistance of counsel: The Sixth Amendment and the fair trial guarantee,* 50 U Chi L R 1380 (1983).

[4] Justices LEVIN and MALLETT held that the right against self-incrimination, the right to remain silent, and the right to counsel afforded by Const 1963, art 1, § 17, include being informed by the police of attempted contact in person by retained counsel. Chief Justice CAVANAGH concurred, but would have further required the police to take prompt and diligent steps to inform the suspect of his attorney's attempts to contact him or would render subsequent statements by the suspect inadmissible as taken in derogation of the right to counsel. Justice BRICKLEY concurred in the result, but found lack of a valid waiver on other grounds.

[5] A standard that focuses only on the reliability of the outcome ignores the procedural element of the right to effective assistance, turning the right to effective assistance into a singular issue of harmless error. The right to effective assistance includes a right to have an attorney who is at least minimally competent to assist in presenting the defense.

[6] Similarly, contrary to the majority's suggestion, a "good" plea bargain accepted by a defendant on the sound advice of his attorney would not form the basis of a successful ineffective assistance claim because the first prong of the test would not be satisfied. An attorney who chooses a "good" strategy would meet the competency requirements of the first prong.

[7] The jury instruction on diminished capacity is as follows:

(1) A person who is under the influence of voluntarily consumed [alcohol/(and/or) controlled substances] at the time of the alleged offense is not for that reason alone to be judged legally insane.

(2) However, a person may be mentally ill and intoxicated, with both conditions affecting his actions. It is for you to judge whether, under all of the circumstances, the defendant was mentally ill at the time of the offense, and then to apply the further tests of whether or not the defendant was legally insane. [CJI 7:8:02.]

At the *Ginther* hearing, Mr. Graziotti explained that because evidence was presented refuting that his client was intoxicated at the time of the shooting, he felt the instruction would be detrimental to his client's case.

[8] This is also true because a necessary component of the diminished capacity defense is that the defendant was mentally ill. The jury rejected such a finding when it rejected the guilty but mentally ill verdict.

[9] I am sympathetic to the defendant's claim that because of attorney Graziotti's inadequacies, "he brought an aura of unprofessionalism that reflected so badly on the Appellant and his defense." However, the defendant has done no more to show prejudice than to make a bare allegation that "because of counsel's serious mistakes, he was substantially prejudiced thereby and but for same may have had a strong likelihood of acquittal." *Id.*

[1] *Strickland v Washington,* **446** US 668, 708; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (Marshall, J., dissenting). See also *United States v Decoster,* 199 US App DC 359, 454-457; 624 F2d 196 (1976) (en banc) (Bazelon, J., dissenting).

[2] *Ante,* pp 319-320.

[3] *Ante,* pp 312-314.

[4] *Wilson v State,* 711 P2d 547, 549 (Alas App, 1985). To obtain postconviction relief on the basis of a claim of ineffective assistance of counsel, a defendant must establish that counsel's conduct either generally throughout the trial or in one or more specific instances did not conform to the standard of competence displayed by a person of ordinary training and skill in the criminal law, and that the lack of competency contributed to the conviction. (Citing *Risher v State,* 523 P2d 421 [Alas, 1974].)

The appellate court declined to rule on the merits of defendant's ineffective assistance challenge, as the trial court failed to articulate a test of prejudice. If, as the defendant claimed, an actual conflict of interest existed, prejudice would be presumed and the conviction reversed. *Cuyler v Sullivan,* **446** US 335; 100 S Ct 1708; 64 L Ed 2d 333 (1980).

[5] *State v Smith,* 712 P2d 496 (Hawaii, 1986). In reversing a conviction on the basis of ineffective assistance of counsel, the Hawaii Supreme Court ruled that a claim of inadequate assistance will be sustained only if defendant can show specific errors or omissions reflecting counsel's lack of skill, judgment or diligence, and that the error or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense. *Id.,* p 501.

The court held that defense counsel's direct examination of the defendant eliciting testimony of six prior burglary convictions and his habit of exposing himself in a prosecution for sodomy was outside the range of professional competence. The errors reflected counsel's lack of skill substantially impairing a potentially meritorious defense.*Id.,* p 502.

[6] *Commonwealth v White,* 409 Mass 266, 272; 565 NE2d 1185 (1991). To prevail on a claim of ineffective assistance of counsel, defense counsel's performance must fall measurably below that which might be expected from an ordinary fallible lawyer, and that the defendant's case was prejudiced by counsel's conduct by a likely deprivation of

an otherwise available, substantial ground of defense, citing *Commonwealth v Saferian,* 366 Mass 89, 96; 315 NE2d 878 (1974).

The Supreme Judicial Court of Massachusetts affirmed the conviction, as the lawyer's failure to call and interview two witnesses was within legitimate trial strategy, and therefore not prejudicial.

[7] In *Garcia,* this Court adopted the standard for evaluating Sixth Amendment claims of ineffective assistance set forth in *Beasley v United States,* 491 F2d 687, 696 (CA 6, 1974).

Under *Garcia,* a defendant's lawyer must perform at least as well as a lawyer with ordinary training and skill in the criminal law, and must conscientiously protect his client's interests, undeflected by conflicting considerations. Prejudice is not presumed once this test is met. A defendant would be entitled to a new trial only if, but for the attorney's error, the defendant would have had a reasonably likely chance of acquittal. ***People*** *v Degraffenreid,*19 **Mich** App 702; 173 **NW2d** 317 (1969) was cited.

[8] *Williams v Beto,* 354 F2d 698 (CA 5, 1963).

[9] *Strickland, supra,* p 686.

[10] *Strickland, supra,* p 687.

The two-part *Strickland* test for ineffective assistance requires that defendant show that counsel's representation was objectively unreasonable, based on the facts and circumstances of a particular case. The defendant must also show that the deficient performance prejudiced the defense. To establish prejudice, defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.,* pp 689, 694.

[11] *Ante,* p 330 (opinion of RILEY, J.).

[12] *Ante,* p 354 (opinion of MALLETT, J.).

[13] Wallace's lawyer testified at the *Ginther* hearing that he chose not to request an instruction on diminished capacity because it would confuse the jury. He testified that he wanted the jury to find his client insane — "so why would I want ... the Judge to read a person who is under the influence of voluntarily consumed alcohol or controlled substance at the time of the alleged offense is not for those reasons alone to be judged legally insane?"

Wallace's lawyer did not understand that a diminished capacity defense allows the jury to reach the issue of insanity, combining the effects of past mental illness/retardation and substance abuse as contributory factors to legal insanity. This corresponds to the findings of Dr. Bhama, and was partially corroborated by the forensic center responsibility examination.

[14] Dr. Bhama saw Wallace both as an outpatient and an inpatient during this period.

[15] During the discussion of jury instructions, the prosecutor observed that, although Wallace's lawyer had submitted instructions concerning a diminished capacity defense, the lawyer had before the trial specifically rejected diminished capacity as a defense. The ensuing discussion illustrates the lawyer's utter confusion, or his all-toolate realization that the evidence supported a defense of diminished capacity.

[16] There was credible testimony that Wallace appeared in control and lucid at the time of the murder. There was evidence of premeditation. Wallace worked full time as an electrical inspector and otherwise conducted his daily affairs in an outwardly normal manner. A neighbor of Wallace's testified that several days before the shooting, Wallace said he would kill his wife to end his marital difficulties. Wallace brought a .357 magnum to the bar where he shot his wife.

Employees and bar patrons testified that Wallace sat with his wife, quietly drinking and talking for some time, before he fired the first shot. Eyewitnesses recounted that Wallace shot his wife a second time as she fell to the floor, and finally fired a third shot into her motionless body beneath a table. The second and third shots were anywhere from one to five minutes apart. Wallace calmly placed his gun on the table and went to the restroom. When he emerged, he submitted to arrest, telling the police that he had shot his wife.

[17] *Waters v Zant,* 979 F2d 1473 (CA 11, 1992); *Evans v Lewis,* 855 F2d 631 (CA 9, 1988). Failure to fully investigate cannot be characterized as a trial tactic, and the omission of relevant and material evidence at sentencing seriously undermined confidence in the outcome, requiring reversal.

[18] *State v Savage,* 120 NJ 594, 622; 577 A2d 455 (1990).

[19] The defendant carried the victim's dismembered torso in a suitcase for days, attempted suicide while hospitalized, and had a history of cocaine use.

[**20**] *Vasquez v State,* 830 SW2d 948 (Tex Crim App, 1992).

[21] *Id.* at 950. See also *Watrous v State,* 842 SW2d 792 (Tex App, 1992), in which the court reversed a sexual assault conviction because the attorney failed to request an instruction on a statutory defense.

[22] *Mak v Blodgett,* 970 F2d 614, 622 (CA 9, 1992), citing *Ewing v Williams,* 596 F2d 391, 395 (CA 9, 1979)(prejudice may result from the cumulative effect of multiple deficiencies), citing *Cooper v Fitzharris,* 586 F2d 1325 (CA 9, 1978) (en banc), cert den 440 US 974 (1979).

Habeas corpus relief was granted in *Harris v Dugger,* 874 F2d 756 (CA 11, 1989), on the basis of cumulative error. Because there was a reasonable probability that the jury would have rejected the death penalty in light of favorable evidence, the defendant was prejudiced by his lawyer's omissions. Accord *Horton v Zant,* 941 F2d 1449 (CA 11, 1991); *Cave v Singletary,* 971 F2d 1513 (CA 11, 1992), the failure to present favorable evidence and witnesses at sentencing greatly undermined the jury verdict, establishing prejudice.

[23] At the *Ginther* hearing, the lawyer repeatedly misstated the rules of evidence. Midtrial, the judge gave the lawyer a book of the Michigan Rules of Evidence after various baseless objections. At the *Ginther* hearing, the lawyer testified, "Not all objections were made based upon my knowledge or expertise or lack thereof. Lots of times, I was trying to do things to grandstand for the Jury. I was often trying to interrupt and sometimes trying to confuse."

The lawyer also testified that "[a]fter twenty years in this business, I can tell you something, I am more confused now than I was the day I got out of law school, okay."

Errors of omission included the lawyer's failure to cross-examine the forensic psychologist on his conclusion that Wallace did not suffer from acute mental organic disorder, a conclusion that contradicted Wallace's expert testimony. The lawyer failed to provide his own expert with police reports in preparation for trial.

[24] I would ask the Court that it instruct the Jury that part of Second Degree Murder includes plan, purpose, premeditation.

[*The Court*]: That's not the law, Mr. [Wallace's lawyer].

[*Lawyer*]: I think that instruction should be given.

[*The Court*]: That's not the law.

[*Lawyer*]: What is the law?

[The Court explains the elements.]

[*Lawyer*]: Requests malice aforethought instruction for second degree murder — Court refuses, [Lawyer] want[s] objection on the record.

[25] MCR 2.003(C)(3).

[26] He argued, in response to the prosecutor's hearsay objection, "[i]f two men are both in the room and I'm asking him to tell the conversation they had at that time...."

[27] Ten-year-old incidents of work absenteeism, for example.

[28] MCL 768.20(1); MSA 28.1043(1).

[**29**] Compare ***People*** *v Pearson,* 404 **Mich** 698; 273 **NW2d** 856 (1979).

[30] MCL 775.16; MSA 28.1253.

[31] As Anthony Lewis observed after the *Gideon* decision:

It will be an enormous social task to bring to life the dream of *Gideon v Wainwright* — the dream of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer

representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense. [Gideon's Trumpet, p 205.]

[32] Wallace's lawyer was retained.

[33] Administrative Order No. 1990-2, ¶ 2(C)(3)(b); **Mich** Ct R, pp A 1-42 to A 1-43.

People v Reed

198 Mich. App. 639 (1993)

499 N.W.2d 441

PEOPLE

v.

REED

Docket No. 150502.

Michigan Court of Appeals.

Submitted January 13, 1993, at Detroit.

Decided March 15, 1993, at 9:25 A.M.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,*Prosecuting Attorney, *Timothy A. Baughman,* Chief of Research, Training, and Appeals, and*Thomas M. Chambers,* Assistant Prosecuting Attorney, for the people.

Elizabeth L. Jacobs, for the defendant on appeal.

Before: GRIFFIN, P.J., and SHEPHERD and FITZGERALD, JJ.

FITZGERALD, J.

This case involves a prosecutor's appeal from the trial court's grant of defendant's postappeal motion for relief from judgment brought under MCR 6.500 *et seq.* (subchapter 6.500). In granting the motion, the court ruled that defendant was entitled to a new trial. Pursuant to our order granting leave to appeal, we instructed the parties to address the issue concerning this Court's jurisdiction with regard to the prosecutor's application for leave to appeal.

On August 1, 1983, defendant was convicted by a jury of first-degree felony murder, MCL 750.316; MSA 28.548, assault with intent to murder, MCL 750.83; MSA 28.278, assault with intent to rob while armed, MCL 750.89; MSA 28.284, and possession 642*642 of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant appealed, raising two issues: erroneous instructions regarding the charge of felony murder and improper prosecutorial comments. This Court affirmed defendant's convictions in an unpublished opinion per curiam, decided September 13, 1984 (Docket No. 74583). On March 28, 1985, the Supreme Court denied defendant's request for appointment of counsel for the purpose of pursuing leave to appeal. Defendant's May 20, 1991, motion for relief from judgment pursuant to MCR 6.502 was granted by the Recorder's Court for the City of Detroit.[1]

I

The prosecutor asked this Court for leave to appeal the order granting defendant's motion for relief from judgment.[2] In his answer, defendant asserted that this Court lacked jurisdiction to grant leave to appeal because the underlying offenses were committed on September 24, 1982, and the amended statute, MCL 770.12; MSA 28.1109, authorizing appeals by prosecutors, does not apply to crimes that occurred before March 30, 1988.[3] A brief synopsis of the history of prosecutorial appeals from an order granting a new trial is instructive in understanding defendant's argument.

643*643 Appeals by the prosecutor in a criminal case are allowed only in specific instances set forth in MCL 770.12; MSA 28.1109. *People v Cooke,* 419 Mich 420; 355 NW2d 88 (1984). In*Cooke,* the Supreme Court extremely limited the availability of a prosecutorial appeal as of right or by leave granted. One type of order that was eliminated as appealable was an order granting a new trial.

To circumvent the holding in *Cooke* prosecutors attempted to file complaints for superintending control to contest orders granting a new trial. In *In re People v Burton,* 429 Mich 133; 413 NW2d 413 (1987), the Court further limited the ability of a prosecutor to contest the granting of a new trial by holding that this Court lacked jurisdiction to issue an order of superintending control to grant the prosecutor's request for reversal of the trial court's decision granting the defendant a new trial. Under MCL 770.12; MSA 28.1109, the order granting a new trial to a defendant was not appealable, and the order of superintending control was an improper means of granting appellate review when an appeal was not provided by general law.

In 1988, the Legislature amended MCL 770.12; MSA 28.1109 to broaden the authority of prosecutors to appeal. 1988 PA 66. As a result of the amendment, prosecutors were given authority to appeal orders granting a new trial in cases where the crime occurred on or after March 30, 1988.

In this case, however, defendant proceeded under the postappeal relief procedures of subchapter 6.500. The prosecutor contends, therefore, that MCL 770.12; MSA 28.1109 is inapplicable and that appeals are governed by the specific appeal procedures provided in subchapter 6.500. We agree.

MCL 600.308; MSA 27A.308 defines the jurisdiction 644*644 of the Court of Appeals. Section 308(2)(d) provides:

> *(2) The court of appeals has jurisdiction on appeal from the following orders and judgments which shall be reviewable only upon application for leave to appeal granted by the court of appeals:*
>
> * * *
>
> *(d) Such other judgments or interlocutory orders as the supreme court may by rule determine.*

The postappeal relief procedure of subchapter 6.500 specifically provides for the availability of an appeal from decisions under the subchapter. MCR 6.509 provides that "decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205." The rule does not limit the availability of an appeal to a defendant. Thus, this Court has jurisdiction to review the trial court's order granting defendant relief from judgment. MCL 600.308(2)(d); MSA 27A.308(2)(d); MCR 6.509(A).

People v Brown, 196 Mich App 153; 492 NW2d 770 (1992), involved a prosecutor's appeal from the Detroit Recorder's Court's grant of the defendant's postappeal motion for relief from judgment brought under MCR 6.500 *et seq.* The underlying crime occurred on September 20, 1987. This Court treated the prosecutor's application for leave to appeal as a complaint for superintending control. The defendant sought leave to appeal. The Supreme Court denied leave to appeal, holding:

> *It was improper for the Court of Appeals to exercise superintending control jurisdiction under the circumstances of this case. In re Burton, 429 Mich 133 (1987). However, it is noted that an application for leave to appeal was available to the prosecutor. MCL 600.308(2)(d); MSA 27A.308(2)(d); 645*645 MCR 6.509(A). The Court of Appeals should proceed with this matter as on leave granted rather than as superintending control. [439 Mich 1010 (1992).]*

II

Having concluded that this Court has jurisdiction over the prosecutor's appeal, the question before us is whether the trial court properly granted defendant's motion for relief from judgment and awarded him a new trial. Generally, the grant of a new trial is reviewed for an abuse of discretion. *People v Bradshaw,* 165 Mich App 562, 566-567; 419

NW2d 33 (1988). However, MCR 6.508(D)(3) imposes limits on the trial court's grant of a postappeal motion for relief from judgment. That rule provides in pertinent part as follows:

> *The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion*
>
> * * *
>
> *(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates*
>
> *(a) good cause for failure to raise such grounds on appeal or in the prior motion, and*
>
> *(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,*
>
> *(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal.*

In this case, the trial court granted defendant's motion on the ground of ineffective assistance of646*646 counsel. Specifically, the trial court held that no sound trial strategy existed for trial counsel's failure to object to certain prosecutorial comments, and that appellate counsel failed to act as "reasonably prudent counsel" in failing to raise the issue regarding ineffective assistance of trial counsel.[4]

To establish a claim of ineffective assistance of counsel at trial, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. Second, the deficiency must be prejudicial to the defendant. *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991). We conclude that this same standard also applies when analyzing claims of ineffective assistance of appellate counsel.[5]

An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial. However, appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. See *Jones v Barnes,* 463 US 745; 103 S Ct 3308; 77 L Ed 2d 987 (1983). Counsel 647*647 must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. The fact that counsel failed to recognize or failed to raise a claim despite recognizing it does not per se constitute cause for relief from judgment. Thus, to permit proper review in cases where appellate counsel has pursued an appeal as of right and raised nonfrivolous claims, the defendant must make a testimonial record in

the trial court in connection with a claim of ineffective assistance of appellate counsel. *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973).[6]

In this case, defendant labeled his appellate counsel "ineffective" eight years after the appeal of his conviction in an attempt to establish "good cause" for failing to raise additional issues in his appeal as of right. In light of appellate counsel's decision to raise two arguments in the appeal as of right, we do not think that it can seriously be maintained that the decision not to press unpreserved issues (or issues relating to trial counsel's failure to object) on appeal was an error of such magnitude that it rendered appellate counsel's performance seriously deficient under the *Strickland* test. Defendant has failed to overcome the presumption that appellate counsel's decision regarding which claims to pursue might be considered sound appellate strategy.[7] A deliberate, tactical decision not to pursue a particular claim is not the type of circumstance envisioned by subchapter 6.500 to constitute "good cause" for failure to raise 648*648 an issue in the appeal as of right.[8] Defendant has not sustained his burden of establishing good cause for his failure to raise in his original appeal the issues now raised in his motion for postappeal relief. The use of the postappeal relief procedure is inapplicable unless the defendant succeeds in showing both good cause for failure to raise an issue and actual prejudice resulting from the alleged irregularity. Therefore, we need not determine whether defendant has carried the burden of showing actual prejudice from the allegedly improper prosecutorial comments and trial counsel's failure to object.

The trial court erred in granting defendant's motion for postappeal relief. Therefore, we vacate the trial court's order granting defendant relief from judgment and a new trial and instruct the court to reinstate defendant's convictions and sentences. We do not retain jurisdiction.

Reversed.

GRIFFIN, P.J., concurred.

SHEPHERD, J. *(concurring in part and dissenting in part).*

I agree with the majority opinion with regard to the jurisdiction of the Court of Appeals to hear the prosecutor's appeal. I disagree with my colleagues regarding the question whether there was ineffective assistance of appellate counsel, not because the opinion is incorrect, but because I believe it is premature. I agree that there would be no valid claim of ineffective assistance of appellate 649*649 counsel if counsel had decided not to raise issues for strategic reasons. However, in this case the trial court did not conduct an evidentiary hearing so that the former appellate counsel could account for his decisions. There is nothing in the record to establish why issues that have at least some prima facie validity were not raised. I would also have the trial court make findings regarding whether the failure to raise valid issues was non-prejudicial. I would reserve jurisdiction.

[1] Subchapter 6.500 of the Michigan Court Rules establishes the procedures for pursuing postappeal relief from criminal convictions. The subchapter is the exclusive

means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process.

[2] Although the order granted "Defendant's Motion for Relief from Judgment," the actual effect of the order is to grant defendant a new trial.

[3] The statute was amended by 1988 PA 66. The historical note to § 12 provides: "This amendatory act shall take effect March 30, 1988 and apply to crimes committed on or after that date."

[4] Because the ineffective assistance of trial counsel issue could have been raised in defendant's appeal as of right, defendant cannot raise the issue as a ground for postappeal relief unless good cause for failure to raise the issue is shown. The trial court found that appellate counsel's deficient performance in failing to raise the issue constituted good cause. However, the trial court did not determine that defendant suffered "actual prejudice" as a result of appellate counsel's failure to raise the issue of ineffective assistance of trial counsel.

[5] See, e.g., *Smith v Murray,* 477 US 527, 535; 106 S Ct 2661; 91 L Ed 2d 434 (1986).

[6] Where appellate counsel has perfected an appeal on behalf of a defendant, it is unlikely, in the absence of testimony of appellate counsel, that the defendant would be able to establish that appellate counsel's failure to raise particular issues was the result of deficient performance as opposed to strategy.

[7] Although the trial court concluded that the issues raised by defendant in his motion for postappeal relief *may*be meritorious, appellate counsel did not have the benefit of the trial court's hindsight at the time of the original appeal.

[8] The process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones v Barnes, supra* at 751-752. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland, supra* at 689.

People v Reed (1995)

449 Mich. 375 (1995)

535 N.W.2d 496

PEOPLE

v.

REED

Docket No. 96936, (Calendar No. 9).

Supreme Court of Michigan.

Argued November 1, 1994.

Decided July 25, 1995.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *John D. O'Hair,* Prosecuting Attorney, *Timothy A. Baughman,* Chief, Research, Training and Appeals, and *Thomas M. Chambers,* Assistant Prosecuting Attorney, for the people.

Elizabeth L. Jacobs for the defendant.

Amici Curiae:

Sandra Girard for Prison Legal Services of Michigan, Inc.

Joan E. Morgan for Criminal Defense Attorneys of Michigan.

Barbara R. Levine for Michigan Appellate Assigned Counsel System.

BOYLE, J.

"Cause" for excusing procedural default is established by proving ineffective assistance of appellate counsel, pursuant to the standard set forth in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), or by showing that some external factor prevented counsel from previously raising the issue. MCR 6.508 protects unremedied manifest injustice,[1] preserves 379*379 professional independence, conserves judicial resources, and enhances the finality of judgments.

Six justices agree that in postconviction proceedings under MCR 6.508(D)(3)(a),[2] "good cause for failing to raise issues [of ineffective assistance of counsel] on the first appeal"[3] is not defined as failure to comply with standard 9 of the Minimum Standards for Indigent Criminal Appellate Defense Services. The Minimum Standards[4] require appellate counsel to raise all claims of "arguable legal merit," and a failure to raise an arguable claim does not establish the proper test for assessing whether a defendant has established "cause" excusing a procedural default in postconviction proceedings. The definition proposed is inconsistent with the purpose and language of the Rules of Criminal Procedure, with federal authority defining ineffective assistance of trial and appellate counsel as cause, and with our holding in *People v Pickens,*446 Mich 298; 521 NW2d 797 (1994).

However, we disagree with Justice CAVANAGH that "federal habeas corpus jurisprudence should play only a limited role in defining the standards imposed by MCR 6.508." *Post* at 402. As Justice CAVANAGH notes, federal habeas corpus review and MCR 6.508 share the paramount goal of promoting finality of judgments. *Post* at 404. Moreover, in both the federal and state systems, the constitution guarantees only a fair trial, not a perfect one. *Murray v Carrier,* 477 US 478; 106 S Ct 2639; 91 L Ed 2d 397 (1986); *People v Bahoda,* 448 Mich 261, 292-293, n 64; 531 NW2d 659 (1995). While it is true that the state can create its own procedural rules, we presumably chose to model MCR 6.508 after the federal habeas corpus statute 380*380 because it serves important state interests. As the Supreme Court has observed, the exhaustion doctrine,[5] promotes the legitimate interest of this state in enhancing the accuracy, efficiency, and reliability of our own criminal process by assessing and resolving appellate issues shortly after trial. *Murray v Carrier, supra.*

We also believe that Justice CAVANAGH has failed to advance a persuasive reason why the habeas corpus standard articulated in *Gray v Greer,* 800 F2d 644 (CA 7, 1985), not passed upon by the Court of Appeals, should be adopted here. As the Court now assumes for itself the role of adding judicial gloss to the terms "significant and obvious," the approach marks at least a partial repudiation of the limiting purpose of MCR 6.508. The burdens on trial courts passing on postconviction claims will be clearly expanded to the extent of demonstrating compliance with *Gray* and, in fact, may be further expanded. The observation that the strategic decisions of counsel will be respected "if such discretion was actually exercised," invites the argument that a *Ginther* hearing with appellate counsel must be held to determine that question.[6] *Post* at 405.

381*381 The Rules of Criminal Procedure "are to be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay." MCR 6.002. The specific purpose for creating the postconviction procedure was to provide finality of judgments affirmed after one full and fair appeal and to end repetitious motions for new trials. MCR 6.508(D) is identical to the federal standards for habeas corpus relief under 28 USC 2255. Postconviction relief is provided for the extraordinary case in which a conviction constitutes a miscarriage of justice.

Requiring appellate lawyers to function at a level of objectively reasonable performance encourages lawyers to accept assignments and to diligently serve their clients, as well as

promoting the goal of finality in judgments. Where a procedural default is the result of ineffective assistance of counsel, the Sixth Amendment mandates that the state bear the risk of the constitutionally deficient performance. However, where the state has afforded a full and fair opportunity to reliably determine guilt and an appeal of right, assisted by constitutionally adequate counsel at public expense, 382*382 all institutional and public interests support the conclusion that proceedings should come to an end unless the defendant's conviction constituted a miscarriage of justice.

When ineffective assistance of counsel, based on a failure to raise viable issues, is the justification for excusing procedural default, the movant must establish ineffective assistance of counsel pursuant to the standard set forth in *Strickland v Washington, supra,* or that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v Carrier, supra* at 488. MCR 6.508 is based on federal precedent and Michigan's standard for ineffective assistance of trial counsel is the same as the federal standard. *People v Pickens, supra.* "Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial." *Murray* at 492.

Defining ineffective assistance of appellate counsel as the failure to raise any arguable claim would impair the independence of the profession. And because failure to raise all colorable claims will expose appellate lawyers to malpractice suits and grievances, the approach would inevitably result in flooding the appellate courts with non-meritorious claims on direct appeal. Moreover, because in hindsight, the number of claims of arguable legal merit is virtually limitless, it is predictable that lawyers either will decline representation that will expose them to grievances and civil sanctions, or will suggest that funding units should underwrite the cost of malpractice insurance.

The ultimate effect would profoundly destabilize the finality of judgments beyond what occurred under the previous procedure, and exponentially 383*383 increase the burdens on appellate counsel, the Court of Appeals, and trial courts presiding in collateral matters. Such an approach is neither commanded by the constitution nor justified by sound public policy.

I

The commentary to MCR 6.508 states that the "cause and prejudice" standard is based on the United States Supreme Court decisions in *Wainwright v Sykes,* 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977), and *United States v Frady,* 456 US 152; 102 S Ct 1584; 71 L Ed 2d 816 (1982). In *Wainwright,* the United States Supreme Court held that the "[r]espondent's failure to make timely objection under the Florida contemporaneous-objection rule to the admission of his inculpatory statements, absent a showing of cause for the noncompliance and some showing of actual prejudice, bars federal habeas corpus review of his *Miranda*[7] claim." *Id.* at 72 (reporter's syllabus).

While *Wainwright* adopted the cause and prejudice standard, it left "open for resolution in future decisions the precise definition...." *Id.* at 87. Similarly, in *Frady, supra,* the Court applied the cause and prejudice standard but found "it unnecessary to determine whether Frady ha[d] shown cause" and "refrained from giving `precise content' to the

term `prejudice'...." *Frady* at 168, citing *Wainwright, supra* at 91. Thus, while laying the groundwork for the cause and prejudice standard, *Wainwright* and *Frady* offered limited guidance regarding the proper definition of either term.

However, in *Strickland,* the United States Supreme Court clearly held that to receive collateral384*384 relief on the basis of ineffective assistance of trial counsel, the defendant must meet a two-pronged test of both cause and prejudice. In addressing the "cause" prong of the test,*Strickland* held that the defendant must show that counsel "made errors so serious that counsel was not functioning as the `counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. In evaluating whether counsel was ineffective, "[j]udicial scrutiny of counsel's performance must be highly deferential," and the court should restrain from second-guessing trial strategy. *Id.* at 689. "There are countless ways to provide effective assistance," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* Thus, with regard to defaults that occur at trial, error or inadvertence is not cause for procedural default in postconviction proceedings. *Murray, supra* at 487.

Strickland dealt with allegations of ineffective assistance of trial counsel as cause (and prejudice) for procedural defaults in collateral proceedings. In *Murray,* the Supreme Court also definitively held that a failure to assert a claim on appeal whether from "ignorance or inadvertence rather than from a deliberate decision," does not constitute cause for purposes of postconviction relief. *Id.* at 487. "Attorney error short of ineffective assistance of counsel does not constitute cause for a procedural default even when that default occurs on appeal rather than at trial." *Id.* at 492. In *Murray,* the Supreme Court dismissed the respondent's habeas corpus petition because the respondent failed to show cause for not raising his ineffective assistance claim on direct appeal. In reaching its decision, the Court squarely addressed the standard for "cause" and, applying *Strickland,* held that "cause" for appellate default could be385*385 established only by proving ineffective assistance of counsel pursuant to *Strickland,* or by showing that some factor external to the defense precluded counsel from previously raising the issue. *Id.*[8]

Where trial or appellate counsel's performance is constitutionally defective, procedural defaults will not bar a remedy for manifest injustice. However, the vestigial definition of "cause" contended for would transform postconviction proceedings into the "main event" of the criminal justice system, with significant cost to the entire system and to the public interest. If a defendant received a fair trial, was represented at trial and on appeal by a constitutionally adequate lawyer, no legitimate interest is served in excusing procedural default.

II

The appellant contends that standard 9 of the Minimum Standards is the proper test for whether the defendant has shown "cause." *Post* at 412-413. Standard 9 requires an appellate attorney to assert every claim of "arguable legal merit." Thus, an appellate attorney's failure to raise an issue on direct appeal that would not have succeeded had it been raised, would excuse a procedural default under MCR 6.508(D). The Minimum

Standards dictate only whether an attorney who is listed on the roster of attorneys at the Appellate Assigned Counsel Administrator's office is eligible for assignments. The standards are simply the vehicle adopted by this Court to assure a standard of 386*386 performance by certain attorneys who seek to represent clients at state expense. They do not establish the definition of "cause" in collateral relief. Unlike the Minimum Standards, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation.... The purpose is simply to ensure that criminal defendants receive a fair trial." *Strickland, supra* at 689.

The commentary to standard 9 states that it is based on this Court's opinion in *People v Garcia,* 398 Mich 250; 247 NW2d 547 (1976). Just last term, however, we held that "the Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel."*People v Pickens, supra* at 302. In reaching our decision we stated, "*Garcia,* therefore, does not stand for the proposition that the Michigan Constitution was intended to grant stronger protection than federal authority with regard to the standards applied to the issue of ineffective assistance of counsel." *Id.* at 312-313. Thus, contrary to the understanding of the drafters of standard 9, our holding in *Garcia* does not suggest a departure from federal precedent, but rather embodies the federal standard.

Defining "cause" as any deviation from compliance with an exact set of standards was considered and rejected in the context of trial counsel performance in *Strickland.* The Court refused to adopt a "particular set of detailed rules for counsel's conduct," finding that no specific set of standards "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." *Strickland, supra* at 688-689.

387*387 Likewise, requiring appellate counsel to raise every arguably meritorious issue would undermine the strategic and discretionary decisions that are the essence of skillful lawyering. A fair trial defended by constitutionally competent trial counsel and reviewed with the representation of constitutionally competent appellate counsel is a final judgment, subject to reversal only in the extraordinary circumstances set forth in the rule.

Inherent in the definition of "arguable legal merit" is the notion that attorneys will disagree about what issues are "arguable."[9] By adopting a standard of arguable merit, the Minimum Standards encourage lawyers representing indigent clients on appeal to err on the side of presenting all colorable claims for relief. Although the standard undoubtedly imposes a tax on the resources of the Court of Appeals, it is arguable that the burden is justified by the institutional need to assure that appellate attorneys paid by the taxpayers of Michigan do not err on the side of underrepresentation. It is one thing, however, to encourage lawyers to raise claims on direct appeal that conceivably might succeed, and quite another to say that failure to raise all such claims is constitutionally defective. If failure to raise a claim of "arguable legal merit" constituted "cause" in collateral proceedings, the standard would constitute a frontal attack on the finality of judgments that the Rules of Criminal Procedure were adopted to promote

388*388 without any benefit to the notion that collateral proceedings are intended as extraordinary protection against unreliable fact finding and unjust convictions.[10] The standard does not consider the presumption of competence inherent in the wide range of reasonable appellate assistance, nor does it address the fact that for purposes of appeal, as at trial, the constitution does not guarantee a perfect process, but rather one that is not constitutionally defective.

III

Before October 1, 1989, the procedure for collateral review of criminal convictions in Michigan did not make any provision for finality of judgments. As a consequence, defendants could, and did, repeatedly seek relief without limitation. To create a uniform system of procedure, Michigan Court Rules 6.501 *et seq.* were enacted. The rules present a carefully balanced scheme that liberally permits the assertion of claims on direct appeal,[11] whether timely or not, while at the same time introducing a concept of finality to discourage repeated trips up and down the appellate ladder.

In explaining the proper standard for collateral postconviction relief, the drafters of proposed rule 7.404, later adopted as MCR 6.508, stated:

> *The collateral postconviction remedy provided by subchapter 7.400 should be regarded as extraordinary. Lacking any statute of limitations, this remedy has the potential for seriously undermining 389*389 the state's important interest in the finality of criminal judgments. Such a cost is appropriate only to prevent manifest injustice. Stated differently, collateral postconviction remedies should have a narrower role than direct appeal; errors that may warrant appellate reversal of a conviction may not warrant postconviction relief. [Proposed Rules of Criminal Procedure, 428A Mich 50 (1987).]*

Specifically addressing ineffective assistance of appellate counsel claims, the drafters stated that "ineffective assistance of counsel, as opposed to mere attorney oversight, establishes cause for failure to raise the issue." *Id.* at 53.

The rules are designed to encourage raising legal issues on initial appeal rather than in post-conviction review. The United States Supreme Court has observed:

> *[A rule which is designed to afford] the opportunity to resolve the issue shortly after trial, while evidence is still available both to assess the defendant's claim and to retry the defendant effectively if he prevails in his appeal ... promotes not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions.... [Reed v Ross, 468 US 1, 10; 104 S Ct 2901; 82 L Ed 2d 1 (1984).]*

MCR 6.508 was adopted to insure that the finality of criminal judgments was not diminished. Mandating that all appellate attorneys must raise all claims of arguable legal merit will tax judicial resources on direct and postconviction attack, and reintroduce a multiplicity of postconviction proceedings. Neither the guarantee of a fair trial nor a direct appeal entitles a defendant to as many 390*390 attacks on a final conviction as ingenuity may devise.[12]

IV

The facts of this case present a paradigm of the situation MCR 6.508 seeks to remedy. It has been eight years since defendant, assisted by a different lawyer than trial counsel, sought relief through direct appeal. The appeal followed a three-day jury trial at which defendant was convicted of felony murder. On direct appeal, appellate counsel raised two issues: that the jury instructions were unclear and overly broad, and that it was error for the prosecutor to inform the jury that defendant's alleged codefendant had already been tried.

Defendant here claims that his appellate counsel was ineffective for not arguing that his trial counsel was ineffective in failing to object to three statements made in the prosecutor's closing argument. To excuse this double procedural default defendant must "show that [trial] counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *Pickens, supra* at 303. Defendant must also show that appellate counsel's performance fell below an objective standard of reasonableness and was constitutionally deficient.

While not insurmountable, it is clear that this burden is highly demanding. As Justice Brennan explained in *Kimmelman v Morrison,* 477 US 365; 106 S Ct 2574; 91 L Ed 2d 305 (1986):

> *391*391 In order to establish ineffective representation, the defendant must prove both incompetence and prejudice. [Strickland, supra] at 688. There is a strong presumption that counsel's performance falls within the "wide range of [reasonable] professional assistance," id. at 689; the defendant bears the burden of proving that counsel's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. Id. at 688-689. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. Id. at 689. [Id. at 381.]*
>
> *Since "[t]here are countless ways to provide effective assistance in any given case," id. at 689, unless consideration is given to counsel's overall performance, before and at trial, it will be "all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Ibid. [Id. at 386.]*

A

Dealing with the defaults in reverse order, we first observe that under the deferential standard of review, appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance. *Jones v Barnes,* 463 US 745, 752; 103 S Ct 3308; 77 L Ed 2d 987 (1983). Nor is the failure to assert all arguable claims sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented. The question is

whether a reasonable appellate attorney could conclude that the comments made by the prosecutor were not worthy of mention on appeal.

392*392 Since, as discussed next, two of the three comments were not improper statements of law and all were followed by proper instruction, it is evident that the improper comments argument was without merit.

B

The claimed ineffective performance of trial counsel, is based on three instances of alleged prosecutorial misconduct where trial counsel's failure to object subjected each alleged error to the claim of forfeiture on direct appeal,[13] see *People v Duncan,* 402 Mich 1; 260 NW2d 58 (1977). The question is whether trial counsel's failure to object to the following three points during a three-day trial constituted constitutionally deficient performance: (1) the prosecutor's alleged implication that first-degree murder is satisfied if the murder occurred during the course of the robbery without fully explaining that there must be malice sufficient for murder itself and a separate intent to commit the underlying felony, (2) the prosecutor's explanation that "not caring" or "careless disregard" would satisfy the specific intent required for assault with intent to murder, and (3) the prosecutor's use of "we know" in referring to the evidence produced at trial, allegedly implying that he knew something more than produced at trial, that the evidence was abundantly clear, or simply that the jury should suspend its fact-finding powers in deference to the prosecutor's judgment. All instances of alleged defective performance occurred during closing argument. It is not disputed that all were followed by correct jury instructions.

393*393 Although we find no "cause," we analyze each of the claims separately to provide guidance to the bench and bar.[14]

Defendant claims trial counsel erred in failing to object to the prosecutor's argument regarding felony murder.

Review of the relevant statements in the record indicate that the prosecutor did not misstate the law:

> *Whether the persons had the gun in their right hand or their left hand, whether there were fifteen bullets fired or twenty-two bullets fired may not matter. If you believed that Lee Griffin died during the robbery or an attempted robbery, that Mr. Reed shot the fatal shot or was responsible for it being fired, it would still be murder in the first degree, felony murder. If he shot Mr. Moore intending to kill, intending what happened, he's guilty of assault with intent to murder. If he was just holding and pulled out his weapon on the participants at this bar, he's guilty of assault with intent to rob being armed. If he's holding a gun in his hand, he's guilty of possessing a firearm during the commission of a felony.*
>
> * * *

*For murder in the first degree, the Judge is going to define that there has to be a loss of life. Mr. Griffin lost his life. It had to be caused by an act of the Defendant. Being shot was the act that caused his death. And there had to be a mental 394*394state, a mental state of either wanting to kill or disregarding the consequences of the activity, not caring what happened, in this case, shooting a person, to the extent of shooting at the vital organs, that kind of not caring — I'm going to help my friend, I'm going to shoot you.*

You don't have to intend "I'm going to kill him." All you have to do is, "I'm going to shoot him. I don't care if this bullet kills or not."

And it has to be done during an attempted robbery. This certainly was an attempted robbery. Even if Mr. Sharp may have been the one more intimately involved in the whole event — he's taken care of — look at Mr. Reed's responsibility, and his shooting Mr. Griffin with disregard for what's going to happen, causing the fatal wound while a robbery is going down is murder in the first degree.

And the Court has to instruct you on murder in the second degree. That's just a killing with a wrongful intent, a wrongful state of mind, whether part of a robbery or not. That's murder in the second degree.

But the killing when you're trying to advance a robbery is first, murder in the first degree. Not that it's planned or premeditated or cold-blooded, but that it's done during the robbery. That's murder in the first degree. And for that we charge Mr. Reed for being involved in that act of murder in the first degree.

And we know that he also shot Mr. Moore twice, in the chest and in the arm. First in the arm would make sense. If he's holding the gun the way he said, he would shoot him in the arm which has the gun in it, which caused him to let go of the arm [sic].

Then he shot him in the chest, for which we charge him with assault with intent to murder, intent to kill; the Defendant didn't care what happened when he shot him. He shot him in the chest, which is a pretty serious place. He's lucky. He was shot twice in the trunk and survived. Mr. Griffin was shot once in the trunk and he died.

*395*395 I think the fact that one man died shows that the intent was to kill, to not care, not caring what the results would be. And again, Mr. Moore said that Mr. Reed was the one who was shooting at him. "I looked up and I saw him shooting at me. The second and third wounds that I received came from Mr. Reed."*

The prosecutor argued that shooting at Mr. Griffin's vital organs satisfied the malice required for second-degree murder. He did not misstate the law or lessen the burden of proof regarding the malice requirement for murder.[15] See *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980).

The prosecution concedes that the trial prosecutor misstated the intent requirement of assault with intent to murder charge. He stated:

Then he shot him in the chest, for which we charge him with assault with intent to murder, intent to kill; the Defendant didn't care what happened when he shot him. He shot him in

> *the chest, which is a pretty serious place. He's lucky. He was shot twice in the trunk and survived. Mr. Griffin was shot once in the trunk and he died.*

We are not bound to accept such a concession, and it may well be that the prosecutor was correctly arguing that an intention to kill may be inferred from circumstances. Nonetheless, assuming arguendo the correctness of the concession, an intent to kill is necessary to convict of assault with intent to murder. *People v Taylor,* 422 Mich 554, 567-568; 375 NW2d 1 (1985). We find that counsel was not 396*396 ineffective in failing to object because, at the time of trial,*Taylor* was not yet decided.

Counsel is not ineffective for taking a position that, while objectively reasonable at the time, is later ruled incorrect. *McMann v Richardson,* 397 US 759, 770-771; 90 S Ct 1441; 25 L Ed 2d 763 (1970). The question is whether the position when taken was objectively reasonable pursuant to the standard set forth in *Strickland, supra.*[16] We are mindful of the *Strickland*Court's warning that "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful [or later deemed incorrect], to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Thus, trial counsel was not ineffective in failing to object to the prosecutor's argument.[17]

397*397 The final claim is that trial counsel erred in failing to object to the prosecutor's use of the term "we know" in summing up the evidence in his closing argument.[18] This claim is based on the 398*398 theory that trial counsel should have objected during the prosecutor's closing argument because the prosecutor was impermissibly vouching for the credibility of the witnesses. We believe a claim of this type is precisely the type of trial decision the United States Supreme Court cautioned against second guessing in postconviction collateral proceedings.

First, as a matter of law, the argument did not constitute improper vouching. It is not here disputed "that the prosecutor may not vouch for the character of a witness or place the prestige of his office behind them." *People v Bairefoot,* 117 Mich App 225, 229; 323 NW2d 302 (1982); see also *People v Bahoda, supra; People v Cowell,* 44 Mich App 623; 205 NW2d 600 (1973). The record must be read as a whole, however, and the allegedly impermissible statements judged in the context in 399*399 which they are made. *People v Duncan, supra* at 15-16. As noted by the Court of Appeals in *Cowell, supra:*

> *A statement cannot be taken out of context. Just as jury instructions must be read as a whole, so must the remarks of the prosecutor. The prosecutor's remarks must be evaluated in light of the relationship or lack of relationship they bear to the evidence admitted at trial. [Id. at 627.]*

The propriety of the prosecutor's comments "does not turn on whether or not any magic words are used." *Id.* at 628. The crucial inquiry is not whether the prosecutor said "We know" or "I know" or "I believe," but rather whether the prosecutor was attempting to vouch for the defendant's guilt.

Read as a whole, and in the context of this case, the prosecutor's use of "we know" does not show an attempt to place the credibility of his office behind the case or a suggestion that he possessed extrajudicial information on which defendant should be convicted.[19]

Rather, the prosecutor was asserting that "we know," on the basis of the evidence presented at trial and inferences drawn from that evidence, that the propositions advanced had been established.[20]

400*400 Second, trial strategy supports counsel's decision not to object. Objecting would have invited an overruling by the trial judge and risked jury disapproval. At best, trial counsel might have obtained a direction to the prosecutor to rephrase his summary, or a charge that the lawyer's arguments were not evidence. Trial counsel had to balance this meager benefit against the potential that the jury would believe defense counsel did not want them to hear the prosecutor's analysis of the evidence. Trial counsel's failure to object was a quintessential example of trial strategy. None of the omissions alleged, standing alone or together, falls below an objective standard of reasonable performance.

C

Finally, we observe that if the first prong of *Strickland* is satisfied because a reasonable attorney would have objected, in this collateral proceeding, the defendant could not fulfill the prejudice prong. See also *People v Pickens, supra.* The *Strickland* formulation of ineffective assistance includes both a performance component and a prejudice component. Both prongs of the test must be fulfilled and

> *a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness 401*401 claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [Id. at 697.]*

To establish prejudice, "a criminal defendant ... must show `that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Lockhart v Fretwell,* 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993), quoting *Strickland, supra* at 687.[21]

Defendant in this case received a fair trial and there are no circumstances that undermine confidence in the reliability of the factfinder's determination of guilt. Given the well-established proposition that jurors are presumed to follow the law, an alleged misstatement of the law by the prosecutor is presumptively not harmful, since the trial judge instructed the jury properly.

Moreover, a witness who was himself shot twice by Mr. Reed, testified that he saw defendant fatally shoot the victim during the attempted robbery, and three witnesses identified defendant as being in the bar at the time of the shooting. Another witness for the people testified that he drove defendant to the bar on the day in question, that defendant was armed with a .38 caliber revolver, and that when defendant returned to the car, either the defendant or Sharp said "I had to shoot the dude." A man working on a freezer identified defendant as the man with a revolver in his hand who ordered him out of the bathroom after the shots were fired. There was no prejudice or manifest injustice so that the good cause requirement should be waived.

402*402 V

We agree with the Court of Appeals that appellate counsel did not fall below the standard of*Strickland* by failing to claim that trial counsel was ineffective. Trial counsel's performance was constitutionally adequate, and defendant's counsel on direct appeal did not render ineffective assistance by failing to raise meritless claims.

Because defendant has failed to demonstrate "cause" as required by MCR 6.508(D)(3), we would affirm the decision of the Court of Appeals and reinstate defendant's convictions and sentences.

BRICKLEY, C.J., and RILEY, J., concurred with BOYLE, J.

CAVANAGH, J. (*concurring in part and dissenting in part*).

I agree with Justice BOYLE that the right to effective assistance of appellate counsel does not necessarily require that appellate counsel advance every conceivable issue on appeal. I write separately, however, to emphasize my belief that federal habeas corpus jurisprudence should play only a limited role in defining the standards imposed by MCR 6.508.

I

The primary motivation behind the writ of habeas corpus is to provide a mechanism whereby state prisoners can seek redress of their federal rights. A federal habeas corpus claim is based on the theory that the prisoner is being held in violation of the federal constitution or federal law and, thus, his imprisonment is unconstitutional or otherwise illegal. 28 USC 2254(a). Nevertheless, federal courts are increasingly reluctant to interfere with state court judgments because of the 403*403 concepts of comity and federalism; thus, habeas corpus relief is sparingly granted. *Coleman v Thompson,* 501 US 722, 730-731; 111 S Ct 2546; 115 L Ed 2d 640 (1991).

As the New Jersey Supreme Court has recently, and unanimously, observed:

> *It would be a bitter irony indeed if our courts, in an attempt to accommodate the [United States] Supreme Court's retrenchment of federal habeas corpus review, were artificially to elevate procedural rulings over substantive adjudications in post-conviction review, at a time when the Court's curtailment of habeas review forces state prisoners to rely increasingly on state post-conviction proceedings as their last resort for vindicating their state and federal constitutional rights.When appropriate, the procedural bars imposed by Rules 3:22-4, 3:22-5, and 3:22-12 may be asserted to preclude post-conviction relief, but their use should not be shaped or influenced in the slightest by the federal courts' restrictive standards for allowing or disallowing habeas review. [New Jersey v Preciose, 129 NJ 451, 477; 609 A2d 1280 (1992). Emphasis added.]*

Thus, the curtailment of habeas corpus review is based on a theory of federalism that subordinates the vindication of federal constitutional rights to a state's enforcement of its procedural rules. *Id.* at 472.

It seems evident to me that the concepts of comity and federalism are simply inapplicable to MCR 6.508. Therefore, the more prominence these concepts gain in federal habeas corpus jurisprudence, the less that jurisprudence should influence our interpretation of MCR 6.508. MCR 6.508 is intended to force a defendant to bring all his appellate claims in his appeal of right, thereby promoting the finality of judgments, and is not concerned in the least with comity or federalism.

404*404 This is not to say that federal habeas corpus jurisprudence is of no use whatsoever. The limited usefulness of that jurisprudence in interpreting the meaning of "good cause" is evidenced by the citation in the committee notes of MCR 6.508 of *United States v Frady,* 456 US 152; 102 S Ct 1584; 71 L Ed 2d 816 (1982), and *Wainwright v Sykes,* 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977). However, the committee citations of these cases surely do not mean that it also was adopting every future federal case that expanded or restricted those holdings.

Although the concepts of comity and federalism have no place in interpreting MCR 6.508, that rule shares at least one goal in common with habeas corpus review: finality of judgments. Consequently, I believe that the Court should embrace the very reasonable approach adopted in*Gray v Greer,* 800 F2d 644 (CA 7, 1985), because it protects both the state's interest in finality of judgments and the defendant's interest in the effective assistance of appellate counsel.

In *Greer,* petitioner Gray sought habeas corpus relief on the basis of ineffective assistance of appellate counsel, essentially the claim defendant Reed makes in the case at bar. In resolving the petitioner's claim, that court held:

> *Were it legitimate to dismiss a claim 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. 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 obviousissues on appeal. Significant issues which could have been raised should then405*405 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.*
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> * * *
>
> *A reviewing court can evaluate appellate counsel's choice of issues on appeal by examining the trial record and the appellate brief. While it is true that decisions which were arguably correct at the time will not be "second-guessed," a reviewing court must initially determine whether such decisions were, in fact, strategic. [Id.at 646. Emphasis added.]*

Under *Greer,* therefore, only those issues that are both significant and obvious can be a basis of relief. Any such issues must be presented in defendant's brief, and citation of the record must be included. *Greer* also incorporates a respect for the strategic decisions of counsel if such discretion was actually exercised.

II

Finally, I also wish to point out that this Court need not even reach the issue whether defendant has shown good cause because it is evident that he has not suffered actual prejudice. As observed in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and implicitly adopted by this Court in *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994), a defendant must show both good cause and prejudice to substantiate a claim of ineffective assistance of counsel. But,

> *a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of 406*406 lack of sufficient prejudice, which we expect will often be so, that course should be followed. [Strickland, 466 US 697.]*

Therefore, if it is clear that there is no actual prejudice, then there is no need to determine whether good cause has been shown. A defendant needs to prove both — thus a failure to meet one dooms relief. "Actual prejudice" is defined by MCR 6.508(D)(3)(b)(i) to mean that the defendant must show a reasonably likely chance of acquittal if not for the alleged error.[*] In light of the overwhelming evidence of defendant's guilt, the errors asserted would not have altered the verdict of guilty. Because the defendant cannot show actual prejudice, it is unnecessary to determine whether he can show good cause. His conviction should be affirmed and this appeal dismissed.

MALLETT, J., concurs with CAVANAGH, J.

LEVIN, J. I concur in part I of Justice CAVANAGH'S opinion.

LEVIN, J. (*dissenting*).

Following affirmance by the Court of Appeals of his convictions of first-degree murder, assault with intent to murder, attempted armed robbery and possession of a firearm during the commission of a felony,[1] defendant Albert Reed filed a motion for postappeal relief from judgment. MCR 6.508.[2] The judge who heard 407*407 the motion found that Reed's trial lawyer had been ineffective in failing to object to or request curative instructions for prosecutorial misconduct, that Reed's first appellate lawyer had been ineffective in failing to raise those issues on direct appeal, and that those errors constituted a "miscarriage of justice." The judge granted Reed's motion for relief from judgment.

A divided panel of the Court of Appeals reversed,[3] holding that the judge erred in finding that Reed had shown good cause, as required by MCR 6.508(D)(3)(a), on the basis of the failure of his first appellate lawyer to raise issues on Reed's first appeal. The Court of Appeals did not consider on the merits the allegations of prosecutorial misconduct or the allegations or finding by the judge 408*408 that the trial lawyer was ineffective. Nor did it consider whether Reed had shown "actual prejudice" as required by MCR 6.508(D)(3)(b).

This Court granted leave to appeal "limited to whether defendant has shown cause and prejudice as is required by MCR 6.508(D)(3)."[4] I would find that Reed showed good cause for failing to raise issues on the first appeal. Unless the first appellate lawyer is Groucho Marx, his own ineffectiveness is not an issue that will be raised by him on direct appeal.

Because the Court of Appeals did not consider the allegations or findings of prosecutorial misconduct and trial lawyer ineffectiveness, and did not consider whether Reed showed actual prejudice, I would not and do not address those issues. This Court should not bypass the trial court and Court of Appeals by resolving issues not addressed by those courts. Because the judge's findings on the actual prejudice issue are inadequate, this Court should remand to the trial court for further consideration.

I

Reed's convictions stemmed from his role in what had apparently been a botched robbery attempt that took place at the Traffic Light Lounge in the City of Detroit on March 24, 1982. Reed and a codefendant, Keith Sharp — who had been tried before Reed and found guilty, but not of murder — had been driven to the lounge by a friend of Sharp's, who saw that both were armed when they entered his automobile.

After he and Reed had been in the lounge for awhile, Sharp went over to the bar. His demeanor disturbed one of the bartenders, who went to the back room to inform her boss, the decedent bar 409*409 owner, Lee Griffin, that a patron was causing a disturbance. Sharp went to the back room, where he was met at the swinging doors by Johnny Ray Moore, a friend of Griffin's, who had been with him in the back room. Sharp announced a robbery and began shooting. He and Moore struggled for Sharp's gun, a nine millimeter semiautomatic handgun. Moore was shot once in the chest. Their struggle led them to the bar area.

Griffin followed Moore out of the back room. When Moore appeared to have Sharp subdued, Sharp yelled for help. Griffin asked Moore to give him Sharp's gun and to let Sharp up. Moore testified that as he turned to hand Sharp's gun to Griffin, he heard three or four more shots, from a different gun, coming from behind him. He looked to see Reed standing over him, shooting at him. Reed shot Moore once in the arm and once in the chest. Griffin slumped over on Moore. Sharp got up, stepped on Moore's chest, retrieved the nine millimeter handgun, and he and Reed left the bar.

No witness other than Moore saw Reed shoot a gun. Numerous nine millimeter casings and slugs were found in the bar, and one .38 caliber casing was found near the pool table. Reed had been standing near the pool table, according to Moore, and had been armed with a .38 caliber handgun according to the person who had driven Reed and Sharp to the bar. No slugs were recovered from Griffin's body or from Moore, with the result that there is no evidence that any of the recovered casings or slugs matched either of the weapons.

Griffin died of his wounds. Moore was hospitalized with his injuries for five days, and still carries one of the bullets that entered his chest.

II

The judge found that the prosecutor committed 410*410 misconduct that denied Reed a fair trial.[5] Reed's trial lawyer had failed to object, and failed to ask for curative instructions.[6] Reed's first appellate lawyer had failed to raise the issues of prosecutorial misconduct and ineffectiveness of the trial lawyer on direct appeal, on which the judge based her conclusion that the first appellate lawyer had not acted as reasonably competent counsel. Those errors, she said, "were serious enough to constitute a miscarriage of justice and should have been raised by appellate counsel despite trial counsel's failure to object."

The Court of Appeals disagreed with the judge, finding that Reed had not shown the good cause that MCR 6.508(D)(3)(a) requires for failing to raise issues that could have been raised on direct appeal. The Court of Appeals reasoned that, for Reed to show good cause for having failed to raise an issue that could have been raised on direct appeal, he had to show that his first appellate lawyer had been ineffective. The Court had held that the requirements of*Strickland v Washington,* 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984),[7] 411*411would apply to claims of ineffective assistance of appellate counsel.[8]

Following *Jones v Barnes,* 463 US 745; 103 S Ct 3308; 77 L Ed 2d 987 (1983),[9] the Court of Appeals said that "appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel."[10] The Court added:

> *Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. The fact that counsel failed to recognize or failed to raise a claim despite recognizing it does not per se constitute cause for relief from judgment.[*[11]*]*

412*412 *Jones v Barnes* is a federal habeas corpus case. The United States Supreme Court, in fashioning federal habeas corpus jurisprudence, is concerned with the principles of finality and comity. Since Michigan courts review only Michigan cases, we need not concern ourselves with comity.

The goal of promoting the finality of judgments is not served by encouraging appellate lawyers in criminal cases to outguess appellate benches by deciding which will be the winning issues that should be brought to the appellate court's attention, and ignoring other meritorious issues.

Finality of judgments[12] will best be promoted by holding appellate lawyers, whether retained or appointed, to standard 9 of the Minimum Standards for Indigent Criminal Appellate Defense Services, adopted by this Court in Administrative Order No. 1981-7, pursuant to MCL 780.712; MSA 28.1114(102). Standard 9 provides:

> *Counsel should assert claims of error which are supported by facts of record, which will benefit the defendant if successful, which possess arguable legal merit, and which should be recognizable by a practitioner familiar with criminal law and procedure who engages in diligent legal research.*

Often what an appellate lawyer thought would be his best issue will be ignored by the appellate413*413 court. Reversal may be granted on what the lawyer thought was a losing issue.

The majority of the Court of Appeals chides Reed for raising unpreserved issues in his motion for relief from judgment.[13] Neither of the issues raised in Reed's appeal of right had been preserved by objection.

Ineffective assistance is not merely a "conceivable" issue, but one that may sometimes be objectively determined from the trial record. Where ineffective assistance is clearly established on the record, there is no need for an evidentiary hearing.[14]

III

The Court of Appeals, having found that Reed failed to show "good cause" for filing a MCR 6.508 motion, declined to discuss the issues concerning Reed's trial that the judge discussed at some length and had found to be meritorious.

In the motion for relief from judgment, Reed's present lawyer raised five issues.[15] The judge found no merit in the first four issues,[16] but found merit 414*414 in the fifth issue, claiming that the trial lawyer and first appellate lawyer had rendered ineffective assistance. An assessment of the claim that the first appellate lawyer had been ineffective thus required an assessment of the trial lawyer's performance.[17]

The trial lawyer failed to object to (1) the prosecutor's repeatedly erroneously defining felony murder as "a killing occurring during the course 415*415 of a robbery," (2) the prosecutor's repeated use of the phrase "we know" as a preface to comments made during closing arguments, "which the defense asserts injected the prosecutor or his office in the fact-finding process," and (3) the prosecutor's use of "not caring" as the mental state required for the crime of assault with intent to murder.

The judge said that she was following the two-pronged test set forth in *Strickland v Washington*in measuring the effectiveness of the trial lawyer.

The prosecutor misstated the felony-murder rule stated by this Court[18] by characterizing felony murder as a killing occurring during the course of an enumerated felony under the felony-murder statute.[19] The judge said that there was no advantage to the defense in failing to object to a statement of the law that would lessen the prosecutor's burden of proof on the felony-murder charge and increase the likelihood of conviction.

The judge similarly so found regarding the prosecutor's repeated use of "not caring" as the mental state required for assault with intent to murder — as distinguished from actual intent to kill — and the trial lawyer's failure to object to that misstatement. The erroneous statement similarly lessened the prosecutor's burden of proof and increased the likelihood of conviction.[20]

416*416 The judge found that the prosecutor's repeated use of the preface "we know" during his closing argument "does not necessarily constitute misconduct or reflect that the prosecutor vouched for the guilt of the defendant." It could have been a shortened

way of saying "we all (jury and prosecutor) heard the testimony" given in court. The judge added that "the prosecutor's remarks must be evaluated in light of the relationship they bear to the evidence admitted at trial."[21] Where such a preface was employed in recounting issues of fact not in controversy, there was no error.

The judge found error where the prosecutor used "we know" to preface a fact in dispute — the identity of the person who fired the fatal shot — to which the trial lawyer failed to object. The fatal shot was not recovered from the decedent's body, and the caliber of the fatal bullet was never determined. Since the evidence showed that Reed had used a .38 caliber handgun, and that Sharp had used a nine millimeter semiautomatic handgun, there was no consensus concerning the gun that fired the fatal shot.

While Moore testified that Reed had shot both him and the decedent, two other witnesses testified that they saw Sharp struggling with Moore as shots rang out, not Reed. Other witnesses neither saw the shootings nor identified the shooters. The judge concluded that the use of "we know" to preface what she characterized as "*the* central issue in controversy" (the identity of the decedent's shooter), where "the evidence [on that issue] conflicted," could not "be said to be an innocent, fair summation of the testimony." Such a preface appeared to the judge to "have lead the jury (who were the *only* fact finders) to `suspend its own 417*417 powers of critical analysis and judgment in deference to those of the prosecutor.'"[22]

Because the Court of Appeals did not assess the judge's decision that the trial lawyer was ineffective, this Court should not address or rule on that issue.[23]

418*418 IV

The judge said that the prosecutor's misstatements denied Reed due process, and his trial lawyer's failure to object or request curative instructions meant that he did not perform "as a reasonably competent attorney or as counsel guaranteed by the Sixth Amendment." She further stated that the appellate lawyer's failure to raise prosecutorial errors and trial lawyer ineffectiveness constituted failure of the first appellate lawyer to act as a reasonably competent lawyer. Those errors, she said, "were serious enough to constitute a miscarriage of justice and should have been raised by appellate counsel despite trial counsel's failure to object."

Relief from judgment may be granted only when the defendant shows that he suffered "actual prejudice from the alleged irregularities that support the claim for relief." "`[A]ctual prejudice' means that ... in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal, MCR 6.508(D)(3)(b)(i), or, "in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case...." MCR 6.508(D)(3)(b)(iii).

The judge may have found prejudice under MCR 6.508(D)(3)(b)(iii), in that she characterized the errors as "serious enough to constitute a miscarriage of justice" without regard for their effect on the outcome of the trial.

The majority of the Court of Appeals, having found that failure to raise certain alleged improprieties on direct appeal did not constitute "good cause" under MCR 6.508(D)(3)(a), did not rule on 419*419 whether the alleged errors caused Reed actual prejudice.

Reed argues that he showed actual prejudice under both subsections (i) and (iii). He argues that the evidence against him was not overwhelming, and that the prosecutorial errors asserted — the prosecutor having misstated the law and having repeatedly vouched for his case — are the type that lead a jury to suspend its own powers of analysis in deference to those of the prosecutor. Further evidence of actual prejudice is the judge's finding that some of the errors were serious enough to have caused a miscarriage of justice under subsection (iii).

The prosecutor argues that there was neither good cause for failing to raise particular issues on direct appeal nor actual prejudice suffered by Reed.

The judge referred to neither of the MCR 6.508(D)(3)(b) definitions of actual prejudice (subsections [i] and [iii]) in granting Reed's motion. The Court of Appeals did not address the actual prejudice issue.

This Court should vacate the decision of the Court of Appeals and remand to the trial court for further exposition on the actual prejudice issue.

WEAVER, J., took no part in the decision of this case.

[1] MCR 6.508(D) recognizes that the most fundamental injustice is the conviction of an innocent person and specifically allows the court to waive "the `good cause' requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime." If the petitioner in fact demonstrates that there is a significant possibility that he is innocent, the court may consider his claim without requiring the petitioner to demonstrate good cause for his failure to raise the issue in an earlier proceeding.

[2] See n 2, *post* at 406.

[3] *Id.* at 408.

[4] Adopted by this Court in Administrative Order No. 1981-7.

[5] In the debate regarding the appropriate scope of federal habeas corpus review, *one* cost identified by those who support a less expansive view is the inconsistency of plenary review of state decisions with the "`constitutional balance upon which the doctrine of federalism is founded,'" 3 LaFave & Israel, Criminal Procedure, § 27.2, p 302, quoting *Schneckloth v Bustamonte,* 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973). Another cost is the consumption of scarce judicial resources. *Id.*

[6] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973). Justice O'Connor's words regarding the costs of such hearings are equally applicable here.

In order to determine whether there was cause for a procedural default, federal habeas courts would routinely be required to hold evidentiary hearings to determine what prompted [appellate] counsel's failure to raise the claim in question. While the federal habeas courts would no doubt strive to minimize the burdens to all concerned through the use of affidavits or other simplifying procedures, we are not prepared to assume that these costs would be negligible, particularly since, as we observed in *Strickland v Washington,* 466 US 668, 690 (1984), "[i]ntensive scrutiny of counsel ... could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client." Nor will it always be easy to clarify counsel's behavior in accordance with the deceptively simple categories propounded by the Court of Appeals. Does counsel act out of "ignorance," for example, by failing to raise a claim for tactical reasons after mistakenly assessing its strength on the basis of an incomplete acquaintance with the relevant precedent? The uncertain dimensions of any exception for "inadvertence" or "ignorance" furnish an additional reason for rejecting it. [*Murray, supra* at 487-488.]

[7] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[8] External factors include "showing that the factual or legal basis for a claim was not reasonably available to counsel, see *Reed v Ross,* 468 US [1, 16; 104 S Ct 2901; 82 L Ed 2d 1 (1984)], or that `some interference by officials,' *Brown v Allen,* 344 US 443, 486 [73 S Ct 397; 97 L Ed 469] (1953), made compliance impracticable...."*Murray, supra* at 488.

[9] If reasonable legal minds can differ about whether a claim has "arguable legal merit," the standard is reduced to one in which mere negligence or simple oversight is sufficient to fulfill the cause prong. The Supreme Court has directly rejected such a standard and has stated that "the defendant bears the burden of proving that counsel's representation was unreasonable" and that "[o]nly those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the *gross incompetence* of their attorneys" will be able to obtain relief.*Kimmelman v Morrison,* 477 US 365, 381, 382; 106 S Ct 2574; 91 L Ed 2d 305 (1986) (emphasis added).

[10] An expansive definition of cause for failure to raise issues on appeal may actually have the effect of discouraging diligent performance on direct appeal.

[11] MCR 6.425(F)(1)(b).

[12] The Supreme Court has recently observed that the fundamental miscarriage of justice exception seeks "to balance the societal interests in finality, comity, and conservation of scarce judicial resources with the individual interest in justice that arises in the extraordinary case." *Schlup v Delo,* 513 US ___; 115 S Ct 851, 865; 130 L Ed 2d 808 (1995).

[13] The contemporaneous objection rule is supported by the notion that it is the trial that is the main event and that the person best qualified to judge error, which denies fundamental fairness, is normally defendant's own trial lawyer. *Murray, supra* at 506.

[14] While we analyze each claim of error separately, and recognize that "the right to effective assistance of counsel ... may in a particular case be violated by even an isolated error... if that error is sufficiently egregious and prejudicial," *Murray, supra* at 496, we emphasize again that each error must be assessed in relation to "counsel's overall performance, before and at trial." *Kimmelman, supra* at 386. It is only when a defendant can demonstrate that a single egregious error, or combination of minor errors, caused counsel's overall performance to fall below the level guaranteed by the Sixth Amendment that defendant has fulfilled the cause prong of the inquiry.

[15] It is undisputed that the trial judge gave an appropriate instruction regarding felony murder. The prosecutor also notes that the jury asked for clarification of the difference between felony murder and second-degree murder and the trial judge reread his previous instruction. This strengthens the fact that the jury was not confused and that the prosecutor's comments did not prejudice defendant.

[16] Defendant does not contend that counsel should have foreseen the subsequent clarification of the law in*Taylor. Smith v Murray,* 477 US 527; 106 S Ct 2661; 91 L Ed 2d 434 (1986).

[17] The trial judge instructed the jury, in accordance with CJI 17:2:01 and 17:2:02 (now CJI2d 17.3 and 17.4), as follows:

Now with regard to count two, the Defendant is charged with assault with intent to murder Johnny Ray Moore. Any person who shall assault another with the intent to commit the crime of murder is guilty of this crime. The Defendant pleads not guilty to this charge.

To establish this charge, the Prosecution must prove each of the following elements beyond a reasonable doubt:

First, that the Defendant tried to physically injure another person.

Second, that he had the present ability to cause the injuries or at least believed that he had the present ability.

Third, that at the time he committed the assault, the Defendant intended to kill the complainant under circumstances that did not justify, excuse or mitigate the crime.

Now, this also requires a specific intent, and if you find that the Defendant for any reason whatsoever did not consciously and knowingly act with the intent to kill Johnny Ray Moore, then the crime cannot have been committed, and you must find the Defendant not guilty of the crime of assault with intent to commit the crime of murder. If from all the evidence you have a reasonable doubt as to whether or not the Defendant knowingly and consciously acted with the intent to kill, then you must find the Defendant not guilty of the crime of assault with intent to commit the crime of murder.

[18] The prosecutor made the following comments:

What we do know is that two men went to the bar. I think we know that clearly. Two men went to the bar for the purpose of holding it up, Albert Reed and Mr. Keith Sharp.

* * *

All we know is that he [Willie Burns] took the two men to the bar and that both men were armed with weapons; that Mr. Albert Reed had a .38 caliber in his belt or what looked like a .38 caliber, and Mr. Sharp had a 9 millimeter that he was playing with. So both men went to the bar armed.

* * *

He [Mr. Sharp] pulls out a gun and then a holdup is announced. We're not sure who says it, but a holdup is announced.

But we know at some point in time Mr. Reed is seen at the door holding a gun. Mr. Sharp is at the front of the bar holding the gun. So both men are holding a gun, and they're clearly part of the holdup attempt.

* * *

And the photograph and the sketch shows there's some slugs in the back room. So we know Keith Sharp goes in the back of the bar, leaving twenty people in the bar. We know there must be somebody else involved in the holdup. There's no way he could be pulling off this holdup by himself, announce a holdup and then leave the room for a minute without backup from Albert Reed, who's standing at the door.

* * *

And according to the medical examiner's testimony, the fatal wound that Mr. Griffin suffered in the chest was slightly downward, indicating the person shooting would have had to have been standing upward, somewhere above, to shoot in the chest, for the bullet to go a slightly downward angle. It couldn't have been Mr. Sharp on the floor because Mr. Moore covered him as he was fighting with him. Besides that, we know that Mr. Griffin was eventually on the other side of the pool table, which would have blocked his view. So he couldn't even see Mr. Griffin on the floor because it's on the other side of the pool table.

* * *

We do know that a .38 was fired, and a .38 was held by Mr. Reed, and a .38 jacket was found next to the pool table.

* * *

You have the medical examiner's testimony as to the angle being downward, and we have the .38 slug or the jacket of a .38 slug found, which could not have come out of Mr. Keith Sharp's gun. So we know that Mr. Reed fired the fatal shot.

* * *

And we know that he also shot Mr. Moore twice, in the chest and in the arm. First in the arm would make sense. If he's holding the gun the way he said, he would shoot him in the arm which has the gun in it, which caused him to let go of the arm [sic].

* * *

And we certainly know that Mr. Reed was possessing a firearm, a .38. Mr. Willie Burns saw it. Mr. Alvira saw it.

* * *

What we do know is that Mr. Reed is the mobile one, the one that was able to walk around. We know that Mr. Griffin is still standing and could be turning in a certain direction, turning to face the man who's pulling out a gun on his friend and himself.

And we do know that other shots are being fired by Mr. Reed on Mr. Moore.

[19] See also *Therrien v Vose,* 782 F2d 1, 4 (CA 1, 1986), in which the United States Court of Appeals for the First Circuit, rejecting the petitioner's habeas petition, held that the prosecutor's use of "we know he shot them" was not prosecutorial misconduct because the prosecutor had previously instructed the jury that it was their recollection of the evidence and not his that "counts."

[20] Moreover, the trial court judge instructed the jury as follows:

You are the sole judges of the facts, and you alone have the solemn duty and obligation to decide this case from the evidence.

Any statements and arguments of the attorneys are not evidence, but are only intended to assist you in understanding the evidence and the theory of each party.

* * *

You should disregard anything said by an attorney which is not supported by the evidence or by your own general knowledge and experience.

[21] The proper inquiry is not whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland, supra* at 694. An analysis that focuses "solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." *Lockhart v Fretwell, supra* at 369.

[*] Of course, MCR 6.508(D)(3)(b)(ii), (iii), and (iv) provide other definitions.

[1] Unpublished opinion per curiam, issued September 13, 1984 (Docket No. 74583).

[2] MCR 6.500 *et seq.* provides for review of judgments in criminal cases no longer subject to direct appeal to the Court of Appeals or this Court. MCR 6.508(D) provides that the "defendant has the burden of establishing entitlement to the relief requested," and that the court may not grant relief to the defendant if the motion alleges grounds

for relief which were decided against the defendant in a prior appeal unless there has been a retroactive change in the law, and that the "court may not grant relief to the defendant if the motion"

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

* * *

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

* * *

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

[3] 198 Mich App 639; 499 NW2d 441 (1993).

[4] 445 Mich 882 (1994).

[5] The judge found that the prosecutor had repeatedly misstated the felony-murder rule, characterizing felony murder as a killing occurring during the course of a felony. He had also misstated the law regarding the specific intent required for a conviction of assault with intent to kill — that the defendant must have intended to kill the victim. Those errors had the effect of lessening the prosecution's burden of proof. The judge also found that the prosecutor had used the phrase "we know" during his closing argument to characterize an important fact in dispute at the trial, thus putting the weight of the prosecutor's office behind his argument.

[6] In the appeal of right, Reed's appointed appellate lawyer raised two issues: (1) the instruction by the court on the felony-murder rule had been overbroad and unclear in that it did not inform the jury that it could not infer intent to kill from intent to commit the underlying felony, and (2) introduction of evidence that Sharp had been tried and, inferably, convicted in a prior proceeding for his role in these events.

[7] To establish ineffective assistance of counsel, *Strickland* requires that a defendant show that the lawyer committed errors that were so serious, under an objective standard of reasonableness, "that counsel was not functioning as an attorney as

guaranteed under the Sixth Amendment. [T]he defendant must overcome the presumption that, under the circumstances, the challenged action also might be considered sound trial strategy." In addition, the error must prejudice the defendant.

[8] *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991).

[9] The Court of Appeals said:

The process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones v Barnes, supra* at 751-752. [198 Mich App 648, n 8.]

Jones v Barnes relied on Stern, Appellate Practice in the United States (BNA, 1981), where, in § 7.22, p 283, it was observed:

Perhaps criminal cases are an exception to the general rule. Defense counsel, including and perhaps particularly appointed counsel, deem it their obligation to raise *every possible contention,* in part to avoid being charged with not having fulfilled their duty to an indigent client. [Emphasis added.]

Although today's decision is the first interpretation by this Court of MCR 6.508(D), in the five years since it was adopted, there has not been a flood of orders granting relief from judgment pursuant to this rule.

[10] 198 Mich App 646.

[11] *Id.,* pp 646-647. The Court of Appeals continued:

Thus, to permit proper review in cases where appellate counsel has pursued an appeal as of right and raised nonfrivolous claims, the defendant must make a testimonial record in the trial court in connection with a claim of ineffective assistance of appellate counsel. *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973).

[12] While trial is the "main event," discretionary and direct appeal, and postconviction proceedings, including state and federal habeas corpus, have a well-established and historic role in the criminal justice system. See *Murray v Carrier,* 477 US 478, 516; 106 S Ct 2639; 91 L Ed 2d 397 (1986) (Brennan, J., dissenting).

[13] 198 Mich App 647.

[14] In the instant case, the errors of the trial lawyer did not necessarily require an evidentiary hearing. The errors (see text preceding n 18) appear on the record.

[15] (1) The prosecutor argued facts not in evidence by exhibiting a photograph of Sharp, in which he appeared younger than Reed, thus implying that Reed was the ringleader and an experienced criminal; (2) the prosecutor argued facts not in evidence by stating in opening argument that shells matching Sharp's gun were found in the bar, when no such evidence was introduced at trial; (3) the prosecutor erred in placing Sharp's conviction before the jury; (4) the trial court gave improper instructions on the

elements of assault with intent to murder; and (5) the trial lawyer and former appellate lawyer rendered ineffective assistance as guaranteed by the Sixth Amendment.

[16] Sharp appeared younger than Reed in a photograph displayed to the jury. The judge said that this would not, without other misconduct, "lead to an inference that the defendant was a bad man or experienced criminal," even if that had been, in fact, what the prosecutor intended the jury to infer. Since there had been no other related misconduct at Reed's trial — nothing in the nature of his having a prior record, of which there is no evidence, or references to other illegal acts committed by Reed, of which there is no evidence — the prosecutor having said that Sharp may have made mistakes because he was the younger of the two did not deprive Reed of a fair trial.

The prosecutor's statement in opening argument that shells matching Sharp's gun were found in the bar when no such evidence was presented at trial did not deprive Reed of a fair trial. The evidence, presented by numerous witnesses, that Sharp had been present and that he had been shooting his gun, was overwhelming.

Sharp's conviction had been erroneously placed before the jury. Since this had been litigated on direct appeal, this issue was not appropriately before the judge in the motion for relief from judgment, and she properly noted that she could not grant relief on it.

The judge also disagreed with Reed's contention that the judge's instructions on the offense of assault with intent to commit murder were erroneous. The trial judge had instructed the jury that the requisite intent was intent to kill. There was no case law to support Reed's contention that the instruction on manslaughter but not second-degree murder could have led the jury to infer that it could convict Reed of assault with intent to commit murder if it found that his intent in shooting Moore was to commit great bodily harm or was done with wilful and wanton disregard of the likelihood that death or great bodily harm would occur.

[17] In *Murray v Carrier,* n 12 *supra,* p 483, Carrier had abandoned any claim of ineffective assistance of counsel. In the instant case, an issue is whether there was effective assistance of counsel. The United States Supreme Court said: "So long as a defendant is represented by counsel whose performance is *not constitutionally ineffective* under the standard established in *Strickland v Washington* [466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)], we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default" under state law. *Murray v Carrier, supra,* p 488. (Emphasis added.)

Murray v Carrier does not circumscribe this Court's authority to decide what constitutes procedural default under Michigan law and procedure.

[18] *People v Aaron,* 409 Mich 672; 299 NW2d 304 (1980).

[19] *Aaron* requires that the prosecutor show malice in connection with the killing, in addition to the mental state necessary to commit the underlying felony. After *Aaron,* "felony murder" in Michigan is murder committed as a direct result of the commission

or attempt to commit a felony, with one of the recognized forms of malice (intent to kill, intent to cause great bodily harm, or wanton and wilful disregard of the likelihood that the natural tendency of one's acts will cause death or great bodily harm), not a killing that occurred during the course of a felony.

[20] In *People v Taylor,* 422 Mich 554, 567; 375 NW2d 1 (1985), this Court held that the mental state required to convict of assault with intent to murder was actual intent to kill. No lesser intent provides the requisite mental state.

[21] The judge cited *People v Cowell,* 44 Mich App 623, 627; 205 NW2d 600 (1973).

[22] The judge cited *People v Humphreys,* 24 Mich App 411, 418; 180 NW2d 328 (1970).

The judge's characterization of the identity of the shooter of the fatal shot as the central issue in the trial might not be correct because Reed may have been subject to liability as an aider or abetter.

[23] The prosecutor argues that the prosecutor did not commit misconduct at Reed's trial, and Reed therefore was not prejudiced by any failure to object to statements made by the prosecutor during closing argument.

The prosecutor argues that all the instances of alleged prosecutorial misconduct in the form of misstatements of the law and prosecutorial vouching did not constitute misconduct when the statements are viewed in the context of the prosecutor's entire closing argument.

The prosecutor argues that the prosecutor's use of "we know" as a preface to many of his remarks during closing argument was not an instance of vouching where there was evidence to support his arguments. He disagrees with the judge's characterization of the identity of the shooter as the central issue in controversy, because Moore's testimony on that issue was undisputed — no other witness contradicted that statement, and most were not in a position to see who was shooting whom.

The prosecutor, when using "not caring" as a proper mental state for murder when recounting the felony-murder rule, was describing the third form of malice attendant to murder, that of wilful and wanton disregard of the natural likelihood that one's actions would cause death or great bodily harm.

The prosecutor posits that, when viewed in its entirety, the prosecutor's definition of the malice requisite to a finding of murder was adequate. Also, the judge gave proper instructions on the felony-murder rule.

Finally, the prosecutor argues that the prosecutor's statement of the elements of the crime of assault with intent to murder, while erroneous, was cured by the instructions given by the judge. The prosecutor argues that the law at that time was in a state of flux with regard to the mental state requisite to a finding of assault with intent to murder, and notes that *People v Taylor* would not be decided until two years after the prosecutor made his closing argument at Reed's trial.

Reed maintains that the judge correctly assessed the effect of the prosecutorial errors in his closing argument — that they lessened the prosecution's burden of proof, and that there was no sound trial strategy for the trial lawyer having failed to object or request curative instructions.

People v Stanaway

446 Mich. 643 (1994)

521 N.W.2d 557

PEOPLE

v.

STANAWAY

PEOPLE

v.

CARUSO

Docket Nos. 92269, 96823, (Calendar Nos. 12-13).

Supreme Court of Michigan.

Argued January 13, 1994.

Decided August 29, 1994.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Gary L. Walker,*Prosecuting Attorney, and *Terrence E. Dean* and *Matthew J. Wiese,* Assistant Prosecuting Attorneys, for the people in *Stanaway.*

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BRICKLEY, J.

This case presents the question whether, and under what circumstances, records of 649*649 a psychologist, a sexual assault counselor, a social worker, or a juvenile diversion officer regarding a witness should be discoverable by the accused in a criminal trial. To the extent the records are privileged under MCL 330.1750; MSA 14.800(750), MCL 600.2157a(2); MSA 27A.2157(1)(2), MCL 339.1610; MSA 18.425(1610), and MCL 722.826-722.829; MSA 25.243(56)-25.243(59), respectively, resolution requires a determination whether defendant's federal and state constitutional rights of due process require a pretrial review of the requested records before trial.[1]

This Court is faced with the difficult task of reconciling the state's compelling interest in protecting the confidentiality of counseling and juvenile diversion records with the defendant's federal and state constitutional rights to obtain evidence necessary to his defense in a criminal trial. We hold that where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records 650*650 must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense. Only when the trial court finds such evidence, should it be provided to the defendant.

The procedure we adopt today attempts to balance the Legislature's interest in protecting the confidentiality of the therapeutic setting with the possibility that there may be exculpatory evidence in such records necessary to prevent the conviction of an innocent person.

In *People v Stanaway,* we affirm the trial court's denial of an in camera review of the victim's counseling records. The defendant's generalized assertion of a need to attack

the credibility of his accuser did not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges. However, we hold that the trial court abused its discretion when it allowed the improper impeachment of a prosecution witness with hearsay testimony that was highly prejudicial. We reverse Stanaway's conviction and remand for a new trial because the error was not harmless.

In *People v Caruso,* we remand to the trial court for a determination of whether an in camera review of the victim's counseling records is warranted. If the defendant has demonstrated a good-faith belief, grounded in articulable fact, that there is a reasonable probability that the records contain material information necessary to his defense such an inspection should be conducted by the trial judge.

I

A. *PEOPLE v STANAWAY*

Defendant Brian Stanaway was charged with 651*651 three counts of third-degree criminal sexual conduct[2] involving sexual intercourse with the complainant on three separate occasions during the summer of 1988 when she was fourteen years old. The complainant testified during direct examination that she discussed these incidents with a counselor over a year after they happened. The counselor reported the allegations to the police pursuant to the mandatory disclosure requirements of MCL 722.623; MSA 25.248(3).[3]

Before trial, Stanaway's defense counsel filed a motion that sought direct access to the records of a social worker in the juvenile diversion program and a sexual assault counselor regarding the complainant. The defendant argued that the records might contain inconsistent statements or might lead to exculpatory evidence, but admitted he had no basis for a good-faith belief that it was probable such information would be found.[4] This request was repeated on the morning of trial. Both motions were denied by the trial court.[5]

The complaining witness testified at trial that 652*652 she knew the defendant and baby-sat for him and his wife for some time. She stated that the first incident occurred on a summer night in 1988. She had sneaked out of her home during the night to talk to the defendant's nephew, Terry Stanaway. The nephew was staying in a tent outside the defendant's house. She said the defendant asked her to have sex with him and she responded that she did not want to. She related that the defendant pulled down her pants and underwear and that sexual intercourse occurred outside, in the yard, near the tent.

A second incident occurred two weeks later. The witness stated she was visiting her aunt who lived on the same block as the defendant. She was in the backyard when another nephew of the defendant, Ricky Stanaway, called to her. Ricky indicated that the defendant was in the house and wanted to talk to her. Once in the house, Ricky told her the defendant was in the bathroom and that she should just knock and he would let her in. She knocked and entered and the defendant closed the door behind her. She

said the defendant was naked and indicated to her that he wanted to have sex. She said she repeated that she did not want to. Again the defendant pulled down her 653*653 pants and underwear and sexual intercourse occurred on the bathroom floor.

The witness testified that the third incident happened later that summer. She could not remember the circumstances of how it came to be that she was at the defendant's house but she said sexual intercourse took place on a single bed in a back bedroom. She remembered the defendant getting a towel to clean off the bed afterwards.

The defendant testified on his own behalf. He denied having any sexual contact with the complainant. He said there was no tent in the yard at the time in question. He said she was never in his house except to baby-sit and he and his wife would have been gone together.

The jury convicted the defendant on all three counts. In the Court of Appeals, defendant challenged the denial of discovery, the admittance of testimony by a police officer regarding a statement made by a nephew of the defendant, statements made by the prosecutor during closing arguments and the ineffectiveness of his trial counsel. The Court of Appeals affirmed the defendant's conviction in an unpublished opinion per curiam, issued August 14, 1991 (Docket No. 130448).

On the basis of statements made by the prosecutor that suggested access to the records in question, this Court entered an order directing the trial judge to conduct an in camera review of the requested documents. That order was later modified in response to motions to intervene filed by the social worker, the rape crisis counselor, and the mental health clinic. Although the motions to intervene eventually were denied, the prosecutor instead was ordered to file a written response explaining the basis for the statements made during closing arguments regarding what the complaining witness told counselors. Specifically, the 654*654 prosecutor was directed to identify which counseling records were made available to him or were in his possession before trial. Upon receipt of the prosecutor's response, indicating he did not have pretrial access to any of the counseling records, this Court directed the trial judge to make a finding of fact on the issue. After hearing testimony from the prosecutor who tried the case, the trial judge determined that the source of any references made by the prosecutor during closing arguments was the complainant's trial testimony. The judge further determined that none of the counseling records had been provided to the prosecutor. We granted leave to appeal. 444 Mich 876 (1993).

B. *PEOPLE v CARUSO*

Defendant Stanley Caruso is charged with second-degree criminal sexual conduct.[6] The charges are based on allegations by his niece that the defendant rubbed her private with his hand during a visit when she was eight years old. The allegation surfaced when the child wrote a note to her mother's live-in boyfriend about the alleged incident.

Before trial, defense counsel moved to obtain the complainant's counseling records, asserting that there was good reason to believe the complainant had been the victim of sexual abuse by her biological father. It was further suggested that this may not have

been the first note written to the live-in boyfriend of a sexual nature. It was believed by the defense that the child had written at least one prior note in which she suggested she wanted to 655*655 have sex with him in the car.[7] The circuit court granted defendant's motion and entered an order for production of the records for an in camera review.

The Court of Appeals granted the prosecutor's interlocutory emergency motion for immediate consideration, but affirmed the trial court's order requiring production for an in camera review.[8]Unpublished opinion per curiam, issued May 25, 1993 (Docket No. 157437). This Court granted leave to appeal with *People v Stanaway.* 444 Mich 876 (1993).

II

The first issue to decide is whether the various statutory privileges are intended to shield disclosure of this evidence and, if so, whether they violate the defendants' rights under US Const, Ams VI, XIV, and Const 1963, art 1, §§ 17, 20.

A. THE STATUTORY PRIVILEGES

In opposition to defendant Stanaway's discovery motion, the prosecutor asserted that the records at 656*656 issue were privileged under Michigan's statutory sexual assault counselor-victim privilege, MCL 600.2157a(2); MSA 27A.2157(1)(2);[9] social worker-client privilege, MCL 339.1610; MSA 18.425(1610);[10] 657*657 and the statutory provisions regarding records kept pursuant to the juvenile diversion program, MCL 722.828-722.829; MSA 25.243(58)-25.243(59).[11] The prosecutor asserted that because the juvenile diversion officer held a master's degree in social work and had provided counseling services to the 658*658 complainant as part of diversion, the social worker-client privilege barred disclosure.

In opposition to defendant Caruso's discovery request, the prosecutor asserted that the records requested were absolutely privileged under Michigan's statutory psychologist-patient privilege, MCL 330.1750; MSA 14.800(750).[12]

Unlike other evidentiary rules that exclude evidence because it is potentially unreliable, privilege statutes shield potentially reliable evidence in an attempt to foster relationships. Westen, *The compulsory process clause,* 73 Mich L R 71, 160-161 (1974). While the assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth. 1 McCormick, Evidence (4th ed), § 72, pp 268-270. Privileges therefore are not easily found or endorsed by the courts. "The existence and scope of a statutory privilege ultimately turns on the language and meaning of the statute itself." *Howe v Detroit Free Press,*440 Mich 203, 211; 487 NW2d 374 (1992). Even so, the goal of statutory construction is to ascertain and facilitate the intent of the Legislature. *People v Love,* 425 Mich 691, 705; 391 NW2d 738 (1986).

The Legislature expressly provided that confidential communications made to a sexual or domestic assault counselor "shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim." 659*659 MCL

600.2157a(2); MSA 27A.2157(1)(2). The House Legislative Analysis, HB 4609, November 16, 1983, indicates a desire to afford victims who consult with counselors at a sexual assault crisis intervention center the same assurance of confidentiality that those who consult with psychologists, psychiatrists, or social workers are afforded. The analysis discusses the role confidentiality plays in effective therapy:

> *[Sexual assault] [c]ounselors feel obliged to warn their clients beforehand that communications between them may be used as evidence in court, and they report that this knowledge often has an important chilling effect on the client's willingness to be forthcoming. Crisis intervention centers often make it a practice to keep minimal records in order to protect privacy as much as possible, but this practice makes resumption of counseling after a lapse of time or by another counselor much more difficult. [Id.]*

The only exception recognized in MCL 600.2157a; MSA 27A.2157(1) is the mandatory disclosure provisions of the Child Protection Act, MCL 722.623(1); MSA 25.248(3)(1).[13]

The statute addressing the social worker-client privilege, MCL 339.1610(1); MSA 18.425(1610)(1) provides in part one that the social worker "shall not be required to disclose a communication" and in part two that communications are confidential. The exceptions to the privilege are disclosures for internal supervision of the social worker, disclosures made under the duty to warn third parties, as set forth in MCL 330.1946; MSA 14.800(946), and where the client has waived the privilege.

The psychologist-patient privilege, MCL 330.1750; MSA 14.800(750), establishes an evidentiary660*660 privilege in court proceedings unless the patient has waived the privilege. The few exceptions provided by the statute include when the communication is relevant to a condition the patient has introduced as an element of a claim and when a malpractice action is brought against the treating psychologist. The privilege extends not just to the communications made in the course of treatment, but to the fact of treatment as well.

Defendant Stanaway included a request for the juvenile diversion records of the complainant in his discovery motion. The prosecutor asserted that those records were privileged by both the social worker-client privilege and under the Juvenile Diversion Act, MCL 722.828-722.829; MSA 25.243(58)-25.243(59).[14] The juvenile diversion officer in this case was a licensed social worker. Her contract with the juvenile division of the probate court stipulated that she would provide counseling services to juveniles in the diversion program.

The Juvenile Diversion Act[15] mandates the creation of a limited record containing some specific, basic information to document the fact of diversion.[16] An examination of the House Legislative 661*661 Analysis, HB 4597, December 10, 1987, reveals that the purpose of this recordkeeping requirement was to provide a trail in the event future decisions needed to be made regarding whether or not to place a juvenile in the diversion program.[17]

Records created pursuant to these requirements are accessible by court order if it is determined that the person requesting them has a legitimate interest.[18] However, MCL

722.829; MSA 25.243(59) arguably defines "legitimate interest" in the records as being only for the purpose of considering whether to divert a minor.[19]

We hold that the records required under the act are subject to the privilege established by the act. Any additional records created by the juvenile diversion officer in her capacity as a social worker are protected by the statutory social worker-client privilege. Defendants' need for the records does not fit any of the exceptions afforded under the statutes.

662*662 All the privileges cited indicate a legislative intent to create an evidentiary privilege that precludes a defendant's access to confidential communications. Under the clear and unambiguous language used in the statutes, the Legislature intends to preclude defendants from having any access to communications made in these counseling settings. These communications are not intended to be available for use as evidence, either for impeachment or as exculpatory evidence, in a civil or criminal trial.

We agree with the prosecutors' views that these privileges shield the counseling and juvenile diversion records of the complainants.

B. DUE PROCESS CHALLENGE

We now must consider whether the constitutional rights of the defendants to due process[20] supersede the statutory privileges.

At the heart of this controversy is the defendants' premise that if relevant evidence is shielded by privilege for some purpose other than enhancing the truth-seeking function of a trial, then the danger of convicting an innocent defendant increases. While the duty to provide evidence may involve a sacrifice of privacy, the public has a right to everyone's evidence. 8 Wigmore, Evidence 663*663 (McNaughton rev), § 2192, pp 70-74. "All that society can fairly be expected to concede is that it will not exact this knowledge when necessity does not demand it, or when the benefit gained by exacting it would in general be less valuable than the disadvantage caused...." *Id.,* p 72. In *United States v Nixon,* 418 US 683, 710; 94 S Ct 3090; 41 L Ed 2d 1039 (1974), the Supreme Court explained that "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." However, the United States Supreme Court also held in *Mancusi v Stubbs,*408 US 204; 92 S Ct 2308; 33 L Ed 2d 293 (1972), that evidentiary limitations may be placed on confrontation rights to accommodate other legitimate interests in a criminal trial where prior recorded testimony was admitted because a witness was unavailable and the statements bore a sufficient indicia of reliability.

The nation's highest court has struck down a Mississippi hearsay rule because, when combined with that state's voucher rule, the defendant was prevented from presenting witnesses in his defense. *Chambers v Mississippi,* 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). "[T]he ... rule may not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process. Evidentiary rules must be evaluated when applied for a determination whether the interests served justify the potential limitation imposed on a defendant's constitutional rights. *Rock v*

Arkansas, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987) (in which an evidentiary rule regarding the inadmissibility of post-hypnotic memories was determined to unconstitutionally limit the accused's due process right to testify on her own behalf). However, the United 664*664 States Supreme Court has vacated and remanded a Michigan Court of Appeals opinion, *People v Lucas,* 160 Mich App 692; 408 NW2d 431 (1987), holding that a ten-day notice rule regarding a criminal defendant's intention to introduce evidence did not violate per se the Sixth Amendment of the federal constitution.[21] *Michigan v Lucas,* 500 US 145; 111 S Ct 1743; 114 L Ed 2d 205 (1991).

A protective order prohibiting cross-examination regarding a witness' juvenile offenses granted pursuant to a similar state statute providing for juvenile records to be kept confidential was struck down in *Davis v Alaska,* 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974), as violative of the defendant's right of confrontation under the Sixth and Fourteenth Amendments:

> *The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness.... [T]he State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. [Id., p 320.]*

The issue in this case is discovery access to information that would be useful at trial for impeachment purposes or useful as exculpatory evidence. "There is no general constitutional right to discovery in a criminal case...." *Weatherford v Bursey,* 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977). The leading United States Supreme Court case on the issue of pretrial access to privileged 665*665 counseling records is *Pennsylvania v Ritchie,* 480 US 39, 56; 107 S Ct 989; 94 L Ed 2d 40 (1987). The defendant in *Ritchie* was charged with criminal sexual assault of his daughter. He requested access to the confidential files of the state service agency charged with investigating child abuse. *Id.,* p 43. A majority of the United States Supreme Court held that the in camera procedure ordered by the trial court satisfied the defendant's federal constitutional rights. *Id.,* p 61. The Court disagreed regarding whether the Confrontation Clause compelled pretrial discovery or whether the result was compelled by a due process analysis. A plurality held that the right to confrontation is a trial right. *Id.,* p 54. To the extent that limitations on discovery may infringe on the defendant's right to compulsory process, under the facts of the case before the Court, that right affords no greater protection than afforded by due process.[22] *Id.,* p 56.

"Our cases establish, at a minimum, that criminal defendants have the right to ... put before a jury evidence that might influence the determination of guilt." *Ritchie, supra,* p 56. The Court held that the defendant's due process interests in seeking favorable evidence would be satisfied by in camera review. The Court acknowledged that where an in camera review is conducted, the defendant does not receive the benefit of the advocate's eye, but the Court observed that full disclosure would "sacrifice unnecessarily the Commonwealth's 666*666 compelling interest[23] in protecting its child-abuse information." *Id.,* p 60.

Part of the Court's rationale for upholding in camera inspection was the fact that the records were those of a government agency. *Id.,* pp 57-60. Defendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment. *Brady v Maryland,* 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963);*People v Carter,* 415 Mich 558, 593; 330 NW2d 314 (1982). Material has been interpreted to mean exculpatory evidence that would raise a reasonable doubt about the defendant's guilt.*United States v Agurs,* 427 US 97, 104; 96 S Ct 2392; 49 L Ed 2d 342 (1976). The prosecution must turn over such evidence regardless of whether the defendant makes a request. *Id.* The defendant in *Ritchie* had been convicted in the trial court without agency records having been furnished. *Ritchie, supra,* p 57. The in camera inspection was to determine whether the investigatory records contained exculpatory material that should have been provided to him. *Id.,*p 58. The test for whether the material should have been provided to him is "whether it contains information that probably would have changed the outcome of his trial." If there was no such material or if the nondisclosure was harmless beyond a reasonable doubt, then, the Court held, the conviction could be reinstated. In a footnote, the Court indicates that "Ritchie, of course, may not require the trial court to search through the CYS [Children and Youth Services] file without first establishing a 667*667 basis for his claim that it contains material evidence." *Id.,* p 58, n 15.

Our remand of *Stanaway* has established that the prosecutor has not at any time had access to the records requested by the defendant. Nor were these "investigative" records of a governmental agency. The disclosure requirements of *Brady, supra,* are directly applicable where the prosecutor possesses the record. *People v Reed,* 393 Mich 342, 353; 224 NW2d 867 (1975); *People v Dellabonda,* 265 Mich 486, 500-501; 251 NW 594 (1933). An in camera review would be appropriate to determine whether the prosecutor withheld any evidence he was duty-bound to disclose.[24] That is not the situation in the cases we are considering today.

The *Ritchie* Court also noted that the privilege regarding the investigatory files was "qualified" in that the Pennsylvania statute[25] contemplated some use of the files in judiciary proceedings. The Court explicitly stated: "[w]e express no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to anyone, including law-enforcement and judicial personnel." *Id.,* p 57, n 14.

Other than the very limited use in deciding whether a juvenile is a likely candidate for diversion, the privilege statutes this Court is asked to apply today do not contemplate use in judicial proceedings. As such, our statutes do not create the qualified privilege the United States Supreme 668*668 Court addressed in *Ritchie.*[26] We do not believe it generally is necessary to delve into the subtle distinctions between the various privileges asserted in this case.[27] While the aforementioned privileges arguably consist of gradations, we believe none are the equivalent of the qualified privilege interpreted by the Supreme Court. The Supreme Court definition of qualified privileges in *Ritchie* contemplates some use of the file in judicial proceedings. *Id.,* p 58.

Absolute privileges — privileges providing that information is not to be disclosed to anyone — have been abrogated despite the existence of the government's privilege to withhold disclosure of the identity of an informant where disclosure was compelled to satisfy the defendant's Sixth Amendment confrontation rights. *Roviaro v United States,* 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957); *People v Poindexter,* 90 Mich App 599; 282 NW2d 411 (1979). "[N]o fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense."*Roviaro, supra,* p 62.

Common-law and statutory privileges may have 669*669 to be narrowed or yielded if those privileges interfere with certain constitutional rights of defendants. See, e.g., *Davis, Ritchie, Roviaro, Lucas,* and *Nixon, supra* (even the executive privilege afforded the president must yield to due process demands in the administration of criminal justice); *People v Adamski,* 198 Mich App 133; 497 NW2d 546 (1993); *Howe v Detroit Free Press, supra* (the statutory privilege precluding access to probation reports must yield where it conflicts with certain constitutional rights); *People v Bellanca,* 386 Mich 708; 194 NW2d 863 (1972) (despite the need for secrecy, the defendant has a right to a grand jury transcript in order to be prepared for cross-examination of the witnesses); *Davis v Lhim,* 124 Mich App 291; 335 NW2d 481 (1983) (endorsing the reasoning of *Tarasoff v Regents of Univ of California,* 17 Cal 3d 425; 131 Cal Rptr 14; 551 P2d 334 [1976], in finding that psychiatrists have a duty to warn third parties of the danger a patient may pose where threats have been made); *People v Mobley,* 390 Mich 57; 210 NW2d 327 (1973) (a codefendant who takes the stand against a defendant cannot claim the privilege against self-incrimination and avoid having his testimony and credibility tested by cross-examination); *People v Hunter,* 374 Mich 129; 132 NW2d 95 (1965) (if the prosecution submits medical proof in a rape case, the submission operates as an admission that there will not be an assertion of any privilege when rebuttal medical testimony is offered); *In re Baby X,* 97 Mich App 111; 293 NW2d 736 (1980) (a parent's right to confidentiality in drug treatment records must yield if a court determines that the records are necessary and material to the state's proof of neglect in a child neglect proceeding); *People v Walton,* 71 Mich App 478; 247 NW2d 378 (1976) (confidential statements made to the police 670*670 by witnesses should be inspected in camera to determine whether fundamental fairness requires that the defendant have access to the information in order to prepare his defense).

Where other jurisdictions have specifically addressed the validity of counseling privileges, most have attempted to balance the defendant's constitutional right to a fair trial with the complainant's interest in confidential therapy. Many require the defendant to make a preliminary showing that the privileged information is likely to contain evidence useful to his defense.[28] Once such a showing is 671*671 demonstrated, the privilege must yield to the defendant's constitutional rights.[29] An in camera

672*672 673*673 inspection of the privileged records is conducted. For example, the New Hampshire Supreme Court has ruled that due process requires access to privileged medical and psychological records by way of an in camera inspection if the defendant establishes a reasonable probability that the records contain information that is material and relevant to his defense. *State v Gagne,* 136 NH 101; 612 A2d 899 (1992).

Illinois and Pennsylvania both have refused to disclose records where the statutory privilege was determined to be absolute. *People v Foggy,* 121 Ill 2d 337; 521 NE2d 86 (1988);*Commonwealth v Wilson,* 529 Pa 268, 278; 602 A2d 1290 (1992); *Commonwealth v Kennedy,*413 Pa Super 95; 604 A2d 1036 (1992). In *Foggy,* the court gave two reasons for denying the defendant's request. The first was support for the strong public policy against disclosure underlying the privilege. The second was the fact that the defendant had failed to show that the files contained relevant information that might exculpate or be useful to impeach. Under the facts of *Foggy,* the request was merely for inconsistent statements because, in the words of the defendant, the trial would amount to a credibility contest. The court stated that if it were to be held that the defendant had established a sufficient showing that the records likely contained relevant information on the basis that this case 674*674 amounted to a credibility contest, then the privilege would be abrogated in virtually every case. *Id.,* p 350.

The Pennsylvania appellate courts have also held that in camera review violates the absolute privilege established by the state legislature.[30] *Wilson* and *Kennedy, supra.* The Pennsylvania Supreme Court interpreted *Ritchie* as inapplicable when the privilege is absolute. *Wilson,* pp 280-281. The Pennsylvania Court of Appeals held *Ritchie* applies only to cases in which the records are in the possession of the prosecution. *Kennedy,* p 114. "`Subjecting the confidential file to *in camera* review by the trial court (as well as the appellate courts and staff members) would jeopardize the treatment process and undermine the public interests supporting the privilege. Simply stated, an absolute privilege of this type and in these circumstances requires absolute confidentiality.'" *Id.,* pp 115-116, quoting *Commonwealth v Kyle,* 367 Pa Super 484, 505; 533 A2d 120 (1987).

The concurring opinion in *Kennedy* expressed concern that it was unconstitutional to hold a statutory privilege superior to a defendant's rights of due process. It is the "state's compelling interest in the confidentiality of the counseling relationship [that] must yield to the greater interest in promoting and protecting the defendant's constitutional rights." *Id.,* p 119. Constitutional protections for the accused should not be sacrificed by way of 675*675 a rule of nondisclosure per se as a sympathetic response to the physical and emotional trauma suffered by victims. "`The Constitution of this Commonwealth is the absolute — a legislative enactment of a statutory privilege is not.'" *Id.,* quoting *Commonwealth v Wilson, supra,* p 286.

Not only is judicial in camera review of privileged material possible in certain situations, the Massachusetts Supreme Court has attempted to include the so-called "eye of the advocate" in its review of privileged documents. *Commonwealth v Stockhammer,* 409 Mass 867, 882-883; 570 NE2d 992 (1991). The procedure involves a multistep inquiry. In order to receive an in camera inspection, a defendant must advance a good-faith belief, having some factual basis, that the privileged records are likely to be relevant to an issue in the case. The judge will then conduct an in camera review of the records. *Commonwealth v Bishop,* 417 Mass 169; 617 NW2d 990 (1993). If upon inspection, the trial judge finds the records in fact to be relevant, he will then allow defense counsel access to those records to determine whether disclosure of the relevant communications is necessary for a fair trial. *Id.,* pp 179-180. "[F]ull disclosure,

predicated solely on a defendant's uninformed request may yield nothing for the defense, and the privilege would have been pierced unnecessarily." *Id.,* p 177.

In *State v Shiffra,* 175 Wis 2d 600; 499 NW2d 719 (1993), the prosecutor provided a defendant accused of sexual assault with information that indicated the complainant had a history of psychiatric problems that might affect her credibility. On the basis of this information, the defendant moved for an in camera inspection of the complainant's past mental health records. Applying Wisconsin 676*676 Court of Appeals precedent,[31] the trial court ruled that the defendant had provided a sufficient basis for an in camera inspection to determine if the records contained evidence that would be material to the defendant.[32] The complainant refused to waive her statutory privilege.[33] The Wisconsin Court of Appeals affirmed the order issued by the trial court barring the witness from testifying at trial, stating that no other sanction was appropriate because the witness had no obligation to waive her privilege to the records.[34] *Id.,* pp 611-612.

The numerous writings that contributed to the plurality *Ritchie* holding and the factors discussed, but not resolved therein, make it difficult to divine a precise formula for balancing against a defendant's due process rights the state's pronounced interest in its evidentiary counseling privileges that enhance the healing process in the wake of abuse.[35] However, our review of the jurisprudence 677*677 of other states, along with our own precedent in dealing with discovery and evidentiary principles, coupled with a prudent need to resolve doubts in favor of constitutionality, prompts us to hold that in an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.

We reject the novel approach fashioned by the separate opinion that would place before the trial court the additional inquiry regarding how important the absolute privilege in question is to the particular privilege holder.[36] This suggested inquiry into the variable weight of the privilege depending on the sensitivity of the privilege holder would be both unprecedented and unworkable.[37] It 678*678 is not even remotely suggested by the Supreme Court in *Ritchie.*

The creation of the various privileges discussed in this opinion establishes the Legislature's assumption that any forced disclosure of the information protected will cause injury to the privilege holder. The weight of the privilege or the need for the privilege is relevant to and is incorporated into the balancing test this Court articulates today. The test we adopt today anticipates that the privilege holder would be better off if the privilege remains intact.[38]

We believe we are upholding the general purposes of the statutory privileges to prevent the routine disclosures that would undermine therapeutic relationships. We must recognize, however, that in *certain* circumstances an in camera review of the records is necessary so as not to undermine confidence in the outcome of a trial. In camera inspection of privileged information by the court is a "useful intermediate step between

full disclosure and total nondisclosure." *United States v Gambino,* 741 F Supp 412, 414 (SD NY, 1990); *People v Hackett,* 421 Mich 338; 365 NW2d 120 (1984).

Where the defendant has made the required showing, in camera inspection of privileged documents by the judge strikes the delicate balance between the defendant's federal and state constitutional 679*679 rights to discover exculpatory evidence shielded by privilege, and the Legislature's interest in protecting the confidentiality of the therapeutic setting.[39] Only after the court has conducted the in camera inspection and is satisfied that the records reveal evidence necessary to the defense is the evidence to be supplied to defense counsel.[40] We are confident that trial judges will be able to recognize such evidence. The presence of defense counsel at such an inspection is not essential to protect the defendant's constitutional rights and would undermine the privilege unnecessarily.

The state's interest in preserving the confidentiality of the social worker, diversion, and rape-counseling 680*680 counseling records must yield to a criminal defendant's due process right to a fair trial when the defendant can show that those records are likely to contain information necessary to his defense.

C

We now turn to the application of the test enunciated to the specific facts and circumstances of the cases before us. It was not an abuse of discretion to find the counseling communications protected by the privileges in *Stanaway* or discoverable in *Caruso.*

Criminal defendants do not have general rights to discovery. MCR 6.001. Discovery in criminal cases, however, is left to the discretion of the trial court:

> *Discovery will be ordered in criminal cases, when, in the sound discretion of the trial judge, the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression. The burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party. [People v Maranian, 359 Mich 361, 368; 102 NW2d 568 (1960).]*

In general, when a discovery request is made disclosure should not occur when the record reflects that the party seeking disclosure is on "a fishing expedition to see what may turn up."*Bowman Dairy Co v United States,* 341 US 214, 221; 71 S Ct 675; 95 L Ed 879 (1951).

In camera inspection is often utilized to determine whether evidence sought is discoverable. The Legislature has expressly provided for this procedure 681*681 in the context of evaluating a defendant's proposed use of evidence generally inadmissible under the rape shield statute. MCL 750.520j(2); MSA 28.788(10)(2). The in camera hearing promotes the state's interest in protecting the privacy interests of the alleged victim, while safeguarding the defendant's right to a fair trial. *People v Hackett, supra,* p 350.

Defendant Stanaway asserts that the records sought were necessary to his attempt to unearth any prior inconsistent statements made by the complainant or any other relevant rebuttal evidence. This is no more than a generalized assertion that the counseling records may contain evidence useful for impeachment on cross-examination.[41] This need might exist in every case involving an accusation of criminal sexual conduct. Defendant Stanaway has not stated any specific articulable fact that would indicate that the requested confidential communications were necessary to a preparation of his defense. He has not stated a good-faith basis for believing that such statements were ever made or what the content might be and how it would favorably affect his case. The defendant merely alleged that the records may contain prior inconsistent statements. The defendant overstates his case when he asserts that his right to discovery, confrontation, and effective cross-examination compels that he be granted an opportunity to discover any potentially exculpatory evidence. Without a more specific request, defendant is fishing. The request falls short of the specific justification 682*682 necessary to overcome the privilege.[42] The trial court did not abuse its discretion in refusing to order an in camera inspection.

Defendant Caruso may have demonstrated a realistic and substantial possibility that the material he requested might contain information necessary to his defense. The defendant argued in his motion for in camera discovery that the circumstances in which the accusation was made were relevant to the truth or falsity of the claim. The defense theory is that the claimant is a troubled, maladjusted child whose past trauma has caused her to make a false accusation against her uncle. The defendant asserted a good-faith belief in his motion that the complainant suffered sexual abuse by her biological father before this allegation of abuse, the nonresolution of which produced a false accusation,[43] and factual support for some sexually aggressive behavior, namely, writing a letter to her mother's live-in boyfriend inviting him to have683*683 sex with her in his car.[44] The in camera review ordered by the trial judge may have been proper under the facts of this case. Because the record is not altogether clear regarding the grounds for ordering the in camera inspection,[45] we remand to the trial court for further proceedings consistent with this holding.[46]

Should the defendant prevail on rehearing, a waiver of the privilege should be requested of the complainant because the privilege in question in *Caruso* is an absolute privilege.[47] We are not relying on an implied waiver analysis to overcome the absolute privileges in question. *Howe v Detroit Free Press, supra,* correctly finds implied waiver 684*684 when the plaintiff in a defamation suit invokes MCL 791.229; MSA 28.2299 in an attempt to shield evidence that might establish the truth of the publication. The privilege in this case cannot be said to be the prosecutor's to waive. The Legislature has expressly provided that in the case of psychologists and psychiatrists, the privilege must be expressly waived by the privilege holder. The fact of prosecution cannot be said to impliedly waive the privilege. Where it cannot be said that the privilege holder placed mental state in controversy, implied waiver analysis is inappropriate. Our ruling is that where the privilege is absolute if the complainant will not waive her statutory privilege and allow the in camera inspection after the defendant's motion has been granted, suppression of the complainant's testimony is the appropriate sanction.[48]

Only if the in camera inspection reveals information essential and reasonably necessary to the defense should it be provided to the defendant.[49]

III

Defendant Stanaway asserts that prosecutorial misconduct occurred during closing arguments to the jury. The defendant further asserts that his trial counsel was ineffective in his failure to object. 685*685 Specifically, the defendant objects to the following statements made by the prosecutor:

> *Now, who has [the victim] told this incident to? Well, number one, she told the juvenile counselor; number two, she told her girlfriend; she told her sister; she told the Community Mental Health counselor; she told the prosecutor that works in our office, who handled the preliminary hearing; she told the Judge at the preliminary hearing; she told me; and then she told Kathy O'Day, the counselor, the other counselor; and then the jury. Running out of fingers here, that's nine people she told.*
>
> *If she were lying, do you think she would go to this great length, and that she would expose herself to this type of process to tell nine different people, nine different times about these incidents? No, she wouldn't do that. She would just say forget it, it's not true. I am not going through with this, it's not worth the hassle. But, unfortunately, you are seeing what happens to this victim, when she does come forward and tells what happened to her. She goes through this type of process.*
>
> * * *
>
> *Her story is the same, it has never really changed, it's always been the same. And she has been through it so many times in her mind, and she has told so many people about it, from the counselors all the way through the criminal system, she hasn't been shaken on it yet, and he didn't shake her on the stand when she testified.*

The defendant's position is that the effect of the prosecutor's words were to advise the jury that the complainant's privileged statements to various counselors regarding the charged offenses had remained consistent on the numerous occasions on which the incidents were reported. Although the complainant testified about the fact of counseling, she did not reveal any statements actually made 686*686 during counseling. Defendant believes the inference created for the jury was that the prosecutor had been given access to the communications and vouched for their consistency.

Further support for defendant's theory is found in two questions to the court by the jury during deliberations:

> *The Court: Okay. You can be seated, Members of the Jury. Court is in session. The record should reflect that the jury sent out a question, and I have talked about it with counsel.*
>
> *And actually, there are two questions. First, "Why was there no testimony proving the plaintiff did talk to counselors?" The attorneys and I are agreed that there was testimony from [the complainant] that she had talked to counselors. It was some number of months*

after the charged events took place, but both attorneys alluded to that fact in their closing arguments, and it seems to be well established that she did in fact talk to various counselors.

And the second question is, "Is that admissible testimony?" Well, the fact that she talked to counselors is admissible, but the content of the conversation with the counselors is not admissible. So we can't get into that. [Emphasis added.]

We note at the outset that the prosecutor either was impermissibly arguing facts not in evidence or was vouching for the credibility of the witness. He admitted on remand that he had no specific knowledge of what the complainant told any counselor.

A prosecutor may not argue the effect of testimony that was not entered into evidence at trial.*People v McCain,* 84 Mich App 210, 215; 269 NW2d 528 (1988). It is improper bolstering for a prosecutor to vouch for credibility of facts and evidence not in the case. See *People v Couch,*49 Mich App 69; 211 NW2d 250 (1973). If defense 687*687 counsel is precluded by statutory privilege from examining counseling communications, it is error for the prosecutor to announce to the jury the contents of those communications.

Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Buckey,* 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Gonzalez,* 178 Mich App 526, 534-535; 444 NW2d 228 (1989); *People v Gonyea,* 126 Mich App 177, 189; 337 NW2d 325 (1983). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Duncan,*402 Mich 1, 16; 260 NW2d 58 (1977); *People v Walker,* 93 Mich App 189, 198; 285 NW2d 812 (1979).

Had there been a timely objection by defense council when the prosecutor made his argument, the trial court could have cautioned the prosecutor and instructed the jury that the prosecutor had no knowledge of the content of any counseling the complainant testified she had undergone. Any misleading inference to the contrary could have been dispelled.

The defendant further asserts that his trial counsel's failure to object to the inappropriate remarks constitutes ineffective assistance of counsel. In order to succeed on such a claim, the defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would 688*688 have been different. *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1994).

During cross-examination of the complainant, defense counsel pursued a theory in which he asserted that the complainant told a lie the first time she related the occurrence of sex between herself and the defendant. His theory was that once she told the lie the first time, she was compelled to keep repeating the story. If defense counsel

had objected in front of the jury to the prosecutor's presentation of the same scenario, he might have undermined his theory of the case. While the lack of an objection may have been questionable strategy, absent the advantage of hindsight, we cannot say that defense counsel performed below the standards of a reasonably competent attorney.[50] It is therefore unnecessary for this Court to determine whether the lack of objection prejudiced the defendant.

IV

Defendant Stanaway further asserts that the trial court erred when it admitted the hearsay testimony of Officer Robert Peters. As part of the prosecution's case in chief, defendant's nephew, Donald Stanaway was called to testify. The prosecutor 689*689 asked him if he had made a statement to Officer Peters regarding an incriminating statement the defendant had made to a witness, which the witness denied ever having made:

> *[People]: Mr. Stanaway, do you recall talking to Officer Peters about statements that Brian had made to you?*
>
> *[Witness]: No, I didn't tell him that Brian made any statements directly to me.*
>
> * * *
>
> *Q. You never made any statement implicating Brian with this incident?*
>
> *A. I haven't talked to Brian. I don't talk to Brian. Like I said, we weren't getting along.*
>
> *Q. Okay. And you are saying that you never told Officer Peters that Brian admitted that he was having sex with a young girl?*

A. I never said that.

> *Q. And Brian never told you that if he got caught, he would get into a lot of trouble?*
>
> *A. Like I said, I didn't talk to Brian and Brian didn't talk to me.*

Q. And you are related to Brian; right?

A. Brian is my uncle.

> *Q. Now, you indicated earlier that you were out of town when this all happened?*

A. That's right.

Q. You were down south; right?

A. Right.

> * * *

Q. I just want to make sure I'm clear, Mr. Stanaway. You are saying that you never — that Brian never made any statements to you implicating himself with sex with a young woman?

A. I don't remember him doing that, no.

Q. You don't remember or he didn't?

A. I don't remember. I have a bad memory.

Q. Pardon?

A. I have a real bad memory.

690*690 *Q.* Okay.

A. I do.

The prosecutor then called Officer Peters to the stand. Officer Peters was the investigating officer in the case. He testified that he had interviewed the complainant and her parents and that he had interviewed the defendant and some of his family members. He testified that the complainant's testimony was basically the same as when she reported the incidents to him. He testified that the defendant denied the allegations. Over hearsay objections, the prosecutor then asked Officer Peters about what Donald Stanaway had to say:

[*People*]: Did you ask him about this incident?

[Witness]: I asked him if he knew [the complainant]. He stated he knew who she was but he didn't know her. He just knew who she was. And I asked him if his nephew [sic, uncle] Brian had ever mentioned anything to him about [the complainant] or any type of sexual activity between them.

Q. What did he say?

A. He told me that Brian never mentioned him — Brian never stated that he had any sex with a person by the name of [the complainant]. But on a couple of different occasions while Brian was intoxicated, he did state that he had "screwed a young girl," and if he was caught, he would be in a lot of trouble.

Q. Now, this is a statement allegedly made from Brian to Don Stanaway, Jr.?

A. Yes.

The trial court responded to defense counsel's hearsay objection to this line of questioning with a cautionary instruction to the jury, sua sponte:

*The Court: Well, Members of the Jury, evidence such as this, it's called a prior inconsistent statement, 691*691 and it's used, usable properly for only one purpose. And let me see if I can draw the distinction for you.*

What a witness said on a prior occasion, like whatever Mr. Stanaway said to the officer, can't be used to determine — what he said before can't be used to determine whether or not the defendant is guilty or not guilty. So whatever he told the officer can't be used for that purpose.

Whatever he told the officer before can be used to decide if you are going to believe the witness, Mr. Stanaway, but you can't use it as substantive proof of what the witness may have said on a former occasion. So for that limited purpose, the objection is overruled, and you may proceed, Mr. Wiese.

The jury's attention was again drawn to this impeachment evidence during the final instructions given by the court:

[The Court]: Now, there has been some evidence in this case that the witness Donald Stanaway, Jr. made a statement to Officer Peters that differs from what his testimony was during trial. You may recall that during trial he was asked whether the defendant told him "I have screwed a young girl and I'm going to be in a lot of trouble if anybody finds out." And the witness, Donald Stanaway, Jr., denied making that statement. Later on, Officer Roberts was called, and he said, yes, the witness, Donald Stanaway, Jr., did make that statement.

Now, you have to be very careful about how you consider this evidence, it's called evidence of a prior inconsistent statement. The statement wasn't made during this trial. So you must not consider the statement itself when you decide whether the elements of the crime have been proven; in other words, decide whether or not the defendant has been proven guilty.

*But, on the other hand, you are allowed to use 692*692 the evidence regarding that statement to help you decide whether you think the witness is truthful, the witness, Donald Stanaway, is being truthful. So consider the statement carefully. Ask yourself if the witness made the statement, whether it was true, and whether it differs from the witness' testimony here in court. Then remember that you may only use it to help you decide whether you believe Donald Stanaway, Jr. concerning the testimony that he gave here in court.*

And if you should decide that Donald Stanaway, Jr. did make that statement to Officer Peters, the best that you can conclude from that is that the testimony of Donald Stanaway, Jr. should be rejected, should be thrown out and ignored. But that does not make the testimony of Officer Peters useful by you in deciding whether or not the defendant made such a statement or whether or not the defendant is guilty of the crimes with which he is charged.

The only relevance Donald Stanaway's testimony had to this case was whether he made the statement regarding his uncle's alleged admission. The witness had no direct knowledge of any of the alleged incidents and was out of town at the time they would have occurred. While prior inconsistent statements may be used in some circumstances to impeach credibility, MRE 613, this was improper impeachment.[51] The substance of the statement, 693*693 purportedly used to impeach the credibility of the witness, went

to the central issue of the case. Whether the witness could be believed in general was only relevant with respect to whether that specific statement was made. This evidence served the improper purpose of proving the truth of the matter asserted. MRE 801.

While the prosecutor could have presented defendant's alleged admission by way of the nephew's statement, he could not have delivered it by way of the officer's testimony because the statement would be impermissible hearsay. See *People v Carner,* 117 Mich App 560, 571; 324 NW2d 78 (1982). Likewise, a prosecutor may not use an elicited denial as a springboard for introducing substantive evidence under the guise of rebutting the denial. *People v Bennett,*393 Mich 445; 224 NW2d 840 (1975). Here the prosecutor used the elicited denial as a means of introducing a highly prejudicial "admission" that otherwise would have been inadmissible hearsay.[52] The testimony of Officer Peters was that Donald Stanaway said that Brian Stanaway said that he had sex with a young girl. This would have been clearly inadmissible without Donald Stanaway's denial. It is less reliable in the face of the denial. Absent any remaining testimony from the witness for which his credibility was relevant to this case, the impeachment should have been disallowed.

694*694 The defendant asserts that the error was hardly harmless. We agree. While the prosecution argued the impeachment was proper, he did not refute the defendant's assertion that the error was too prejudicial to be deemed harmless.[53] Generally, arguments not raised and preserved for review are waived. See, *People v Grant,* 445 Mich 535; 520 NW2d 123 (1994);*Napier v Jacobs,* 429 Mich 222, 227-228; 414 NW2d 862 (1987).

In our assessment of unfair prejudice in *People v Robinson,* 417 Mich 661, 665-666; 340 NW2d 631 (1983), we held that a trial judge abused his discretion when he allowed the defendant's prior criminal record to be admitted into evidence:

> *[T]his evidence had a devastating effect on the defendant's right to a fair trial. We agree with the defendant that it "is simply incredible that anyone would hear all of those prior acts of criminal conduct and then remove them from their mind based upon an instruction by the court when they are then to consider the guilt or innocence of the 695*695 accused. The prejudicial impact of all of those past anti-social acts cannot be effectively removed from the jury's mind by a curative instruction."*

Similarly, the admission of this improper statement that had the effect of a confession in the minds of the jury was not an error that, under the circumstances of this case, could be cured by a cautionary instruction. This trial essentially came down to a credibility contest between the defendant and the complainant. The complainant testified about the elements of the crime; the defendant denied any sexual involvement. There is little evidence that compares to the probative weight a confession carries, particularly when delivered by a police officer. The inference from the police officer's testimony was that the defendant admitted the acts he was accused of. Any nagging doubts the jury may have had about whether these sexual incidents took place between the complainant and the defendant were likely erased by the words he purportedly uttered to his nephew.

Likewise, we are of the opinion that in this case, the hearsay error was prejudicial. Under these circumstances, we conclude that allowing the police officer to present defendant's statement purportedly made to his nephew requires reversal of the defendant's conviction and a new trial.

V

In summary, defendant Stanaway's generalized assertion of a need to attack the credibility of his accuser is not sufficient to establish the necessary showing of a reasonable probability that the records contain information material to his defense to overcome the applicable statutory privileges. Despite our agreement that the prosecutor's reference 696*696 during closing arguments to the substance of the confidential disclosures was improper, it does not require reversal because there was no objection, and a cautionary instruction could have cured the misleading inference. However, it was an abuse of discretion requiring reversal for the trial court, despite defense objections, to allow the improper impeachment of a prosecution witness with hearsay testimony that was highly prejudicial. Because the error was not harmless, we therefore reverse the decision of the Court of Appeals and remand for a new trial.

Defendant Caruso's assertion of particularized facts would support a determination that an in camera review of the victim's counseling records is required. The generalized assertion of a need for impeachment material would not. We vacate the decision of the Court of Appeals and remand to the trial court for a determination of whether an in camera review of the victim's counseling records in *People v Caruso* must be ordered because the defendant has demonstrated a good-faith belief, grounded in articulable fact, that there is a reasonable probability that the records contain material information that is material and favorable necessary to his defense.

People v Stanaway reversed and remanded.

People v Caruso vacated and remanded to the trial court.

CAVANAGH, C.J., and LEVIN, GRIFFIN, and MALLETT, JJ., concurred with BRICKLEY, J.

RILEY, J. (*concurring*).

Although I join Justice BRICKLEY'S discussion and result in part IV, I write separately to express my dissatisfaction with the nonconstitutional harmless-error doctrine in Michigan. 697*697Despite guidance from both our court rules[1] and statute,[2] this Court has yet to fully examine the relevant considerations for nonconstitutional harmless error and certainly has failed to set forth a clear and concise nonconstitutional harmless-error test.[3] Instead, this Court has generally chosen 698*698 to rely on the harmless-error statute and court rules for the limited guidance provided therein in making this determination. *People v Travis,* 443 Mich 668, 686; 505 NW2d 563 (1993). From a plain reading of these rules, however, the vague concept of injustice certainly does not provide any meaningful help to appellate courts in reviewing nonconstitutional error.

Indeed, the lack of guidance from these sources has led many panels of the Court of Appeals to consider varying considerations, including an assumption that the federal constitutional harmless-error rule applies to nonconstitutional error.[4] See *Chapman v California,* 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967) (the prosecution must prove, and the court must determine, beyond a reasonable doubt that there is no "reasonable possibility that the evidence complained of might have contributed to the conviction"). However, this assumption fails to recognize that there are important state considerations relevant to this inquiry,[5] including 699*699the policies implicit in the statute and court rules that have yet to be examined. Indeed, the United States Supreme Court in *Chapman, supra,* explicitly recognized a state's interest in this respect:

> *The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed [by the federal constitution].... Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these petitioners not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent — expressly created by the Federal Constitution itself — is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule. [Chapman, supra at 21.]*

While I do not attempt to fully explain or adopt a nonconstitutional harmless-error test in this opinion, I write separately to indicate the need for full briefing and argument on this important issue of state law. See *People v Anderson (After Remand),* 446 Mich 392, 407, n 39; 521 NW2d 538 (1994). Considering the frequent use of this doctrine and the many factors currently considered by 700*700 our courts,[6] a full and decisive explanation by this Court would be in order. However, until this opportunity arises and the parties are properly prepared to argue this issue, I likewise reserve full consideration of this issue. Nevertheless, I agree that this error, the admission of Officer Peters' hearsay testimony, resulted in a miscarriage of justice and thus cannot be deemed harmless.

BOYLE, J. (*concurring*).

Although I agree with the result in both *Stanaway* and *Caruso,* I write separately because I disagree with the majority's rationale. In these cases we deal with the extremely difficult problem of formulating a lawful and usable approach to balancing a defendant's due process right to a fair trial against resistance to discovery based on claims of privilege.

In my judgment, the test for in camera review is a plausible showing of need and materiality. The test for disclosure and use is whether there is a reasonable probability

that material and necessary information would affect the factfinder's determination of guilt or innocence. The issues are (1) the nature of the privilege asserted, (2) the test for in camera review, (3) the test for determining when constitutional materiality requires discovery or use of protected information, and (4) the remedy for nondisclosure. The majority (1) creates too rigid a barrier to a defendant's request for in camera review, (2) treats all "privileges" as functionally equivalent, (3) confuses the standard for in camera review with the test for disclosure, and (4) assumes that the remedy appropriate to resistance to discovery of all information protected by an absolute privilege is striking the witness' testimony.

The majority's rationale is based on two dubious grounds, one that unnecessarily limits a defendant's 701*701 right to in camera review, and a second that limits the viability of all privileges. There are two types of privileges — (1) conditional or qualified privileges and (2) absolute privileges. Statutes protecting confidential communications are construed to protect the communications from extrajudicial disclosure. Absolute privileges are those that expressly protect all disclosure, in court as well as out of court. Conditional or qualified privileges, which do not expressly bar in court disclosures, do not create an exception to judicial control under the Michigan Rules of Evidence.[1] The majority's implicit but erroneous assumption that all the statutes at issue bar in-court disclosure leads to its creation of too high a threshold for in camera review,[2] which, in my opinion, should be available on a showing of plausible need and materiality. At the same time, the majority creates too low a threshold for invading those few privileges that must be construed to be absolute. The theoretical internal inconsistency of this position produces this schizophrenic result: while all privileges yield on the same terms to in camera review, in camera review will hardly ever be available. The majority's approach thus achieves the remarkable feat of both underappreciating and overvaluing privileges in a single effort.

Moreover, the majority's failure to distinguish 702*702 between those privileges that do not bar disclosure in court and those that do, leads to the erroneous conclusion that where a defendant makes the requisite showing of materiality for in camera review, the holder of an absolute privilege may continue to refuse to submit the protected information, resulting in the holder's testimony being struck. When privileges can be appropriately narrowed to avoid such clashes, and a sufficient showing overrides a privilege of confidentiality, the remedy is an order to the holder of the privileged information, failing which the consequence may be contempt.[3] Only when the privilege is absolute, and its purpose will be destroyed by invasion, will disclosure be dependent on waiver by the privilege holder.

The first step in analysis when a due process right to discovery is asserted and a privilege is invoked, is to examine the basis for the defendant's request. Where the defendant makes a plausible showing of materiality and favorability to his case, further consideration is in order. Passing the initial materiality test, a determination whether the privilege is absolute or conditional is necessary to assess whether further deliberation may be called for before in camera review is warranted. Where the statute establishing the privilege fairly permits a construction that in camera disclosure can be required as a screening device, in camera examination is appropriate. Even where the

privilege invoked is absolute, if it cannot be said that in camera review would destroy the ends sought 703*703 through the privileged communication, such review may still be proper. However, where the privilege cannot be narrowed, and in camera review would itself destroy its purpose, such continued scrutiny is inappropriate and may not be conducted unless the privilege holder yields, failing which the prosecutor must accept the burden of upholding the privilege.

Achieving in camera review, however, does not end the inquiry. A decision on disclosure to the defendant still awaits. At this stage, the test for disclosure is whether the protected material is both necessary and constitutionally material, as developed more fully below. This standard does not vary with the nature of the privilege.

The psychologist-patient privilege involved in *People v Caruso* is an absolute privilege protecting private communications. Although Caruso did not make an initially sufficient showing of plausible materiality, on the remand ordered by the majority,[4] the court should consider how allegedly truncated counseling, stemming from prior sexual abuse, is plausibly material to the claim of fabrication. If such a showing is made, the trial court must determine whether in camera review would itself destroy the privilege. I concur in the result in *People v Stanaway*regarding the defendant's desire for in camera review of the absolutely privileged sexual assault counselor-victim records. The social worker-client and juvenile diversion records sought by defendant Stanaway do not possess the same absolute character as the other privileges at issue in these cases; however, because I agree that the defendant's generalized assertions have failed 704*704 to make a plausible showing of materiality, I also concur in the majority's result denying in camera review of these records.

I

A

Contemporary case law of this Court has construed "privileges" broadly to uphold the right of a defendant in a criminal case to prevent in-court disclosure of relevant evidence. See, e.g.,*People v Howe,* 445 Mich 923 (1994); *Howe v Detroit Free Press,* 440 Mich 203; 487 NW2d 374 (1992); *People v Hamacher,* 432 Mich 157; 438 NW2d 43 (1989); *People v Vermeulen,* 432 Mich 32; 438 NW2d 36 (1989). In these cases, however, the failure to engage in a discrete analysis that construes privileges as narrowly as possible in recognition of their impediment to the truth-seeking objective produces a manipulation of the standard for in camera review that jeopardizes the right of a defendant in a criminal case to a fair trial.

The majority today requires that, in order for a court to conduct an in camera review of any privileged records, a defendant must "establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense...." *Ante* at 649. My first point of departure from the majority's rationale is that this initial materiality requirement erects a higher initial barrier to in camera review than that articulated by the United States Supreme Court.

In *Pennsylvania v Ritchie,* 480 US 39, 58, n 15; 107 S Ct 989; 94 L Ed 2d 40 (1987), the Court rejected the government's resistance to in camera review because Ritchie had not established a "particularized" basis for his claim. The Court required 705*705 only a plausible showing of how the evidence at issue would be both material and favorable to the defense to secure in camera review under a statute creating a conditional privilege. *Id.,* citing *United States v Valenzuela-Bernal,* 458 US 858, 867; 102 S Ct 3440; 73 L Ed 2d 1193 (1982); see also *Exline v Gunter,*985 F2d 487 (CA 10, 1993) (a denial of in camera review constituted a violation of due process, even where the state court found that the defendant failed to show a "particularized need" for the records sought).[5] I would adopt the *Ritchie* standard of materiality for the further review of all privileges, requiring a plausible showing of materiality and favorability in order to subject the records in the present cases to further consideration. At this initial stage of review, I see no reason to distinguish between absolute and conditional privileges.

Valenzuela-Bernal, supra, provides useful instruction on the plausible materiality standard. In that case, the Court sought to determine the requisite showing in order to demonstrate a violation of a defendant's right to compulsory process by the deportation of possible defense witnesses before affording defense counsel an opportunity to interview the deportees. The Court rejected the suggestion that the testimony of the witnesses need only be shown to be of "conceivable benefit" to the defense because such a standard was limited only by the imagination of defense counsel or the trial judge. *Id.* at 866. The Court held that the defendant706*706 "must at least make some plausible showing of how [the deportees'] testimony would have been both material and favorable to his defense." *Id.* at 867. Expanding on this requirement, the Court turned to "cases in what might loosely be called the area of constitutionally guaranteed access to evidence...." *Id.*[6] While noting that a defendant's right of access to evidence was generally measured by the prejudicial effect of denial of such access, the Court admitted that the specificity of materiality required should be relaxed, but not wholly dispensed with, where a defendant has had no opportunity to determine what favorable information the witness, or the evidence, might possess. In that case, the defendant must show the events to which the evidence might relate, and the relevance of those events to the crime charged. This approach suggests that defendants seeking discovery of privileged information must make an initial showing of plausible materiality and favorability by demonstrating what events the information might relate to and the relevance of those events to the defendant's theory of defense "in ways not merely cumulative to the testimony of available witnesses." *Id.*at 873.[7] The majority's high initial burden on the defendant fails to account for the fact, acknowledged by the United States Supreme Court, that neither the defendant nor the court has yet had an opportunity to review the records in question at this initial stage. This handicap707*707 dictates a lower threshold for initial review than the ultimate proof required for disclosure.

> *[A] lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege. [United States v Zolin, 491 US 554, 572; 109 S Ct 2619; 105 L Ed 2d 469 (1989).]*

The detail asserted may assist the court in evaluating how the privileged material might be relevant to the defense,[8] but it need not meet a standard of probable necessity. As observed in another context, but equally apposite here:

> *[A] trial judge cannot accurately evaluate the litigant's showing of necessity without knowing something of the content of the information sought. There is no judicial algebra by which a court can determine how badly a litigant needs "X."[*[9]*]*

B

Under the plausible materiality and favorability standard, defendant Stanaway has failed to articulate a sufficient basis for discovery of the social worker-client and juvenile diversion records. Stanaway can only justify his discovery request by a hope to unearth some statements inconsistent with the victim's prior testimony. This generalized aspiration 708*708provides no reasonable justification for further in camera review. As noted in *Ritchie, supra* at 58, n 15, a defendant "of course, may not require the trial court to search through the [requested files] without first establishing a basis for his claim that it contains material evidence." Because Stanaway articulated no different basis for his request for discovery of the psychologist-patient records than he did for those protected by qualified privileges, it is apparent that discovery of this evidence is also unavailable.

Because Caruso has not been tried, I agree with the majority that a showing of plausible necessity might yet be made. However, the defendant's claim in *Caruso* that the listing of a psychologist as an expert witness might permit access to other privileged records on the basis of a good-faith belief that the records may reveal another explanation for the symptoms does not set forth a plausible basis for in camera review. There is no showing of relevancy that is not merely cumulative with respect to the testimony of the expert witness. The opinion of the psychologist/expert witness may be offered only with respect to the behavior traits of the victim.*People v Beckley,* 434 Mich 691; 456 NW2d 391 (1990). The expert witness' records will be available, thus affording the defendant the basis for full exploration of the expert's opinion. Nor can a plausibly sufficient justification for disclosure of the privileged records be grounded on the claims that the complainant was abused by her father, has not received proper treatment and has a warped sense of right or wrong. These claims are directed at a collateral act. Their relevance to fabrication of this incident is supported only by conclusory statements. The defendant asserts before this Court that the relevance of the requested information is to rebut the 709*709 inference that the youthful victim would have knowledge sufficient to describe the alleged acts by the defendant unless they actually occurred. These assertions are also insufficient to warrant in camera review. In order to find plausible relevancy, the defendant must articulate some similarity between the possible abuse by the father and the charges of sexual contact in the present case or otherwise demonstrate the necessary relevancy.[10] See, e.g.,*State v Oliver,* 158 Ariz 22; 760 P2d 1071 (1988), *Commonwealth v Rathburn,* 26 Mass App 699; 532 NE2d 691 (1988).[11]

II

The United States Supreme Court has disclaimed any intent to constitutionalize the discovery process. *Weatherford v Bursey,* 429 US 545; 97 S Ct 837; 51 L Ed 2d 30 (1977). Moreover, "[p]rivileges are not all equally important; they vary with the privacy interests they protect and the policies they promote." Saltzburg, *Privileges and professionals: Lawyers and psychiatrists,*66 Va L R 597, 622 (1980), quoted in 1 McCormick, Evidence (4th ed), § 77, p 290, n 5. Lacking clear guidance from the United States Supreme Court, the majority has collapsed all state privileges, irrespective of their relative importance, qualified as well as unqualified, 710*710and governmental as well as purely private, to possible violation under the same method of review.

All the privileges at issue in the instant cases are statutorily protected by language that evinces a respect for the privileged communications. However, only the privileges afforded communications with sexual assault counselors[12] (at issue in *Stanaway*), and psychologists[13] (at issue in *Caruso*), specifically express an intent to bar the use of records of such communications from court proceedings.[14] Because expansive construction of privileges interdicts the court's primary truth-finding function, privileges must be interpreted as being consistent with that purpose whenever possible. Thus, my second point of departure from the majority is that I disagree that all the statutes at issue here create privileges that expressly dictate that the information 711*711 be barred from use in judicial proceedings. Neither the social worker-client privilege, MCL 339.1610; MSA 18.425(1610), nor the privilege for records kept pursuant to the juvenile diversion program, MCL 722.828-722.829; MSA 25.243(58)-25.243(59), contain such an expression of legislative intent. These statutes create qualified privileges to protect confidential communications,[15] and do not erect an absolute bar to the discovery of privileged information. *Howe v Detroit Free Press,* 440 Mich 203, 233-234; 487 NW2d 374 (1992) (opinion of BOYLE, J.). While I agree with the majority that the trial court must weigh the legislative purpose in creating qualified privileges in the context of its particular evidentiary value to the accused, thus honoring confidentiality while preserving relevant evidence, the same method of analysis cannot be employed where the Legislature has expressly erected an absolute bar to in-court disclosure.

The statutory privileges extended to communications with sexual assault counselors and psychologists evince the highest societal regard,[16] both for the relationships in which the communications 712*712 arise and for the critical importance the confidentiality of such communications have in the successful achievement of the ultimate goal of those relationships.[17] The question is whether these intended absolute privileges[18] may be vindicated or when and how they must be qualified to accommodate a defendant's constitutional right to due process.[19]

713*713 I do not doubt that the United States Supreme Court might find absolute privileges unconstitutional as applied. See *Michigan v Lucas,* 500 US 145; 111 S Ct 1743; 114 L Ed 2d 205 (1991). "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."[20] However, given the scope of the cloak of privacy created by the Legislature, the protection afforded to the privacy of crime victims by our state constitution, Const 1963, art 1, § 24,[21] and the fact that we are sailing in constitutionally uncharted waters, a

measured response to the question when in camera review and disclosure is required is appropriate.

III

Given the lack of guidance from the Supreme Court with respect to the initial materiality standard and the ultimate issue of disclosure and use of privileged information,[22] some discussion is in order regarding the mode of analysis to be used in the further proceedings in*Caruso.* For the sake of 714*714 illustration, I include a discussion regarding the privileges at issue, but already disposed of, in *Stanaway.*

There is no authority from the United States Supreme Court that holds that absolute statutory privileges protecting private relationships are unconstitutional on their face. The Court has never dealt squarely with the validity of a statutorily mandated, societal privilege that expressly bars introduction of privileged material into judicial proceedings. In *Pennsylvania v Ritchie, supra,* the Court expressly refused to articulate an opinion regarding the result of a direct clash between a defendant's pretrial discovery claim to records of a government agency and a specific statutory bar to the desired access. The defendant's request for exculpatory material was opposed in*Ritchie* by a statute that permitted disclosure of confidential information to a court in appropriate circumstances. The Court construed the statute narrowly to hold that "[g]iven that the Pennsylvania Legislature contemplated *some* use of [Children and Youth Services] records [the records being sought for discovery] in judicial proceedings, we cannot conclude that the statute prevents all disclosure in criminal prosecutions." 480 US 57-58.[23] (Emphasis in the original.)

The majority acknowledges this limitation on *Ritchie,* but implicitly concludes[24] that any privilege 715*715 must potentially yield to a sufficiently compelling discovery claim, basing its holding on the Court's high regard for a defendant's constitutional rights and a survey of the jurisprudence of other states. *Ante* at 677-678. Although the rights of accused persons are so fundamental a priority of the American system of justice that we can safely predict that the United States Supreme Court will not permit substantial limitations of these core protections, we should not anticipate that, as a corollary, the Court will treat all privileges alike.

In addition to *Ritchie,* other United States Supreme Court opinions relevant to an evaluation of absolute privileges fail to provide clear guidance. In *Roviaro v United States,* 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957), the Court determined that the common-law informer's privilege[25] had to give way where it was determined that the defendant had demonstrated a vital need for access to the informer's identity. The Court noted that the scope of the privilege was limited by its underlying purpose, in this case the furtherance and protection of the public interest in effective law enforcement. *Id.* at 59-60. The advancement of that interest paled when compared against the defendant's right to prepare his defense. Thus, under the circumstances of the case, the privilege yielded to the defendant's paramount right.

In *United States v Nixon,* 418 US 683; 94 S Ct 3090; 41 L Ed 2d 1039 (1974), the Court found that the president's generalized claim of absolute executive privilege, made in an

attempt to bar in camera review of records of conversations between the president and his close advisors, had to yield to 716*716 the special prosecutor's demonstrated, specific need for evidence in a criminal trial. While the Court acknowledged the constitutional underpinnings of executive privilege, it found that the president's claim exceeded the scope of that privilege. *Id.* at 706-707.[26] The Court did not hold that a privilege could never be maintained against the fundamental due process right to the production of evidence at a criminal trial, but, rather, found fault in the broad, generalized privilege being asserted. The Court quoted with approval the proposition that "`the public ... has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege...." *Id.* at 709, quoting *Branzburg v Hayes,*408 US 665, 674; 92 S Ct 2646; 33 L Ed 2d 626 (1972). Emphasizing the modest quantity of, and restrictive criteria for, legitimate privileges, the Court nevertheless cited the attorney-client and priest-penitent privileges as examples of valid prohibitions against forced disclosure. *Nixon, supra* at 709-710.[27] Acknowledging the important nature of the privilege asserted by the president, the Court instructed that the information sought should be presumptively privileged and that the special prosecutor could only defeat such assertion by demonstrating that the material was "`essential to the justice of the [pending criminal] case.'" *Id.* at 713, quoting*United States v Burr,* 25 F Cas 187, 192 (No. 14,694) (CCD Va, 1807).

717*717 Finally, restrictions on a defendant's opportunity to cross-examine a witness because of a statutory privilege were questioned in *Davis v Alaska,* 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974). The Court found that a state statute barring admission of a witness' juvenile record in criminal proceedings impermissibly denied the defendant his right of confrontation under the facts of the case. The witness had provided the prosecution with testimony inculpating the defendant in the crime. The defendant sought to use the witness' juvenile record and the fact that he was on probation at the time of his identification of the defendant to show that the witness may have been under undue police pressure at the time of identification and to call into question the truthfulness of his answers during cross-examination. *Id.* at 311-314. The Court framed the question as one of the "adequacy" of the scope of the permitted cross-examination, and again embarked on a balancing test of the state's interest in protecting the anonymity of juvenile offenders in the interest of furthering the rehabilitative goals of the juvenile corrections system against the right of the defendant to effective cross-examination. *Id.* at 318-319. Focusing on the specific case before it, the Court found that "[w]hatever temporary embarrassment might result to [the witness] or his family by disclosure of his juvenile record — if the prosecution insisted on using him to make its case — is outweighed by the petitioner's right to probe into the influence of possible bias in the testimony of a crucial identification witness." *Id.* at 319.

IV

From the background of precedent discussed above, drawing guidance to aid in evaluation of718*718 discovery requests for information protected by privileges that successfully pass the initial materiality test is difficult. As noted, for purposes of illustration it will be assumed that the discovery requests in both the present cases have withstood the first materiality challenge. Implicit in such guidance is an assumption that

the United States Supreme Court would uphold absolute statutory privileges protecting private communications as being constitutional on their face and an admission that they may be unconstitutional as applied. The Supreme Court has left this question open.[28]

If a privilege is conditional, there is no need for further consideration before in camera review. The defendant in such a case has made a plausible showing of materiality and favorability, and the considerations at in camera review, discussed below, await. In *Stanaway,* had the challenge to the social worker-client and juvenile diversion records privileges met the plausibility standard, the trial court properly would have ordered the records submitted for in camera review.

Where there is a clear indication that a privilege was intended to block the introduction of the information protected into judicial proceedings, however, I would hold that the privilege is an absolute bar to the discovery of the privileged material by a defendant in a criminal proceeding if, under the facts of the particular case, defeat of the privilege would preclude the achievement of the goal sought through the privileged communication. Discovery of the privileged information in this case is only possible through waiver of the 719*719 privilege by its holder. If maintenance of the privilege is of such an imperative quality, and no waiver is forthcoming, the prosecutor must bear the burden of the privilege, either by being barred from calling the privilege holder as a witness or dismissing the charges against the defendant.[29]

Analysis of the effect of violation of the absolute privilege on the ends sought through the communication should be initiated before any in camera review. It thus serves as an overriding hurdle to further in camera inquiry. When the preliminary showing of the requisite materiality of the evidence sought has been made, and the privilege has been asserted, the prosecutor, representing the interests of the privilege holder, and the defendant should present their respective arguments regarding the effect disclosure would have on the goals of the privilege.[30] While in no way seeking to limit the breadth of the arguments regarding the maintenance of the absolute privilege, relevant inquiry might include consideration of the particular ends that are expected to be achieved through the privileged communication, the reason for the initiation of the communication, and alternative means for accomplishing the ends sought.[31]

720*720 The validity of privileges against the introduction of relevant evidence, in order to protect "weighty and legitimate competing interests," has been recognized by the United States Supreme Court. *Nixon, supra* at 709. What has not been clearly expressed is the particular privileges that sufficiently protect these interests to withstand challenge. Legislatures, through statutes and constitutional directives, are in a better position to make the societal value judgments necessary to determine if a privilege should be presumptively absolute.[32] However, the difficulty in resolution, and ultimate clash of the dictates of an absolute privilege and the truth-seeking goal at trial, Weisberg, Defendant v Witness: *Measuring confrontation and compulsory process rights against statutory communications privileges,* 30 Stan L R 935, 721*721938 (1978), counsel against creation of more than a very few, clearly articulated and soundly reasoned absolute privileges. *Howe, supra* (opinion of BOYLE, J.). With this caveat, I leave to that

branch of government the burden of determining what privileges should be considered absolute. By acknowledging the Legislature's duty in this regard, I do not preclude the possible absolute character of those privileges originating at common law. *Privileged communications,*98 Harv LR 1450, 1456-1458 (1985) (attorney-client and spousal privileges originated at common law, but were not absolute in application).

These observations regarding the Legislature's duty do not absolve courts of their responsibility for interpretation and application of privileges. In *United States v Nixon, supra,* the Court considered the injury that defeat of the asserted privilege for presidential communications would have on the goal of the privilege to encourage frank and honest discussions between the president and his advisers. The Court found that the president's executive privilege had its origins in Article II of the United States Constitution. *Id.* at 705-706. While acknowledging that the "interest in preserving confidentiality is weighty indeed and entitled to great respect," the Court stated, "we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution." *Id.* at 712 (citation omitted). Similarly, in *Davis v Alaska, supra,* the Court considered the possible injury to the goal of the privilege afforded by statute to juvenile records that would result from disclosure of those records through cross-examination of the witness, but characterized such injury as merely a "temporary 722*722 embarrassment" to the witness or his family, not on par with the defendant's right of confrontation. *Id.* at 319.

Where an absolute privilege is clearly intended by statute, I would allow the court to weigh the anticipated injury in that case to the goal of the privileged communications under consideration, similar to the Court's analysis in *Nixon* and *Davis.* This forces the tribunal to come to grips with the importance of the privilege, not just in the abstract, but in the context of the facts of the particular case. Thus, in further proceedings regarding the psychiatrist-patient privilege in*Caruso,* if a showing of plausible materiality for discovery of material that is expressly exempted from in court disclosure is made, further analysis is in order. If the ends of the absolute privilege would be destroyed by in camera review, the court has no authority to invade it and is precluded from further inquiry unless the privilege holder yields. Similar analysis would apply to discovery of the records protected by the sexual assault counselor privilege in*Stanaway,* had the defendant been able to pass the initial materiality test.

As I have noted above, a determination whether violation of a statutorily absolute privilege in a particular case would preclude achievement of the ends sought through the communication dictates a specific factual analysis. Such analysis was not done in the trial courts in the present cases, and this Court has insufficient information to legitimately make such a determination on the basis of the record before it. In this connection, it bears repeating that appellate courts can review these questions only on the basis of an adequate record. Thus I am unable at this juncture to predict the probable injury from disclosure of the records protected by the sexual assault counselor privilege in *Stanaway* and the psychologist privilege in 723*723*Caruso.* For the sake of further discussion, however, I assume that the ends of the privileged

communications would not be precluded by possible disclosure and move on to considerations for in camera review.

Assuming that defendant Caruso makes a showing on remand of plausible materiality for discovery of the records protected by the psychologist-patient privilege, under my test the trial court should make a preliminary determination regarding the gravity of the injury. If the injury is grave and the holder will not yield, the prosecutor will bear the consequences.[33]

V

The final issue regarding disclosure of privileged information to the defendant who has made a successful showing of the need for in camera review is the trial court's determination of the information that should be disclosed. That process encompasses again weighing the defendant's right to the information against privileges that are now acknowledged to be susceptible to breach, but the balancing takes a different focus. At this final stage of review, the policy base for the privilege at issue should still be respected,[34] and the information disclosed to the defendant only upon a sufficient constitutional showing of need.

A

When the focus shifts to the question of a workable 724*724 framework for evidentiary rulings on disclosure of privileged information, we again turn to the limited sources available for guidance.[35] The United States Supreme Court thus far has expressly characterized the right of the defendant in due process terms, suggesting that as against a claim of privilege, material that "probably would have changed the outcome of his trial," must be disclosed. *Ritchie, supra*at 58. Because it is the right to a fair trial that is implicated, trial courts must make an a priori determination that without use of the protected information, confidence in the reliability of the outcome of the trial would be undermined. *United States v Bagley,* 473 US 667; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

Illustration of the requisite materiality of privileged information is provided by *Roviaro v United States, supra.* The informer's privilege at issue in that case was premised on the furtherance of effective law enforcement. *Id.* at 59. By allowing the government to assert that an informer's identity was privileged, the government's task in obtaining information inculpating the defendant was eased.[36] While the Court did not question the legitimacy 725*725 of the government's interest in that case, it found that the privilege had to yield when the information protected by the privilege was "relevant and helpful to the defense of the accused, or ... essential to a fair determination of a cause ...." *Id.* at 60-61. While the Court articulated a confusing "relevant and helpful" or "essential" standard of materiality in *Roviaro,* a closer look at the facts shows that the information sought — the informer's identity — was of vital importance to the defense. See*United States v Valenzuela-Bernal, supra* at 870-871. The informer was the only party participating with the defendant in the drug transactions for which the defendant had been accused, and the only witness who could possibly contradict the testimony presented by the government.

A determination whether the privilege must yield depends on the significance of the privileged information in the particular circumstances of the case, that is, its probative force. Thus, while disclosure of the informant's identity in *Roviaro* was of vital importance because he was the only witness to the transaction charged, informant identity is denied where the informant does not actively participate in the transaction that generates the charge, or his information would be merely cumulative. *United States v Mendoza-Salgado,* 964 F2d 993 (CA 10, 1992). Evidence is material only if there is a reasonable probability that if it is disclosed to the defense, the result of the proceeding will be different. *United States v Parker,* 836 F2d 1080, 1083 (CA 8, 1987)quoting *Bagley, supra* at 682.

726*726 Because there is no generalized constitutional right to discovery, the test for constitutional relevance must be higher than a requirement that the evidence would be merely helpful to the defense. The existence of the privilege, qualified or absolute, indicates that the information encompassed by it is entitled to special protection. A court may therefore decline to disclose such evidence, where its potential benefit to the defendant is available from other sources. This requirement dictates that the information must be necessary to, and not merely supplementary of, a particular mode of impeachment or to defendant's theory of defense, that is, it must be unavailable from any alternative source. Thus, as the majority correctly notes, a defendant is not deprived of effective cross-examination if the material withheld, like prior inconsistent statements, is merely cumulative of the traditional lines of impeachment. The defendant is not precluded from such inquiries by a privilege, but only precluded from discovery of one source of such inconsistencies.

Davis v Alaska, supra, while examined as a Confrontation Clause violation affecting testimony at trial, is instructive regarding the requisite standard of necessity. The privilege rule at issue in that case was designed primarily, or at least incidentally, to benefit the state rather than to protect a private communication. In addition, the information protected was subject to disclosure under limited circumstances. Finally, the bar constructed by the juvenile records privilege deprived the defense of the only opportunity to show the witness' bias and ulterior motive for testifying against the defendant. *Id.* at 316-318; see also *Olden v Kentucky,* 488 US 227; 109 S Ct 480; 102 L Ed 2d 513 (1988). The Court in *Davis* affirmed that revealing a witness' motive for testifying is included within 727*727 the protected right of cross-examination. As McCormick notes in discussing the case:

> *In the first instance, it is probable that the defendant's ability to challenge claims of privilege as impairing his "right to present a defense" will to some extent be dependent upon the criticality to that defense of the matter protected by the privilege. In Davis, the privileged matter in effect represented a significant and irreplaceable means of impeaching the chief prosecution witness. By contrast, where the privileged matter desired is of significantly lesser probative force or simply cumulative, its denial to the defendant has been held not to violate the constitutional guarantees. [McCormick, Evidence (3d ed), § 74.2, p 179.]*

Thus, a case for the necessity of disclosure of privileged information is not made out if the information sought is merely cumulative of evidence otherwise available to the defendant.

It thus appears that the test of constitutional relevancy for disclosure purposes is that the evidence must be material in the sense that it would make a difference in the outcome[37] and necessary, in the sense that it is not merely cumulative of other nonprivileged evidence that would serve the same purpose, a formulation that is roughly akin to the majority's test for in camera review.

Several other sources support the conclusion that the majority's test for in camera review is an appropriate standard for disclosure and use of material protected by a privilege. First, on close inspection, every case from the United States Supreme 728*728 Court on its facts indicates a necessity for the protected information. See *Ritchie, Roviaro, Nixon,* and *Davis, supra.* Second, the work product privilege formally recognized in the federal civil procedure rules requires that the party seeking disclosure must show that without undue hardship he cannot obtain "the substantial equivalent of the materials by other means." FR Civ P 26(b)(3). Although a defendant's right to due process in a criminal trial obviously weighs more heavily in the balancing process than in a civil case, the centrality of the attorney-client privilege is such that the adoption of a necessity test as a middle road between open discovery and an absolute privilege is some evidence of the limiting principle the Supreme Court might endorse in resolving the tension between competing rights when other privileges are challenged. Third, the rejected standards for invocation of and exceptions to the informers privilege originally proposed in the Federal Rules of Evidence in pertinent part provide:

> *If the judge [after an in camera review] finds that there is a reasonable probability that the informer can give the testimony, [necessary to a fair determination of the issue of guilt or innocence in a criminal case] and the government elects not to disclose his identity, the judge on motion of the defendant in a criminal case shall dismiss the charges to which the testimony would relate.... [2 Weinstein & Berger, Evidence, Proposed Supreme Court Standard 510(c)(2) — Identity of Informer, pp 510-1 to 510-2.]*

Although not ultimately adopted, the proposed standard encompasses the advisory committee's recommendation that disclosure should be available on a showing of reasonable probability that privileged information is necessary to a fair determination of guilt or innocence.

729*729 Finally, other states enacting standards directing when a privilege can be overcome provide for admission where (1) the information is relevant to an essential issue in the case, (2) there are no available alternative means to obtain the substantial equivalent of the information, and (3) the need for the information outweighs the interest against disclosure, or the value of the material as it bears on the issue of guilt or innocence outweighs the privilege against disclosure.[38] See, e.g., Ky R Evid 506 (counselor-client privilege), NJ R Evid 508 (newsperson's privilege), quoted in 2 Weinstein & Berger, ¶ 501, pp 501-120 to 501-124 (1994 Supp).

The only state my research has located that specifically addresses the standard for disclosure of material protected by a counselor-client privilege, including a sexual assault counselor, provides that otherwise privileged communications may be disclosed:

"(2) if the judge finds:

> *"(A) That the substance of the communication is relevant to an essential issue in the case;*
>
> *"(B) That there are no available alternate means to obtain the substantial equivalent of the communication and;*
>
> *"(C) That the need for the information outweighs the interest protected by the privilege. The court may receive evidence in camera to make findings under this rule." [Ky R Evid 506(d)(2), quoted in 2 Weinstein & Berger, ¶ 501, p 501-124 (1994 Supp).]*

730*730 These sources uniformly endorse a principle of materiality and necessity for trial judges to apply in making the disclosure decision that is consistent with the majority's test for in camera review. On a finding that there is no available alternate means "to obtain the substantial equivalent" of the protected information, the judge must order disclosure of evidence relevant to a substantial issue in the case when there is a reasonable probability that the protected information will affect the factfinder's determination of guilt or innocence.

B

Applying these principles to the issue of disclosure in the present cases, defendant Stanaway has shown no basis for allowing him access to the privileged information. The defendant made no more than a generalized request for review of the complainant's sexual assault counselor's records to potentially find useful impeachment information. This falls far short of a showing that discovery of the privileged records is either necessary or material to test the complainant's credibility on cross-examination. The defendant has simply failed to demonstrate that effective cross-examination is unavailable because of the privilege bar. As noted by the majority, "statements made to a counselor are not the only avenue ... available for exploration regarding the complainant's credibility." *Ante* at 682, n 42.

In defendant Caruso's case, the showing made to this point is likewise insufficient. As we have noted, the need for the absolutely protected record was partially based upon a belief that the complainant had written sexually suggestive notes to her mother's fiance. Conflicting testimony from several witnesses has already been presented at a 731*731 pretrial hearing concerning this note. Moreover, it has not been suggested that the defendant has not been afforded informal discovery making available all the material in the prosecutor's possession. Thus, this basis for disclosure calls for only cumulative material. However, defendant also asserts that the eight-year-old victim's knowledge of sexual activity is necessary to examine the complainant regarding its theory that the incident in question was fabricated and that there is some connection between a failure of prior counseling, previous sexual abuse by her father, and a theory

of fabrication. If Caruso is able to make the additional showing of relevancy I have previously described, the trial court should reevaluate these claims. If the trial judge determines at the intermediate stage of review that the privilege can be accommodated, in camera review may require disclosure[39] on the basis of the materiality to and necessity for the requested records in order to conduct an effective cross-examination. It must be remembered in this regard that defendant has not only the usual means of cross-examination available to explore the witness' knowledge, but can additionally explore at that time the alleged sexually explicit nature of the notes described above.

I have written separately regarding the standard for in camera review, and disclosure and use, of information protected by privilege because I disagree with the majority's initial standard for in camera review and because of the majority's failure to meaningfully distinguish between that standard 732*732 and the standard for disclosure and use. More importantly, I have written separately because I identify so strongly with the position of a trial court judge who is directed to administer a ruling without guidance in its application.

The approach I have suggested protects absolutely privileged private communications. It limits the availability of in camera review in respect to absolute privileges, and applies a standard that permits the balancing of societal interests against the defendant's due process interests and disclosure. It is also consistent with the limitations of statutory relevance we have previously found constitutional. *People v Arenda,* 416 Mich 1; 330 NW2d 814 (1982); *People v Hackett,*421 Mich 338; 365 NW2d 120 (1984). Lacking clear direction from the United States Supreme Court, I offer these suggestions, which are a necessarily limited vision of the direction of that jurisprudence, mindful of the frontline responsibility of the trial judiciary to harmonize legislative purpose with the fair ascertainment of truth that is the basic assurance of due process. In the end, there is no surer guide to the resolution of the issues presented here than the experience of trial court judges, as they attempt to strike the delicate balance between upholding the interest protected by a privilege and assuring the integrity of the constitutional guarantee of a fair trial.

RILEY, J., concurred with BOYLE, J.

LEVIN, J. (*separate opinion*).

I have signed Justice BRICKLEY'S opinion, but would permit a lawyer for the accused to participate in an in camera examination for the reasons stated by the Supreme Judicial Court of Massachusetts in *Commonwealth* 733*733 *v Stockhammer,* 409 Mass 867, 881-884; 570 NE2d 992 (1991):[*]

> *The United States Supreme Court has held that, where a criminal defendant desires access to privileged records of the confidential communications of the complaining witness, the interests of the defendant and the State in a fair trial are fully protected by an in camera review of those records by the trial judge. SeePennsylvania v Ritchie, 480 US 39, 59-61 [107 S Ct 989; 94 L Ed 2d 40] (1987). This holding does not necessarily answer the question before us, however, because, in the past, "on similar facts, we have reached different*

results under the State Constitution from those that were reached by the Supreme Court of the United States under the Federal Constitution." *Commonwealth v Upton, 394 Mass 363, 372 [476 NE2d 548]* *(1985), and cases cited. Thus, in* *Commonwealth v Clancy, 402 Mass 664 [524 NE2d 395]* *(1988), we rejected the defendant's argument — predicated solely on Federal constitutional principles — that he was entitled to examine the medical records of the chief prosecution witness. At the same time, we reserved the question whether the result would be the same under the Massachusetts Declaration of Rights. See id. at 670. See also* *Commonwealth v Jones, 404 Mass 339, 340-344 [535 NE2d 221]* *(1989) (rejecting argument that Federal Constitution requires more than in camera review of requested DSS records, and expressly declining to address unraised State law question).*

The Federal standard requiring only an in camera review by the trial judge of privileged records requested by the defendant rests on the assumptions that trial judges can temporarily and effectively assume the role of advocate when examining such records; and that the interests of the State and complainant in the confidentiality of the records cannot adequately be protected in any other way. Neither assumption withstands close scrutiny.

734*734 As to the first assumption, the United States Supreme Court has said that "`it [is] extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the [information] that would be useful in impeaching a witness.' ... Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment ... would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." (Citation omitted.) *Dennis v United States,* 384 US 855, 874-875 [86 S Ct 1840*; 16 L Ed 2d 973] (1966). We have expressed a similar concern: "The danger lurking in the practice of ... in camera review [of privileged documents] by the trial judge is a confusion between the roles of trial judge and defense counsel. The judge is not necessarily in the best position to know what is necessary to the defense." *Commonwealth v Clancy, supra* at 670. See *Commonwealth v Liebman,* 388 Mass 483, 489 [446 NE2d 714] (1983) ("[W]hen a judge undertakes to decide if [evidence] benefits the defendant's case he is `assuming vicariously and uncomfortably the role of counsel'").

Regarding the second assumption, we are not convinced that the interests of the State and the complaining witness in preserving the confidentiality of communications to psychotherapists and social workers can *only* be protected by an in camera review procedure. Trial judges have broad discretion to control the proceedings before them. There is no reason why they cannot take steps to insure that breaches of confidentiality attending discovery are limited only to those absolutely and unavoidably necessary to the preparation and presentation of the defendant's defense. For example, judges could allow counsel access to privileged records only in their capacity as officers of the court. Admission of or reference to any such information at trial could be conditioned on a determination (made after an in camera hearing) that the 735*735information counsel seeks to use is not available from any other source. Cf. *Commonwealth v Two Juveniles,* 397 Mass 261, 269 [491 NE2d 234] (1986); *Commonwealth v Jones, supra* at 345 (Lynch, J., dissenting). Protective orders (enforced by the threat of sanctions) requiring

counsel and other necessary participants in the trial not to disclose such information could be entered. See *Commonwealth v Amral,* 407 Mass 511, 526-527 [554 NE2d 1189 (1990) (Liacos, C.J. [concurring]). Although these procedures would result in counsel for the defendant and the Commonwealth, rather than just the judge, viewing privileged records, if careful precautions in the order of those described above are taken, such breaches of confidentiality need not be any more intrusive or harmful than those attending in camera review of records by the judge alone.

In addition to rejecting the assumptions that support the Federal standard, we note that § 20B of G.L. c. 233, and § 135 of G.L. c. 112, are not statements of absolute privilege, unlike certain other statutory testimonial privileges such as G.L. c. 233, § 20A (priest/penitent), and G.L. c. 233, § 20J (sexual assault counselor/victim). See *Commonwealth v Jones, supra* at 343. Both sections contain exceptions limiting their scope. As such, the privileges at issue here derive from a "less firmly based legislative concern ... for the inviolability of the communication being protected." *Commonwealth v Two Juveniles, supra* at 266.

Balanced against these qualified privileges are important State constitutional rights of the defendant. Because we have said that, in appropriate circumstances, even absolute statutory privileges (nonconstitutionally based) must yield to a defendant's constitutional right to use privileged communications in his defense, see *id.,* we are not persuaded that allowing counsel access to the treatment records at issue in this case would do great violence to the less firmly based policies represented by §§ 20B and 135. In these circumstances, those policies must give way to the defendant's 736*736 need to examine the complainant's treatment records.

Accordingly, we conclude that, under art 12 of the Massachusetts Declaration of Rights, counsel for the defendant is entitled to review the records of the complainant's treatment at the New York Hospital and with the Greenwich, Connecticut, social worker to search for evidence of bias, prejudice, or motive to lie. On remand, the judge shall determine the circumstances under which counsel for the defendant and the Commonwealth shall review the records. The judge then shall conduct an in camera hearing concerning the admissibility of any information in the records that counsel may wish to use at trial. In his discretion, the judge also shall enter any orders that are deemed appropriate to ensure that the information contained in the records will not be disclosed beyond the defendant's need to prepare and present his defense.

[1] This is a consolidated case. Both defendants presented arguments regarding the Sixth Amendment right of confrontation and compulsory process. Because we decide this case on the basis of a due process analysis, we do not address these issues beyond stating that any confrontation or compulsory process rights implicated are sufficiently protected by an in camera review when due process compels that result. *Pennsylvania v Ritchie,* 480 US 39, 56; 107 S Ct 989; 94 L Ed 2d 40 (1987). Michigan courts have routinely adopted federal law when examining the right of confrontation. *People v LaLone,* 432 Mich 103; 437 NW2d 611 (1989).

Where the United States and Michigan Constitutions contain virtually identical provisions, as is the case when the Sixth Amendment of the United States Constitution is compared to art 1, § 20 of the Michigan Constitution of 1963, federal construction of the constitution should be followed absent compelling reasons for an expansive interpretation of the state constitution. *Sitz v Dep't of State Police,* 443 Mich 744; 506 NW2d 209 (1993).

We note that the Sixth Amendment would be directly implicated by the request to *use* at trial evidence subject to statutory privilege. *Davis v Alaska,* 415 US 308; 94 S Ct 1105; 39 L Ed 2d 347 (1974); *People v LaLone, supra;People v Adamski,* 198 Mich App 133; 497 NW2d 546 (1993).

[2] MCL 750.520d(1)(a); MSA 28.788(4)(1)(a).

[3] MCL 722.623(1); MSA 25.248(3)(1) provides in part:

A physician, coroner, dentist, medical examiner, nurse, a person licensed to provide emergency medical care, audiologist, psychologist, family therapist, certified social worker, social worker, social work technician, school administrator, school counselor or teacher, law enforcement officer, or regulated child care provider who has reasonable cause to suspect child abuse or neglect shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department.

[4] Defendant's April 20, 1990 Memorandum of Law — Privilege and Discovery.

[5] The challenged discovery requests were to paragraphs 8-11 of defendant's April 6, 1990 motion for discovery:

8. The Defendant also demands the names and addresses, and the contact person, of any agency, program, or counseling assistance that [the complainant] sought for either treatment or diagnosis after the occurrence of the alleged sexual assault.

9. The Defendant also demands any written observation, document, record or memoranda prepared by Cathy O'Day or any other member of the Marquette Woman's Crisis Center, or by any member of the Marquette County Juvenile Diversion Counseling Program that pertains to this matter or the aforesaid agencies or programs contact with [the complainant].

10. The Defendant also demands the records of the Juvenile Center Diversion Program pertaining to [the complainant].

11. The Defendant also demands the names of any psychiatrist or psychologist, social worker or counselor that [the complainant] consulted for diagnosis or treatment before the alleged sexual occurrence.

[6] MCL 750.520c; MSA 28.788(3).

[7] This assertion was supported by the preliminary examination testimony of a witness for the defense who stated he had read the note and was present when the note was presented to the mother's boyfriend.

[8] The Court of Appeals cited *People v Adamski,* n 1 *supra,* as authority for the correct resolution of the collision between the constitutional right of confrontation and the statutory psychologist-patient privilege.

The defendant in *Adamski* had somehow obtained confidential communications between the complainant and a mental health counselor. At trial, the judge ruled that the statements were inadmissible for impeachment purposes because they were privileged under MCL 330.1750; MSA 14.800(750). The Court of Appeals held that the proper inquiry regarding admissibility must include a determination whether exclusion on the basis of the statutory privilege would "unduly infringe[]" on the defendant's right of confrontation. If so, the privilege must yield. *Id.,* p 141.

[9] MCL 600.2157a; MSA 27A.2157(1) provides:

(1) For purposes of this section:

(a) "Confidential communication" means information transmitted between a victim and a sexual assault or domestic violence counselor, or between a victim or sexual assault or domestic violence counselor and any other person to whom disclosure is reasonably necessary to further the interests of the victim, in connection with the rendering of advice, counseling, or other assistance by the sexual assault or domestic violence counselor to the victim.

(b) "Domestic violence" means that term as defined in section 1501 of Act No. 389 of the Public Acts of 1978, being section 400.1501 of the Michigan Compiled Laws.

(c) "Sexual assault" means assault with intent to commit criminal sexual conduct.

(d) "Sexual assault or domestic violence counselor" means a person who is employed at or who volunteers service at a sexual assault or domestic violence crisis center, and who in that capacity provides advice, counseling, or other assistance to victims of sexual assault or domestic violence and their families.

(e) "Sexual assault or domestic violence crisis center" means an office, institution, agency, or center which offers assistance to victims of sexual assault or domestic violence and their families through crisis intervention and counseling.

(f) "Victim" means a person who was or who alleges to have been the subject of a sexual assault or of domestic violence.

(2) Except as provided by section 11 of the child protection law, Act No. 238 of the Public Acts of 1975, being section 722.631 of the Michigan Compiled Laws, a confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a

sexual assault or domestic violence counselor, shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim.

[10] MCL 339.1610; MSA 18.425(1610) provides:

(1) A person registered as a certified social worker, social worker, or social work technician or an employee or officer of an agency for whom the certified social worker, social worker, or social work technician is employed shall not be required to disclose a communication or a portion of a communication made by a client to the person or advice given in the course of professional employment.

(2) Except as otherwise provided in this section, a communication between a certified social worker, social worker, or social work technician or an agency of which the certified social worker, social worker, or social work technician is an agent and a person counseled is confidential. This privilege is not subject to waiver except when the disclosure is part of the required supervisory process within the agency for which the certified social worker, social worker, or social work technician is employed; or except where so waived by the client or a person authorized to act in the client's behalf. The certified social worker, social worker, or social work technician shall submit to the appropriate court a written evaluation of the prospect or prognosis of a particular case without divulging a fact or revealing a confidential disclosure when requested by a court for a court action.

[11] The juvenile statutes regarding disclosure of records provides in § 8:

(1) Except as otherwise required in subsection (2), a record required to be kept under this act shall be open only by order of the court to persons having a legitimate interest.

(2) A record required to be kept under this act shall be open to a law enforcement agency or court intake worker for only the purpose of deciding whether to divert a minor.

(3) A minor's record kept under this act shall be destroyed within 28 days after the minor becomes 17 years of age. [MCL 722.828; MSA 25.243(58).]

Section 9 of the statute provides the following penalty for violations regarding the use of the juvenile diversion record:

(1) A record kept under this act shall not be used by any person, including a court official or law enforcement official, for any purpose except in making a decision on whether to divert a minor.

(2) A person who violates this section is guilty of a misdemeanor, punishable by imprisonment for not more than 180 days, or a fine of not more than $1,000.00, or both. [MCL 722.829; MSA 25.243(59).]

[12] Section 750(2) of the statute provides:

Privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section. [MCL 330.1750(2); MSA 14.800(750)(2).]

[13] See n 3 for text.

[14] See n 11 for text.

[15] MCL 722.821 *et seq.;* MSA 25.243(51) *et seq.*

[16] Specifically, MCL 722.826; MSA 25.243(56) provides:

When a decision is made to divert a minor, the law enforcement official or court intake worker shall file with the court in the county in which the minor resides or is found all of the following information:

(a) The minor's name, address, and date of birth.

(b) The act or offense for which the minor was apprehended.

(c) The date and place of the act or offense for which the minor was apprehended.

(d) The diversion decision made, whether referred or released.

(e) The nature of the minor's compliance with the diversion agreement.

[17] diversion] programs should not be used to give "free rides" to youths who do not take their parts under diversion agreements seriously. Consistent recordkeeping on diverted youth would provide information needed by law enforcement and courts in deciding whether diversion is appropriate for a given youngster. [House Legislative Analysis, HB 4597, December 10, 1987.]

[18] We note that the diversion records controlled by MCL 722.828; MSA 25.243(58) relate to those records required to be kept under the Juvenile Diversion Act.

We also note that this issue is moot because the act provides for the destruction of a minor's record within twenty-eight days after the minor's seventeenth birthday. MCL 722.828(3); MSA 25.243(58)(3).

[19] MCL 722.829; MSA 25.243(59) provides:

(1) A record kept under this act shall not be used by any person, including a court official or law enforcement official, for any purpose except in making a decision on whether to divert a minor.

(2) A person who violates this section is guilty of a misdemeanor, punishable by imprisonment for not more than 180 days, or a fine of not more than $1,000.00, or both.

[20] US Const, Am XIV provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law....

The Michigan counterpart, Const 1963, art 1, § 17, provides in part:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

[21] The Court of Appeals thereafter remanded to the trial court for an in camera hearing to determine whether the notice requirement would violate the defendant's Sixth Amendment rights in light of the evidence. *People v Lucas (On Remand),* 193 Mich App 298; 484 NW2d 685 (1992).

[22] Justice Blackmun, writing separately, was of the opinion that the right of confrontation encompassed the right of effective cross-examination. This, in his view, may mean a right of pretrial discovery:

If I were to accept the plurality's effort to divorce confrontation analysis from any examination into the effectiveness of cross-examination, I believe that in some situations the confrontation right would become an empty formality. [*Ritchie, supra,* p 62.]

[23] The risk that a trial court might not recognize exculpatory evidence does not justify thwarting the state's commendable effort to assure confidentiality of child abuse records in the wake of the difficulty of detection and prosecution and the unwillingness of victims and witnesses to come forward. *Ritchie, supra,* pp 60-61.

[24] See, e.g., *Kirby v State,* 581 So 2d 1136 (Ala, 1990) (in camera examination was ordered for those psychiatric records the prosecutor had knowledge of).

But see *State v Little,* 260 Mont 460; 861 P2d 154 (1993) (there is no access to counseling records if the prosecutor does not use them).

[25] 23 Pa Cons Stat Ann 6340(a)(5).

[26] The unqualified statutory privilege for communications between sexual assault counselors and victims, 42 Pa Cons Stat Ann 5945.1(b), was specifically cited by the Court as the privilege it was not addressing. *Ritchie, supra,* p 57 and n 14.

The Rhode Island Supreme Court has ruled that the creation of an absolute evidentiary privilege would violate the constitutional rights of the defendant to confrontation and compulsory process. *Advisory Opinion to the House of Representatives,* 469 A2d 1161 (RI, 1983).

[27] The consideration of all the statutory privileges examined today under the "plausible showing of materiality" test, as suggested by the separate opinion, would not

sufficiently balance the state's important and legitimate interest in protecting the confidentiality evidenced by the establishment of the privileges. Such a position ignores the distinction between the privileges presently before this Court and the privilege contained in the Pennsylvania statute construed by the *Ritchie* Court. The position ignores the harm in camera review in and of itself does to the privileged relationship.

[28] See, e.g., *Arizona ex rel Romley v Superior Court, Maricopa Co,* 172 Ariz 232; 836 P2d 445 (1992) (where a state constitutional right afforded to the victim conflicts with the defendant's due process right to present a defense, the victim's right to refuse discovery must yield if the defendant makes a sufficient showing of need);*People v Turley,* 870 P2d 498 (Colo App, 1993) (the defendant failed to make a sufficient preliminary showing to warrant in camera review when he alleged that the victim's mental health records were related to her general credibility and reliability); *People v Exline,* 775 P2d 48 (Colo App, 1988) (the defendant's request for anything in the reports that relates to credibility is not the specific preliminary showing sufficient to warrant in camera review of counseling records); *State v Joyner,* 225 Conn 450; 625 A2d 791 (1993) (in camera inspection of psychiatric and substance abuse records is proper where the defendant failed to offer any evidence likely to establish a reasonable connection between the victim's alleged alcohol abuse and testimonial reliability); *People v McMillan,*239 Ill App 3d 467; 607 NE2d 585 (1993) (the defendant failed to show that the psychiatric records of his codefendant were sufficiently relevant to overcome the privilege); *Louisiana v Ortiz,* 573 So 2d 531 (La App, 1991) (in camera review of psychological records met due process requirements); *Zaal v State,* 326 Md 54; 602 A2d 1247 (1992) (review of a victim's school records protects both the interest of the state and the rights of the accused); *Baltimore Dep't of Social Services v Stein,* 328 Md 1; 612 A2d 880 (1992); *State v Hummel,* 483 NW2d 68 (Minn, 1992) (a defendant is not entitled to in camera review of a murder victim's psychiatric records absent a showing of how the file could likely be related to the defense); *State v Morgan,* 477 NW2d 527 (Minn App, 1991)(relevance and materiality of confidential medical documents is determined by in camera review); *State v Cressey,*137 NH 402; 628 A2d 696 (1993) (in camera review of a psychologist's counseling notes is necessary if the defendant establishes a reasonable probability that the notes contain information relevant and material to the defense); *State v Ramos,* 115 NM 718; 858 P2d 94 (1993) (the defendant must show there is some information in the psychiatric records of a witness that suggests a mental disorganization affecting credibility in order to have access); *People v Arnold,* 177 AD2d 633; 576 NYS2d 339 (1991) (if a defendant requests the psychiatric reports of a witness, the proper procedure is to conduct an in camera review after the defendant shows the records might contain material "bearing on the reliability and accuracy of the witness' testimony"); *State v Middlebrooks,*840 SW2d 317 (Tenn, 1992) (because the psychiatric records of a witness were relevant in determining veracity, the trial court should have conducted an in camera inspection); *State v Kalakosky,* 121 Wash 2d 525; 852 P2d 1064 (1993) (a defendant must make a showing of need for review of the counseling records of a victim that is greater than an allegation that the records might contain inconsistent statements); *Gale v State,* 792 P2d 570 (Wy, 1990) (in camera review for constitutionally material evidence was not an abuse of discretion).

[29] The following are examples of how other jurisdictions have balanced the defendant's constitutional rights with other privileges: *Coats v State,* 615 So 2d 1260 (Ala App, 1993) (in camera review of Department of Human Resources file for *Brady* exculpatory information); *Duncan v State,* 587 So 2d 1260 (Ala App, 1991) (once an undercover officer testifies for the government, the defendant is entitled to at least an in camera inspection of his report); *State v March,* 859 P2d 714, 717 (Alas App, 1993) (a threshold showing of admissibility to entitle a defendant to in camera access to a confidential personnel file fails to safeguard a criminal defendant's due process right to discovery of exculpatory information); *State v Harris,* 227 Conn 751; 631 A2d 309 (1993) (in camera review of personnel files for *Brady* exculpatory evidence satisfies defendant's due process rights; examination for impeachment evidence should be conducted if the defendant establishes a reasonable ground to believe the failure to produce the records would likely impair his defense); *State v Hubbard,* 32 Conn App 178; 628 A2d 626 (1993) (in camera inspection of police records was properly denied where the defendant failed to demonstrate a reasonable likelihood that the records would contain information relevant to his case); *Carter v United States,* 614 A2d 913 (DC App, 1992) (denial of an in camera hearing regarding the location of a police observation post was proper where the defendant's generalized need to know did not outweigh the government's interest in maintaining confidentiality); *Dep't of Health & Rehabilitative Services v Lopez,* 604 So 2d 11 (Fla App, 1992) (agency records must be inspected in camera for *Brady* violation); *Stewart v State,* 210 Ga App 474; 436 SE2d 679 (1993) (in camera review of children's services file, including videotaped interview with the victim, for exculpatory material satisfies *Brady*); *Anderson v State,* 200 Ga App 29; 406 SE2d 791 (1991) (in camera review of prosecutor's file is not necessary if the defendant did not identify the materiality or favorable nature of the evidence sought); *Stripling v State,* 261 Ga 1; 401 SE2d 500 (1991) (in camera inspection of parole records met due process requirements); *State v SP,* 608 So 2d 232 (La App, 1992) (in camera inspection of juvenile records must be conducted if defense counsel makes a request for specific, relevant evidence); *State v Jackson,* 608 So 2d 949 (La App, 1992) (in camera inspection of a prosecutor's file to determine if exculpatory material should have been disclosed); *State v Hutchinson,* 597 A2d 1344 (Me, 1991) (in camera review of Department of Human Services records for exculpatory information satisfies due process); *Reynolds v State,* 98 Md App 348; 633 A2d 455 (1993) (in camera review and production of hospital records require more than the fact that the complainant took the witness stand); *State v Goodwin,* 249 Mont 1; 813 P2d 953 (1991) (information determined to be relevant and necessary to the defense should be forwarded to the defendant if discovered during an in camera inspection of family services files); *State v Dedrick,* 135 NH 502; 607 A2d 127 (1992) (denial of review in camera of the prosecutor's notes was proper where the defendant did not show the prosecutor withheld evidence); *State v Baker,* 112 NC App 410; 435 SE2d 812 (1993) (it was error for the trial court to refuse to conduct review in camera of the witness' statements in the possession of the prosecutor); *People v Ellis,* 188 AD2d 1043; 592 NYS2d 200 (1992) (in camera review of the prosecutor's file revealed *Brady* violations); *People v Monroe,* 186 AD2d 93; 588 NYS2d 547 (1991) (in camera review of personnel files for information that is relevant to impeachment of witness credibility); *People v Gallardo,* 173 AD2d 636; 570 NYS2d 222 (1991) (defendant is entitled to in camera inspection of the prosecutor's notes if he can articulate a factual basis supporting his

need for the information); *State v Black,* 85 Ohio App 3d 771; 621 NE2d 484 (1993) (conducting in camera inspection of confidential educational records rather than allowing the defendant direct access is not an abuse of discretion);*State v Wadsworth,* 86 Ohio App 3d 666; 621 NE2d 773 (1993) (in camera inspection is not required when the defendant failed to make a proper challenge to the prosecutor's claim that the requested sheriff's records were work product); *Chillicothe v Knight,* 75 Ohio App 3d 544; 599 NE2d 871 (1992) (where the plaintiff failed to assert facts to establish materiality, trial court was under no obligation to conduct review of police "use of force" records); *Amos v Dist Court of Mayes Co,* 814 P2d 502, 503 (Okla App, 1991) (the trial court must conduct an in camera examination of the Oklahoma State Bureau of Investigation file even though they are privileged by statute because "[e]xculpatory evidence is always available to a defendant and statutory provisions cannot deny access"); *State ex rel Dugan v Tiktin,* 313 Or 607; 837 P2d 959 (1992) (a judge may not delegate statutory duty to examine a children's services division file upon a showing of good cause for disclosure); *State v Leslie,* 119 Or App 249; 850 P2d 1134 (1993) (in camera examination of personnel files appropriately balances the interests);*State v Pena,* 108 Or App 171; 813 P2d 1134 (1991) (*Brady* exculpatory standard applied to eye witness records); *State v Christopherson,* 482 NW2d 298 (SD, 1992) (the failure by the trial court to disclose confidential juvenile records after an in camera examination was not error because the records did not contain relevant information); *Crawford v State,* 863 SW2d 152, 165 (Tex App, 1993) (the defendant is entitled to in camera review of confidential "Crime Stoppers" report to determine if *Brady* information is contained therein); *Washington v State,*856 SW2d 184 (Tex Crim App, 1993) (when a work product privilege is claimed, the defendant is entitled to in camera review of documents for a determination of whether they are discoverable).

But cf. *DeFries v State,* 597 So 2d 742 (Ala App, 1992) (in a jurisdiction that retains a prohibition against impeaching one's own witness, the defendant was not entitled to an in camera inspection of the police report where the officer who prepared the report was called as a defense witness); *State v Little,* n 24 *supra* (*Ritchie*applies to access to Department of Family Services files but not to psychological records); *Commonwealth v Kennedy,* 413 Pa Super 95; 604 A2d 1036 (1992) (where the statute establishes that the protective service file is to be absolutely privileged, in camera review is not allowed).

[30] 42 Pa Cons Stat Ann 5945.1(b)(1) provides:

(b) Privilege —

(1) No sexual assault counselor may, without the written consent of the victim, disclose the victim's confidential oral or written communications to the counselor nor consent to be examined in any court or criminal proceeding.

[31] The Wisconsin Court of Appeals had held previously that *Pennsylvania v Ritchie, supra,* is applicable even when the information is not in the possession of the state but is in the possession of a private counseling agency as long as it is shielded by statutory privilege. *State v SH,* 159 Wis 2d 730; 465 NW2d 238 (1990); *In re KKC,* 143 Wis 2d 508; 422 NW2d 142 (1988).

[32] The court analogized to cases in which the informant privilege has been abrogated by the defendant's due process right to a fair determination of guilt.

See *Roviaro v United States, supra* (the public interest in protecting the confidentiality of an informant must give way if a defendant can demonstrate that disclosure would be relevant and helpful to his defense or essential for a fair determination of a cause); *State v Outlaw,* 108 Wis 2d 112; 321 NW2d 145 (1982).

[33] Wis Stat Ann 905.04.

[34] Similarly, the Illinois Supreme Court has ruled that in the event that a complainant refuses to allow a defendant's expert to conduct an examination, the prosecutor is precluded from offering rape trauma syndrome evidence to establish the defendant's guilt. *People v Wheeler,* 151 Ill 2d 298; 602 NE2d 826 (1992).

[35] Hogan, *The constitutionality of an absolute privilege for rape crisis counseling: A criminal defendant's sixth amendment rights versus a rape victim's right to confidential therapeutic counseling,* 30 BC L R 411, 413 (1989) (the testimonial privilege for communications between a rape victim and her counselor promotes the important social goals of rehabilitation of the victim and prosecution of the rapist).

[36] After the defendant has made a plausible showing of materiality, "the prosecutor, representing the interests of the privilege holder, and the defendant should present their respective arguments regarding the effect disclosure would have on the goals of the privilege." *Post,* p 719.

[37] Under this fluctuating standard, the trial court would be asked to conduct an individualized assessment of the importance of the statutory privilege to the particular privilege holder. How is a judge to determine how grave an injury disclosure of records will cause a particular privilege holder without knowing, at least in a partial sense, what the records contain? How can a prosecutor represent the particularized importance of the privilege without knowing what the records contain? The partial disclosure necessary in many cases to establish the privilege holder's need for the noninspection of the records would be more intrusive than the in camera inspection.

As will be the case in many instances, where the accuser is the privilege holder, it would seem that the more unstable the accuser, the greater the likelihood abrogation of the privilege would be deemed harmful. Correlating with the accuser's instability, however, will be the greater need for the defendant to access mental health records to prove that the accusation arises from instability rather than reality. Where a statute seeking to protect a victim clashes with the defendant's federal and state constitutional rights, the statute must yield. It should be remembered that the legal status of an accuser as victim does not obtain until a conviction is entered.

[38] The suggestion in the separate opinion that a less stringent test for abrogation of all privileges in which the Legislature had not used waiver language is difficult to accept given this Court's recognition of evidentiary privilege in the courtroom where less than an absolute privilege was established. *Howe v Detroit Free Press, supra.* The test

suggested by the separate opinion could unnecessarily burden trial courts with the need to conduct more in camera inspections under its "plausible showing of materiality test" and undermine the legislative purposes in establishing the statutory privileges in question.

[39] Far from overvaluing and underappreciating the privileges at issue, as the separate opinion accuses, see*post,* p 701, today's opinion is narrowly tailored to preserve the privileges to the extent permissible under the federal and state constitutions.

[40] The separate opinion also suggests that a new and different inquiry be conducted when the judge is trying to decide whether to turn over any or all of the file in the course of conducting the in camera inspection. We believe the basic inquiry that determined whether to conduct the inspection controls the decision whether to give information to the defendant. The separate opinion mischaracterizes as identical our tests for whether to grant an in camera inspection and whether to disclose the documents to the defendant. The inquiry is similar, but not identical. The initial threshold is whether there is a reasonable probability, that material information necessary to the defense is likely to be in the record. The determination to be made after looking at the record is whether the evidence is material and necessary to the defense, with material meaning exculpatory evidence capable of raising a reasonable doubt about the defendant's guilt.

The separate opinion would unnecessarily overcomplicate this decision by requiring the trial court to determine 1) the policy base for the privilege at issue, 2) the significance of the privileged information in a given case, 3) assess the effect the privilege has on the defendant's right to effective cross-examination or theory of defense, and 4) determine whether there are available alternative means to obtain the substantial equivalent of the privileged information.

We simply ask the trial court to decide whether the evidence suspected of being contained in the records was in fact there. The weighing of the legislative purpose in creating the various privileges presented by this case has been done today by this Court. There is no need for any further assessment by the trial court because the importance of the privilege is accounted for in the tests for in camera review and disclosure we announce today.

[41] Counsel for defendant Stanaway asserted the counseling records would be exculpatory if they revealed that the complainant had opportunities to confide regarding the alleged sexual incidents, but was silent. We reject this asserted need for negative evidence. Silence in this circumstance would not prove that the offense did not occur.*State v Scheffelman,* 250 Mont 334; 820 P2d 1293 (1991) (the absence of rape trauma symptoms during psychological counseling does not logically prove that a sexual assault did not occur).

[42] While defendant Stanaway is denied access to possible prior inconsistent statements made in the counseling context, we note, as we did in *People v LaLone,* n 1 *supra,* that statements made to a counselor are not the only avenue that was available

for exploration regarding the complainant's credibility. The wide world of possible prior inconsistent statements made in nonprivileged communications remains open to him.

[43] We are fully cognizant that under the rape shield statute, MCL 750.520j(1); MSA 28.788(10)(1), evidence of past sexual conduct with others is generally legally irrelevant. *People v Arenda,* 416 Mich 1; 330 NW2d 814 (1982). Any request for the alleged victim's privileged records for the purpose of proving past sexual conduct would not be a request for information material to the defense.

The defendant never suggests that the incident from which the accusation arises was committed by the child's biological father or that the act was consensual. The defense theory in this case is that the act did not happen. The theory is that this is a false accusation that is the product of unresolved trauma inflicted by the biological father. This Court has recognized that while prior sexual conduct may be declared irrelevant to prove consent or to generally impeach, it may be properly admitted for other purposes such as to show bias, motive for false charge, or fact of prior false accusations. *People v Hackett,* 421 Mich 338, 348; 365 NW2d 120 (1984).

[44] We cannot agree with the suggestion by the separate opinion that further evidence of the existence of the note or production of the note itself if contained in counseling files would be unnecessary because it is cumulative. Cumulative evidence can be probative. While it is true that there was testimony by one witness that he was present when the eight-year-old child presented the note to her mother's boyfriend, the mother's boyfriend refuted that testimony. At the preliminary examination, he testified that he couldn't really remember what the note said. He characterized it as innocent kid stuff.

[45] It is possible that the judge granted the in camera inspection on the facts established at the preliminary examination that would support the preliminary showing required of defendants as enunciated in this opinion. It is also possible that the inspection was improperly ordered to look for impeachment material in general.

[46] Interestingly, the separate opinion would adopt a supposedly more permissive, "plausible showing of materiality" test for criminal defendants, but would not recognize its test as having been met by defendant Caruso on the basis of the facts presented. Yet, under our stricter test requiring a reasonable probability that the records are likely to contain material information necessary to the defense, we would uphold the ordering of an in camera review on these facts as being properly within the judge's discretion.

[47] See n 12 for the text of the psychiatrist-patient privilege, MCL 330.1750; MSA 14.800(750). Although, not presented by defendant Caruso's motion, we would hold that nonabsolute privileges, meaning privileges that do not specify express waiver, would not require waiver by the privilege holder before an order to produce the documents in question for in camera inspection could be entered. Where the defendant is successful in demonstrating a reasonable probability that material information necessary to confront the evidence against him or necessary to present his theory of defense, his federal and state due process rights outweigh the evidentiary privilege.

[48] Where the statutory privilege is not absolute, express waiver is not required.

[49] Harmless error analysis has been applied for review of the trial court's improper denial of in camera access. See *State v Morgan,* n 28 *supra* (an independent review of material examined by the trial judge and withheld from the defendant revealed that the denial was proper because the evidence simply restated that which was presented to the jury by other means); *State v Middlebrooks,* n 28 *supra* (the failure by the trial court in not conducting an in camera inspection of psychiatric records was harmless error because inspection by the court of appeals revealed that the records did not contain information probative of witness credibility).

[50] Defense counsel pursued this theory in his closing argument to the jury:

[*Defense Counsel*]: She has told the story over and over again, [the prosecutor] says to at least nine people. After telling it and telling it and telling it to all these people, when would she get the opportunity to say I made it up, I'm sorry to all the people, didn't occur, it really occurred this way? She got locked in the first time she told the story, and nobody checked up on the details. If they had, they would have seen it was implausible, it couldn't have happened.

[51] We note that the prosecutor's impeachment of his own witness would have been improper at the time of trial under the court rules then in effect. MRE 607 permitted a prosecutor to attack the credibility of a witness only if the prosecutor was obliged to call the witness or if the testimony was contrary to that anticipated and was actually injurious to the calling party's case. While the prosecutor may or may not have anticipated that Donald Stanaway would deny making the statement, his denial did not hurt the prosecutor's case in the sense required by the rule. All the denial did was fail to establish a piece of evidence the prosecutor wanted the jury to hear.

MRE 607 has since been amended, effective March 1, 1991, to conform to Federal Rule of Evidence 607 and now provides:

The credibility of a witness may be attacked by any party, including the party calling him.

Because the new rule would be applied in the event of a new trial, the fact of impeachment alone is not dispositive of this issue, but the manner of impeachment must be analyzed.

[52] In *People v Standifer,* 425 Mich 543, 558; 390 NW2d 632 (1986), this Court distinguished the impeachment of a recanting witness whose testimony was unexpected and harmful to the prosecution's case from the situation in which a prosecutor deliberately places a witness on the stand in order to elicit a denial.

[53] Although not briefed or argued by the parties, we would note that where there is trial error in admitting hearsay testimony not admissible under the Michigan Rules of Evidence, there may be an issue regarding whether we must determine if the evidentiary ruling implicated constitutional error under the Confrontation Clause, US Const, Am VI and Const 1963, art 1, § 20, in order to properly assess harmless error. In

California v Green, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970), the Supreme Court held that it is not a Sixth Amendment violation where hearsay was improperly admitted but the declarant testified and was therefore available for cross-examination. Where the declarant can be cross-examined about the prior inconsistent statement, there is no Confrontation Clause violation because the literal right to confront the witness has been satisfied. A state may develop a standard of harmless error at variance with the harmless error analysis set forth for constitutional error by the Supreme Court in *Chapman v California,* 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967), to be applied to incorrect rulings regarding its rules of evidence not amounting to a constitutional violation. *Green,* p 170.

We continue to reserve for another day the enunciation of the precise harmless error standard to be applied to preserved, nonconstitutional error. See *People v Anderson (After Remand),* 446 Mich 392, 407, n 39; 521 NW2d 538 (1994).

[1] error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, *unless* refusal to take this action appears to the court *inconsistent with substantial justice.* [MCR 2.613(A). Emphasis added.]

Moreover, our evidentiary court rule provides a similar harmless-error rule:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence*unless* a *substantial right* of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context, or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

* * *

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting *substantial rights* although they were not brought to the attention of the trial court. [MRE 103. Emphasis added.]

[2] judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, *unless* in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a *miscarriage of justice.*[MCL 769.26; MSA 28.1096. Emphasis added.]

[3] Although this Court did appear to adopt a harmless-error test in *People v Robinson,* 386 Mich 551, 562; 194 NW2d 709 (1972), it is unclear whether that test applies to

nonconstitutional error. However, even if it does, the question remains whether the Court's discussion of that test was dicta. Indeed, I note that if *Robinson* did purport to create a new test applicable to nonconstitutional error, the discussion of the relevant authorities was rather brief, given the degree of confusion regarding this issue. Accordingly, I question its continued relevance to nonconstitutional harmless error.

[4] There have been varying tests and considerations applied when analyzing harmless error. See, e.g.,*Robinson, supra; People v Roberson,* 55 Mich App 413; 222 NW2d 761 (1974) (distinguishing between constitutional and nonconstitutional error); *People v Winans,* 187 Mich App 294; 466 NW2d 731 (1991) (not indicating any difference in tests and simply applying the two-part *Robinson* test); *People v Fredericks,* 125 Mich App 114, 118; 335 NW2d 919 (1983) ("Error is not harmless if, in the absence of the error, it is reasonably possible that some juror would have voted to acquit"); *People v Norwood,* 70 Mich App 53; 245 NW2d 170 (1976) (applying the beyond a reasonable doubt standard to an evidentiary error). However, a majority of this Court has never applied the beyond a reasonable doubt standard to a nonconstitutional error. Indeed, when reviewing nonconstitutional error, this Court has simply reviewed the error under the miscarriage of justice standard set forth in the harmless-error statute. *Travis, supra* at 686.

[5] Without having this issue fully briefed and argued, I reserve full explanation of these policies until the appropriate case.

[6] See n 4.

[1] "Privilege is governed by the common law, except as modified by statute or court rule." MRE 501.

[2] The majority's test for in camera review requires that the evidence sought be *material,* meaning more than merely favorable or relevant to the defense. Implicit in this standard is recognition of our state's rape shield statute, MCL 750.520j(1); MSA 28.788(10)(1), which is a policy determination that certain logically relevant evidence is legally irrelevant. To the extent that a particularized request appears to seek information for a generally irrelevant purpose, that is, evidence of a rape victim's prior sexual conduct with others or sexual reputation as character impeachment, in camera inspection should be denied unless the defendant can show that it is not collateral and otherwise so material that denial would deprive him of a fair trial.

[3] The consequence of failing to comply may thus be contempt. I do suggest that the trial court may appropriately use other means to encourage compliance with its order, such as requesting waiver or striking all or portions of the testimony. See n 29 and accompanying text. My point is only that if the privilege is properly construed as qualified or conditional, the policy behind the privilege is protected by in camera review and the holder must yield on the appropriate showing.

[4] Should remand result in an in camera review, the trial court should make a separate sealed record to be retained in the event of appeal to facilitate review of the in camera decision. See FR Crim P 16(d).

[5] It was at the in camera review stage that the Court imposed a higher standard of materiality in *Ritchie.* At that point, the Court suggested that reversal of Ritchie's conviction should be ordered only "if there is a reasonable probability" (defined as "a probability sufficient to undermine confidence in the outcome") that, had the evidence been disclosed, the result would have been different. *Ritchie, supra* at 57. This standard is taken from *United States v Bagley,* 473 US 667; 105 S Ct 3375; 87 L Ed 2d 481 (1985), involving the prosecution's duty to disclose exculpatory evidence.

[6] The plausible materiality standard adopted in *Ritchie* is thus clearly not limited to the type of privilege at issue in that case, but is more broadly applicable to a defendant's right to evidence where he has no means by which to determine the favorable character of the evidence sought with great specificity.

[7] While the Court in *Valenzuela-Bernal, supra* at 871, n 8, suggests that even a lower standard of materiality may be in order when a defendant has no knowledge of the contents of the evidence in question, the adoption of the plausible materiality standard in *Ritchie* counsels against such action in the present setting.

[8] the obligation to disclose exculpatory material does not depend on the presence of a specific request, we note that the degree of specificity of [the defendant] Ritchie's request may have a bearing on the trial court's assessment on remand of the materiality of the nondisclosure. [*Ritchie, supra* at 58, n 15, citing *Bagley, supra* at 682-683.]

[9] Hardin, *Executive privilege in the federal courts,* 71 Yale L J 879, 893-894 (1962).

[10] My dissatisfaction with Caruso's showing to date stems from the absence of a logical nexus between the alleged past abuse and the possibility of fabrication. Taken to its logical conclusion, the proposition would support a claim that records containing information of a trauma-producing sexual incident, must be disclosed whenever there is an allegation that the trauma is unresolved.

[11] Caruso also tries to support his discovery request on the basis that evidence was presented at pretrial hearing relating to the victim's alleged sexually explicit note to someone other than the defendant. However, testimony on this issue will be available at trial to provide a basis for inquiry regarding the victim's sexual awareness. This justification for discovery of the privileged records is also flawed because it seeks information that is cumulative.

[12] MCL 600.2157a(2); MSA 27A.2157(1)(2) provides:

Except as provided by section 11 of the child protection law, Act No. 238 of the Public Acts of 1975, being section 722.631 of the Michigan Compiled Laws, a confidential communication, or any report, working paper, or statement contained in a report or working paper, given or made in connection with a consultation between a victim and a sexual assault or domestic violence counselor, *shall not be admissible as evidence in any civil or criminal proceeding without the prior written consent of the victim.* [Emphasis added.]

[13] MCL 330.1750(2); MSA 14.800(750)(2), which states the pertinent scope of the psychologist and psychiatrist privilege, provides:

Privileged communications *shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings,* unless the patient has waived the privilege, except in the circumstances set forth in this section. [Emphasis added.]

[14] Further distinction between the sexual assault counselor-victim and psychologist-patient privileges is possible, on the basis of the language of the statutes, but such distinction draws too fine a line. Both statutes bar admission of the privileged material in civil or criminal proceedings absent a waiver.

[15] The statute concerning social worker-client communications provides both that there not be compelled disclosure of communications with clients and that the relevant communication is "confidential." Confidentiality concerns the extrajudicial disclosure of information, not its disclosure in judicial proceedings. *Howe v Detroit Free Press,* 440 Mich 203, 229; 487 NW2d 374 (1992) (opinion of BOYLE, J.), citing 23 Wright & Graham, Federal Practice & Procedure, § 5437, p 892, n 15.

The relevant statute regarding the juvenile diversion records contemplates that the records may be revealed by court order "to persons having a legitimate interest." MCL 722.828(1); MSA 25.243(58)(1). Even though such legitimate interest may be limited to making decisions regarding diversion of a minor, MCL 722.829(1); MSA 25.243(59)(1), the allowance for *some* use of the records by a court and the absence of an express preclusion from use of the records in judicial proceedings causes me to find that the privilege provided by this statute is not absolute. *Pennsylvania v Ritchie, supra* at 57-58.

[16] While the statutes articulating the scope of the sexual assault counselor-victim and psychologist-patient privileges allow for compelled waiver in limited situations, the express evidentiary bar in criminal or civil proceedings, absent voluntary waiver, provides a definitive indication of an intent that the prohibition in these situations be absolute.

[17] Analysis of the bill creating the sexual assault counselor privilege notes that

[v]ictims of sexual assault or domestic assault are often gravely in need of counseling to cope with the trauma of their experiences. The assurance of the confidentiality of all communications between a counselor and a client is vital to effective therapy. Those victims of abuse or assault who receive their counseling from members of the clergy or from licensed professionals such as psychiatrists, psychologists, or social workers have that assurance.... [House Legislative Analysis, HB 4609, November 16, 1983.]

[18] The specter of disclosure of records of these privileged communications, even to a trial judge for in camera review, threatens the basic tenet of confidentiality upon which these relationships are founded. This intrusion should not be underestimated. Slovenko, *Psychiatry and a second look at the medical privilege,* 6 Wayne L R 175, 185 (1960). The process also creates the possibility of greater exposure of the privileged

communications, dependent upon the decision of the trial judge. While this potential damage to the relationship engendered by a privilege must be considered, however, it must also be recognized that review by a judge in chambers is significantly less invasive of that relationship than ultimate disclosure to a defendant. Cf. *Zolin, supra* at 568 ("[D]isclosure of allegedly privileged materials to the district court for purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege").

[19] I limit my analysis, as does the majority, to the defendant's due process right to a fair trial. *Ante* at 649, n 1. The right of confrontation has been found to be limited to a right at trial to unfettered cross-examination, not "a constitutionally compelled rule of pretrial discovery." *Pennsylvania v Ritchie, supra* at 52. But see *id.* at 61-62 (Blackmun, concurring in part and concurring in the judgment) ("[T]here might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible *effective* cross-examination of a crucial prosecution witness." Emphasis added.) See also *Kentucky v Stincer,* 482 US 730, 738, n 9; 107 S Ct 2658; 96 L Ed 2d 631 (1987). The application of the right of compulsory process to the current problem remains unsettled, but has been found to be sufficiently protected by a due process consideration. *Ritchie, supra*at 56.

[20] *United States v Nixon,* 418 US 683, 710; 94 S Ct 3090; 41 L Ed 2d 1039 (1974).

[21] Const 1963, art 1, § 24 provides, in relevant part:

(1) Crime victims, as defined by law, shall have the following rights, as provided by law:

The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.

[22] The jurisprudence of our sister states has tended to take an all or nothing position, *ante* at 670-677, and therefore also fails to provide much constructive assistance.

[23] The statutory exclusion in *Ritchie* severely limits its usefulness in determining the proper scope of an absolute privilege. The case is instructive, however, in its express caution against application of its holding to absolute privileges.

[24] I do not fault the majority for acceding to the temptation to simplify the trial court's duty at the in camera stage to one of mere verification. *Ante* at 679, n 40. However, where such simplification is at the expense of important and compelling considerations that can only be given sufficient consideration by the trial court through review of the privileged information, the cost exacted in the name of administrative efficiency is too high.

[25] The informer's privilege is "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro* at 59.

[26] The opinion suggests that the scope of executive privilege may be limited to the protection of military or diplomatic secrets. *Id.* at 710-711.

[27] It is important to note that *Nixon* concerned the claim of a defendant's privilege, rather than a claimant's assertion of privilege against a defendant's due process right. *Nixon* is important for our purposes in acknowledging the validity of privileges, asserted within their proper scope, and the Court's continued attempt to balance the protection provided by a privilege against a legitimately demonstrated need for the protected information.

[28] express no opinion on whether the result in this case would have been different if the statute had protected the CYS files from disclosure to anyone, including law enforcement and judicial personnel. [*Ritchie* at 57, n 14.]

[29] A third, less severe remedy may be satisfactory in some cases in which the witness' privilege does not relate to testimony concerning a substantive element of the defendant's case. In such instance, the witness' testimony need not be completely barred, and only the portion related to the privileged information struck. Weisberg, Defendant v Witness: *Measuring confrontation and compulsory process rights against statutory communications privileges,* 30 Stan L R 935, 982 (1978).

[30] Weisberg, n 29 *supra* at 986-987. While Weisberg would include the privilege holder and the party to whom the privileged communication was directed in this meeting, a preferable approach is to at least initially allow the prosecutor to represent the privilege holder's interests. Forcing the privilege holder to argue the importance of the privileged communication might well unintentionally visit upon that party the very same injury that would result from disclosure of the privileged material.

[31] Even where a privilege is statutorily absolute, discovery of privileged information may not always preclude achievement of the goal sought through the communication. In a given case, the relationship developed between a patient and counselor may be strong enough to withstand limited disclosure of past communications, or the relationship may not yet have developed to a point of confidentiality that would be endangered by disclosure. Where a patient is engaged in alternate forms of counseling, disclosure of information from one counselor may not preclude achievement of the goal of the patient's treatment through another. On the other hand, where resolution of a patient's emotional or psychological problem is only being pursued through treatment by a single counselor with whom the patient has built a relationship of trust, engendered by the privileged nature of their communication, disclosure of such communications may preclude further progress in the patient's treatment. These examples serve only as illustrations, in a patient-counselor setting, of the myriad of possible scenarios that may be present in a particular case, and are in no way exhaustive of the situations or relationships that may allow for, or counsel against, disclosure of absolutely privileged information.

[32] theory at least, courts are not so well-equipped as legislatures either to determine the validity of the value judgments involved in creating particular privileges or to assess "empirically ... the general harm that overriding a privilege may cause privilege holders." [White, *Evidentiary privileges and the defendant's constitutional right to introduce evidence,*

80 J Crim L & Criminology 377, 425, quoting Weisberg, n 29 *supra* at 971. Additional citation omitted.]

[33] Further useful guidance may be provided to the trial court in considering Caruso's materiality claim by Veilleux, anno: *Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts,* 83 ALR4th 685.

[34] The privilege may be respected by excision of material on grounds of relevancy or admissibility, *Nixon, supra*at 715.

[35] The refusal to order disclosure has been reviewed under an abuse of discretion standard, *United States v Moore,* 954 F2d 379, 381 (CA 6, 1992); *United States v Jenkins,* 4 F3d 1338, 1341 (CA 6, 1993).

[36] The need to conduct effective cross-examination is one of three principles that one commentator has suggested for appropriate analysis of discovery requests for privileged information. White, n 32 *supra.* In addition to the cross-examination principle, Professor White would examine the privilege at issue to determine if it is designed in significant part to assist the government in performing one of its essential functions, such as law enforcement, see *Roviaro v United States, supra* (informants privilege); or was capable of even-handed application, see *Washington v Texas,* 388 US 14; 87 S Ct 1920; 18 L Ed 2d 1019 (1967) (a state statute that barred testimony of a coparticipant in a crime when offered by defendants as exculpatory evidence, but allowed as evidence for the prosecution, denied the defendant his right to compulsory process). These principles may be useful to determine when a privilege has tipped the fair balance at trial in favor of the government and make it appropriate to assign to the prosecution the burden of disproving the materiality and need for the privileged information requested. Because the only principle at issue in the present cases, that of effective cross-examination, is considered in the necessity prong of the disclosure evaluation, further development of the applicability of these principles at this time is unwarranted.

[37] Compare one commentator's suggestion that the materiality standard for private privileges is whether the evidence is sufficiently probative to probably create a reasonable doubt regarding the truth of a witness' testimony if offered to impeach or probably create a reasonable doubt regarding a defendant's guilt if offered on the merits of the defense. Weisberg, n 29 *supra* at 959-964.

[38] While this final standard might appear to beg the core question we have attempted to answer today, it may also acknowledge the possibility of some limited privilege whose importance transcends the determination of guilt or innocence (such as strategic military secrets), allow for the accommodation of the defendant's interests in a manner outside the conventional realm of discovery, or encompass the discretionary issue whether the prejudicial effect of the evidence outweighs its probative value. These explanations, at least to some degree, may be subsumed by the intermediate review of absolute privileges I have described.

[39] The disclosure decision does not contemplate the eye of the advocate, but where questions arise in the process in which the assistance of counsel would be helpful, it is within the discretion of the trial court to seek their assistance, *Nixon, supra* at 715, n 21, subject to appropriate directive that unless disclosure is ordered, no in camera information is to be revealed to anyone, including the defendant. *Id.* at 716.

[*] Similarly, see *Zaal v State,* 326 Md 54; 602 A2d 1247 (1992).

People v Yost

749 N.W.2d 753 (2008)

278 Mich. App. 341

PEOPLE of the State of Michigan, Plaintiff-Appellee,

v.

Donna Alice YOST, Defendant-Appellant.

Docket No. 270938.

Court of Appeals of Michigan.

Decided March 27, 2008, at 9:15 a.m.

760*760 Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, Kurt C. Asbury, Prosecuting Attorney, and 761*761 Martha G. Mettee, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by Gail Rodwan) for the defendant.

Before: FITZGERALD, P.J., and MARKEY and SMOLENSKI, JJ.

PER CURIAM.

Defendant appeals as of right her jury conviction of second-degree murder and first-degree felony murder predicated on an underlying felony of first-degree child abuse. See MCL 750.316, MCL 750.317, and MCL 750.136b(2). On appeal, defendant argues that the trial court committed several errors that deprived her of a fair trial. Defendant contends that the trial court erred when it prevented her from presenting testimony about her limited intellectual functioning and by preventing her from calling an expert toxicologist. Defendant also contends that the trial court violated her right to confront the witnesses against her when it allowed the prosecution to play a videotape of an informant's testimony. Finally, defendant contends that the trial court erred when it permitted the prosecution's medical examiner to offer an opinion that seven-year-old children do not have the maturity to decide to end their own lives and when it permitted the prosecution to elicit testimony about other acts of abuse or neglect by defendant against her children to show that defendant had bad character and acted in conformity with that character. We agree that the trial court should have permitted defendant to present evidence about her limited intellectual functioning, should have allowed defendant to call a toxicologist, and erred when it permitted the prosecution to elicit testimony about defendant's involvement with Child Protective Services without appropriately limiting the nature and the extent of the testimony. Because these errors deprived defendant of a fair trial, we reverse defendant's convictions, vacate her sentence, and remand for a new trial.

I. Nature of the Case

This case arises out of the death of defendant's seven-year-old daughter, Monique, on October 10, 1999.[1] On that day, defendant was home alone with Monique. Sometime after 11 a.m., Monique left home without permission. When Monique returned, defendant angrily told her to take a nap on the couch. At around 6 p.m., defendant tried to wake Monique, but Monique did not respond. Shortly thereafter, a couple who lived next door came over to visit. Defendant again tried to wake Monique but to no avail. When one of the neighbors entered the room where Monique was lying, Monique suffered a seizure and stopped breathing. The neighbor began efforts to resuscitate Monique and told his girlfriend to call for help. Emergency personnel arrived shortly thereafter. The emergency personnel immediately transported Monique to the hospital, where she was pronounced dead.

After conducting an autopsy, the medical examiner was not able to determine the cause and the manner of Monique's death. But a blood test later revealed that Monique had a significant amount of Imipramine, an antidepressant drug, in her system. Monique had months earlier been prescribed the Imipramine to control bedwetting 762*762 and anxiety. On the basis of the level of Imipramine found in Monique's body and the ratio

of Imipramine to its metabolite, the medical examiner concluded that Monique died of acute Imipramine poisoning. Further, the medical examiner determined that it would take more than 90 of the pills prescribed to Monique to reach the level of Imipramine found in her system. Because the medical examiner found no pill residue in Monique's stomach, he concluded that the pills must have been dissolved in liquid before Monique ingested them. From this evidence, the medical examiner concluded that Monique's death was a homicide.

The prosecution brought two counts against defendant. The first count was for first-degree premeditated murder and the second count was for felony murder with first-degree child abuse as the underlying felony. The primary issues at trial were (1) whether Monique died from an overdose of Imipramine and, if she did, (2) whether defendant caused Monique to ingest the Imipramine.

The prosecution centered its case on the unlikelihood that Monique would deliberately or accidentally take such a large overdose of Imipramine along with evidence that defendant had both a motive and the opportunity to cause Monique to ingest the Imipramine. For her defense, defendant presented evidence that Monique had a heart defect that may have caused her death and tried to present evidence that the level of Imipramine found in Monique was not lethal. The defense also suggested that Monique suffered from depression and may have deliberately or accidentally ingested the Imipramine.

After a lengthy trial, the jury found defendant not guilty of premeditated murder under the first count, but convicted defendant of the lesser-included offense of second-degree murder, and found defendant guilty of first-degree felony-murder under the second count. The trial court sentenced defendant to life in prison without the possibility of parole for the felony-murder conviction.

This appeal followed.

II. Evidence of Defendant's Intellectual Capabilities

Defendant first argues that the trial court abused its discretion when it prevented defendant's expert psychologist, Dr. Siroza VanHorn, from testifying about defendant's intellectual functioning, cognitive processing, judgment, and problem solving and parenting abilities. Defendant also contends that the trial court erred when it prevented another daughter of the defendant, Roxanne Davis, from testifying about her mother's limited intellectual capabilities and how these limitations affected defendant's ability to function in the family and react to life situations. We agree that the trial court erred

when it prevented VanHorn and Davis from testifying about defendant's limited intellectual capability as a means of shedding light on defendant's behaviors and statements.

A. Relevant Trial Testimony and Court Rulings

At trial, the prosecution spent a significant portion of its case eliciting testimony about defendant's unnatural reactions and conduct during the events leading up to and surrounding Monique's death and the subsequent investigation. The prosecution used the testimony as proof of motive and consciousness of guilt.

Several witnesses offered testimony that together tended to suggest that defendant had deliberately tried to keep the prosecutor from interviewing Monique as part of an investigation into allegations that a houseguest had sexually abused Monique. Because this behavior was not consistent with how a mother would normally respond 763*763 to allegations of abuse against her child, it strongly supported the prosecution's theory that defendant had an ulterior motive to prevent Monique from participating in the investigation.

The prosecution also elicited testimony from medical personnel and persons who attended Monique's funeral that defendant's reaction to her daughter's death was inconsistent with that of an innocent mother who had lost a child.

One of the paramedics who responded to the Yost home testified that defendant was unemotional and that after she told defendant that her daughter was in grave condition, defendant merely responded, "okay." This was in contrast to defendant's husband, who was "pretty emotional; he was crying." The paramedic also noted that defendant declined the invitation to ride in the ambulance with Monique. Another paramedic testified that defendant's reaction was "odd." He said that defendant answered all his questions, but that she was "unemotional" and that this was not "something I typically see . . . when we have a sick child."

A nurse at the hospital where Monique was treated testified that defendant turned her emotions on and off at will. She explained that when she entered the room and made eye contact with defendant, defendant would cry and exclaim "my baby, my baby." But that when she left the room, defendant would immediately stop crying and become unemotional.

Likewise, Monique's family therapist testified that she went to Monique's funeral and observed that defendant had an unusual demeanor: she appeared nervous.

In addition, the prosecution made effective use of several recorded statements of conversations between defendant and the officers investigating Monique's death. In

these conversations, defendant made seemingly odd statements about Monique's death and the events surrounding the investigation. These statements suggested that defendant had a guilty conscience or was, at the least, apathetic about her daughter's death. In addition to these recordings, two officers testified about defendant's reactions to their investigation into Monique's death.

Amado Arceo, who was an officer of the Michigan State Police, testified that defendant said she felt "responsible" for Monique's death and that she deserved a second chance. He also testified that he asked defendant about the worst thing that ever happened to her and defendant responded, "Two weeks ago, I was in jail, and Monique lying to everybody."

Detective Dean Vosler also testified that defendant's reactions were odd. He stated that the only time defendant showed any emotion about her daughter was when she described being angry with her. Vosler explained:

> *I never noticed in any of the interviews with [defendant] that she cried from — over Monique's death. She cried because she thought she was in trouble. She told me how it was hard for Lonnie and Josh and Jessica, Monique's death, but she never even told me it was hard for her. It didn't appear to me that she felt any sorrow for her.*

Vosler also said that defendant told him that she did not mean to kill her daughter and that she should have watched her more closely.

As an alternative explanation for defendant's seemingly odd behaviors and comments, defendant's trial counsel wanted to present expert testimony about defendant's limited intellectual capabilities. Indeed, during opening arguments, defendant's attorney noted that defendant was mentally challenged and argued that, because of her limitations, defendant appeared 764*764 confused and could be easily manipulated into making apparently incriminating statements. Defendant's trial counsel stated that a psychologist would testify about defendant's limited intellectual capacity and explain how it affected defendant's ability to communicate.

However, on March 21, 2006, which was after the start of the trial, the prosecution moved in limine to prevent defendant from eliciting testimony that defendant had "diminished capacity." Specifically, the prosecution argued that defendant was improperly attempting to put forth evidence that she could not form the requisite intent to commit the charged crimes and improperly attempting to argue that defendant's statements to the police were not voluntary. The trial court addressed the motion before taking testimony on March 23.

Defendant's trial counsel denied that he was presenting a diminished-capacity defense. He explained that he was not attempting to show that defendant lacked the mental capacity to form the requisite intent to commit the charged offenses. Rather, he stated that the sole defense was that defendant did not commit the charged offenses.

Defendant's trial counsel also denied that any testimony about defendant's limited intellectual capabilities would be offered to challenge the voluntary nature of

defendant's interviews with the police or to bolster defendant's credibility. Defendant's trial counsel stated that he wanted to offer evidence concerning defendant's intellectual functioning, cognitive processing, judgment, and problem-solving and parenting abilities, which were placed at issue by the prosecution's proofs. The purpose of the testimony, he contended, was to "put into context and explain" the evidence offered by the prosecution in these areas. Defendant argued that evidence of defendant's limitations would help the jury understand how defendant displayed her emotions and why she would not ask a neighbor to assist with transportation issues, and would also explain the context of statements that appear to be untruthful or indicate a sense of responsibility for Monique's death.

Defendant's trial counsel also argued that the jury needed this evidence to understand the context of defendant's statements to the police. Specifically, he contended that the interrogating officers could easily manipulate defendant into making statements that made her look guilty. Defendant's trial counsel also stated that this evidence would help the jury understand the context underlying the testimony about defendant's involvement with protective services personnel and the statements by the various caseworkers with whom she was involved. He explained that the evidence would "explain why she said what she did, or the way she said it, or how she said it, and put[ ] it into context why some people either misunderstood statements or why someone [who] was functioning at a second grade level would act in a certain way or talk in a certain way."

At the close of these arguments, the trial court indicated that there were four areas that defendant's expert clearly could not go into: the trial court precluded the defense from (1) offering a diminished capacity defense, (2) arguing that defendant's statements to the police were not voluntary, (3) using the evidence to bolster defendant's credibility, and (4) using the evidence to argue innocence. Notwithstanding this, the trial court recognized that the testimony might be relevant for purposes other than those four areas. But, rather than rule immediately, the trial court stated that it would deal with those issues as they came up outside the presence of the jury and would create a separate record if necessary.

765*765 After trial resumed, the defense called Roxanne. Defendant's trial counsel tried to elicit testimony from Roxanne concerning her mother's abilities to plan and communicate with others, but the trial court sustained the prosecution's objections to these questions. After the trial court excused the jury, defendant's trial counsel indicated that he wanted to elicit testimony from Roxanne concerning her mother's lack of communication skills and lack of emotion. He also indicated that he wanted to ask Roxanne if she thought her mother was capable of killing Monique. Defendant's trial counsel indicated that he thought Roxanne could properly testify about whether defendant had the intelligence to plan the murder, execute the plan, and then cover it up.

The trial court specifically precluded defendant from presenting any evidence that defendant did not have the intelligence to carry out the murder. It also prohibited the witness from testifying about defendant's lack of communication skills or about

abnormal behavior resulting from defendant's slowness because "that is going to deal with diminished capacity." And, it further ruled that, even if the evidence was relevant for a proper purpose, the relevance was outweighed by its prejudicial value.

After Roxanne testified, defendant's trial counsel called VanHorn as an expert psychologist for a separate record. Notwithstanding the fact that the testimony was part of a separate record, the prosecution objected on the grounds that any opinion that VanHorn had must have been formed on the basis of inadmissible hearsay statements and, therefore, that she would not be able to offer an opinion under MRE 703. The trial court ruled that the witness could not testify about anything that defendant told her.

VanHorn then began to explain that she had performed a mental-status examination of defendant. The prosecutor again objected on the ground that the examination was based on inadmissible hearsay. The court sustained the objection. Defendant's trial counsel then asked the witness if all the tests that she administered required input from defendant, to which she replied, "yes." VanHorn stated that she used the tests, some personal history, and defendant's records. The trial court again sustained the prosecution's objection on hearsay grounds. After this ruling, defendant's trial counsel responded, "Then I guess we won't be using her as a witness, Judge, because the State — you — you know, has basically cut it — gutted it out."

The defense proceeded to call a different witness, who testified for approximately 23 minutes. Sometime after this witness testified, defendant's trial counsel indicated that he wanted to clarify that during VanHorn's testimony he was relying on MRE 803(4) for the admissibility of defendant's statements to VanHorn. The trial court indicated that defendant failed to lay a foundation for the admission of the statements based on medical treatment and had waived the issue by not raising it earlier. The trial court further indicated that defendant's statements would not be admissible if the statements were not made for the purpose of treatment.

B. Analysis

1. Standard of Review

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v. Martin,*271 Mich.App. 280, 315, 721 N.W.2d 815 (2006). "However, whether a rule or statute precludes admission of evidence is a matter of law and is reviewed de novo." *Id.*

A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes. 766*766 *People v. Young,* 276 Mich.App. 446, 448, 740 N.W.2d 347 (2007). However, it is necessarily an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Martin, supra* at 315, 721 N.W.2d 815.

2. Diminished-Capacity Defense

As already noted, the trial court ruled that defendant could not elicit testimony from Roxanne concerning defendant's limited intellectual capabilities because that evidence pertained to a diminished-capacity defense. Likewise, with regard to VanHorn's testimony, the prosecution argues on appeal that defendant improperly tried to present a diminished-capacity defense through VanHorn's testimony. Therefore, as a preliminary matter, we will first examine whether, and to what extent, evidence tending to demonstrate that a defendant has limited intellectual functioning may still be admitted at trial after the abolition of the diminished-capacity defense.

In *People v. Carpenter,* 464 Mich. 223, 627 N.W.2d 276 (2001), our Supreme Court addressed the continuing validity of the diminished-capacity defense in Michigan. Before the decision in*Carpenter,* a defendant who was otherwise legally sane could present evidence of some mental abnormality to negate the specific intent required to commit a particular crime. *Id.* at 232, 627 N.W.2d 276. The Court noted that the theory underlying the diminished-capacity defense was that a defendant with a mental defect that prevented the defendant from forming the specific intent necessary to commit the crime could only be convicted of a lesser offense not requiring that particular mental element. *Id.*

In examining the continued viability of that defense, our Supreme Court observed that the Legislature had enacted a comprehensive statutory scheme concerning defenses based on either mental illness or mental retardation. *Id.* at 230-232, 236, 627 N.W.2d 276. The enactment of this scheme, our Supreme Court concluded, demonstrated the Legislature's "intent to preclude the use of *any* evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *Id.* at 236,627 N.W.2d 276 (emphasis in original). For this reason, the Court held that the defense of diminished capacity was no longer viable after the enactment of the statutory scheme. *Id.* at 241, 627 N.W.2d 276.

The key component of the diminished-capacity defense is the evidence that the defendant could not form the requisite intent to commit the crime. *Id.* at 232, 627 N.W.2d 276. That is, the defense is an attempt to avoid or reduce criminal responsibility for a particular offense on the basis of the lack of mental capacity to form the specific intent required as an element of the offense. *Id.* at 241, 627 N.W.2d 276. Hence, a

defendant is not entitled to offer evidence of a lack of mental capacity for the purpose of avoiding or reducing criminal responsibility by negating the intent element of an offense. But this does not mean that a defendant who is legally sane can never present evidence that he or she is afflicted with a mental disorder or otherwise has limited mental capabilities.

Relevant evidence is generally admissible, except as provided by the United States and Michigan constitutions and other rules. *People v. Sabin (After Remand),* 463 Mich. 43, 56, 614 N.W.2d 888 (2000), citing MRE 402. Because our Supreme Court has determined that a defendant may not present evidence of diminished mental capacity for the purpose of negating specific intent, the trial court could properly exclude evidence of defendant's mental limitations offered for that purpose. 767*767 *Carpenter, supra* at 236, 627 N.W.2d 276. However, "[t]hat our Rules of Evidence preclude the use of evidence for one purpose simply does not render the evidence inadmissible for other purposes. Rather, the evidence is admissible for a proper purpose, subject to a limiting instruction under MRE 105." *Sabin, supra* at 56, 614 N.W.2d 888. Therefore, defendant could present evidence of her limited intellectual capabilities if offered for a relevant purpose other than to negate the specific intent element of the charged crimes. See, e.g., *People v. Manser,* 250 Mich.App. 21, 33; 645 N.W.2d 65 (2002) (noting that our Supreme Court has held that expert testimony can be relevant and helpful to explain a specific behavior that might otherwise be misconstrued by the jury).

Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Although a defendant may no longer present evidence of diminished capacity to negate the intent element of a crime, there are circumstances where a defendant's mental capacity may make a fact that is of consequence to the determination of the action more or less probable without such evidence being offered to negate the specific-intent element of the charged offense.

For example, it is well settled that identity is an element of every offense. *People v. Oliphant,*399 Mich. 472, 489, 250 N.W.2d 443 (1976); *People v. Kern,* 6 Mich.App. 406, 409, 149 N.W.2d 216 (1967). And, therefore, where identity is in dispute, a defendant may properly present evidence concerning his or her mental capacity that tends to make it less probable that the defendant has been accurately identified as the perpetrator of the crime. Thus, where an offense involved such complicated and specific actions that it could only have been committed by a person with very high intelligence, a defendant could properly submit evidence that he or she had below-average intelligence because that evidence would tend to make it less probable that the defendant was the perpetrator of the crime. Similarly, if the crime at issue was committed in an elevator, a defendant could properly submit evidence that he or she has a pathological fear of elevators. Again, such evidence would involve the defendant's mental faculties, but would not be offered to negate specific intent. Rather, it would be offered as evidence that the defendant was less likely to be the perpetrator of the crime.

In the present case, the prosecution's theory was that defendant caused Monique to ingest an overdose of Imipramine. However, there was no direct physical evidence or eyewitness testimony that connected defendant to Monique's ingestion of the Imipramine. Further, although the prosecution presented evidence that tended to prove that defendant had both a motive and the opportunity to kill Monique, this evidence was not particularly compelling and did not negate the possibility that Monique either accidentally or deliberately took an overdose of the medication. As a result, one of the key questions at trial was whether Monique ingested the Imipramine on her own, resulting in either a deliberate or accidental overdose, or whether defendant caused Monique to ingest the Imipramine. For this reason, the circumstances, timing, and context surrounding defendant's statements and actions became highly relevant to determining whether defendant caused Monique to ingest the Imipramine and, if she did, what defendant's state of mind was at the time. Indeed, the prosecution relied heavily on testimony concerning defendant's 768*768 statements and actions from both before and after Monique's death, which suggested that defendant was attempting to cover up her involvement in Monique's death or otherwise had a guilty conscience.

In response to the prosecution's evidence, defendant's trial counsel attempted to show that defendant's statements and actions were not evidence of guilt when understood in light of her limited education and intellectual capabilities. Likewise, defendant's trial counsel wanted to present evidence that a person of defendant's intellect is easily manipulated into making statements that might appear to reflect a guilty conscience. Defendant's trial counsel did not propose to use the evidence of defendant's limited mental faculties to negate the intent element of the charged offenses. Rather, defendant's trial counsel wanted to place defendant's statements in context so that the jury could fully and fairly determine whether defendant's statements and actions were truly indicative of a guilty conscience or were merely misinterpreted by the listeners and observers who witnessed the statements and actions. Therefore, to the extent that this evidence was offered for a purpose other than to negate the intent element of the charged offenses, the evidence was not barred by the rule stated in*Carpenter, supra,* even though it dealt with defendant's limited mental capacity. See *Sabin, supra* at 56, 614 N.W.2d 888.

3. Roxanne's Lay Testimony

At trial, defendant's counsel attempted to ask defendant's daughter Roxanne about her opinion of defendant's ability to plan and about her mother's communication skills. After the jury was excused, the trial court admonished the witness that she may not "in any way imply or give any indication that you think that your mother's not capable of committing this offense." The trial court also ruled that defendant's trial counsel would

not be permitted to elicit testimony from Roxanne concerning defendant's communication skills. The trial court explained that such testimony is impermissible diminished-capacity evidence. Finally, the trial court indicated that defendant's trial counsel would not be permitted to elicit testimony that defendant's behavior was "out of norm because of her slowness." The trial court did permit defendant's counsel to elicit testimony about defendant's reactions to Monique's death, that were actually observed by Roxanne. Thereafter, defendant's counsel did not attempt to elicit testimony of this nature.

Under MRE 701, a witness who is not testifying as an expert, may only testify in the form of opinions or inferences that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Roxanne's testimony established that, given her own perceptions of defendant, she had the ability to offer testimony and an opinion about her mother's ability to plan ahead, her mother's communication skills, and how her mother's intellectual limitations affected her mother's behavior. Further, this testimony would have been helpful for the jury in determining whether the statements and behavior offered into evidence by the prosecution were inconsistent with innocence. Hence, this testimony met the requirements of MRE 701.

Notwithstanding that the requirements of MRE 701 were met, defendant's trial counsel did not establish that the charged offense required any particular level of intelligence to carry out. As a result, the relevance of any testimony by Roxanne concerning whether her mother was intelligent enough to carry out the actions necessary to commit the crime was at best 769*769marginal. Likewise, defendant's trial counsel's question about whether defendant was the type of person who "would plan things out or act on the moment," implicated whether defendant was mentally capable of premeditation. Therefore, the trial court properly prevented testimony of this nature as both likely offered to improperly negate the intent element of the charged offenses and, to the extent that it had marginal relevance, because its probative value was substantially outweighed by the danger of unfair prejudice. MRE 403.

Roxanne could, however, properly testify about defendant's poor communication skills and how defendant's behaviors might seem unusual because of her "slowness" without running afoul of the rule stated in *Carpenter.* Additionally, this evidence was not substantially outweighed by unfair prejudice to the prosecution. Any unfair prejudice could have been dealt with by the trial court's instructing the jury that it could only use the testimony to further its understanding of defendant's statements and behavior. See MRE 105. Because this testimony was particularly relevant to the facts of this case and not substantially outweighed by unfair prejudice, the trial court's decision to prevent defendant from eliciting this testimony fell outside the range of reasonable and principled outcomes. *Young, supra* at 448, 740 N.W.2d 347. Consequently, the trial court abused its discretion when it prohibited defendant from eliciting testimony from Roxanne about defendant's communication skills and behaviors.

4. VanHorn's Expert Testimony

a. Preservation

As a preliminary matter, we will first address whether defendant properly preserved this issue before the trial court.

After the trial court's earlier ruling on the prosecution's motion to prevent defendant from offering a diminished-capacity defense, defendant's trial counsel called VanHorn to the stand outside the presence of the jury to create a separate record of her testimony. Defendant's trial counsel then proceeded to ask questions of the witness. The prosecution repeatedly objected on the basis of hearsay. And the trial court sustained each objection. Indeed, the trial court would not even permit the defense to create a separate record of the VanHorn's testimony for evaluation by this Court. After this, defendant's trial counsel elicited testimony from VanHorn that clarified that her opinion would be based entirely on defendant's records, defendant's self-reported background information, and tests that relied on defendant's responses to questions. The prosecution again objected on the basis of hearsay, and the trial court sustained the objection. Thereafter, defendant's trial counsel abandoned further questioning of the witness.

Although it does not appear from this isolated portion of the record that the trial court completely barred defendant from using this witness, the trial court's rulings with regard to VanHorn must be examined in light of the trial court's earlier rulings on expert testimony.

On March 21, the defense called Lisa Gano. Gano testified that she had a masters degree in social work and had evaluated Monique for special-education purposes and helped create Monique's individualized education program. During the course of Gano's testimony, the defense tried to admit records generated as part of Gano's evaluation. The prosecution objected that the records contained statements by Monique, teachers and others who took part in evaluating Monique. The court initially ruled that Gano could not testify about anything anyone told her and could not 770*770 offer a "conclusion that would be drawn from these things. . . ." Thereafter, Gano was only permitted to testify about her conclusions to the extent that the conclusions were based solely on her own observations of Monique.

After a time, defendant's trial counsel noted that Gano should be allowed to base her opinion on hearsay statements because the statements were made in furtherance of Monique's diagnosis and treatment. The next day, the court determined that Gano could testify about, and base her conclusions on, statements by Monique and Monique's answers to test questions. But the trial court prohibited the witness from testifying about any statements made by defendant and precluded any opinion testimony to the extent that the testimony was based on statements by Monique's teachers or defendant. Hence, the trial court eventually permitted the expert witness to testify about and render an opinion based on hearsay, but only to the extent that the hearsay involved statements by Monique.[2]

Unlike the case with Gano, who diagnosed Monique for treatment purposes, the defense retained VanHorn two years before trial to evaluate defendant. For this reason, the defense could not rely on MRE 803(4) for the admission of defendant's statements to VanHorn or the admission of defendant's responses to questions asked as part of diagnostic tests. Consequently, in light of the trial court's previous rulings with regard to expert testimony, it was evident that the trial court's hearsay rulings effectively barred VanHorn from offering an opinion on defendant's limited intellectual functioning. And defendant's trial counsel cannot be faulted for not taking further steps to convince the trial court that the expert should be permitted to testify — he took all the steps reasonably necessary to preserve this issue for appeal.

b. Analysis

Under MRE 703, the "facts or data in the particular case upon which an expert bases an opinion or inference" must be in evidence. Hence, in order for VanHorn to offer an opinion that defendant had limited intellectual capabilities, Van-Horn's opinion had to be based on facts or data in evidence. By separate record, the defense established that VanHorn's opinion was based on defendant's statements about her background and history, on defendant's answers to psychological testing, and on records of defendant's prior treatment, as well as the treatment received by defendant's children. Therefore, before VanHorn could render her opinion, defendant had to demonstrate that the background statements, tests, and previous records, which VanHorn relied on to form her opinion about defendant's limited intellectual abilities, were admissible. At trial, the trial court summarily sustained the prosecution's objections based on hearsay. Consequently, whether the trial court erred depends on whether it properly excluded771*771 the evidence underlying VanHorn's opinion on hearsay grounds.

Hearsay is generally inadmissible. MRE 802. Hearsay is a "statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c).

Although VanHorn indicated that she relied on defendant's statements concerning her background and defendant's responses during testing, the mere fact that VanHorn relied on these statements does not necessarily mean that defendant had to offer the statements to prove the truth of the matters asserted. VanHorn may very well have been able to evaluate defendant's intellectual functioning on the basis of defendant's answers regardless of the veracity of those answers. For this reason, the defense could have offered the statements solely to clarify the basis of VanHorn's conclusions about defendant's intellectual abilities. Indeed, our Supreme Court has recognized that statements to a mentalhealth professional by a patient are often valuable for evaluation without regard to their truth. See *People v. Beckley,* 434 Mich. 691, 728, 456 N.W.2d 391 (1990) (opinion by BRICKLEY, J.) (noting that mentalhealth professionals generally only receive information from the patient and that they start "with the basic assumption that the history they receive is what the patient believes to be the truth, not necessarily what actually is the truth"). Thus, the fact that the tests VanHorn performed on defendant reflect defendant's answers does not necessarily require a conclusion that the tests or the answers were inadmissible hearsay.

Likewise, VanHorn may have been able to use the background information for evaluation without regard to the truth of the statements concerning defendant's background. Therefore, to the extent that the tests and background information were not offered to prove the truth of the assertions made as part of the test or the truth of the background information, the tests and background information were not hearsay and the trial court erred in excluding them on this basis. MRE 801(c).

Furthermore, to the extent that the tests could be undermined by answers designed to skew the results, that possibility is a matter that goes to the weight of VanHorn's opinion, which the prosecution could have pursued on cross-examination or through its own expert. In order to reduce prejudice, the trial court could also have instructed defendant's trial counsel to limit his questions to eliciting testimony from VanHorn that she performed tests and that the tests were based on defendant's responses without getting into the details of the responses. The same could have been done for the background information.

To the extent that VanHorn's opinion was based on previous records, those records likely were admissible under a hearsay exception. VanHorn stated that she evaluated records that pertained to the prior treatment of defendant's children and defendant. The records themselves were likely admissible as records of regularly conducted activity. MRE 803(6). In addition, the statements within the records were likely admissible as statements made for the purpose of medical treatment or diagnosis in connection with treatment. MRE 803(4).

Because the evidence relied on by VanHorn was likely not hearsay or was admissible under a hearsay exception, the trial court's decision to prevent VanHorn from offering an opinion about defendant's limited faculties on the basis that this evidence was inadmissible fell outside the range of reasonable and principled outcomes. *Young, supra* at 448, 740 N.W.2d 347. 772*772 The trial court erroneously deprived defendant of the opportunity to present expert testimony about her limited intellectual abilities for the

purpose of explaining how the limitations might explain the previously admitted evidence concerning defendant's behaviors and statements.

C. Conclusion

The trial court abused its discretion when it prevented Roxanne from testifying about defendant's poor communication skills and behaviors and how they might seem unusual because of her "slowness." The trial court also abused its discretion when it prevented defendant's psychologist from testifying about her conclusions regarding defendant's limited intellectual functioning and how that functioning might have affected defendant's communication skills and behaviors. Finally, because a significant portion of the prosecution's case rested on defendant's reactions to the events surrounding her daughter's death and to statements made by defendant, which could not be fully evaluated by the jury without understanding defendant's intellectual limitations, we conclude that it is more probable than not that the error was outcome determinative. *People v. Lukity,* 460 Mich. 484, 495-496, 596 N.W.2d 607 (1999).[3] Consequently, defendant is entitled to a new trial on the basis of these errors. Further, although these errors warrant reversal of defendant's convictions and vacation of her sentence, because each of defendant's remaining claims of error are likely to arise again on retrial, we shall address them.

III. Right to Confront Witnesses

Defendant next argues that the trial court deprived her of her right to confront the witnesses against her when it admitted the 2004 special hearing testimony of Marisol Sarmiento, who served time in jail with defendant shortly after her arrest. Defendant notes that, although Sarmiento testified under oath before the trial court and defendant's trial counsel had the opportunity to cross-examine Sarmiento, defendant's trial counsel did not have all the information necessary to effectively cross-examine Sarmiento in 2004. Specifically, defendant claims that her trial counsel did not have the benefit of the testimony made by two additional inmate informants who testified at trial. Had defendant's trial counsel had this information, defendant contends, he could have questioned Sarmiento about the inconsistencies between the statements that defendant allegedly made to Sarmiento in jail and the versions that the other inmates testified about at trial. Defendant claims that because Sarmiento's testimony likely

affected the outcome of the trial, her conviction must be reversed on this basis. We disagree.

A. Procedural History and Relevant Testimony

In 2004 the prosecution moved for permission to preserve the testimony of a Sarmiento by videotape in lieu of in-court 773*773 testimony. The trial court held a hearing on the motion on August 24, 2004. At the hearing, the prosecution noted that Sarmiento had been incarcerated first in California and later in Washington, but was brought to Michigan under a material-witness warrant. The prosecution also noted that defendant had moved for an adjournment of the trial. And because Sarmiento was going to be deported, the prosecution argued that, rather than hold her until the trial, the prosecution should be permitted to preserve her testimony on the record at the hearing and later use it at trial. Although defendant's trial counsel recognized that Sarmiento was to be deported immediately after the hearing, he nevertheless objected to the preservation of her testimony. Defendant's trial counsel objected on the basis that he had not been given enough time to prepare and indicated that he might be prejudiced by the inability to use information on cross-examination that might only become available later.

After hearing the arguments, the trial court concluded that it was appropriate to take Sarmiento's testimony at the special hearing. The trial court found that defendant had had enough time to prepare. The trial court also rejected defendant's argument that it might not be fair to use the testimony at trial. The trial court explained:

> *If something comes up between now and — and then, the Court certainly would take that into consideration in determining whether or not that should be admitted to reflect upon that testimony, or even would take that into consideration in the argument that that testimony should be precluded that we've taken today.*
>
> *But I can't anticipate that at this point and would reserve my ruling until such circumstances should arise and the law be presented with respect thereto.*

During the hearing, Sarmiento testified under direct examination that she met defendant in jail in early 2000. She stated that defendant told her that Monique was on medication for bed-wetting and that she kept the medicine on a high shelf. Sarmiento also testified that defendant told her that on the day of Monique's death, Monique had run off and later came home. "And she [defendant] told her [Monique] to take a nap and she gave her a drink, and she put her medication [in] that drink. And she went to sleep; and, later on, she went to check up on her, and she didn't respond."

On cross-examination, defendant's trial counsel elicited testimony that Sarmiento had been incarcerated and was to be deported as part of the sentence for a federal conviction. Defendant's trial counsel also questioned Sarmiento about whether she had seen newspaper articles about the case while incarcerated with defendant. Sarmiento testified that she did not remember any articles. Sarmiento also testified that defendant said that she could not understand how her daughter got into the medication and said that she didn't really know what happened to her daughter. She also admitted that defendant stated that she did not have anything to do with her daughter's death. Sarmiento also testified that there was no one else listening in on that conversation.

On recross-examination, defendant's trial counsel attempted to get Sarmiento to acknowledge that defendant had told her that she was *accused* of putting medicine in her daughter's drink, but that she did not in fact do so. However, Sarmiento reiterated that defendant told her that she placed medicine in her daughter's drink. Sarmiento did acknowledge that before her conversation with defendant, she knew 774*774 that defendant was accused of killing her daughter by placing medicine in her drink. Sarmiento testified that she never came to the police with this information because defendant told her she did not kill her daughter and she (Sarmiento) assumed that defendant merely placed the bed-wetting medicine in her daughter's drink. Finally, Sarmiento testified that defendant showed no remorse and never cried or talked nice about her daughter.

At trial, defendant's trial counsel objected to the admission of Sarmiento's videotaped testimony on the ground that it violated defendant's right to confront the witnesses against her. Specifically, defendant's trial counsel raised the fact that he could not cross-examine Sarmiento on the basis of the actual testimony of the other inmates. However, the trial court determined that defendant did have a full opportunity to cross-examine Sarmiento and overruled the objection.

B. Analysis

A defendant has the right to be confronted with the witnesses against him or her. US Const, Am VI; Const 1963, art 1, § 20; *Crawford v. Washington,* 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). "`The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness.'" *People v. Watson,* 245 Mich.App. 572, 584, 629 N.W.2d 411 (2001), quoting *People v. Frazier (After Remand),* 446 Mich. 539, 543, 521 N.W.2d 291 (1994) (opinion by BRICKLEY, J.). The Sixth Amendment bars testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. *Crawford, supra* at 53-54, 124 S.Ct. 1354. A witness is considered unavailable if he or she is "absent from the hearing and the proponent of a statement has been unable to procure the

declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). On appeal, defendant has not challenged the unavailability of Sarmiento or the prosecution's due diligence. Hence, the only question is whether defendant had a prior opportunity to effectively cross-examine Sarmiento.*Crawford, supra* at 53-54, 124 S.Ct. 1354.

Defendant acknowledges that her trial counsel was present at the motion hearing at which the trial court ordered the preservation of Sarmiento's testimony and had the opportunity to cross-examine Sarmiento. Nevertheless, defendant contends that the cross-examination was not constitutionally adequate because it did not include information that only became available after the cross-examination. We disagree.

Defendant argues that, had her trial counsel known about the differences between Sarmiento's statements and the testimony of two jail inmates who testified about statements purportedly made by defendant, he would have been able to more effectively cross-examine Sarmiento about her version of defendant's statements. However, Sarmiento testified that defendant had told her about the events of the day of Monique's death when no one else was listening — and neither of the other witnesses indicated that they overheard defendant's conversation with Sarmiento. Hence, it is difficult to see how defendant could have impeached Sarmiento's testimony with knowledge of the specific details of the other witnesses' testimony. Indeed, the similarities largely outweighed the differences. Further, defendant's trial counsel effectively cross-examined Sarmiento about the statements defendant allegedly made and suggested that Sarmiento's recollection was inaccurate. Specifically, he interjected the possibility that Sarmiento 775*775 may be misremembering the statement and that, in fact, defendant merely told her that she was *accused* of having given her daughter medicine in a drink. He also asked Sarmiento about the possibility that she learned that defendant had placed medicine in her daughter's drink from newspaper articles. Finally, defendant's trial counsel elicited testimony from Sarmiento that defendant had denied causing her daughter's death. Thus, on the whole, defendant's trial counsel properly and effectively cross-examined Sarmiento on all the relevant issues. Therefore, the trial court did not deprive defendant of her right to confront Sarmiento by permitting the prosecution to admit Sarmiento's videotaped testimony.

IV. Defendant's Expert Toxicologist

Defendant next argues that the trial court denied her a fair trial when it prevented her from calling a different toxicologist after the prosecutor refused to agree to allow defendant's originally proposed toxicologist to testify. We agree that the trial court abused its discretion when it prevented defendant from calling a toxicologist at trial. Because this error was not harmless, defendant is entitled to a new trial.

A. Procedural Background and Relevant Testimony

In order to properly evaluate the propriety of the trial court's decision to prohibit defendant from calling a toxicologist, it will be necessary to examine the trial court's earlier rulings on the addition of witnesses. Further, because the prejudicial effect of this ruling is inextricably tied to defendant's ability to present similar evidence through her pathologist, it will be necessary to examine the trial court's decision to limit the testimony of defendant's pathologist.

1. Pretrial Rulings

After a hearing held on January 24, 2005, the trial court ordered defendant's trial counsel to file an amended witness list within seven days. On the order, the court noted that defendant's trial counsel was looking for a new forensic pathologist because the previously proposed pathologist had moved to Arizona. On February 1, 2005, defendant filed the amended witness list.

On February 16, 2005, defendant's trial counsel moved to adjourn the trial, which had been scheduled to begin that day, in order to review the jury questionnaires. The trial court held a hearing on the motion. At the hearing, the trial court indicated that the prosecutor had also orally requested a motion to adjourn the trial date for 30 days in order to investigate an undisclosed matter and schedule a status conference. On the basis of the total circumstances, the trial court concluded that the trial should be adjourned. At this point, the prosecution indicated that defendant had submitted several new witness lists, which included defendant's new pathologist, Dr. Stephen Cohle. In light of these additions, the prosecution asked the court to order defendant to add new witnesses only by motion and at least 30 days before trial.

After the hearing, the trial court signed a document labeled "Action in Court." Under the heading "Notes/Further Orders," the trial court ordered the adjournment of the trial date, set the date for a status conference, and ordered the parties to submit updated witness lists by February 18, 2005. In addition, there was a marginal notation written perpendicularly to the notes, which read: "Add. witnesses to be handled by motion."

On March 2, 2005, defendant's trial counsel filed an amendment to his February 1, 2005, witness list, which added 776*776 Cohle as an expert witness. Defendant's trial counsel did not move for the addition of Cohle.[4]

2. Trial Rulings

On February 21, 2006, which was the day before the start of the present trial, defendant's trial counsel officially moved for the addition of Cohle to the witness list and also asked that the court permit the addition of Dr. Bernie Eisenga as an expert toxicologist. In his motion, defendant's trial counsel explained that he had forgotten that witnesses could only be added with the permission of the court and only recently realized that he would need the testimony of a toxicologist.

At a hearing held on the same day, the trial court addressed defendant's motions to add Cohle and Eisenga. Defendant's trial counsel noted that although he forgot to add Cohle by motion, the prosecution had actual notice of defendant's intention to call Cohle for more than one year. Defendant's trial counsel admitted that the prosecution did not have significant notice of defendant's intention to call Eisenga, but explained that he decided to add Eisenga to the list only after Cohle advised him that he should have a defense toxicologist to counter the testimony of the prosecution's toxicologist.

The prosecution objected to the addition of Eisenga because it violated the trial court's earlier order that witnesses had to be added by motion. And, if the trial court were to permit the addition of Eisenga, the prosecution would ask that the court order defendant to comply with MCR 6.201 by providing a summary of the proposed testimony and the underlying basis of his opinion.

After hearing the arguments, the trial court denied as untimely defendant's motion to add Eisenga; however, the court informed defendant that it would allow her to make an offer of proof and might reconsider the motion on the basis of the offer.

On March 1, 2006, the trial court excused the jury for the day in order to hear arguments about defendant's renewed motion to add Eisenga and evaluate defendant's offer of proof. (Although defendant served an offer of proof on the prosecution shortly thereafter, a copy was apparently not placed in the record until much later.) After the jury left the court, defendant's trial counsel explained that he had orally told the prosecution about Eisenga approximately three weeks earlier. Defendant's counsel stated that, at that time, the prosecution did not indicate that it had had prior contact with Eisenga. Defendant's counsel stated that Eisenga had subsequently informed him that the prosecution had contacted Eisenga six years earlier about the case and that he would not testify without a release from the prosecution.

Defendant's trial counsel explained that the prosecution indicated that it would object to Eisenga's testimony on the basis of this prior contact. So defendant's trial counsel requested permission to add a different toxicologist. Defendant's trial counsel argued that the prosecution would suffer no prejudice because it already had its own toxicologist who was aware of the areas about which defendant's toxicologist would testify. Further, he argued that, on the basis of Cohle's recommendation, he believed the toxicologist's testimony would be helpful to the jury and, "if it were 777*777 excluded, it would — it would substantially impact on [ ] the defense."

The prosecution responded by noting that defendant's trial counsel's offer of proof indicated that the toxicologist would discuss postmortem redistribution, an issue that arose at the 2000 preliminary examination. Thus, the prosecution argued, the issue was not new, and defendant's trial counsel could not now argue that he had only just learned of its importance. The prosecution noted that it takes extensive preparation to prepare for expert testimony, and that, under the circumstances, it was not even clear whom defendant would call. As such, he concluded, "It's too late in the game for him to start bringing in new people, especially experts."

The trial court stated that defendant's trial counsel appeared to know about the issue of postmortem redistribution years earlier and that it would now be unfair to add another expert. The court explained:

> *To say that there's no prejudice, when we don't have any idea who the witness would be or what they would say, is just total speculation; and that's what prejudice would really be here, because there'd be no way to prepare for it prior to their coming in now and — and perhaps saying something that would need verification or some other method of preparation.*

On March 7, 2006, defendant's trial counsel renewed his request to add a toxicologist to his witness list. Defendant's trial counsel argued that there would be no prejudice to the prosecution and even offered to make the witness available to the prosecution before the witness testified. But the trial court continued its ruling that the addition was too late.

3. Dr. Cohle's Toxicology Testimony

On March 27, 2006, the trial court held a hearing, which included Dr. Cohle by telephone, to address issues involving Cohle's proposed testimony. At the hearing, Cohle stated that he disagreed with the conclusion that Monique died of an overdose of Imipramine. He explained that he did not believe that the conclusion properly took into consideration the phenomenon of postmortem redistribution. He stated that he consulted a standard text used by pathologists and found that postmortem

redistribution could increase the level of Imipramine in the blood by up to a factor of three. Thus, he explained, the blood result taken at face value constituted an overestimation. Further, he stated that, even assuming that this level were accurate, the standard text indicated that the lethal level of Imipramine is actually higher than the amount found in Monique's system. Hence, the amount of Imipramine in Monique's system was likely not lethal. Given this, Cohle stated that Monique's heart defect was more likely the cause of death.

Cohle also noted that there was no literature discussing levels of Imipramine that would be lethal in children. Cohle further testified that even if the level of Imipramine in Monique's blood were accurately stated at 1950 nanograms per milliliter, it would only take 30 to 40 pills to reach that level. This was in contrast to the testimony of the prosecution's toxicologist, who testified that it would take between 80 and 120 pills to reach that level, and the prosecution's forensic pathologist, who testified that it would take between 90 and 100 pills to reach that level. Cohle explained that he came to this conclusion by applying a simple formula involving Monique's weight, the dosage, and the volume of distribution for Imipramine, which he obtained from a standard source.

778*778 Cohle also stated that the ratio of Imipramine to Desipramine, an antidepressant drug, in Monique's system could also indicate that Monique was taking a chronic low dose of Imipramine; this statement directly contradicted the testimony of the prosecution's pathologist, who testified that the ratio of Imipramine and Desipramine indicated that the bulk of the drug was introduced shortly before Monique's death.

Cohle testified that although he obtained the case materials sometime in 2005 and reported his conclusions to defendant's trial counsel sometime after July 2005, he thought that he reported his conclusions in either late 2005 or early 2006. Cohle stated that he did not place his findings in writing until just one week before the hearing. He explained that that was when he was asked to do so. Cohle stated that after he reached his own conclusions, he consulted with Eisenga about his findings to confirm that he "was on the right track." He noted that Eisenga agreed with him.

Although Cohle indicated that he came to his findings employing his own expertise, because Cohle relied on outside references to determine the pharmacological characteristics of Imipramine, the trial court severely limited Cohle's ability to offer opinions concerning the Imipramine found in Monique's blood. The court explained that, under MRE 703, "any underlying data that he's basing his opinion on, any facts, have to be in evidence." The court further ruled that the learned treatise Cohle relied on to familiarize himself with the pharmacological characteristics of Imipramine would not be admissible under any exception to the hearsay rule. For this reason, the court prevented Cohle from testifying that the Imipramine level might not have caused Monique's death, from opining that the number of pills that would be necessary to reach the level found in Monique's blood was substantially less than the 90 to 120 pills posited by the prosecution's toxicologist, and from discussing how postmortem redistribution might have affected the level of Imipramine found in the blood sample taken from Monique. At that time, the trial court clearly recognized that defendant's

case was prejudiced by having no testimony from its own expert on toxicology. The court even stated that it may very well have allowed defendant to present the testimony of a toxicologist, "if I would have known the reason for wanting a toxicologist at that time."

Defendant's trial counsel again asked the trial court to permit him to call a toxicologist. After a brief discussion off the record, the trial court stated that it had asked the prosecution if it would waive its objection to Cohle's testimony under MRE 703. But the prosecution had refused. Therefore, the trial court determined that Cohle would not be permitted to testify about those areas. In addition, the trial court again denied both defendant's request to call a toxicologist and her requests for either a mistrial or a continuance to file for leave to appeal in this Court.

B. Defendant's Late Endorsement of a Toxicologist

1. Standard of Review

A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion. *People v. Callon,* 256 Mich.App. 312, 325-326, 662 N.W.2d 501 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Young, supra* at 448, 740 N.W.2d 347.

779*779 2. Analysis

A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses. US Const, Am VI; Const 1963, art 1, § 20; see also *People v. Hayes,*421 Mich. 271, 278-279, 364 N.W.2d 635 (1984) (noting that an accused has the right to present his or her own witnesses to establish a defense). But this right is not absolute: the "accused must still comply with `established rules of procedure and

evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.* at 279, 364 N.W.2d 635, quoting *Chambers v. Mississippi,* 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Nevertheless, the sanction of preclusion is extreme and should be limited to only the most egregious case. *People v. Merritt,* 396 Mich. 67, 82, 238 N.W.2d 31 (1976)(discussing whether the trial court erred when it precluded the defendant from presenting an alibi defense after the defendant failed to comply with the alibi notice requirements). This is not such a case.

Defendant's trial counsel formally asked the trial court to permit him to add a toxicologist on three separate occasions: at the hearing held on February 21, 2006, during trial on March 1, 2006, and at trial on March 7, 2006. Defendant's trial counsel also raised the trial court's refusal to permit defendant to call an expert toxicologist during the discussions before Cohle testified. But in each case the trial court denied the motion.

In the request of February 21, defendant's trial counsel indicated that he wanted to call a toxicologist because defendant's new pathologist opined that it would be helpful. Admittedly, defendant did not make an offer of proof or otherwise state why the defense needed a toxicologist. But the court had a long history with this case and was well aware of the fact that the prosecution's case rested primarily on the level of Imipramine found in Monique's blood, the number of pills that it would take to reach that level, and the inferences that could be drawn from that evidence. Thus the trial court was aware of the importance of toxicology evidence. Furthermore, although the prosecution objected to the addition of Eisenga as a violation of the trial court's earlier order, it did not indicate that it would suffer any prejudice if the trial court granted the request. Indeed, the prosecution stated that if the trial court were to permit the addition of Eisenga, it merely wanted defendant to provide a written summary of Eisenga's opinion and the underlying basis for it, to which defendant's trial counsel readily agreed. Despite this, the trial court denied defendant's motion to add Eisenga on the basis of timeliness alone.

The decision to initially deny defendant's request to call a toxicologist was not within the range of reasonable and principled outcomes. There was no indication at the February 21 hearing that defendant had engaged in abusive conduct or that the prosecution would be prejudiced by the defense's addition of a toxicologist. Although defendant's request came one day before trial, the parties indicated that it would take a full month to put on the case. Furthermore, defendant's trial counsel had offered to submit a written synopsis of the expert's opinion and the basis for that opinion to the prosecution. And the prosecution already had an expert toxicologist prepared to testify about the Imipramine found in Monique's blood. Therefore, the prosecution had both the means and the time to adequately prepare for defendant's toxicologist. "Clearly, it would be improper to exclude the defense where neither serious abuse of the right on the part of defendant nor prejudice to the people's 780*780 case [has] been demonstrated." *Merritt, supra* at 82, 238 N.W.2d 31. Hence, the trial court abused its discretion when it denied defendant's request to add Eisenga on February 21.

The trial court again abused its discretion when it denied defendant's renewed motion to add a toxicologist on March 1. Defendant's trial counsel renewed his motion to add a toxicologist in reliance on the trial court's earlier indication that it might reconsider the issue after an offer of proof. By this time, defendant's trial counsel submitted an offer of proof to the prosecution and indicated that the defense would be adversely affected if prevented from calling a toxicologist. Defendant's trial counsel also reiterated that there was ample time for the prosecution to prepare and stated that he would make the witness available to the prosecution before testifying. Nevertheless, the trial court again denied the motion.

The trial court noted that defendant's trial counsel was apparently aware of the issues about which the toxicologist would testify from at least the time of the preliminary examination and concluded that it would now be unfair to add another expert. The court explained that the prosecution would be prejudiced because defendant had not even identified who the witness would be and, therefore, the prosecution would be unable to prepare. Although these appear to be valid considerations, on careful examination of the record, it is clear that defendant's trial counsel acted reasonably and that the trial court could have added defendant's original toxicologist or another toxicologist without prejudicing the prosecution.

At the preliminary examination, defendant's trial counsel did in fact address the possibility that the level of Imipramine found in Monique's blood could have been affected by the phenomenon of postmortem redistribution. However, defendant's trial counsel did not elicit this testimony to prove that the level of Imipramine found in Monique was not lethal. Rather, it was defendant's sole theory at that time that Monique deliberately or accidentally ingested the pills on her own. Indeed, defendant's own pathologist at the time testified that he was certain that Monique died of an Imipramine overdose in light of the level of Imipramine in Monique's system and the fact that Monique's symptoms were typical of Imipramine poisoning. At the preliminary examination, defendant's pathologist merely offered testimony to rebut the conclusion of a witness for the prosecution, Dr. Kanu Virani, the forensic pathologist that performed the autopsy on Monique's that the absence of pill fragments in Monique's stomach suggested that the pills had been dissolved before ingestion. For this reason, defendant's pathologist concluded that the cause of death could not be definitively ruled a homicide. Taken in context, it appears that defendant's trial counsel's cross-examination of the prosecution's experts at the preliminary examination on the issue of postmortem redistribution was limited to attempting to show that the experts were not being impartial or thorough.

It was not until more than five years after the preliminary examination that Cohle offered his opinion that Monique might not have died from Imipramine poisoning at all and suggested that defendant might want to call a toxicologist to offer an opinion about the level of Imipramine found in Monique's blood. Given the convoluted history of this case and that defendant's prior pathologist opined that he was *certain* that Monique died of an Imipramine overdose, defendant's trial counsel cannot be faulted for failing to realize the need for a toxicologist earlier than late 2005 or early 2006. Further, defendant's 781*781 trial counsel would then have had to investigate Cohle's opinion

and secure a toxicologist. Understood in light of the totality of the circumstances, the lateness of defendant's trial counsel's initial motion to add a toxicologist does not appear to have been motivated by gamesmanship or an abuse of the right to call witnesses. See *Merritt, supra* at 82, 238 N.W.2d 31.

The record also does not support the trial court's conclusion that the prosecution would be prejudiced by the late endorsement of the toxicologist. Defendant's trial counsel originally identified Eisenga as the proposed toxicologist. At the February 21 hearing, the prosecution only argued that defendant's motion to add Eisenga should be denied because it was untimely. The prosecution did not state that it had any other objection to Eisenga. However, at the March 1 hearing, defendant's trial counsel revealed that the prosecution had contacted Eisenga about the case in 2000. Defendant's trial counsel indicated that Eisenga would not testify without first obtaining a signed release from the prosecution, which the prosecution would not give. For this reason, defendant's trial counsel was forced to ask for permission to add an unidentified toxicologist.

In considering the renewed motion, the trial court clearly gave weight to the fact that defendant did not have a toxicologist ready to testify when it concluded that the prosecution would be prejudiced. But the trial court apparently did not consider the fact that the prosecution contributed to this problem. Further, the trial court did not explore the propriety of removing Eisenga as a potential witness. At the hearing, defendant's trial counsel indicated that Eisenga himself brought to defendant's trial counsel's attention the issue of the prior contact and that Eisenga was not even sure of the contact. Defendant's trial counsel explained:

> *He indicated to me, he said, "Hey, you know, I'm — I'm not sure, but, you know, the — you don't get calls on cases involving the death of — of little kids very often," and he said, "I — I have some memory of being contacted by someone, I think it may have been Bay County, in reference a — a death of a small child case," and he said, "It — it may have been this case."*
>
> *And I said, "Well, did you do any reports for them?" And he said, "No"; I said, "Well," you know, "what — what was your involvement?" He said, "I just talked with `em a little bit and that was the end of it, and I never heard from them again.'"*

After explaining that his proposed toxicologist would not testify without a release, defendant's trial counsel also indicated that the prosecution informed him that it would also object to Eisenga's colleague's testifying on defendant's behalf.

In response, the prosecution noted that someone from the prosecutor's office did recall speaking to Eisenga at the very beginning of the case. But the prosecution did not offer a reason for refusing to provide Eisenga with a release and did not explain why it would object to Eisenga's colleague's testifying for the defense. Given the extremely limited nature of the contact and the fact that the contact was approximately six years earlier, the prosecution's failure to provide a release appears manifestly unreasonable. Yet the trial court failed to investigate the matter further. In addition, it is clear from the record that Eisenga would have testified had he been given some assurance that he would incur no liability. Thus, had the court elected, it could have ordered Eisenga to testify.

Instead, the trial court impliedly sanctioned the prosecution's unreasonable refusal and held it against defendant in considering the motion.

782*782 In addition, defendant's trial counsel indicated that he orally informed the prosecution about Eisenga approximately three weeks before the March 1 hearing, which would have been approximately two weeks before defendant first moved to add Eisenga as a witness. Had the prosecution raised its objections then or at the February 21 hearing, defendant likely would have had sufficient time to find a new toxicologist. Notwithstanding the prosecution's unreasonable refusal to release Eisenga and the fact that several days were lost by the trial court's summary rejection of defendant's first request, there was still adequate time to find and prepare for a new toxicologist. The prosecution's first witnesses did not begin to testify until February 28, and the prosecution had already stated its belief that its proofs would take two weeks. Further, the prosecution already had a toxicologist who was going to testify on the same matters that defendant's trial counsel identified in his offer of proof, and defendant's trial counsel had offered to make the new toxicologist available to the prosecution. Hence, the prosecution would not have been prejudiced by the addition of the toxicologist. In contrast, given the nature of the toxicology evidence against defendant, the trial court should have realized that the importance of the toxicologist to the defense substantially outweighed any prejudice that the prosecution might suffer in preparing for the late endorsement.

For these reasons, we conclude that the trial court's decision to again deny defendant's request to add a toxicologist on March 1 fell outside the range of reasonable and principled outcomes.*Young, supra* at 448, 740 N.W.2d 347. Rather than resort to this extreme sanction, the trial court should have fashioned some remedy that would have assured defendant a fair opportunity to present her defense while limiting any prejudice to the prosecution. See *Merritt, supra* at 79-83, 238 N.W.2d 31 (examining whether, under the totality of the circumstances, the trial court abused its discretion when it resorted to the sanction of preclusion rather than granting a continuance).

3. Conclusion

Under these facts, we cannot conclude that the trial court's decision to preclude defendant from calling a toxicologist fell within the range of reasonable and principled outcomes. *Young, supra*at 448, 740 N.W.2d 347. Further, this error was not harmless. See *Lukity, supra* at 495-496, 596 N.W.2d 607. By depriving defendant of a toxicologist, the trial court effectively prevented defendant from establishing that the measured level of Imipramine in Monique's blood was not sufficient to cause her death and might even be significantly overstated. In addition, defendant was not able to contradict the prosecution's assertion that the number of pills needed to reach the measured level of Imipramine was 90 to 120. Because the sheer number of pills suggests deliberate

poisoning by a third party, defendant's inability to challenge this testimony severely hampered her theory that Monique might have deliberately or accidentally ingested the pills. Indeed, even the trial court eventually recognized the importance of the toxicologist's testimony after it barred Cohle from offering any testimony suggesting that the level of Imipramine found in Monique's blood was inaccurate or not sufficiently high to have caused her death. Consequently, this error independently warrants reversal of defendant's convictions and remand for a new trial.

C. Ineffective Assistance of Counsel

In the alternative, defendant argues that her trial counsel was ineffective for failing to timely request a toxicologist. To establish ineffective assistance of counsel, 783*783 the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v. Cone,* 535 U.S. 685, 695, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *People v. Toma,* 462 Mich. 281, 302-303, 613 N.W.2d 694 (2000). In order to meet the second requirement, a defendant must show that counsel's error was so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *People v. LeBlanc,* 465 Mich. 575, 578, 640 N.W.2d 246 (2002).

As noted above, defendant's trial counsel reacted in a reasonably timely fashion after obtaining information that suggested that he would need a toxicologist. Therefore, defendant's trial counsel was not ineffective for failing to earlier request the endorsement of Eisenga.

D. Preclusion of Cohle's Testimony Under MRE 703

Although defendant has not appealed the trial court's decision to prevent Cohle from offering certain testimony involving the Imipramine found in Monique's blood, because we are convinced that this decision was plain error, see *People v. Carines,* 460 Mich. 750, 763-764, 597 N.W.2d 130 (1999),[5] which is likely to be repeated on remand, we elect to address this issue sua sponte. See MCR 7.216(A)(7); *People v. Noel,* 88 Mich.App. 752, 754, 279 N.W.2d 305 (1979)("Generally we do not address issues not raised by the

parties on appeal. However, our function is to dispense justice, and we are given the limited power to raise questions on our own."), citing *Dearborn v. Bacila,* 353 Mich. 99, 118, 90 N.W.2d 863 (1958) (noting that there "is no hard and fast rule that appellate courts, sitting either in law or equity, cannot and, hence, do not raise and decide important questions *sua sponte.*").

As already noted, the trial court severely curtailed Cohle's ability to offer an opinion involving the accuracy of the level of Imipramine in Monique's blood, the accuracy of the calculation of the number of pills that it would take to reach that level, and whether the Imipramine in Monique's blood was sufficient to cause her death. The trial court did not conclude that Cohle was not qualified to offer expert testimony on these issues. See MRE 702. Rather, it concluded that because Cohle stated that he could only offer an opinion on these topics after reviewing the published pharmacological data for Imipramine, the data would have to be admitted into evidence and they could not be admitted because they would be hearsay. Therefore, the trial court concluded that Cohle could not offer any opinions that utilized data about Imipramine obtained from an outside source.

By a special record, Cohle stated that through experience he was generally familiar with postmortem redistribution, but that the ratio of heart blood to peripheral blood will vary on the basis of the specific characteristics of the drug at issue. Because he did not have the characteristics of Imipramine memorized, Cohle indicated that he had to look up the ratio in a widely used medical text by Dr. Randall C. Baselt. He also indicated that he would have to use the Baselt book to determine the lethal level of Imipramine and its half-life in order to calculate the time between ingestion of the Imipramine and Monique's death. Finally, he stated that he was generally 784*784 familiar with the formula for calculating the number of pills that it would take to reach a certain concentration of a particular drug — given the dosage and the weight of an individual — but admitted that he would also need to know the volume of distribution for Imipramine before he could calculate the figure. Because he did not know the volume of distribution for Imipramine, he consulted a text that is part of the Micromedics Healthcare Series that is used by his hospital's poison control center.

The prosecution's toxicologist and pathologist both relied on data for Imipramine from outside sources in rendering their opinions. But the trial court nevertheless precluded Cohle from relying on outside data except to the extent that the data were admitted during the testimony of the prosecution's witnesses. The trial court barred Cohle from offering opinions on these topics because his opinion had to be based on facts or data in evidence under MRE 703, and the treatises could not be placed into evidence because they were hearsay.

MRE 703 provides:

> *The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.*

Hence, under this rule, an expert may not offer an opinion that is based on "facts or data in the particular case" unless the facts or data are in evidence or will be in evidence.

But the reference to facts or data "in the *particular case*" limits the type of evidence that must be admitted into evidence to facts or data that are *particular* to that case. That is, the fact or datum must be specific to the case. Here, some facts that are particular to the case are: Monique's weight, that the blood sample was taken from the heart, that Imipramine was found in the blood, that the Imipramine level was 1950 nanograms per milliliter, and the dosage of the pills prescribed to Monique. But the pharmacological characteristics of Imipramine were not "facts or data in the particular case. . . ." Rather, the half-life of Imipramine, the ratio of postmortem redistribution, the volume of distribution, and the level of Imipramine that would be lethal in a human are all constants in every case involving Imipramine. Therefore, it was not necessary to have the data in evidence before Cohle could utilize them in rendering an opinion.

Even if the pharmacological characteristics of Imipramine had to be placed in evidence before Cohle could render an opinion based in part on those characteristics, the treatises Cohle relied on were clearly admissible under MRE 803(24) as an exception to the prohibition against hearsay. Under MRE 803(24), a statement not specifically covered by any other hearsay exception, "but having equivalent circumstantial guarantees of trustworthiness," may be admitted if the court determines that "(A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence."

Given the incredible number of drugs that have been and continue to be marketed to the public, it is highly unlikely that a physician will be familiar with the specific pharmacological characteristics of any particular drug. As such, in order to treat 785*785 patients and form opinions, physicians and other experts must routinely consult references that list the key pharmacological characteristics for drugs. In order to be useful to the experts who utilize these references, the texts must be objective, thorough, accurate, and current. Therefore, those references that have obtained widely recognized acceptance by the community of experts who use them will meet the trustworthy requirements of MRE 803(24).

As already noted, the prosecution's pathologist and toxicologist both used and recognized outside sources on the pharmacological characteristics of Imipramine. Likewise, Cohle stated that the Baselt book was a widely recognized and commonly used reference for determining the pharmacological characteristics of drugs. In addition, Cohle indicated that he relied on a text from the Micromedics Healthcare Series, which is used by his hospital's poison control center, to determine the volume of distribution for Imipramine. Hence, these references clearly met the requirements of MRE 803(24). Consequently, the trial court plainly erred when it determined that the data from these references were hearsay that did not fall within any exception.

V. Pathologist's Qualification to Render an Opinion on Suicide by Children

Defendant next argues that the prosecution's medical examiner was not qualified to offer an opinion that children who are seven do not have the mental maturity to commit suicide. Defendant further argues that there were no facts or data in evidence to support the medical examiner's opinion. Consequently, defendant concludes, the trial court should have excluded this testimony. We disagree.

A. Relevant Testimony

At trial, the prosecution called Dr. Virani, who was the forensic pathologist that performed the autopsy on Monique. Virani testified that Monique had an abnormal heart, but that the abnormality had nothing to do with Monique's death. Virani further stated that he found only mild pulmonary and brain edema and that, from these findings, he could not determine the cause of death. However, he stated that he took a blood sample and that later testing showed the presence of Imipramine, which he determined to be at a toxic level. From this he determined that Monique died from acute Imipramine poisoning.

On the basis of the amounts of Imipramine found in the blood and the amount of the metabolic byproduct of Imipramine, Virani determined that Monique was not using Imipramine for an extended period. Rather, the Imipramine was introduced into her system shortly before her death. He also opined that it would take 90 to 100 pills to reach the level of Imipramine found in Monique's blood. Finally, he noted that he did not find any pill residue in Monique's stomach and, from this, he concluded that the Imipramine was probably liquefied before it entered Monique's body.

Virani concluded that the manner of death was homicide. He came to this conclusion on the basis of information that Monique would not have accidentally taken the medication and that she was too young to have committed suicide. When asked about whether seven-year-old children commit suicide, Virani stated that he was not aware of any forensic pathologist classifying the death of a child of that age as a suicide. He stated that children of that age do not have the mental maturity to commit suicide.

Defendant's trial counsel objected to Virani's testimony concerning whether children of Monique's age are capable of committing suicide on the ground that Virani 786*786 lacked sufficient expertise to offer the opinion. The trial court overruled the objection and determined that Virani was sufficiently qualified to testify about whether children of Monique's age commit suicide.

B. Analysis

MRE 702 governs the qualification of expert witnesses for the purpose of offering testimony at trial. Under MRE 702, an expert may not testify unless the trial court first determines that "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the expert witness is "qualified as an expert by knowledge, skill, experience, training, or education. . . ." Based on the language of MRE 702 and MRE 104(a), which requires trial courts to determine preliminary questions concerning the qualification of a person to be a witness, trial courts have an obligation to exercise their discretion as a gatekeeper and ensure that any expert testimony admitted at trial is reliable.*Gilbert v. DaimlerChrysler Corp.,* 470 Mich. 749, 780, 685 N.W.2d 391 (2004).

> *This gatekeeper role applies to all stages of expert analysis. MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [Id. at 782, 685 N.W.2d 391 (emphasis in original).]*

In the present case, Virani testified that he is a medical doctor and is board-certified in forensic pathology, which involves the investigation of suspicious and violent deaths. He also stated that he has served as a medical examiner for several counties since 1988 and performed over 13,000 autopsies. Hence, Virani was clearly qualified to testify as a medical doctor who specializes in forensic pathology. Nevertheless, defendant argues that Virani's qualifications are insufficient to offer an opinion about whether seven-year-old children are sufficiently mature to commit suicide.

Although Virani was not an expert on suicide, this alone did not preclude him from offering an opinion about whether Monique committed suicide. Rather, under some circumstances an expert's qualifications pertain to weight rather than admissibility. See *id.* at 788-789, 685 N.W.2d 391. Nevertheless, if the subject of the proffered testimony is far beyond the scope of the witness's expertise, the testimony will be inadmissible. *Id.* at 789, 685 N.W.2d 391.

It is noteworthy that medical examiners, such as Virani, are statutorily required to investigate the cause and manner of the death of an individual under certain circumstances. See MCL 52.202. As a result, medical examiners must routinely investigate and determine whether the manner of death for a particular person was suicide. In this regard, Virani testified that he was unaware of any cases where a forensic pathologist classified the death of a child of Monique's age as suicide. And he stated that he personally has never experienced a child of this age committing suicide or accidentally ingesting 90 to 100 pills.

In addition to his experience in the field of forensic pathology, Virani indicated that his opinion was also based on 787*787 his knowledge of the human brain. Although medical doctors are not necessarily experts on the development of the human brain, medical training clearly includes a basic understanding of brain development. Thus, Virani was minimally qualified by both experience and training for purposes of MRE 702 to offer an opinion about whether children of Monique's age commit suicide. Consequently, any limitations in his experience and training were properly a matter of weight rather than admissibility. *Gilbert, supra* at 788-789, 789 n. 63,685 N.W.2d 391. Finally, Virani was not required by either MRE 702 or MRE 703 to offer data in support of his opinion that children of Monique's age do not normally commit suicide. Rather, his opinion need only be based on the actual facts admitted into evidence and his general training and experience.

C. Conclusion

The trial court did not abuse its discretion when it determined that Virani was qualified to offer an opinion on whether children of Monique's age commit suicide.

VI. Evidence of Other Acts

Finally, defendant argues that the trial court improperly permitted the prosecution to solicit testimony concerning other acts involving defendant that were barred by MRE 404(b). Defendant argues that this evidence was not relevant to the stated purposes and the prosecution actually proffered the testimony to show defendant's bad character and suggest that she acted in conformity with that character.

We agree that the trial court abused its discretion when it permitted the prosecution to elicit testimony about defendant's alleged prior physical abuse of her children to prove

malice, intent and absence of mistake or accident. Likewise, to the extent that the trial court permitted the prosecution to admit the evidence of prior abuse to show that defendant abused her children when under stress, the trial court abused its discretion. However, evidence that protective services personnel had investigated allegations of abuse, which defendant claimed Monique herself falsely reported, was admissible to show that defendant had a motive to kill or hurt her. Nevertheless, because the danger of unfair prejudice substantially outweighed the probative value of the evidence to prove motive, the trial court abused its discretion when it permitted the prosecution to elicit detailed testimony concerning the specific allegations of abuse.

The trial court properly concluded that evidence that defendant was aware that Monique may have been sexually abused by others in her household and knew that permitting such abuse could lead to the removal of her children was admissible to establish motive. Likewise, the trial court properly permitted the prosecution to elicit testimony that defendant's children had been involved in prior accidental overdoses.

A. Procedural History and Trial Court Ruling

In July 2004, the prosecution gave notice to defendant that it intended to submit evidence of certain other acts at trial. Specifically, the prosecution stated that it intended to present evidence of defendant's long involvement with protective services personnel, including their investigation of allegations of physical abuse. The evidence of physical abuse would include testimony, in relevant part, that bruises were found on defendant's daughter Jessica in 1987, that defendant admitted slapping and kicking Jessica in 1988, that Jessica reported being hit in 1990, that defendant's son Joshua reported that his mother threw a cereal bowl at him and cut his head and kicked Monique in 1996, that Jessica had made allegations that defendant 788*788used a rope to tether Monique for running off in 1999, that defendant hit Monique with a fly swatter in 1999, and that defendant placed Monique in counseling to get her to stop making false allegations and reports to protective services personnel. The prosecution submitted that this abuse was relevant to show that defendant had the requisite malice, that her actions were not accidental, and to rebut defendant's claim that Monique took the pills deliberately or accidentally. The prosecution also indicated that it intended to present evidence of defendant's statements concerning the allegations to show defendant's state of mind concerning the allegations Monique made.

The prosecution also gave notice that it intended to submit evidence that defendant's children had experienced prior drug overdoses. The prosecution intended to show evidence that both Monique, at age four, and Joshua, at age six, were treated for a drug overdose in 1996 and that defendant's daughter Roxanne, who was less than two years old at the time, was taken to the emergency room in 1983 for an overdose of Benadryl. The prosecution stated that it intended to elicit evidence of these overdoses to show

that defendant deliberately misled detectives when she stated that the only prior overdose had been by her son Joshua at age two and one-half. The prosecution also stated that the evidence was admissible to show that defendant had knowledge of the potential harm of permitting Monique to have access to the pills.

Finally, the prosecution gave notice that it intended to elicit evidence that defendant knew of prior allegations of sexual abuse involving Monique and was aware that the prosecutor had scheduled a meeting for the day after Monique's death to investigate recent allegations of sexual abuse — including a claim that Joshua had perpetrated the abuse. The prosecution stated that evidence of the recent and prior allegations of sexual abuse and defendant's involvement with protective services personnel during the investigation of those allegations would prove that defendant was aware that she could lose her children as a result of permitting the abuse to occur in her household. The prosecution argued that this evidence was admissible to show motive and to impeach statements by defendant that she was unaware of any sexual impropriety between Monique and Joshua.

Defendant objected to the proposed admission of this evidence. The trial court held a hearing on the issue in October 2004.

At the hearing, the prosecution reiterated the evidence of incidents of physical abuse that it intended to admit. The prosecution stated that the incident with the cereal bowl demonstrated that defendant could not tolerate her children during stressful times and that this resulted in "inappropriate and abusive" acts toward Joshua. The prosecution again stated that the evidence was admissible to show malice and absence of mistake or accident, but also indicated that the long history of protective services involvement would help explain why defendant was so "intolerant of this child making up accusations. . . ." Further, the prosecution argued that the evidence demonstrated that defendant lacked the "ability to cope with the everyday demands of a behaviorally-difficult child." Hence, it was evidence of defendant's motive and intent to stop Monique from making allegations.

The prosecution also stated that it intended to submit evidence of the prior overdoses to prove that defendant willfully misled the police about the fact that her children had had prior overdoses. The prosecution also argued that the evidence 789*789 of the overdoses demonstrates that defendant knew of the danger of an overdose and ignored the risk when she allegedly disposed of the medicine. Finally, the prosecution again argued that the allegations of prior sexual abuse were relevant to show that defendant knew that she could lose her children if Monique implicated her brother in the most recent claim of sexual abuse. At the close of the hearing, the trial court indicated that it would enter an opinion and order with regard to such evidence at a later time.

The trial court entered a preliminary order in January 2005. The trial court entered a final opinion and order in April 2005. In the opinion, the court noted that the prosecution had indicated that it intended to use the other acts evidence to prove motive, malice, intent, and absence of mistake or accident, which were all proper

purposes under MRE 404(b). The court then analyzed the relevance of the various incidents.

The court determined that the incident in 1987, when bruises were found on Jessica, and defendant's admission in 1988 that she slapped and kicked Jessica were relevant for the identified purposes: the evidence tended to show that defendant "used abusive tactics to control her children when they caused her stress in the past, and she intended to do so when she allegedly gave Monique the overdose of Imipramine." However, the trial court ruled that the 1990 incident was not relevant because it was determined that defendant's husband was responsible for Jessica's injury, and there was no evidence that defendant participated. The trial court determined that the incident in 1996 with the cereal bowl was relevant to show how defendant reacted to stress and to establish motive, malice, intent, and absence of mistake or accident. The trial court also determined that the cereal bowl incident was relevant to show both defendant's partial admission and her illogical denial of how the injury occurred. The trial court concluded that the 1999 tethering incident was relevant for the same purposes and because Monique had been punished for wandering away on the day of her death. Finally, although the trial court concluded that the 1999 fly swatter incident was unsubstantiated and prohibited its use in the prosecution's case-in-chief, it allowed the prosecution to present evidence that defendant placed Monique in counseling to get her to stop making false allegations because that showed motive, malice, intent, and absence of mistake or accident.

The trial court then determined that the incidents were highly relevant and not unfairly prejudicial. Therefore, it concluded that the prosecution would be allowed to present this evidence at trial.

The trial court next addressed the prior drug overdoses. The trial court again indicated that the prosecutor successfully identified proper purposes for the evidence under MRE 404(b) and also concluded that the evidence of the prior drug overdoses was relevant to showing that defendant knew about the potential for harm with an overdose and tried to "direct attention away from the actual cause of death." Indeed, the trial court indicated that defendant's failure to tell the police of these earlier overdoses amounted to a false statement that could be used as evidence of guilt. Lastly, the court determined that because the prior incidents did not involve accusations that defendant intentionally gave the children the overdoses, the incidents did not involve prejudice that substantially outweighed the probative value of the evidence. Therefore, it concluded that the prosecution could present the evidence.

Finally, the trial court determined that the evidence of prior allegations of sexual 790*790 abuse against Monique was relevant to show that defendant had a motive to kill Monique. Specifically, the court concluded that the evidence was admissible to show that defendant understood the investigation process and was aware that her children could be removed from her home as a result of the most recent allegations. Additionally, the trial court determined that the probative value of this evidence was not substantially outweighed by unfair prejudice.

At trial, the prosecution elicited testimony about each of the other acts permitted by the trial court. During closing arguments, the prosecution argued that defendant was motivated to kill Monique to keep Monique from revealing that Joshua sexually abused her, but did not otherwise raise any of the other acts evidence until rebuttal arguments. During rebuttal arguments, the prosecution noted that defendant did not mention the earlier overdoses when asked by the police and implied that defendant lied. The prosecution also used defendant's tape-recorded statements accusing Monique of lying to protective services personnel and complaining that the protective services workers were constantly "on her case" to show that defendant had a motive to kill Monique.

B. Analysis

MRE 404(b)(1) provides:

> *Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.*

In *People v. VanderVliet,* 444 Mich. 52, 508 N.W.2d 114 (1993), our Supreme Court adopted the approach to other acts evidence enunciated by the United States Supreme Court in*Huddleston v. United States,* 485 U.S. 681, 691-692, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). See *Sabin, supra* at 55, 614 N.W.2d 888.

> *First, the prosecutor must offer the other acts evidence under something other than a character to conduct or propensity theory. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b), to an issue of fact of consequence at trial. Third, under MRE 403, a "`determination must be made whether the danger of undue prejudice [substantially] outweighs the probative value of the evidence in view of the availability of other means of proof and other facts appropriate for making decision of this kind under Rule 403.'" VanderVliet, supra at 75, 508 N.W.2d 114, quoting advisory committee notes to FRE 404(b). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. [Id. at 55-56, 508 N.W.2d 114.]*

The prosecution bears the initial burden of establishing the relevance of the evidence to prove a fact other than character or propensity to commit a crime. *People v. Knox,* 469 Mich. 502, 509, 674 N.W.2d 366 (2004), citing *People v. Crawford,* 458 Mich. 376, 385, 582 N.W.2d 785 (1998). "Where the only relevance of the proposed evidence is to show the defendant's character or the defendant's propensity to commit the crime, the evidence must be excluded." *Knox, supra* at 510, 674 N.W.2d 366.

1. Evidence of Physical Abuse

a. Relevance for a Proper Purpose

The trial court permitted the prosecution to elicit testimony about 791*791 several allegations that defendant had physically abused her children and the investigations into those allegations. The testimony included details about incidents where defendant's daughter Jessica was found to have bruises and where defendant purportedly admitted slapping and kicking Jessica more than 10 years before Monique's death. The prosecution also elicited testimony that defendant was investigated for throwing a cereal bowl at Joshua in 1996 and tethering Monique in 1999. The trial court permitted testimony about these incidents to prove motive, malice, intent, and absence of mistake or accident.

The testimony concerning prior allegations of abuse was not relevant to show the absence of mistake or accident for the charged crime. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material."*VanderVliet, supra* at 75, 508 N.W.2d 114. In order to be material, the fact must be within the range of litigated matters in controversy. *Sabin, supra* at 57, 69, 614 N.W.2d 888. In the present case, defendant did not argue that she accidentally gave Imipramine to Monique or that she mistakenly gave a greater dosage of Imipramine than she intended. Rather, defendant argued that she did not give Monique any Imipramine on the day of Monique's death. Hence, mistake and accident were not at issue. For the same reason, the fact that defendant may have partially admitted that the cereal bowl incident occurred, but offered an implausible mitigating explanation for Joshua's injury, is not relevant to determining whether defendant gave her daughter an overdose of Imipramine.

In addition, although malice and intent were at issue during the trial, none of the allegations of abuse involved defendant's medicating her children or otherwise forcing them to ingest anything. Rather, each of the alleged acts involved physical contact as a response to the children's behavior. Further, none of the physical contact described in the allegations of prior physical abuse was so severe as to suggest that defendant had the same or similar intent as that required in the charged offenses. Cf. *People v. Biggs,* 202 Mich.App. 450, 452-453, 509 N.W.2d 803 (1993) (noting that the defendant's act of deliberately burning her child, smothering and reviving him, and giving him an overdose of medicine were probative of malice because those incidents showed intent to kill or

cause great bodily harm or wanton disregard for the natural consequences of her actions). Because the alleged acts of physical abuse were so dissimilar to the conduct for which defendant was on trial, the other acts cannot be said to be within the same general category as the charged conduct. *VanderVliet, supra* at 79-80, 508 N.W.2d 114 (noting that the other acts must be of the same general category as the charged offense in order to be logically relevant to show intent). Finally, two of the alleged incidents occurred more than 10 years before the charged conduct and another occurred approximately three years before the charged conduct. And the tethering incident, which was the most recent allegation of abuse, was the least relevant to show intent. Although there is no time limit applicable to the admissibility of other acts evidence, see MRE 404(b), the remoteness in time between the charged conduct and the more serious allegations of physical abuse limits the logical relevance of these other acts to show intent. For these reasons, the allegations of physical abuse were not relevant to show malice, intent, or absence of mistake or accident. See *VanderVliet, supra* at 80 n. 37, 508 N.W.2d 114 (noting that absence of 792*792 mistake or accident is simply a form of the exception that permits the use of other acts to prove intent).

The trial court also indicated that the allegations of physical abuse were relevant to show that defendant "used abusive tactics to control her children when they caused her stress in the past, and she intended to do so when she allegedly gave Monique the overdose of Imipramine." On the surface, it appears that the trial court may have been stating that the allegations of physical abuse were admissible to show a common scheme, plan, or system in doing an act. See MRE 404(b). However, considering the dissimilarity between the charged conduct and the allegations of physical abuse, it cannot be persuasively argued that the alleged physical abuse demonstrated a common scheme, plan, or system employed by defendant to "control her children." See *Sabin, supra* at 64, 614 N.W.2d 888 ("General similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts."). Instead, given the dissimilarities, the trial court's conclusion appears to permit the prosecution to use this evidence for an improper character-to-conduct purpose—to show that defendant had a propensity to violently lash out at her children under stressful situations and that she acted in conformity with that propensity. See *Knox, supra* at 512-513, 674 N.W.2d 366.

Although the trial court erred when it determined that the prosecution could present the evidence of prior physical abuse to prove malice, intent, and absence of mistake or accident, it properly concluded that the allegations of physical abuse were relevant to prove motive. Evidence of other crimes, wrongs, or acts may be offered to prove motive. MRE 404(b)(1). "Motive" is the "`[c]ause or reason that moves the will and induces action. An inducement, or that which leads or tempts the mind to indulge a criminal act.'" *People v. Hoffman,* 225 Mich.App. 103, 106, 570 N.W.2d 146 (1997), quoting Black's Law Dictionary (revised 5th ed).

At trial, the prosecution offered its theory that defendant may have killed Monique out of aggravation with Monique's reports of abuse to protective services personnel. In fact, during rebuttal arguments, the prosecution used a recording of defendant's statements to emphasize this point.

Was the defendant worried about Monique possibly sharing information about her brother to Protective Services and the prosecutor's office during that scheduled interview on October 11th, 1999, or was the defendant worried about Monique making other allegations about her to Protective Services?

(Tape recording played)

"I had Protective Services on my butt and on my butt and on my butt. Monique always told lies."

* * *

"She was coming home, and so I waited right out here, and when she got close I says, `Get your ass over here now. I am pissed.' And so she gets over here. I says, `Why are you taking off?' She wouldn't answer me. I says, `Fine.' Wang, paddled her on the butt once. I says, `You get your damn ass on the couch and you lay down. You're takin' a nap. I'm pissed.'"

(Pause)

"I locked her in the attic, I tied her up, I hit her with the fly swatter, I hit her with the belt, I shoved her down."

(Pause)

*793*793 "I had Protective Services on my butt and on my butt and on my butt. Monique always told lies."*

"I hate you. One of these days I'm gonna kill you."

These statements and defendant's long history of involvement with protective services investigations are strong evidence of defendant's motive. Hence, the trial court correctly determined that the allegations of prior abuse and defendant's history of involvement with protective services personnel were relevant to prove something other than an improper character-to-conduct purpose.

b. MRE 403

Even though the evidence concerning defendant's involvement with protective services investigations as a result of allegations of abuse by her children was relevant to prove something other than bad character, this alone does not mean that the evidence was admissible. *VanderVliet, supra* at 75, 508 N.W.2d 114. Rather, the evidence may still be inadmissible if the probative value of the evidence "is substantially outweighed by the danger of unfair prejudice. . . ." MRE 403; *VanderVliet, supra* at 74, 508 N.W.2d 114.

Because of the unique facts of this case, we conclude that the prejudicial nature of the evidence actually offered at trial substantially outweighed the value for which the evidence was properly probative.

As already noted, there was no direct physical evidence or eyewitness testimony that tended to show that defendant caused Monique to ingest Imipramine. Hence, if the jury concluded that Monique died from Imipramine poisoning, the primary question remaining would have been whether defendant caused Monique to ingest the Imipramine or whether Monique ingested it herself. Under these circumstances, the evidence that defendant harbored anger toward Monique for making allegedly false accusations of child abuse that resulted in unwanted attention from protective services workers, constituted evidence that defendant may have been motivated to kill or cause serious physical harm to Monique. However, although the testimony about the extent and specifics of defendant's involvement with protective services personnel was probative of defendant's motive, it was also powerful evidence that defendant was a poor mother who repeatedly neglected and abused her children. As a result, there was a significant possibility that the jury might inappropriately use this evidence to conclude that defendant acted in conformity with her abusive character and poisoned Monique. In addition, the prosecution could have established defendant's motive without resort to proof of the specifics of defendant's involvement with protective services investigations. See *VanderVliet, supra* at 75,508 N.W.2d 114 (noting that the analysis under MRE 403 should take into consideration the probative value of the evidence in view of the availability of other means of proof). Furthermore, the testimony included discussions of neglect and abuse that also pertained to defendant's other children. Yet the evidence of abuse and neglect directed toward defendant's other children was—at best—only minimally probative of defendant's motive to kill or harm Monique. And the danger of unfair prejudice substantially outweighed any minimal probative value that the evidence of abuse and neglect may have had. MRE 403.

Given the limited necessity of the evidence to prove motive and the high probability that the jury improperly used the testimony, we conclude that the trial court abused its discretion when it determined that the evidence of specific allegations of abuse was not substantially outweighed by 794*794 the danger of unfair prejudice. Had the trial court limited the testimony to establishing generally that protective services workers had investigated allegations of abuse and neglect by defendant relating to Monique and that those investigations were initiated after Monique made statements describing inappropriate conduct, the danger of unfair prejudice would not have substantially outweighed the probative value of the evidence to show motive. However, as presented at trial, the prejudicial nature of the evidence substantially outweighed the probative value of the evidence. MRE 403.

2. Evidence of Prior Drug Overdoses

At trial, the prosecution elicited testimony about two incidents of prior drug overdoses involving defendant's children. The prosecution elicited testimony from Dr. Michael Davison, who testified that in 1983 he treated defendant's daughter Jessica for an overdose of Benadryl. Davison said that defendant stated that the Benadryl was kept on a high shelf and that Jessica, who was 21 months old at the time, climbed up and consumed two-thirds of the bottle. Davison said the overdose could have been fatal.

The prosecution also elicited testimony that Monique and her brother had both been involved in an overdose in 1996. Dr. Renae Carter testified that defendant called her at Bay Medical Center and reported that Monique and her brother had accidentally taken medication. Carter said she advised defendant to call the poison control center. Carter stated that defendant came in the next day with the children and reported that the children had climbed to the top of the refrigerator and drank from two bottles of prescription medicine.

As already noted, the trial court permitted the admission of this evidence to prove that defendant was aware of the risks of leaving medicine in places that were accessible to children and to show that defendant may have misled the police when they inquired about prior overdoses. Because the prosecution argued that, at the very least, defendant was grossly negligent in leaving the Imipramine where Monique could get to it, defendant's experience with her children's prior involvement with accidental overdoses was relevant. Likewise, the fact that defendant may have lied about her knowledge of these overdoses was relevant to show consciousness of guilt. Hence, this testimony was relevant to and offered for purposes other than to show that defendant had bad character. *Sabin, supra* at 55-56, 614 N.W.2d 888. In addition, although a jury might infer from the incidents that defendant was culpably involved with the overdoses, either deliberately or negligently, the danger of unfair prejudice was minimal and did not substantially outweigh the probative value of the evidence. MRE 403. Therefore, the trial court did not abuse its discretion in permitting this testimony.

3. Evidence of Sexual Abuse

At trial, the prosecution also presented evidence that there had been allegations that Monique had been sexually abused before her death. Some of the testimony involved prior allegations of sexual abuse and the investigations that followed. Other testimony

involved a recent allegation that a young man staying at the Yost home had sexually assaulted Monique. The prosecution further presented evidence that the young man had indicated that Joshua was actually responsible for the abuse. The prosecution presented the evidence to show that defendant was aware of the procedures for investigating allegations of sexual abuse and was aware that it could result in the removal of her children. The prosecution also presented 795*795 evidence that Monique died the day before she was scheduled to meet with the prosecutor. The prosecution theorized that defendant was motivated to kill or hurt Monique to prevent Monique from making allegations that could result in further disruptions to defendant's life.

The proffered evidence showed that allegations of sexual abuse had plagued the family in the past and resulted in intrusive investigations. Further, the testimony indicated that defendant had been told that she could lose her children if she permitted sexual abuse in her household. And, in the case of one prior allegation, there was testimony that defendant actually asked her husband to leave the home for one year. There was even testimony that defendant received public support for her children, which she would lose if the children were removed. Hence, the evidence was relevant for a purpose other than a character-to-conduct theory—i.e. to prove that defendant had a motive to kill or hurt Monique in order to avoid the problems associated with the investigation of new allegations.

Furthermore, although the testimony clearly implicated defendant's ability to provide a safe and proper home environment for Monique, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence. MRE 403. The evidence did not involve allegations that defendant took an active role in the abuse or that she could have prevented it and failed to do so. Further, defendant was able to present a significant amount of evidence that she responded to the prior allegations of sexual abuse in an appropriate manner and had affirmatively taken steps to report the abuse and protect Monique from harm. Likewise, defendant was able to present evidence that she cooperated during prior investigations of abuse and that, although defendant was aware of an upcoming meeting with the prosecutor, she was not aware of the exact date. Finally, the trial court did instruct the jury that the evidence could not be used for an improper purpose. For these reasons, we conclude that the trial court did not abuse its discretion in permitting the evidence of prior allegations of sexual abuse involving Monique.

C. Conclusion

The trial court did not err when it permitted the prosecution to present evidence about allegations of prior sexual abuse in defendant's household and to present evidence that defendant's children had been involved in prior accidental overdoses. But the trial court

erred when it permitted the prosecution to elicit detailed testimony about specific allegations of physical abuse by defendant against her children. The evidence of allegations Monique made that resulted in investigations of defendant by protective services personnel was relevant to show that defendant had a motive to harm or kill Monique. However, the danger of unfair prejudice ensuing from detailed testimony into specific allegations and the allegations involving defendant's other children substantially outweighed the potential probative value of the evidence to show motive. Therefore, the trial court abused its discretion when it permitted this testimony. Further, given the nature of this case, we cannot conclude that this error was harmless.

VII. General Conclusions

The trial court abused its discretion when it prevented defendant's daughter and expert psychologist from offering testimony about defendant's limited intellectual capabilities for the sole purpose of explaining defendant's behaviors and statements. The trial court also abused its discretion when it precluded defendant 796*796 from offering the testimony of a toxicologist.

The trial court did not err when it permitted the prosecution to present evidence of prior overdoses by defendant's children and evidence concerning prior and recent allegations of sexual abuse against Monique and defendant's experiences with the investigations into the abuse. However, the trial court erred when it permitted the introduction of detailed evidence concerning specific acts of physical abuse defendant allegedly committed against her children to show malice, intent, or absence of mistake or accident. Further, although the trial court correctly determined that the evidence that defendant had been investigated because of allegations of physical abuse was relevant to prove motive, the trial court erred when it permitted the prosecution to present detailed evidence of the specific instances of abuse.

Finally, the trial court did not err when it permitted the admission of Sarmiento's recorded testimony and did not err when it permitted Virani to offer his opinion about the likelihood that a child of Monique's age would commit suicide.

Because the identified errors were not harmless, defendant is entitled to a new trial. Therefore, we reverse defendant's convictions, vacate her sentence, and remand for a new trial that is consistent with this opinion. We do not retain jurisdiction.

[1] Defendant was arrested just a few months after Monique's death. But the district court originally refused to bind defendant over on the charges for lack of credible evidence of homicide. However, after a lengthy appeal process, see *People v. Yost,* 468 Mich. 122, 123-125, 659 N.W.2d 604 (2003), defendant was eventually bound over for

trial. Even after being bound over for trial, defendant's trial date was repeatedly delayed. The trial at issue began on February 22, 2006, and ended on April 6, 2006.

[2] Although the propriety of this ruling is not now before us, we note that it was plainly erroneous. The hearsay exception stated in MRE 803(4) is not limited to statements made by the person being diagnosed or treated. Rather, the rule specifically permits any "[statements made for purposes of medical treatment or medical diagnosis in connection with treatment . . . insofar as reasonably necessary to such diagnosis and treatment." Hence, the witness should have been permitted to rely on statements by third parties, such as Monique's parents and teachers. MRE 803(4); see, e.g., *Merrow v. Bofferding,* 458 Mich. 617, 624, 628-630, 581 N.W.2d 696 (1998)(upholding the admission of a statement in a patient's medical history regarding the cause of an injury even though the medical personnel could not identify the person who provided the history).

[3] During closing arguments the prosecution repeatedly and vigorously argued that defendant's unusual behaviors and statements were clear evidence of guilt. The prosecution noted that, although defendant supposedly was not aware that something was wrong with Monique when she failed to get up from her nap, the neighbor immediately knew something was wrong and began to help. The prosecutor also noted that defendant refused to get into the ambulance and argued that defendant stopped crying when the nurse left the room at the hospital because there were "no more witnesses." The prosecutor also played excerpts of defendant's recorded statements during closing arguments to punctuate the prosecution's claims that defendant deliberately killed Monique to punish and silence her. The powerful emotive effect of this use of defendant's recorded statements was evident even in the transcription.

[4] Given the prosecutor's statements at the February 16, 2005, hearing, it is clear that defendant added Cohle as a witness before the trial court ordered defendant to add witnesses by motion only. Nevertheless, defendant apparently failed to add Cohle to her final witness list, and the prosecution vigorously opposed defendant's efforts to have Cohle testify at trial.

[5] Indeed, had the trial court permitted Cohle to testify on these matters, the trial court's denial of defendant's motion to add a toxicologist may very well have been harmless.

Rock v Arkansas

483 U.S. 44 (1987)

ROCK

v.

ARKANSAS

No. 86-130.

Supreme Court of United States.

Argued March 23, 1987

Decided June 22, 1987

CERTIORARI TO THE SUPREME COURT OF ARKANSAS

45*45 *James M. Luffman* argued the cause and filed briefs for petitioner.

J. Steven Clark, Attorney General of Arkansas, argued the cause for respondent. With him on the brief was *Clint Miller,* Assistant Attorney General.[*]

David M. Heilbron and *Christopher Berka* filed a brief for the Product Liability Advisory Council et al. as *amici curiae.*

JUSTICE BLACKMUN delivered the opinion of the Court.

The issue presented in this case is whether Arkansas' evidentiary rule prohibiting the admission of hypnotically refreshed testimony violated petitioner's constitutional right to testify on her own behalf as a defendant in a criminal case.

I

Petitioner Vickie Lorene Rock was charged with manslaughter in the death of her husband, Frank Rock, on July 2, 1983. A dispute had been simmering about Frank's wish to move from the couple's small apartment adjacent to Vickie's beauty parlor to a trailer she owned outside town. That night a fight erupted when Frank refused to let petitioner eat some pizza and prevented her from leaving the apartment to get something else to eat. App. 98, 103-104. When police arrived on the scene they found Frank on the floor with a bullet wound in his chest. Petitioner urged the officers to help 46*46 her husband, Tr. 230, and cried to a sergeant who took her in charge, "please save him" and "don't let him die." *Id.,* at 268. The police removed her from the building because she was upset and because she interfered with their investigation by her repeated attempts to use the telephone to call her husband's parents. *Id.,* at 263-264, 267-268. According to the testimony of one of the investigating officers, petitioner told him that "she stood up to leave the room and [her husband] grabbed her by the throat and choked her and threw her against the wall and . . . at that time she walked over and picked up the weapon and pointed it toward the floor and he hit her again and she shot him." *Id.,* at 281.[1]

Because petitioner could not remember the precise details of the shooting, her attorney suggested that she submit to hypnosis in order to refresh her memory. Petitioner was hypnotized twice by Doctor Bettye Back, a licensed neuro-psychologist with training in the field of hypnosis. *Id.,* at 901-903. Doctor Back interviewed petitioner for an hour prior to the first hypnosis session, taking notes on petitioner's general history and her recollections of the shooting. App. 46-47.[2] Both hypnosis sessions were recorded on 47*47 tape. *Id.,* at 53. Petitioner did not relate any new information during either of the sessions, *id.,* at 78, 83, but, after the hypnosis, she was able to remember that at the time of the incident she had her thumb on the hammer of the gun, but had not held her finger on the trigger. She also recalled that the gun had discharged when her husband grabbed her arm during the scuffle. *Id.,* at 29, 38. As a result of the details that petitioner was able to remember about the shooting, her counsel arranged for a gun expert to examine the handgun,a single-action Hawes .22 Deputy Marshal. That inspection revealed that the gun was defective and prone to fire, when hit or dropped, without the trigger's being pulled. Tr. 662-663, 711.

When the prosecutor learned of the hypnosis sessions, he filed a motion to exclude petitioner's testimony. The trial judge held a pretrial hearing on the motion and concluded that no hypnotically refreshed testimony would be admitted. The court issued an order limiting petitioner's testimony to "matters remembered and stated to the examiner prior to being placed under hypnosis." App. to Pet. for Cert. xvii.[3] 48*48 At trial, petitioner introduced testimony by the gun expert, Tr. 647-712, but the court limited petitioner's own description of the events on the day of the shooting to a

reiteration of the sketchy information in Doctor Back's notes. See App. 96-104.[4] The jury convicted petitioner on the manslaughter charge and she was sentenced to 10 years' imprisonment and a $10,000 fine.

On appeal, the Supreme Court of Arkansas rejected petitioner's claim that the limitations on her testimony violated her right to present her defense. The court concluded that "the dangers of admitting this kind of testimony outweigh whatever probative value it may have," and decided to follow 49*49 the approach of States that have held hypnotically refreshed testimony of witnesses inadmissible *per se.* 288 Ark. 566, 573, 708 S. W. 2d 78, 81 (1986). Although the court acknowledged that "a defendant's right to testify is fundamental," *id.,* at 578, 708 S. W. 2d, at 84, it ruled that the exclusion of petitioner's testimony did not violate her constitutional rights. Any "prejudice or deprivation" she suffered "was minimal and resulted from her own actions and not by any erroneous ruling of the court." *Id.,* at 580, 708 S. W. 2d, at 86. We granted certiorari, 479 U. S. 947 (1986), to consider the constitutionality of Arkansas' *per se* rule excluding a criminal defendant's hypnotically refreshed testimony.

II

Petitioner's claim that her testimony was impermissibly excluded is bottomed on her constitutional right to testify in her own defense. At this point in the development of our adversary system, it cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense. This, of course, is a change from the historic common-law view, which was that all parties to litigation, including criminal defendants, were disqualified from testifying because of their interest in the outcome of the trial. See generally 2 J. Wigmore, Evidence §§ 576, 579 (J. Chadbourn rev. 1979). The principal rationale for this rule was the possible untrustworthiness of a party's testimony. Under the common law, the practice did develop of permitting criminal defendants to tell their side of the story, but they were limited to making an unsworn statement that could not be elicited through direct examination by counsel and was not subject to cross-examination. *Id.,* at § 579, p. 827.

This Court in *Ferguson* v. *Georgia,* 365 U. S. 570, 573-582 (1961), detailed the history of the transition from a rule of a defendant's incompetency to a rule of competency. As the 50*50 Court there recounted, it came to be recognized that permitting a defendant to testify advances both the " `detection of guilt' " and " `the protection of innocence,' " *id.,* at 581, quoting 1 Am. L. Rev. 396 (1867), and by the end of the second half of the 19th century,[5] all States except Georgia had enacted statutes that declared criminal defendants competent to testify. See 365 U. S., at 577 and n. 6, 596-598.[6] Congress enacted a general competency statute in the Act of Mar. 16, 1878, 20 Stat. 30, as amended, 18 U. S. C. § 3481, and similar developments followed in other common-law countries. Thus, more than 25 years ago this Court was able to state:

> *"In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case."* *Ferguson v. Georgia, 365 U. S., at 582.*[7]

51*51 The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution. It is one of the rights that "are essential to due process of law in a fair adversary process." *Faretta* v. *California,* 422 U. S. 806, 819, n. 15 (1975). The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony:

> *"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense — a right to his day in court — are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (Emphasis added.) In re Oliver, 333 U. S. 257, 273 (1948).*[8]

See also *Ferguson* v. *Georgia,* 365 U. S., at 602 (Clark, J., concurring) (Fourteenth Amendment secures "right of a criminal defendant to choose between silence and testifying in his own behalf").[9]

52*52 The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. *Washington* v.*Texas,* 388 U. S. 14, 17-19 (1967). Logically included in the accused's right to call witnesses whose testimony is "material and favorable to his defense," *United States* v. *Valenzuela-Bernal,*458 U. S. 858, 867 (1982), is a right to testify himself, should he decide it is in his favor to do so. In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification today for a rule that denies an accused the opportunity to offer his own testimony. Like the truthfulness of other witnesses, the defendant's veracity, which was the concern behind the original common-law rule, can be tested adequately by cross-examination. See generally Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 119-120 (1974).

Moreover, in *Faretta* v. *California,* 422 U. S., at 819, the Court recognized that the Sixth Amendment

> *"grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be `informed of the nature and cause of the accusation,' who must be `confronted with the witnesses against him,' and who must be accorded `compulsory process for obtaining witnesses in his favor.' " (Emphasis added.)*

Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," *ibid.,* is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct his own defense by calling witnesses is incomplete if he may not present himself as a witness.

The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In *Harris* v. *New York,* 401 U. S. 222, 230 (1971), 53*53 the Court stated: "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." *Id.,* at 225. Three of the dissenting Justices in that case agreed that the Fifth Amendment encompasses this right: "[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right `to remain silent unless he chooses to speak in the unfettered exercise of his own will.' . . . The choice of whether to testify in one's own defense . . . is an exercise of the constitutional privilege." *Id.,* at 230, quoting *Malloy* v. *Hogan,*378 U. S. 1, 8 (1964). (Emphasis removed.)[10]

III

The question now before the Court is whether a criminal defendant's right to testify may be restricted by a state rule that excludes her posthypnosis testimony. This is not the first time this Court has faced a constitutional challenge to a state rule, designed to ensure trustworthy evidence, that interfered with the ability of a defendant to offer testimony. In *Washington* v.*Texas,* 388 U. S. 14 (1967), the Court was confronted with a state statute that prevented persons charged as principals, accomplices, or accessories in the same crime from being introduced as witnesses for one another. The statute, like the original common-law prohibition on testimony by the accused, was grounded in a concern for the reliability of evidence presented by an interested party:

> *"It was thought that if two persons charged with the same crime were allowed to testify on behalf of each 54*54 other, `each would try to swear the other out of the charge.' This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue." (Footnote omitted.) Id., at 21, quoting Benson v. United States, 146 U. S. 325, 335 (1892).*

As the Court recognized, the incompetency of a codefendant to testify had been rejected on nonconstitutional grounds in 1918, when the Court, refusing to be bound by "the dead hand of the common-law rule of 1789," stated:

> *" `[T]he conviction of our time [is] that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . .' " 388 U. S., at 22, quoting Rosen v. United States, 245 U. S. 467, 471 (1918).*

The Court concluded that this reasoning was compelled by the Sixth Amendment's protections for the accused. In particular, the Court reasoned that the Sixth Amendment was designed in part "to make the testimony of a defendant's witnesses admissible on his behalf in court." 388 U. S., at 22.

With the rationale for the common-law incompetency rule thus rejected on constitutional grounds, the Court found that the mere presence of the witness in the courtroom was not enough to satisfy the Constitution's Compulsory Process Clause. By preventing the defendant from having the benefit of his accomplice's testimony, "the State *arbitrarily* denied him the right to put on the stand a witness who was 55*55 physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." (Emphasis added.) *Id.,* at 23.

Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In *Chambers* v.*Mississippi,* 410 U. S. 284 (1973), the Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense." *Id.,* at 302. Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The State's hearsay rule, coupled with a "voucher" rule that did not allow the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning these confessions, which were critical to his defense. This Court reversed the judgment of conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of justice," but must meet the fundamental standards of due process. *Ibid.* In the Court's view, the State in *Chambers* did not demonstrate that the hearsay testimony in that case, which bore "assurances of trustworthiness" including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony. *Ibid.*

Of course, the right to present relevant testimony is not without limitation. The right "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id.,* at 295.[11] But restrictions of a 56*56 defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

IV

The Arkansas rule enunciated by the state courts does not allow a trial court to consider whether posthypnosis testimony may be admissible in a particular case; it is a *per se* rule prohibiting the admission at trial of any defendant's hypnotically refreshed testimony on the ground that such testimony is always unreliable.[12] Thus, in Arkansas, an accused's testimony is limited to matters that he or she can prove were remembered *before* hypnosis. This rule operates to the detriment of any defendant who undergoes hypnosis, without regard to the reasons for it, the circumstances under which it took place, or any independent verification of the information it produced.[13]

57*57 In this case, the application of that rule had a significant adverse effect on petitioner's ability to testify. It virtually prevented her from describing any of the events that occurred on the day of the shooting, despite corroboration of many of those events by other witnesses. Even more importantly, under the court's rule petitioner was not permitted to describe the actual shooting except in the words contained in Doctor Back's notes. The expert's description of the gun's tendency to misfire would have taken on greater significance if the jury had heard petitioner testify that she did not have her finger on the trigger and that the gun went off when her husband hit her arm.

In establishing its *per se* rule, the Arkansas Supreme Court simply followed the approach taken by a number of States that have decided that hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be unreliable.[14] Other States that have adopted an exclusionary rule, however, have done so for the testimony of *witnesses,* not for the testimony of a *defendant.* The Arkansas 58*58 Supreme Court failed to perform the constitutional analysis that is necessary when a defendant's right to testify is at stake.[15]

Although the Arkansas court concluded that any testimony that cannot be proved to be the product of prehypnosis memory is unreliable, many courts have eschewed a *per se* rule and permit the admission of hypnotically refreshed testimony.[16] Hypnosis by trained physicians or psychologists has 59*59 been recognized as a valid therapeutic technique since 1958, although there is no generally accepted theory to explain the phenomenon, or even a consensus on a single definition of hypnosis. See Council on Scientific Affairs, Scientific Status of Refreshing Recollection by the Use of Hypnosis, 253 J. A. M. A. 1918, 1918-1919 (1985) (Council Report).[17] The use of hypnosis in criminal investigations, however, is controversial, and the current medical and legal view of its appropriate role is unsettled.

Responses of individuals to hypnosis vary greatly. The popular belief that hypnosis guarantees the accuracy of recall is as yet without established foundation and, in fact, hypnosis often has no effect at all on memory. The most common response to

hypnosis, however, appears to be an increase in both correct and incorrect recollections.[18] Three general characteristics of hypnosis may lead to the introduction of inaccurate memories: the subject becomes "suggestible" and may try to please the hypnotist with answers the subject 60*60 thinks will be met with approval; the subject is likely to "confabulate," that is, to fill in details from the imagination in order to make an answer more coherent and complete; and, the subject experiences "memory hardening," which gives him great confidence in both true and false memories, making effective cross-examination more difficult. See generally M. Orne et al., Hypnotically Induced Testimony, in Eyewitness Testimony: Psychological Perspectives 171 (G. Wells & E. Loftus, eds., 1984); Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness, 68 Calif. L. Rev. 313, 333-342 (1980). Despite the unreliability that hypnosis concededly may introduce, however, the procedure has been credited as instrumental in obtaining investigative leads or identifications that were later confirmed by independent evidence. See, *e. g., People* v. *Hughes,* 59 N. Y. 2d 523, 533, 453 N. E. 2d 484, 488 (1983); see generally R. Udolf, Forensic Hypnosis 11-16 (1983).

The inaccuracies the process introduces can be reduced, although perhaps not eliminated, by the use of procedural safeguards. One set of suggested guidelines calls for hypnosis to be performed only by a psychologist or psychiatrist with special training in its use and who is independent of the investigation. See Orne, The Use and Misuse of Hypnosis in Court, 27 Int'l J. Clinical and Experimental Hypnosis 311, 335-336 (1979). These procedures reduce the possibility that biases will be communicated to the hypersuggestive subject by the hypnotist. Suggestion will be less likely also if the hypnosis is conducted in a neutral setting with no one present but the hypnotist and the subject. Tape or video recording of all interrogations, before, during, and after hypnosis, can help reveal if leading questions were asked. *Id.,* at 336.[19] Such guidelines do not guarantee the accuracy of the testimony, because they cannot control the subject's own 61*61 motivations or any tendency to confabulate, but they do provide a means of controlling overt suggestions.

The more traditional means of assessing accuracy of testimony also remain applicable in the case of a previously hypnotized defendant. Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. Indeed, it is probably to a defendant's advantage to establish carefully the extent of his memory prior to hypnosis, in order to minimize the decrease in credibility the procedure might introduce.

We are not now prepared to endorse without qualifications the use of hypnosis as an investigative tool; scientific understanding of the phenomenon and of the means to control the effects of hypnosis is still in its infancy. Arkansas, however, has not justified the exclusion of*all* of a defendant's testimony that the defendant is unable to prove to be the product of prehypnosis memory. A State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an individual case. Wholesale inadmissibility of a defendant's testimony is an arbitrary restriction on the right to testify in the absence of clear evidence by the State

repudiating the validity of all posthypnosis recollections. The State would be well within its powers if it established guidelines to aid trial courts in the evaluation of posthypnosis testimony and it may be able to show that testimony in a particular case is so unreliable that exclusion is justified. But it has not shown that hypnotically enhanced testimony is always so untrustworthy and so immune to the traditional means of evaluating credibility that it should disable a defendant from presenting her version of the events for which she is on trial.

62*62 In this case, the defective condition of the gun corroborated the details petitioner remembered about the shooting. The tape recordings provided some means to evaluate the hypnosis and the trial judge concluded that Doctor Back did not suggest responses with leading questions. See n. 3, *supra.* Those circumstances present an argument for admissibility of petitioner's testimony in this particular case, an argument that must be considered by the trial court. Arkansas' *per se* rule excluding all posthypnosis testimony infringes impermissibly on the right of a defendant to testify on his own behalf.[20]

The judgment of the Supreme Court of Arkansas is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

In deciding that petitioner Rock's testimony was properly limited at her trial, the Arkansas Supreme Court cited several factors that undermine the reliability of hypnotically induced testimony. Like the Court today, the Arkansas Supreme Court observed that a hypnotized individual becomes subject to suggestion, is likely to confabulate, and experiences artificially increased confidence in both true and false memories following hypnosis. No known set of procedures, both courts agree, can insure against the inherently unreliable nature of such testimony. Having acceded to the 63*63 factual premises of the Arkansas Supreme Court, the Court nevertheless concludes that a state trial court must attempt to make its own scientific assessment of reliability in each case it is confronted with a request for the admission of hypnotically induced testimony. I find no justification in the Constitution for such a ruling.

In the Court's words, the decision today is "bottomed" on recognition of Rock's "constitutional right to testify in her own defense." *Ante,* at 49. While it is true that this Court, in dictum, has recognized the existence of such a right, see, *e. g., Faretta* v. *California,* 422 U. S. 806, 819, n. 15 (1975), the principles identified by the Court as underlying this right provide little support for invalidating the evidentiary rule applied by the Arkansas Supreme Court.

As a general matter, the Court first recites, a defendant's right to testify facilitates the truth-seeking function of a criminal trial by advancing both the " `detection of guilt' " and " `the protection of innocence.' " *Ante,* at 50, quoting *Ferguson* v. *Georgia,* 365 U. S. 570, 581 (1961). Such reasoning is hardly controlling here, where advancement of the

truth-seeking function of Rock's trial was the sole motivation behind limiting her testimony. The Court also posits, however, that "a rule that denies an accused the opportunity to offer his own testimony" cannot be upheld because, "[l]ike the truthfulness of other witnesses, the defendant's veracity. . . can be tested adequately by cross-examination." *Ante,* at 52. But the Court candidly admits that the increased confidence inspired by hypnotism makes "cross-examination more difficult,"*ante,* at 60, thereby diminishing an adverse party's ability to test the truthfulness of defendants such as Rock. Nevertheless, we are told, the exclusion of a defendant's testimony cannot be sanctioned because the defendant " `above all others may be in a position to meet the prosecution's case.' " *Ante,* at 50, quoting *Ferguson* v. *Georgia, supra,* at 582. In relying on such reasoning, the Court apparently forgets that the issue before us arises only by virtue 64*64of Rock's memory loss, which rendered her less able "to meet the prosecution's case." 365 U. S., at 582.

In conjunction with its reliance on broad principles that have little relevance here, the Court barely concerns itself with the recognition, present throughout our decisions, that an individual's right to present evidence is subject always to reasonable restrictions. Indeed, the due process decisions relied on by the Court all envision that an individual's right to present evidence on his behalf is not absolute and must often-times give way to countervailing considerations. See, *e. g., In re Oliver,* 333 U. S. 257, 273, 275 (1948); *Morrissey* v. *Brewer,* 408 U. S. 471, 481-482 (1972); *Goldberg* v. *Kelly,* 397 U. S. 254, 263 (1970). Similarly, our Compulsory Process Clause decisions make clear that the right to present relevant testimony "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers*v. *Mississippi,* 410 U. S. 284, 295 (1973); see *Washington* v. *Texas,* 388 U. S. 14, 22 (1967). The Constitution does not in any way relieve a defendant from compliance with "rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers* v. *Mississippi, supra,* at 302. Surely a rule designed to exclude testimony whose trustworthiness is inherently suspect cannot be said to fall outside this description.[*]

This Court has traditionally accorded the States "respect. . . in the establishment and implementation of their own criminal trial rules and procedures." 410 U. S., at 302-303; see, *e. g., Marshall* v. *Lonberger,* 459 U. S. 422, 438, n. 6 (1983) ("[T]he Due Process Clause does not permit the federal 65*65 courts to engage in a finely tuned review of the wisdom of state evidentiary rules"); *Patterson* v. *New York,* 432 U. S. 197, 201 (1977) ("[W]e should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States"). One would think that this deference would be at its highest in an area such as this, where, as the Court concedes, "scientific understanding . . . is still in its infancy." *Ante,* at 61. Turning a blind eye to this concession, the Court chooses instead to restrict the ability of both state and federal courts to respond to changes in the understanding of hypnosis.

The Supreme Court of Arkansas' decision was an entirely permissible response to a novel and difficult question. See National Institute of Justice, Issues and Practices, M. Orne et al., Hypnotically Refreshed Testimony: Enhanced Memory or Tampering with Evidence? 51 (1985). As an original proposition, the solution this Court imposes upon

Arkansas may be equally sensible, though requiring the matter to be considered *res nova* by every single trial judge in every single case might seem to some to pose serious administrative difficulties. But until there is much more of a consensus on the use of hypnosis than there is now, the Constitution does not warrant this Court's mandating its own view of how to deal with the issue.

[*] *John K. Van de Kamp,* Attorney General, *Steve White,* Chief Assistant Attorney General, *Arnold O. Overoye,*Assistant Attorney General, and *Shirley A. Nelson* and *Garrett Beaumont,* Deputy Attorneys General, filed a brief for the State of California as *amicus curiae* urging affirmance.

[1] Another officer reported a slightly different version of the events:

"She stated that she had told her husband that she was going to go outside. He refused to let her leave and grabbed her by the throat and began choking her. They struggled for a moment and she grabbed a gun. She told him to leave her alone and he hit her at which time the gun went off. She stated that it was an accident and she didn't mean to shoot him. She said she had to get to the hospital and talk to him." Tr. 388.

See also *id.,* at 301-304, 337-338; App. 3-10.

[2] Doctor Back's handwritten notes regarding petitioner's memory of the day of the shooting read as follows:

"Pt states she & husb. were discussing moving out to a trailer she had prev. owned. He was `set on' moving out to the trailer — she felt they should discuss. She bec[ame] upset & went to another room to lay down. Bro. came & left. She came out to eat some of the pizza, he wouldn't allow her to have any. She said she would go out and get [something] to eat he wouldn't allow her — He pushed her against a wall an end table in the corner [with] a gun on it. They were the night watchmen for business that sets behind them. She picked gun up stated she didn't want him hitting her anymore. He wouldn't let her out door, slammed door & `gun went off & he fell & he died' [pt looked misty eyed here — near tears]" (additions by Doctor Back). App. 40.

[3] The full pretrial order reads as follows:

"NOW on this 26th day of November, 1984, comes on the captioned matter for pre-trial hearing, and the Court finds:

"1. On September 27 and 28, 1984, Defendant was placed under hypnotic trance by Dr. Bettye Back, PhD, Fayetteville, Arkansas, for the express purpose of enhancing her memory of the events of July 2, 1983, involving the death of Frank Rock.

"2. Dr. Back was professionally qualified to administer hypnosis. She was objective in the application of the technique and did not suggest by leading questions the responses expected to be made by Defendant. She was employed on an independent, professional basis. She made written notes of facts related to her by Defendant during the pre-hypnotic interview. She did employ post-hypnotic suggestion with Defendant. No one

else was present during any phase of the hypnosis sessions except Dr. Back and Defendant.

"3. Defendant cannot be prevented by the Court from testifying at her trial on criminal charges under the Arkansas Constitution, but testimony of matters recalled by Defendant due to hypnosis will be excluded because of inherent unreliability and the effect of hypnosis in eliminating any meaningful cross-examination on those matters. Defendant may testify to matters remembered and stated to the examiner prior to being placed under hypnosis. Testimony resulting from post-hypnotic suggestion will be excluded." App. to Pet. for Cert. xvii.

[4] When petitioner began to testify, she was repeatedly interrupted by the prosecutor, who objected that her statements fell outside the scope of the pretrial order. Each time she attempted to describe an event on the day of the shooting, she was unable to proceed for more than a few words before her testimony was ruled inadmissible. For example, she was unable to testify without objection about her husband's activities on the morning of the shooting, App. 11, about their discussion and disagreement concerning the move to her trailer, *id.,*at 12, 14, about her husband's and his brother's replacing the shock absorbers on a van, *id.,* at 16, and about her brother-in-law's return to eat pizza, *id.,* at 19-20. She then made a proffer, outside the hearing of the jury, of testimony about the fight in an attempt to show that she could adhere to the court's order. The prosecution objected to every detail not expressly described in Doctor Back's notes or in the testimony the doctor gave at the pretrial hearing. *Id.,* at 32-35. The court agreed with the prosecutor's statement that "ninety-nine percent of everything [petitioner] testified to in the proffer" was inadmissible. *Id.,* at 35.

[5] The removal of the disqualifications for accused persons occurred later than the establishment of the competence to testify of civil parties. 2 J. Wigmore, Evidence § 579, p. 826 (J. Chadbourn rev. 1979). This was not due to concern that criminal defendants were more likely to be unreliable than other witnesses, but to a concern for the accused:

"If, being competent, he failed to testify, that (it was believed) would damage his cause more seriously than if he were able to claim that his silence were enforced by law. Moreover, if he did testify, that (it was believed) would injure more than assist his cause, since by undergoing the ordeal of cross-examination, he would appear at a disadvantage dangerous even to an innocent man." *Id.,* at 828.

[6] The Arkansas Constitution guarantees an accused the right "to be heard by himself and his counsel." Art. 2, § 10. Rule 601 of the Arkansas Rules of Evidence provides a general rule of competency: "Every person is competent to be a witness except as otherwise provided in these rules."

[7] *Ferguson* v. *Georgia* struck down as unconstitutional under the Fourteenth Amendment a Georgia statute that limited a defendant's presentation at trial to an unsworn statement, insofar as it denied the accused "the right to have his counsel question him to elicit his statement." 365 U. S., at 596. The Court declined to reach the question of a defendant's constitutional right to testify, because the case did not involve

a challenge to the particular Georgia statute that rendered a defendant incompetent to testify. *Id.,* at 572, n. 1. Two Justices, however, urged that such a right be recognized explicitly. *Id.,* at 600-601, 602 (concurring opinions).

[8] Before *Ferguson* v. *Georgia,* it might have been argued that a defendant's ability to present an unsworn statement would satisfy this right. Once that procedure was eliminated, however, there was no longer any doubt that the right to be heard, which is so essential to due process in an adversary system of adjudication, could be vindicated only by affording a defendant an opportunity to testify before the factfinder.

[9] This right reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify. See, *e. g., Gagnon* v. *Scarpelli,* 411 U. S. 778, 782, 786 (1973) (probation revocation); *Morrissey* v. *Brewer,* 408 U. S. 471, 489 (1972) (parole revocation); *Goldberg* v. *Kelly,* 397 U. S. 254, 269 (1970) (termination of welfare benefits).

[10] On numerous occasions the Court has proceeded on the premise that the right to testify on one's own behalf in defense to a criminal charge is a fundamental constitutional right. See, *e. g., Nix* v. *Whiteside,* 475 U. S. 157, 164 (1986); *id.,* at 186, n. 5 (BLACKMUN, J., concurring in judgment); *Jones* v. *Barnes,* 463 U. S. 745, 751 (1983)(defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to . . . testify in his or her own behalf"); *Brooks* v. *Tennessee,* 406 U. S. 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

[11] Numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify. See, *e. g., Chambers* v. *Mississippi,* 410 U. S., at 302 ("In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence"); *Washington* v. *Texas,* 388 U. S. 14, 23, n. 21 (1967) (opinion should not be construed as disapproving testimonial privileges or nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses).

[12] The rule leaves a trial judge no discretion to admit this testimony, even if the judge is persuaded of its reliability by testimony at a pretrial hearing. Tr. of Oral Arg. 36 (statement of the Attorney General of Arkansas).

[13] The Arkansas Supreme Court took the position that petitioner was fully responsible for any prejudice that resulted from the restriction on her testimony because it was she who chose to resort to the technique of hypnosis. 288 Ark. 566, 580, 708 S. W. 2d 78, 86 (1986). The prosecution and the trial court each expressed a similar view and the theme was renewed repeatedly at trial as a justification for limiting petitioner's testimony. See App. 15, 20, 21-22, 24, 36. It should be noted, however, that Arkansas had given no previous indication that it looked with disfavor on the use of hypnosis to assist in the preparation for trial and there were no previous state-court rulings on the issue.

[14] See, *e. g., Contreras* v. *State,* 718 P. 2d 129 (Alaska 1986); *State ex rel. Collins* v. *Superior Court, County of Maricopa,* 132 Ariz. 180, 207-208, 644 P. 2d 1266, 1293-1294 (1982); *People* v. *Quintanar,* 659 P. 2d 710, 711 (Colo. App. 1982); *State* v. *Davis,* 490 A. 2d 601 (Del. Super. 1985); *Bundy* v. *State,* 471 So. 2d 9, 18-19 (Fla. 1985), cert. denied, 479 U. S. 894 (1986); *State* v. *Moreno,* 68 Haw. 233, 709 P. 2d 103 (1985); *State* v. *Haislip,*237 Kan. 461, 482, 701 P. 2d 909, 925-926, cert. denied, 474 U. S. 1022 (1985); *State* v. *Collins,* 296 Md. 670, 464 A. 2d 1028 (1983); *Commonwealth* v. *Kater,* 388 Mass. 519, 447 N. E. 2d 1190 (1983); *People* v. *Gonzales,*415 Mich. 615, 329 N. W. 2d 743 (1982), opinion added to, 417 Mich. 1129, 336 N. W. 2d 751 (1983); *Alsbach* v.*Bader,* 700 S. W. 2d 823 (Mo. 1985); *State* v. *Palmer,* 210 Neb. 206, 218, 313 N. W. 2d 648, 655 (1981); *People* v.*Hughes,* 59 N. Y. 2d 523, 453 N. E. 2d 484 (1983); *Robison* v. *State,* 677 P. 2d 1080, 1085 (Okla. Crim. App.),cert. denied, 467 U. S. 1246 (1984); *Commonwealth* v. *Nazarovitch,* 496 Pa. 97, 110, 436 A. 2d 170, 177 (1981);*State* v. *Martin,* 101 Wash. 2d 713, 684 P. 2d 651 (1984). See *State* v. *Ture,* 353 N. W. 2d 502, 513-514 (Minn. 1984).

[15] The Arkansas court relied on a California case, *People* v. *Shirley,* 31 Cal. 3d 18, 723 P. 2d 1354, cert. denied,459 U. S. 860 (1982), for much of its reasoning as to the unreliability of hypnosis. 288 Ark., at 575-578, 708 S. W. 2d, at 83-84. But while the California court adopted a far stricter general rule — barring entirely testimony by any witness who has been hypnotized — it explicitly excepted testimony by an accused:

"[W]hen it is the defendant himself — not merely a defense witness — who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf." 31 Cal. 3d, at 67, 723 P. 2d, at 1384.

This case does not involve the admissibility of testimony of previously hypnotized witnesses other than criminal defendants and we express no opinion on that issue.

[16] Some jurisdictions have adopted a rule that hypnosis affects the credibility, but not the admissibility, of testimony. See, *e. g., Beck* v. *Norris,* 801 F. 2d 242, 244-245 (CA6 1986); *United States* v. *Awkard,* 597 F. 2d 667, 669 (CA9), cert. denied, 444 U. S. 885 (1979); *State* v. *Wren,* 425 So. 2d 756 (La. 1983); *State* v. *Brown,* 337 N. W. 2d 138, 151 (N. D. 1983); *State* v. *Glebock,* 616 S. W. 2d 897, 903-904 (Tenn. Crim. App. 1981); *Chapman* v.*State,* 638 P. 2d 1280, 1282 (Wyo. 1982).

Other courts conduct an individualized inquiry in each case. See, *e. g., McQueen* v. *Garrison,* 814 F. 2d 951, 958 (CA4 1987) (reliability evaluation); *Wicker* v. *McCotter,* 783 F. 2d 487, 492-493 (CA5) (probative value of the testimony weighed against its prejudicial effect), cert. denied, 478 U. S. 1010 (1986); *State* v. *Iwakiri,* 106 Idaho 618, 625, 682 P. 2d 571, 578 (1984) (weigh "totality of circumstances").

In some jurisdictions, courts have established procedural prerequisites for admissibility in order to reduce the risks associated with hypnosis. Perhaps the leading case in this line is *State* v. *Hurd,* 86 N. J. 525, 432 A. 2d 86 (1981). See also *Sprynczynatyk* v. *General Motors Corp.,* 771 F. 2d 1112, 1122-1123 (CA8 1985), cert. denied, 475 U. S. 1046 (1986); *United States* v. *Harrington,* 18 M. J. 797, 803 (A. C. M. R. 1984); *House* v. *State,* 445 So. 2d

815, 826-827 (Miss. 1984); *State* v. *Beachum,* 97 N. M. 682, 689-690, 643 P. 2d 246, 253-254 (App. 1981), writ quashed, 98 N. M. 51, 644 P. 2d 1040 (1982); *State* v. *Weston,* 16 Ohio App. 3d 279, 287, 475 N. E. 2d 805, 813 (1984); *State* v. *Armstrong,* 110 Wis. 2d 555, 329 N. W. 2d 386, cert. denied, 461 U. S. 946 (1983).

[17] Hypnosis has been described as "involv[ing] the focusing of attention: increased responsiveness to suggestions; suspension of disbelief with a lowering of critical judgment; potential for altering perception, motor control, or memory in response to suggestions; and the subjective experience of responding involuntarily." Council Report, 253 J. A. M. A., at 1919.

[18] "[W]hen hypnosis is used to refresh recollection, one of the following outcomes occurs: (1) hypnosis produces recollections that are not substantially different from nonhypnotic recollections; (2) it yields recollections that are more inaccurate than nonhypnotic memory; or, most frequently, (3) it results in more information being reported, but these recollections contain both accurate and inaccurate details. . . . There are no data to support a fourth alternative, namely, that hypnosis increases remembering of only accurate information." *Id.,* at 1921.

[19] Courts have adopted varying versions of these safeguards. See n. 16, *supra.* Oregon by statute has a requirement for procedural safeguards for hypnosis. Ore. Rev. Stat. § 136.675 (1985).

[20] This disposition makes it unnecessary to consider petitioner's claims that the trial court's order restricting her testimony was unconstitutionally broad and that the trial court's application of the order resulted in a denial of due process of law. We also need not reach petitioner's argument that Arkansas' restriction on her testimony interferes with her Sixth Amendment right to counsel. Petitioner concedes that there is a "substantial question" whether she raised this federal question on appeal to the Arkansas Supreme Court. Reply Brief for Petitioner 2.

[*] The Court recognizes, as it must, that rules governing "testimonial privileges [and] nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses" do not "offend the defendant's right to testify." *Ante,* at 55-56, n. 11. I fail to discern any meaningful constitutional difference between such rules and the one at issue here.

Ross v Moffitt

417 U.S. 600 (1974)

ROSS ET AL.

v.

MOFFITT.

No. 73-786.

Supreme Court of United States.

Argued April 22, 1974.

Decided June 17, 1974.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

602*602 *Jacob L. Safron,* Assistant Attorney General of North Carolina, argued the cause for petitioners. With him on the brief was *Robert Morgan,* Attorney General.

Thomas B. Anderson, Jr., by appointment of the Court, 415 U. S. 909, argued the cause and filed a brief for respondent.[*]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are asked in this case to decide whether *Douglas* v. *California,* 372 U. S. 353 (1963), which requires appointment of counsel for indigent state defendants on their first appeal as of right, should be extended to require counsel for discretionary state appeals and for applications 603*603for review in this Court. The Court of Appeals for the Fourth Circuit held that such appointment was required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[1]

I

The case now before us has resulted from consolidation of two separate cases, North Carolina criminal prosecutions brought in the respective Superior Courts for the counties of Mecklenburg and Guilford. In both cases respondent pleaded not guilty to charges of forgery and uttering a forged instrument, and because of his indigency was represented at trial by court-appointed counsel. He was convicted and then took separate appeals to the North Carolina Court of Appeals, where he was again represented by court-appointed counsel, and his convictions were affirmed.[2] At this point the procedural histories of the two cases diverge.

Following affirmance of his Mecklenburg Country conviction, respondent sought to invoke the discretionary review procedures of the North Carolina Supreme Court. His court-appointed counsel approached the Mecklenburg County Superior Court about possible appointment to represent respondent on this appeal, but counsel was informed that the State was not required to furnish counsel for that petition. Respondent sought collateral relief in both the state and federal courts, first raising his right-to-counsel contention in a habeas corpus petition filed in the United States District Court for the Western District of North Carolina in February 1971. Relief was denied at that time, and respondent's appeal to the Court 604*604 of Appeals for the Fourth Circuit was dismissed by stipulation in order to allow respondent to first exhaust state remedies on this issue. After exhausting state remedies, he reapplied for habeas relief, which was again denied. Respondent appealed that denial to the Court of Appeals for the Fourth Circuit.

Following affirmance of his conviction on the Guilford County charges, respondent also sought discretionary review in the North Carolina Supreme Court. On this appeal, however, respondent was not denied counsel but rather was represented by the public defender who had been appointed for the trial and respondent's first appeal. The North Carolina Supreme Court denied certiorari.[3] Respondent then unsuccessfully petitioned the Superior Court for Guilford County for court-appointed counsel to prepare a petition for a writ of certiorari to this Court, and also sought post-conviction relief throughout the state courts. After these motions were denied, respondent again sought federal habeas relief, this time in the United States District Court for the Middle District of North Carolina. That court denied relief, and respondent took an appeal to the Court of Appeals for the Fourth Circuit.

The Court of Appeals reversed the two District Court judgments, holding that respondent was entitled to the assistance of counsel at state expense both on his petition for review in the North Carolina Supreme Court and on his petition for certiorari to this Court. Reviewing the procedures of the North Carolina appellate

system and the possible benefits that counsel would provide for indigents seeking review in that system, the court stated:

> *"As long as the state provides such procedures and allows other convicted felons to seek access to the 605*605 higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court."*[4]

This principle was held equally applicable to petitions for certiorari to this Court. For, said the Court of Appeals, "[t]he same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals."[5]

We granted certiorari, 414 U. S. 1128, to consider the Court of Appeals' decision in light of*Douglas* v. *California,* and apparently conflicting decisions of the Courts of Appeals for the Seventh and Tenth Circuits.[6] For the reasons hereafter stated we reverse the Court of Appeals.

II

This Court, in the past 20 years, has given extensive consideration to the rights of indigent persons on appeal. In *Griffin* v. *Illinois,* 351 U. S. 12 (1956), the first of the pertinent cases, the Court had before it an Illinois rule allowing a convicted criminal defendant to present claims of trial error to the Supreme Court of Illinois only if he procured a transcript of the testimony adduced at his trial.[7] No exception was made for the indigent 606*606 defendant, and thus one who was unable to pay the cost of obtaining such a transcript was precluded from obtaining appellate review of asserted trial error. Mr. Justice Frankfurter, who cast the deciding vote, said in his concurring opinion:

> *". . . Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court." Id., at 22.*

The Court in *Griffin* held that this discrimination violated the Fourteenth Amendment.

Succeeding cases invalidated similar financial barriers to the appellate process, at the same time reaffirming the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants. *McKane* v. *Durston,* 153 U. S. 684 (1894). The cases encompassed a variety of circumstances but all had a common theme. For example, *Lane* v. *Brown,* 372 U. S. 477 (1963), involved an Indiana provision declaring that only a public defender could obtain a free transcript of a hearing on a *coram nobis* application. If the public defender declined to request one, the indigent prisoner seeking to appeal

had no recourse. In *Draper* v. *Washington,*372 U. S. 487 (1963), the State permitted an indigent to obtain a free transcript of the trial at which he was convicted only if he satisfied the trial judge that his contentions on appeal would not be frivolous. The appealing defendant was in effect bound by the trial court's conclusions in seeking to review the determination of frivolousness, since no transcript or its equivalent was made available to him. In *Smith* v. *Bennett,* 365 U. S. 708 (1961), Iowa had required a filing fee in order to process a state habeas corpus application by a convicted defendant, and in *Burns* v.*Ohio,* 360 U. S. 252 (1959), the State of Ohio required a $20 filing fee in 607*607 order to move the Supreme Court of Ohio for leave to appeal from a judgment of the Ohio Court of Appeals affirming a criminal conviction. Each of these state-imposed financial barriers to the adjudication of a criminal defendant's appeal was held to violate the Fourteenth Amendment.

The decisions discussed above stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. In*Douglas* v. *California,* 372 U. S. 353 (1963), however, a case decided the same day as *Lane, supra,* and *Draper, supra,* the Court departed somewhat from the limited doctrine of the transcript and fee cases and undertook an examination of whether an indigent's access to the appellate system was adequate. The Court in *Douglas* concluded that a State does not fulfill its responsibility toward indigent defendants merely by waiving its own requirements that a convicted defendant procure a transcript or pay a fee in order to appeal, and held that the State must go further and provide counsel for the indigent on his first appeal as of right. It is this decision we are asked to extend today.

Petitioners in *Douglas,* each of whom had been convicted by a jury on 13 felony counts, took appeals as of right to the California District Court of Appeal. No filing fee was exacted of them, no transcript was required in order to present their arguments to the Court of Appeal, and the appellate process was therefore open to them. Petitioners, however, claimed that they not only had the right to make use of the appellate process, but were also entitled to court-appointed and state-compensated counsel because they were indigent. The California appellate court examined the trial record on its own initiative, following the then-existing rule in California, and concluded that " `no good whatever could be 608*608 served by appointment of counsel.' " 372 U. S., at 355. It therefore denied petitioners' request for the appointment of counsel.

This Court held unconstitutional California's requirement that counsel on appeal would be appointed for an indigent only if the appellate court determined that such appointment would be helpful to the defendant or to the court itself. The Court noted that under this system an indigent's case was initially reviewed on the merits without the benefit of any organization or argument by counsel. By contrast, persons of greater means were not faced with the preliminary "*ex parte* examination of the record," *id.,* at 356, but had their arguments presented to the court in fully briefed form. The Court noted, however, that its decision extended only to initial appeals as of right, and went on to say:

> *"We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an `invidious discrimination.' Williamson v. Lee Optical Co., 348 U. S. 483, 489; Griffin v.Illinois, supra, p. 18. Absolute equality is not required; lines can be and are drawn and we often sustain them." Id., at 356-357.*

The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support 609*609 being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment.[8] Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding sections.

III

Recognition of the due process rationale in *Douglas* is found both in the Court's opinion and in the dissenting opinion of Mr. Justice Harlan. The Court in *Douglas* stated that "[w]hen an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." 372 U. S., at 357. Mr. Justice Harlan thought that the due process issue in *Douglas* was the only one worthy of extended 610*610 consideration, remarking: "The real question in this case, I submit, and the only one that permits of satisfactory analysis, is whether or not the state rule, as applied in this case, is consistent with the requirements of fair procedure guaranteed by the Due Process Clause." *Id.,* at 363.

We do not believe that the Due Process Clause requires North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. *Gideon* v. *Wainwright,* 372 U. S. 335 (1963). But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable

doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.,* at 344.

By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court" 611*611 by the State and stripped of his presumption of innocence, but rather as a word to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane* v. *Durston,* 153 U. S. 684 (1894). The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas* v.*California, supra.* Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis.

IV

Language invoking equal protection notions is prominent both in *Douglas* and in other cases treating the rights of indigents on appeal. The Court in *Douglas,* for example, stated:

> *"[W]here the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." 372 U. S., at 357. (Emphasis in original.)*

The Court in *Burns* v. *Ohio,* stated the issue in the following terms:

> *"[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." 360 U. S., at 257.*

Despite the tendency of all rights "to declare themselves 612*612 absolute to their logical extreme,"[9] there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions

of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages,"*San Antonio Independent School District* v. *Rodriguez,* 411 U. S. 1, 24 (1973), nor does it require the State to "equalize economic conditions." *Griffin* v. *Illinois,* 351 U. S., at 23 (Frankfurter, J., concurring). It does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi* v. *Yeager,* 384 U. S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversary system. *Griffin* v.*Illinois, supra; Draper* v. *Washington,* 372 U. S. 487 (1963). The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane* v. *Brown,* 372 U. S., at 481 or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas* v. *California, supra,* at 358. The question is not one of absolutes, but one of degrees. In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.

A. The North Carolina appellate system, as are the appellate systems of almost half the States,[10] is multitiered, providing for both an intermediate Court of Appeals and a Supreme Court. The Court of Appeals was 613*613 created effective January 1, 1967, and, like other intermediate state appellate courts, was intended to absorb a substantial share of the caseload previously burdening the Supreme Court. In criminal cases, an appeal as of right lies directly to the Supreme Court in all cases which involve a sentence of death or life imprisonment, while an appeal of right in all other criminal cases lies to the Court of Appeals. N. C. Gen. Stat. § 7A-27 (1969 and Supp. 1973). A second appeal of right lies to the Supreme Court in any criminal case "(1) [w]hich directly involves a substantial question arising under the Constitution of the United States or of this State, or (2) [i]n which there is a dissent. . . ." N. C. Gen. Stat. § 7A-30 (1969). All other decisions of the Court of Appeals on direct review of criminal cases may be further reviewed in the Supreme Court on a discretionary basis.

The statute governing discretionary appeals to the Supreme Court is N. C. Gen. Stat. § 7A-31 (1969). This statute provides, in relevant part, that "[i]n any cause in which appeal has been taken to the Court of Appeals . . . the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals." The statute further provides that "[i]f the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals." The choice of cases to be reviewed is not left entirely within the discretion of the Supreme Court but is regulated by statutory standards. Subsection (c) of this provision states:

> *"In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the 614*614 Supreme Court (1) The subject matter of the appeal has significant public interest, or (2) The cause involves legal principles of major*

significance to the jurisprudence of the State, or (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court."

Appointment of counsel for indigents in North Carolina is governed by N. C. Gen. Stat. § 7A-450 *et seq.* (1969 and Supp. 1973). These provisions, although perhaps on their face broad enough to cover appointments such as those respondent sought here,[11] have generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Thus North Carolina has followed the mandate of *Douglas* v. *California, supra,* and authorized appointment of counsel for a convicted defendant appealing to the intermediate Court of Appeals, but has not gone beyond *Douglas* to provide for appointment of counsel for a defendant who seeks either discretionary review in the Supreme Court of North Carolina or a writ of certiorari here.

B. The facts show that respondent, in connection with his Mecklenburg County conviction, received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had "once been presented by a lawyer and passed upon by an appellate court." *Douglas* v. *California,* 372 U. S., 615*615 at 356. We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make *pro se,* would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case, see *Griffin*v. *Illinois,* 351 U. S., at 18, but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the State," or whether the decision below is in probable conflict with a decision of the Supreme Court. The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect, see *Peaseley* v. *Virginia Iron, Coal & Coke Co.,*282 N. C. 585, 194 S. E. 2d 133 (1973), since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above. Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.

616*616 This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the

Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas.* And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think respondent was given that opportunity under the existing North Carolina system.

V

Much of the discussion in the preceding section is equally relevant to the question of whether a State must provide counsel for a defendant seeking review of his conviction in this Court. North Carolina will have provided counsel for a convicted defendant's only appeal as of right, and the brief prepared by that counsel together with one and perhaps two North Carolina appellate opinions will be available to this Court in order that it may decide whether or not to grant certiorari. This 617*617 Court's review, much like that of the Supreme Court of North Carolina, is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.

There is also a significant difference between the source of the right to seek discretionary review in the Supreme Court of North Carolina and the source of the right to seek discretionary review in this Court. The former is conferred by the statutes of the State of North Carolina, but the latter is granted by statute enacted by Congress. Thus the argument relied upon in the*Griffin* and *Douglas* cases, that the State having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable. The right to seek certiorari in this Court is not granted by any State, and exists by virtue of federal statute with or without the consent of the State whose judgment is sought to be reviewed.

The suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority. It would be quite as logical under the rationale of*Douglas* and *Griffin,* and indeed perhaps more so, to require that the Federal Government or this Court furnish and compensate counsel for petitioners who seek certiorari here to review state judgments of conviction. Yet this Court has

followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for certiorari in this Court. See, *e. g., Drumm* v. *California,* 373 U. S. 947 (1963);*Mooney* v. *New York,* 373 U. S. 947 (1963); *Oppenheimer* v. *California,* 374 U. S. 819 (1963). In the light of these authorities, it would be odd, indeed, to read the Fourteenth Amendment to618*618 impose such a requirement on the States, and we decline to do so.

VI

We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review. Some States which might well choose to do so as a matter of legislative policy may conceivably find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy at the present time. North Carolina, for example, while it does not provide counsel to indigent defendants seeking discretionary review on appeal, does provide counsel for indigent prisoners in several situations where such appointments are not required by any constitutional decision of this Court.[12] Our reading 619*619of the Fourteenth Amendment leaves these choices to the State, and respondent was denied no right secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review.

The judgment of the Court of Appeals' holding to the contrary is

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

I would affirm the judgment below because I am in agreement with the opinion of Chief Judge Haynsworth for a unanimous panel in the Court of Appeals. 483 F. 2d 650.

In *Douglas* v. *California,* 372 U. S. 353, we considered the necessity for appointed counsel on the first appeal as of right, the only issue before us. We did not deal with the appointment of counsel for later levels of discretionary review, either to the higher state courts or to this Court, but we noted that "there can be no equal justice where the kind of an appeal a man enjoys `depends on the amount of money he has.' " *Id.,* at 355.

Chief Judge Haynsworth could find "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel." 483 F. 2d, at 653. More familiar with the functioning of the North Carolina criminal justice system than are we, he concluded that "in the context of constitutional questions arising in criminal prosecutions, permissive review in the

state's highest court may be predictably the most meaningful review the conviction will receive." *Ibid.* The North Carolina Court of Appeals, for example, will be constrained in diverging from an earlier opinion of the State Supreme Court, even if 620*620 subsequent developments have rendered the earlier Supreme Court decision suspect. "[T]he state's highest court remains the ultimate arbiter of the rights of its citizens."*Ibid.*

Chief Judge Haynsworth also correctly observed that the indigent defendant proceeding without counsel is at a substantial disadvantage relative to wealthy defendants represented by counsel when he is forced to fend for himself in seeking discretionary review from the State Supreme Court or from this Court. It may well not be enough to allege error in the courts below in layman's terms; a more sophisticated approach may be demanded:[*]

> *"An indigent defendant is as much in need of the 621*621 assistance of a lawyer in preparing and filing a petition for certiorari as he is in the handling of an appeal as of right. In many appeals, an articulate defendant could file an effective brief by telling his story in simple language without legalisms, but the technical requirements for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate.*
>
> *" `Certiorari proceedings constitute a highly specialized aspect of appellate work. The factors which [a court] deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant. Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 797 (1961) (footnote omitted).' " 483 F. 2d, at 653.*

Furthermore, the lawyer who handled the first appeal in a case would be familiar with the facts and legal issues involved in the case. It would be a relatively easy matter for the attorney to apply his expertise in filing a petition for discretionary review to a higher court, or to advise his client that such a petition would have no chance of succeeding.

Douglas v. *California* was grounded on concepts of fairness and equality. The right to seek discretionary review is a substantial one, and one where a lawyer can be of significant assistance to an indigent defendant. It was correctly perceived below that the "same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." *Id.,* at 655.

[*] Briefs of *amici curiae* urging reversal were filed by *Robert L. Shevin,* Attorney General, and *Enoch J. Whitney,* Assistant Attorney General, for the State of Florida; by *William J. Scott,* Attorney General, and *James B. Zagel,* Assistant Attorney General, for the State of Illinois; and by *Andrew P. Miller,* Attorney General, and*Robert E. Shepherd, Jr.,* Assistant Attorney General, for the Commonwealth of Virginia.

Marshall J. Hartman and *James F. Flug* filed a brief for the National Legal Aid and Defender Assn. as *amicus curiae* urging affirmance.

[1] 483 F. 2d 650 (1973).

[2] *State* v. *Moffitt,* 9 N. C. App. 694, 177 S. E. 2d 324 (1970) (Mecklenburg); *State* v. *Moffitt,* 11 N. C. App. 337, 181 S. E. 2d 184 (1971) (Guilford).

[3] *State* v. *Moffitt,* 279 N. C. 396, 183 S. E. 2d 247 (1971).

[4] 483 F. 2d, at 654.

[5] *Id.,* at 655. The court then decided to remand the case to the District Court to "appraise the substantiality of the federal claim." The court noted that it had no opportunity to examine the papers filed in the State Supreme Court and said that "[i]n the circumstances of this case . . . , where the only remedy available to the District Court would be the prisoner's release on a writ of habeas corpus," it was appropriate for the District Court to determine whether respondent's claim was "patently frivolous." *Ibid.*

[6] See *United States ex rel. Pennington* v. *Pate,* 409 F. 2d 757 (CA7 1969); *Peters* v. *Cox,* 341 F. 2d 575 (CA10 1965).

[7] See 351 U. S., at 13 n. 2.

[8] The Court of Appeals in this case, for example, examined both possible rationales, stating:

"If the holding [in *Douglas*] be grounded on the equal protection clause, inequality in the circumstances of these cases is as obvious as it was in the circumstances of *Douglas.* If the holding in *Douglas* were grounded on the due process clause, and Mr. Justice Harlan in dissent thought the discourse should have been in those terms, due process encompasses elements of equality. There simply cannot be due process of the law to a litigant deprived of all professional assistance when other litigants, similarly situated, are able to obtain professional assistance and to be benefited by it. The same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." 483 F. 2d, at 655.

[9] *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 355 (1908).

[10] See Brief for Respondent 9 n. 5.

[11] For example, subsection (b) (6) of § 7A-451, effective at the time of respondent's appeals, provides for counsel on "[d]irect review of any judgment or decree, including review by the United States Supreme Court of final judgment or decrees rendered by the highest court of North Carolina in which decision may be had." But this provision apparently has not been construed to allow counsel for permissive appellate procedures. See 483 F. 2d, at 652.

[12] Section 7A-451 of N. C. Gen. Stat. (Supp. 1973) provides:

"(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

"(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;

"(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;

"(3) A post-conviction proceeding under Chapter 15 of the General Statutes;

"(4) A hearing for revocation of probation, if confinement is likely to be adjudged as a result of the hearing;

"(5) A hearing in which extradition to another state is sought;

"(6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentally Ill Criminals), of the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5 of Chapter 122 of the General Statutes;

"(7) A civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes; and

"(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible."

[*] An indigent defendant proceeding without the assistance of counsel would be attempting to satisfy one of three statutory standards for review when seeking certiorari from the North Carolina Supreme Court:

"(1) The subject matter of the appeal has significant public interest, or

"(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

"(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." N. C. Gen. Stat. § 7A-31 (c) (1969).

It seems likely that only the third would have been explored in a brief on the merits before the Court of Appeals, and the indigent defendant would draw little assistance from that brief in attempting to satisfy either of the first two standards.

Rule 19 of this Court provides some guidelines for the exercise of our certiorari jurisdiction, including decisions by a state court on federal questions not previously decided by this Court; but it may not be enough simply to assert that there was error in the decision of the court below. Cf. *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163. Moreover, this Court is greatly aided by briefs prepared with accuracy, brevity, and clarity in its determination of whether certiorari should be granted. See *Furness, Withy & Co.* v. *Yang-Tsze Insurance Assn.,* 242 U. S. 430, 434.

Smith v Murray

477 U.S. 527 (1986)

SMITH

v.

MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

No. 85-5487.

Supreme Court of United States.

Argued March 4, 1986

Decided June 26, 1986

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

528*528 *J. Lloyd Snook III,* by appointment of the Court, 474 U. S. 993, argued the cause for petitioner. With him on the briefs was *Richard J. Bonnie.*

James E. Kulp, Senior Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *William G. Broaddus,* Attorney General, and *Frank S. Ferguson,* Assistant Attorney General.[*]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether and, if so, under what circumstances, a prosecutor may elicit testimony from a mental health professional concerning the content of an interview conducted to explore the possibility of presenting psychiatric defenses at trial. We also agreed to review the 529*529 Court of Appeals' determination that any error in the admission of the psychiatrist's evidence in this case was irrelevant under the holding of *Zant* v. *Stephens,* 462 U. S. 862 (1983). On examination, however,

we conclude that petitioner defaulted his underlying constitutional claim by failing to press it before the Supreme Court of Virginia on direct appeal. Accordingly, we decline to address the merits of petitioner's claims and affirm the judgment dismissing the petition for a writ of habeas corpus.

I

Following a jury trial, petitioner was convicted of the May 1977 murder of Audrey Weiler. According to his confession, petitioner encountered Ms. Weiler in a secluded area near his home and raped her at knifepoint. Fearing that her testimony could send him back to prison, he then grabbed her by the neck and choked her until she fell unconscious. When he realized that she was still alive, he dragged her into a nearby river, submerged her head, and repeatedly stabbed her with his knife. A subsequent medical examination indicated that the death was attributable to three clusters of lethal injuries: asphyxia from strangulation, drowning, and multiple stab wounds.

Prior to the trial, petitioner's appointed counsel, David Pugh, had explored the possibility of presenting a number of psychiatric defenses. Towards that end, Mr. Pugh requested that the trial court appoint a private psychiatrist, Dr. Wendell Pile, to conduct an examination of petitioner. Aware that psychiatric reports were routinely forwarded to the court and that such reports were then admissible under Virginia law, Mr. Pugh had advised petitioner not to discuss any prior criminal episodes with anyone. App. 134. See *Gibson* v. *Commonwealth,* 216 Va. 412, 219 S. E. 2d 845 (1975). Although that general advice was intended to apply to the forthcoming psychiatric examination, Mr. Pugh later testified that he "did not specifically tell [petitioner] not to say anything to Doctor Pile about the offense or any offenses." 530*530 App. 132. During the course of the examination, Dr. Pile did in fact ask petitioner both about the murder and about prior incidents of deviant sexual conduct. Tr. of State Habeas Hearing 19. Although petitioner initially declined to answer, he later stated that he had once torn the clothes off a girl on a school bus before deciding not to carry out his original plan to rape her. App. 44. That information, together with a tentative diagnosis of "Sociopathic Personality; Sexual Deviation (rape)," was forwarded to the trial court, with copies sent both to Mr. Pugh and to the prosecutor who was trying the case for the Commonwealth. *Id.,* at 43-45. At no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired. *Id.,* at 90. Cf. *Estelle* v. *Smith,* 451 U. S. 454 (1981).

At the sentencing phase of the trial, the Commonwealth called Dr. Pile to the stand. Over the defense's objection, Dr. Pile described the incident on the school bus. Tr. 934-935. On cross-examination, he repeated his earlier conclusion that petitioner was a "sociopathic personality."*Id.,* at 936. After examining a second psychiatrist, the

Commonwealth introduced petitioner's criminal record into evidence. It revealed that he had been convicted of rape in 1973 and had been paroled from the penitentiary on that charge less than four months prior to raping and murdering Ms. Weiler. The defense then called 14 character witnesses, who testified that petitioner had been a regular churchgoer, a member of the choir, a conscientious student in high school, and a good soldier in Vietnam. After lengthy deliberation, the jury recommended that petitioner be sentenced to death.

Petitioner appealed his conviction and sentence to the Supreme Court of Virginia. In his brief he raised 13 separate claims, including a broad challenge to the constitutionality of Virginia's death penalty provisions, objections to several of the trial court's evidentiary rulings, and a challenge to 531*531 the exclusion of a prospective juror during *voir dire.* Petitioner did not, however, assign any error concerning the admission of Dr. Pile's testimony. At a subsequent state postconviction hearing, Mr. Pugh explained that he had consciously decided not to pursue that claim after determining that "Virginia case law would [not] support our position at that particular time." App. 143. Various objections to the Commonwealth's use of Dr. Pile's testimony were raised, however, in a brief filed by *amicus curiae* Post-Conviction Assistance Project of the University of Virginia Law School.

The Supreme Court of Virginia affirmed the conviction and sentence in all respects. *Smith* v.*Commonwealth,* 219 Va. 455, 248 S. E. 2d 135 (1978). In a footnote, it noted that, pursuant to a rule of the court, it had considered only those arguments advanced by *amicus* that concerned errors specifically assigned by the defendant himself. *Id.,* at 460, n. 1, 248 S. E. 2d, at 139, n. 1. Accordingly, it did not address any issues concerning the prosecution's use of the psychiatric testimony. This Court denied the subsequent petition for certiorari, which, again, did not urge the claim that admission of Dr. Pile's testimony violated petitioner's rights under the Federal Constitution. 441 U. S. 967 (1979).

In 1979, petitioner sought a writ of habeas corpus in the Circuit Court for the City of Williamsburg and the County of James City. For the first time since the trial, he argued that the admission of Dr. Pile's testimony violated his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Federal Constitution. The court ruled, however, that petitioner had forfeited the claim by failing to press it in earlier proceedings. At a subsequent evidentiary hearing, conducted solely on the issue of ineffective assistance of counsel, the court heard testimony concerning the reasons underlying Mr. Pugh's decision not to pursue the Fifth Amendment claim on appeal. On the basis of that testimony, the court found that Pugh and his assistant had researched the question, but had determined that the claim was 532*532unlikely to succeed. Thus, the court found, "counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and . . . this decision resulted from informed, professional deliberation." App. to Pet. for Cert. 71. Petitioner appealed the denial of his habeas petition to the Supreme Court of Virginia, contending that the Circuit Court had erred in finding that his objection to the admission of Dr. Pile's testimony had been defaulted. The Supreme Court declined to accept the appeal, *Smith* v. *Morris,* 221 Va. cxliii (1981), and we again denied certiorari. 454 U. S. 1128 (1981).

Having exhausted state remedies, petitioner sought a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. In an unpublished order, the court denied the petition, holding that the objection to the admission of Dr. Pile's testimony was "clearly barred" under this Court's decision in *Wainwright* v. *Sykes,* 433 U. S. 72 (1977). App. 158. In reaching that conclusion, the District Judge noted that "the default resulted not from the trial attorney's ignorance or inadvertence, but because of a deliberate tactical decision." *Ibid.*

The Court of Appeals for the Fourth Circuit affirmed, but on different grounds. *Smith* v.*Procunier,* 769 F. 2d 170 (1985). Finding it unnecessary to rely on procedural default or to address the merits of the substantive constitutional claim, the court held that admission of Dr. Pile's testimony, even if erroneous, could not be the basis for invalidating petitioner's sentence. It noted that the jury had relied on two distinct aggravating factors in its decision to recommend the death penalty. The psychiatric testimony, however, only bore on one of those factors, the likelihood that petitioner would "constitute a continuing serious threat to society." Va. Code § 19.2-264.2 (1983); Tr. 1102. In that circumstance, the Court of Appeals believed, our decision in*Zant* v. *Stephens,* 462 U. S., at 884, required the conclusion that the error, if any, was irrelevant to the overall validity of the sentence. 533*533 We granted certiorari, *Smith* v. *Sielaff,* 474 U. S. 918 (1985), and now affirm on the authority of our decision in *Murray* v. *Carrier, ante,* p. 478.

II

Under Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding. See, *e. g., Coppola* v.*Warden of Virginia State Penitentiary,* 222 Va. 369, 282 S. E. 2d 10 (1981); *Slayton* v.*Parrigan,* 215 Va. 27, 205 S. E. 2d 680 (1974). In the present case, the Virginia courts have enforced that rule by declining to consider petitioner's objection to the admission of Dr. Pile's testimony, a claim concededly not included in his initial appeal from his conviction and sentence. Consistent with our earlier intimations in *Reed* v. *Ross,* 468 U. S. 1, 11 (1984), we held in *Murray* v. *Carrier, ante,* p. 478, that a federal habeas court must evaluate appellate defaults under the same standards that apply when a defendant fails to preserve a claim at trial. Accordingly, although federal courts at all times retain the power to look beyond state procedural forfeitures, the exercise of that power ordinarily is inappropriate unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and "actual prejudice resulting from the alleged constitutional violation." *Wainwright* v. *Sykes, supra,* at 84; *Murray* v.*Carrier, ante,* at 485. As we explained more fully in *Carrier,* this congruence between the standards for appellate and trial default reflects our judgment that concerns for finality and comity

are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure.

We need not determine whether petitioner has carried his burden of showing actual prejudice from the allegedly improper admission of Dr. Pile's testimony, for we think it self-evident that he has failed to demonstrate cause for his noncompliance with Virginia's procedures. We have declined in 534*534 the past to essay a comprehensive catalog of the circumstances that would justify a finding of cause. *Reed* v. *Ross, supra,* at 13; see also *Wainwright* v. *Sykes, supra,* at 91. Our cases, however, leave no doubt that a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases. As the Court explained in *Reed:*

> *"[D]efense counsel may not make a tactical decision to forgo a procedural opportunity — for instance, to object at trial or to raise an issue on appeal — and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by a federal court on habeas corpus review would not only offend generally accepted principles of comity, but would undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned. Procedural defaults of this nature are, therefore, inexcusable, and cannot qualify as `cause' for purposes of federal habeas corpus review." 468 U. S., at 14 (internal quotation and citation omitted).*

Here the record unambiguously reveals that petitioner's counsel objected to the admission of Dr. Pile's testimony at trial and then consciously elected not to pursue that claim before the Supreme Court of Virginia. The basis for that decision was counsel's perception that the claim had little chance of success in the Virginia courts. With the benefit of hindsight, petitioner's counsel in this Court now contends that this perception proved to be incorrect. Cf. *Gibson* v.*Zahradnick,* 581 F. 2d 75 (CA4 1978) (repudiating reasoning of *Gibson* v. *Commonwealth,* 216 Va. 412, 219 S. E. 2d 845 (1975)). Even assuming that to be the case, however, a State's subsequent acceptance of an argument deliberately abandoned on direct appeal is irrelevant to the question whether the default should be excused on federal habeas. 535*535 Indeed, it is the very prospect that a state court "may decide, upon reflection, that the contention is valid" that undergirds the established rule that "perceived futility alone cannot constitute cause," *Engle* v.*Isaac,* 456 U. S. 107, 130, and n. 36 (1982); for "[a]llowing criminal defendants to deprive the state courts of [the] opportunity" to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity that animate *Sykes* and its progeny. *Id.,* at 130.

Notwithstanding the deliberate nature of the decision not to pursue his objection to Dr. Pile's testimony on appeal — a course of conduct virtually dispositive of any effort to satisfy *Syke*'s "cause" requirement — petitioner contends that the default should be excused because Mr. Pugh's decision, though deliberate, was made in ignorance. Had he investigated the claim more fully, petitioner maintains, "it is inconceivable that he

would have concluded that the claim was without merit or that he would have failed to raise it." Reply Brief for Petitioner 3.

The argument is squarely foreclosed by our decision in *Carrier,* which holds that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Ante,* at 486-487. See also *Engle* v. *Isaac, supra,* at 133-134. Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington,* 466 U. S. 668 (1984). *Carrier* reaffirmed that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error. . . if that error is sufficiently egregious and prejudicial." *Ante,* at 496; see also *United States* v. *Cronic,* 466 U. S. 648, 657, n. 20 (1984). But counsel's deliberate decision not to pursue his objection to the admission of Dr. Pile's testimony falls far short of meeting that rigorous standard. After conducting 536*536 a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones* v. *Barnes,* 463 U. S. 745, 751-752 (1983). It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland* v. *Washington* made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Pile's testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. *Id.,* at 690.

Nor can petitioner rely on the novelty of his legal claim as "cause" for noncompliance with Virginia's rules. See *Reed* v. *Ross,* 468 U. S., at 18 ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). Petitioner contends that this Court's decisions in *Estelle* v. *Smith,* 451 U. S. 454 (1981), and *Ake* v. *Oklahoma,* 470 U. S. 68 (1985), which were decided well after the affirmance of his conviction and sentence on direct appeal, lend support to his position that Dr. Pile's testimony should have been excluded.537*537 But, as a comparison of *Reed* and *Engle* makes plain, the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was "available" at all. As petitioner has candidly conceded, various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal. Brief for petitioner 20-21, n. 12; Reply Brief for Petitioner 3. Moreover, in this very case, an *amicus* before the Supreme Court of Virginia specifically argued that

admission of Dr. Pile's testimony violated petitioner's rights under the Fifth and Sixth Amendments. Brief for Post-Conviction Assistance Project of the University of Virginia Law School as *Amicus Curiae*in No. 780293, pp. 53-62. Under these circumstances, it simply is not open to argument that the legal basis of the claim petitioner now presses on federal habeas was unavailable to counsel at the time of the direct appeal.

We conclude, therefore, that petitioner has not carried his burden of showing cause for noncompliance with Virginia's rules of procedure. That determination, however, does not end our inquiry. As we noted in *Engle* and reaffirmed in *Carrier,* " `[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice `must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray* v. *Carrier, ante,* at 495, quoting *Engle* v. *Isaac, supra,* at 135. Accordingly, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray* v.*Carrier, ante,* at 496.

We acknowledge that the concept of "actual," as distinct from "legal," innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. Nonetheless, we think it clear on this record that application of the cause and prejudice test will not result 538*538 in a "fundamental miscarriage of justice." *Engle,* 456 U. S., at 135. There is no allegation that the testimony about the school bus incident was false or in any way misleading. Nor can it be argued that the prospect that Dr. Pile might later testify against him had the effect of foreclosing meaningful exploration of psychiatric defenses. While that concern is a very real one in the abstract, here the record clearly shows that Dr. Pile did ask petitioner to discuss the crime he stood accused of committing as well as prior incidents of deviant sexual conduct. Although initially reluctant to do so, ultimately petitioner was forthcoming on both subjects. In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, Dr. Pile's testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society. Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice.

Nor can we concur in JUSTICE STEVENS' suggestion that we displace established procedural default principles with an amorphous "fundamental fairness" inquiry. *Post,* at 542-543. Precisely which parts of the Constitution are "fundamental" and which are not is left for future elaboration. But, for JUSTICE STEVENS, when a defendant in a capital case raises a "substantial, colorable" constitutional claim, a federal court should entertain it no matter how egregious the violation of state procedural rules, and regardless of the fairness of the opportunity to raise that claim in the course of his trial and appeal. *Post,* at 546. We reject the suggestion that the principles of *Wainwright* v. *Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws. We similarly reject the suggestion that there is anything "fundamentally unfair" 539*539 about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the

guilt or sentencing determination. In view of the profound societal costs that attend the exercise of habeas jurisdiction, such exercise "carries a serious burden of justification." H. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970); see also *Engle* v. *Isaac, supra,* at 126-129. When the alleged error is unrelated to innocence, and when the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure, that burden has not been carried.

Accordingly, we affirm the judgment of the Court of Appeals upholding the dismissal of petitioner's application for a writ of habeas corpus.

Affirmed.

[For dissenting opinion of JUSTICE BRENNAN, see *ante,* p. 516.]

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join and with whom JUSTICE BRENNAN joins as to Parts II and III, dissenting.

The record in this case unquestionably demonstrates that petitioner's constitutional claim is meritorious, and that there is a significant risk that he will be put to death *because* his constitutional rights were violated.

The Court does not take issue with this conclusion. It is willing to assume that (1) petitioner's Fifth Amendment right against compelled self-incrimination was violated; (2) his Eighth Amendment right to a fair, constitutionally sound sentencing proceeding was violated by the introduction of the evidence from that Fifth Amendment violation; and (3) those constitutional violations made the difference between life and death in the jury's consideration of his fate. Although the constitutional violations and issues were sufficiently serious 540*540 that this Court decided to grant certiorari, and although the Court of Appeals for the Fourth Circuit decided the issue on the merits, this Court concludes that petitioner's presumably meritorious constitutional claim is procedurally barred and that petitioner must therefore be executed.

In my opinion, the Court should reach the merits of petitioner's argument. To the extent that there has been a procedural "default," it is exceedingly minor — perhaps a kind of "harmless" error. Petitioner's counsel raised a timely objection to the introduction of the evidence obtained in violation of the Fifth Amendment. A respected friend of the Court — the University of Virginia Law School's Post-Conviction Assistance Project — brought the issue to the attention of the Virginia Supreme Court in an extensive *amicus curiae* brief. Smith's counsel also raised the issue in state and federal habeas corpus proceedings, and, as noted, the Court of Appeals decided the case on the merits. Consistent with the well-established principle that appellate arguments should be carefully winnowed,[1] however, Smith's counsel did not raise the Fifth Amendment issue in his original appeal to the Virginia Supreme Court — an unsurprising decision in view of the fact that a governing Virginia Supreme Court precedent, which was then entirely valid and only two years old, decisively barred the claim.[2]

Nevertheless, the Court finds the lawyer's decision not to include the constitutional claim "virtually dispositive." *Ante,* at 535. The Court offers the remarkable explanation that "[u]nder these circumstances" — in which petitioner's death penalty will stand despite serious Fifth and Eighth Amendment violations that played a critical role in the determination that death is an appropriate penalty — "we do not believe that refusal to consider the defaulted claim on federal541*541 habeas carries with it the risk of a manifest miscarriage of justice." *Ante,* at 538.

I fear that the Court has lost its way in a procedural maze of its own creation and that it has grossly misevaluated the requirements of "law and justice" that are the federal court's statutory mission under the federal habeas corpus statute.[3] To understand the nature of the Court's error, it is necessary to assess the Court's conclusion that the claim is procedurally defaulted; to consider the Fifth Amendment violation; and to consider the Eighth Amendment violation.

I

We begin with the common ground. The historic office of the Great Writ as the ultimate protection against fundamental unfairness is well know.[4] That mission is reflected in the statutory requirement that the federal court "dispose of the matter as law and justice require." 28 U. S. C. § 2243. It is by now equally clear that the application of the Court's "cause and prejudice" formulation as a rigid bar to review of fundamental constitutional violations has no support in the statute, or in Federal Rule of Criminal Procedure 12 (b)(2), from which it was initially imported;[5] the standard thus represents judicial lawmaking of the most unabashed form. The Court nonetheless reaffirms today, as it has consistently held in the past,[6] that federal courts retain the 542*542 *power* to entertain federal habeas corpus requests despite the absence of "cause and prejudice," *ante,* at 537; the only question is whether to exercise that power. Despite the rigor of its cause-and-prejudice standard, moreover, the Court continues to commit itself to maintaining the availability of habeas corpus under certain circumstances, even in the absence of "cause," *ibid.;* indeed, this Term, the Court has emphasized the importance of that availability by remanding a case to consider the merits of a prisoner's claim even though the prisoner failed to show "cause" for the default. *Murray* v. *Carrier, ante,* p. 478.

The Court concludes in this case that no miscarriage of justice will result from a refusal to entertain Smith's challenge to his death sentence. This conclusion is flawed in three respects. First, the Court mistakenly assumes that only a claim implicating "actual innocence" rises to the level of a miscarriage of justice. Second, the Court does not properly assess the force of a claim that a death penalty is invalid. Finally, the Court vastly exaggerates the state interest in refusing to entertain this claim.

The Court accurately quotes the holding in *Murray* v. *Carrier:* " `[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.' " *Ante,*at 537. The Court then seeks to transfer this "actual innocence" standard to capital sentencing proceedings, and concludes that, in petitioner's sentencing hearing, "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Ante,* at 538. The Court does not explain, however, why *Carrier*'s clearly correct holding about the propriety of the writ in a case of innocence must also be a *limiting* principle on the federal court's ability to exercise its statutory authority to entertain federal habeas corpus actions; more specifically, the Court 543*543 does not explain why the same principle should not apply when a constitutional violation is claimed to have resulted in a lack of fundamental fairness, either in a conviction or in a death sentence.

This analysis is far removed from the traditional understanding of habeas corpus. For instance, in *Moore* v. *Dempsey,* 261 U. S. 86 (1923), the Court considered a claim that the murder convictions and death sentences of five black defendants were unconstitutional. The federal District Court had dismissed the writ of habeas corpus. In his opinion for the Court, Justice Holmes explained that in view of the allegations — systematic exclusion of blacks from the jury and threatened mob violence — the Federal District Court should not have dismissed the writ without considering the factual allegations. The Court noted the presence of a clear procedural default — the Arkansas Supreme Court had refused to entertain the challenge to discrimination in the jury because the objection "came too late." *Id.,* at 91. The Court nevertheless held that the Federal District Court should have entertained the petition. *Id.,* at 92.

Although the allegations clearly implicated questions about the accuracy of the truth-finding process, the Court's opinion cannot be fairly read to rest on the kind of "innocence" inquiry that the Court propounds today. For the Court specifically rejected the notion that its inquiry into the presence of a serious constitutional violation was actually an inquiry into the guilt or innocence of the petitioners: "The petitioners say that [the victim] must have been killed by other whites [rather than by the black petitioners], but that we leave on one side *as what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.*" *Id.,* at 87-88 (emphasis added). Today, the Court adopts the converse of Justice Holmes' proposition: it leaves to one side the question 544*544 whether constitutional rights have been preserved, and considers only petitioner's innocence or guilt.[7]

The majority's reformulation of the traditional understanding of habeas corpus appears to be premised on the notion that only constitutional violations which go to guilt or innocence are sufficiently serious to implicate the "fundamental fairness" alluded to in *Engle* v. *Isaac,* 456 U. S. 107, 126 (1982).[8] If accuracy in the determination of guilt or innocence were the only value of our criminal justice system, then the Court's analysis might have a great deal of force. If accuracy is the only value, however, then many of our constitutional protections — such as the Fifth Amendment right against compelled self-incrimination and the Eighth Amendment right against cruel and unusual

punishment, the very claims asserted by petitioner — are not only irrelevant, but possibly counterproductive.[9] Our Constitution, however, and 545*545 our decision to adopt an "accusatorial," rather than an "inquisitorial" system of justice,[10] reflect a different choice. That choice is to afford the individual certain protections — the right against compelled self-incrimination and the right against cruel and unusual punishment among them — even if those rights do not necessarily implicate the accuracy of the truth-finding proceedings. Rather, those protections are an aspect of the fundamental fairness, liberty, and individual dignity that our society affords to all, even those charged with heinous crimes.

In my opinion, then, the Court's exaltation of accuracy as the only characteristic of "fundamental fairness" is deeply flawed. Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve "law and justice" should similarly reflect those values.

Thus, the Court begins with a conception of "fundamental fairness" that is far too narrow and that conflicts with the nature of our criminal justice system. The Court similarly fails to give appropriate weight to the fact that capital punishment is at stake in this case. It is now well settled that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner* v. *Florida,* 430 U. S. 349, 357 (1977) (STEVENS, J.).[11] It is of vital importance to 546*546 the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures. When a condemned prisoner raises a substantial, colorable Eighth Amendment violation, there is a special obligation, consistent with the statutory mission to "dispose of the matter as law and justice require," to consider whether the prisoner's claim would render his sentencing proceeding fundamentally unfair. Indeed, it was precisely this concern that prompted the Court of Appeals to consider petitioner's argument on the merits: "[W]e give weight to the consideration that we have before us a matter of life and death. The imminent execution of Smith serves as sufficient grounds to review the issue." *Smith* v. *Procunier,* 769 F. 2d 170, 172 (1985).

Finally, as in every habeas corpus decision, the magnitude of the State's interest must be considered. In this case, several 547*547 factors suggest that the State's interest is not adequate to obstruct federal habeas corpus consideration of petitioner's claim. First, petitioner made a timely objection at trial, and the state interest in enforcing procedural default rules at trial is far greater than the State's interest in enforcing procedural default rules on appeal.[12] Second, the issue was raised before the state court in an *amicus curiae* brief.[13] Since this is a matter on which courts ordinarily may exercise discretion,[14] the discretionary decision not to address the issue hardly rises to a state interest of sufficient magnitude that a man should die even though his Fifth and Eighth Amendment rights were violated to achieve that objective. Third, the issue was presented to the state courts in state habeas proceedings — *after* the precedent blocking petitioner's claim had been repudiated[15] — and the state habeas court, while finding that the decision by Smith's counsel not to raise the issue with a governing Virginia precedent squarely against 548*548 him was entirely reasonable,[16] concluded

that the Fifth Amendment claim was procedurally barred and thus did not address it.[17] Fourth, the Court of Appeals for the Fourth Circuit addressed the merits and did not rest on any notion of procedural default; this Court customarily defers to federal courts of appeals on questions of state law,[18] including questions about "cause" for failure to comply with state procedural rules.[19] Finally, and most importantly, the inadequacy of the state interest in this death penalty context is decisively shown by the prevailing practice in many States that appellate courts have a special duty in capital cases to overlook procedural defaults and review the trial record for reversible error, before affirming that most severe of all sentences.[20]

549*549 Thus, the Court is mistaken in its narrow definition of fundamental fairness, in its failure to appreciate the significance of a challenge to a death penalty, and in its exaggeration of 550*550the State's interest in refusing to entertain a claim that was raised at trial, on appeal by an*amicus,* and in state habeas proceedings; that was addressed on the merits by the Court of Appeals (and briefed and argued on the merits in this Court); and that must be assumed to make the difference between life and death. Because I disagree with the Court's evaluation of these matters, I would address the merits of petitioner's argument that constitutional violations render his sentence of death fundamentally unfair.

551*551 II

The introduction of petitioner's comments to the court-appointed psychiatrist clearly violated the Fifth Amendment. As the majority points out, psychiatric reports by court-appointed psychiatrists "were routinely forwarded to the court and . . . were then admissible under Virginia law." *Ante,* at 529. However, "[a]t no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired." *Ante,* at 530. Moreover, the court-appointed psychiatrist related petitioner's description of an earlier sexual assault in a letter to the court and to the prosecution, as well as to the defense, and testified about the description, at the State's request, at petitioner's capital sentencing hearing. The State thus relied on Dr. Pile's testimony as evidence of "future dangerousness," one of the two aggravating circumstances found by the jury to justify a sentence of death.[21]

CHIEF JUSTICE BURGER'S opinion for the Court in *Estelle* v. *Smith,* 451 U. S. 454 (1981),makes it absolutely clear that the introduction of this evidence by the prosecution at the sentencing stage violated the Fifth Amendment. As THE CHIEF JUSTICE explained, the Fifth Amendment fully applies to a capital sentencing proceeding: "Just as the Fifth Amendment prevents a criminal defendant from being made ` "the deluded instrument of his own conviction,"' *Culombe* v. *Connecticut,* 367 U. S. [568,] 581, quoting 2 W. Hawkins, Pleas 552*552of the Crown 595 (8th ed. 1824), it

protects him as well from being made `the deluded instrument' of his own execution." *Id.,* at 462. As THE CHIEF JUSTICE also explained, prosecutorial use of evidence from a psychiatric interrogation in a capital sentencing proceeding requires the protections, and warnings, accorded the Fifth Amendment right in other contexts: "Because [the defendant] did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [the psychiatrist] to establish his future dangerousness." *Id.,*at 468.

Thus, the use of petitioner's statements clearly violated the Fifth Amendment.[22] In view of the majority's willingness to assume that the constitutional violation is present but that the failure to address it does not affect the fundamental fairness of petitioner's sentence, moreover, it is instructive to recall the importance of the Fifth Amendment right at issue. Again, THE CHIEF JUSTICE'S opinion in *Estelle* v. *Smith* provides guidance:

> *"Miranda held that `the prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.'. . . The purpose of these admonitions is to combat what the Court saw as `inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for `an intelligent decision as to its exercise.'*
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> *.....*
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> *553*553 "The Fifth Amendment privilege is `as broad as the mischief against which it seeks to guard,' Counselman v. Hitchcock, 142 U. S. 547, 562 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right `to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence.' Malloy v. Hogan, 378 U. S., at 1, 8 (1964)." Id., at 466-468.*

Given the historic importance of the Fifth Amendment, and the fact that the violation of this right made a significant difference in the jury's evaluation of petitioner's "future dangerousness" (and consequent death sentence), it is not only proper, but imperative, that the federal courts entertain petitioner's entirely meritorious argument that the introduction of the psychiatrist's testimony at his sentencing hearing violated that fundamental protection.[23]

554*554 III

It is also quite clear that the introduction of the evidence violated his Eighth Amendment right to a fair sentencing proceeding. In this respect, I disagree with the

Court of Appeals' reading of the opinion that I authored for the Court in *Zant* v. *Stephens,* 462 U. S. 862 (1983). The Court of Appeals concluded that, because the jury also found an aggravating circumstance of "vileness," the death sentence could stand even if Dr. Pile's testimony represented a flagrant Fifth Amendment violation.

In *Zant,* we held that the Georgia Supreme Court's invalidation of one of the three aggravating circumstances found by the jury did not require that the death penalty be set aside. But that conclusion was reached only after we satisfied ourselves that the evidence relating to the invalid aggravating circumstance had been properly admitted.[24] We 555*555 did not conclude, as the Court of Appeals seems to have assumed, that any evidence concerning the invalid circumstance was simply irrelevant because the valid circumstances were, in all events, sufficient to support the death penalty. The fact that the record adequately establishes one valid aggravating circumstance may make the defendant eligible for the death penalty but it does not justify the conclusion that a death sentence should stand even though highly prejudicial inadmissible evidence was presented to the jury at the sentencing hearing. The introduction of such highly prejudicial, inadmissible evidence — evidence that itself represents an independent constitutional violation — quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment.

IV

Thus, I would not only reach the merits of petitioner's constitutional claim but also would conclude that it has merit. The question that remains is the one the Court addresses in the last two paragraphs of its opinion — whether the constitutional error warrants the conclusion that the death penalty should be set aside in this habeas corpus proceeding. I think that question should be answered by reference to the language of the governing statute — the writ should issue "as law and justice require." To hold, as the Court does today, that petitioner's death sentence must stand despite the fact that blatant constitutional violations presumably made the difference between the jury's recommendation of life or death, violates not only "law," but, quite clearly, "justice" as well.

I respectfully dissent.

[*] Briefs of *amici curiae* urging reversal were filed for the American Psychiatric Association et al. by *Joel I. Klein, Joseph N. Onek,* and *Peter E. Scheer;* for the American Psychological Association by *Bruce J. Ennis, Jr.,*and *Donald N. Bersoff;* and for the New Jersey Department of the Public Advocate by *Linda G. Rosenzweig.*

[1] See *Jones* v. *Barnes,* 463 U. S. 745, 751-752 (1983); *ante,* at 536.

[2] See *Gibson* v. *Commonwealth,* 216 Va. 412, 219 S. E. 2d 845 (1975), cert. denied, 425 U. S. 994 (1976).

[3] See 28 U. S. C. § 2243 ("The court shall . . . dispose of the matter as law and justice require").

[4] See, *e. g., Engle* v. *Isaac,* 456 U. S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence.. . . Today, as in prior centuries, the writ is a bulwark against convictions that violate `fundamental fairness' ").

[5] See *Murray* v. *Carrier, ante,* at 501-505 (STEVENS, J., concurring in judgment). Indeed, the Court in *Murray*conceded that "[t]he cause and prejudice test may lack a perfect historical pedigree," *ante,* at 496, and noted that "the Court acknowledged as much in *Wainwright* v. *Sykes.*" *Ibid.*

[6] See, *e. g., Reed* v. *Ross,* 468 U. S. 1, 9 (1984); *Francis* v. *Henderson,* 425 U. S. 536, 538 (1976); *Fay* v. *Noia,*372 U. S. 391, 398-399 (1963).

[7] In doing so, the Court goes a long way toward eliminating the distinction, in procedural default cases, between the request for habeas relief and the ultimate issue for a trial court — a distinction that has long been central to our understanding of the Great Writ. See, *e. g., Ex parte Bollman,* 4 Cranch 75, 101 (1807) (Marshall, C. J.) ("It has been demonstrated at the bar, that the question brought forward on a *habeas corpus,* is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts").

[8] See n. 4, *supra.*

[9] Expressing this view, William Howard Taft once observed that, precisely because of the central value of accuracy in guilt or innocence determinations, the Fifth Amendment might have been ill advised. See Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 8 (1905) ("When examined as an original proposition, the prohibition that the defendant in a criminal case shall not be compelled to testify seems, in some aspects, to be of doubtful utility. If the administration of criminal law is for the purpose of convicting those who are guilty of crime, then it seems natural to follow in such a process the methods that obtain in ordinary life").

[10] See *Moran* v. *Burbine,* 475 U. S. 412, 434, and n. 1 (1986) (STEVENS, J., dissenting); *Miller* v. *Fenton,* 474 U. S. 104, 110 (1985); *Malloy* v. *Hogan,* 378 U. S. 1, 7-8 (1964); *Rogers* v. *Richmond,* 365 U. S. 534, 540-541 (1961); *Bram* v. *United States,* 168 U. S. 532, 543-545 (1897).

[11] See also *California* v. *Ramos,* 463 U. S. 992, 998-999 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Zant*v. *Stephens,*

462 U. S. 862, 884 (1983) ("[T]here is a qualitative difference between death and any other permissible form of punishment"); *Rummel* v. *Estelle,* 445 U. S. 263, 272 (1980) ("This theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions. . . . [A] sentence of death differs in kind from any sentence of imprisonment"); *Lockett* v. *Ohio,* 438 U. S. 586, 605 (1978) (BURGER, C. J.) ("[T]he imposition of death by public authority is . . . profoundly different from all other penalties"). Cf. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1222 (1986) ("[W]hen a capital defendant raises a nonfrivolous constitutional question, neither state nor federal courts should be free to refuse to decide it simply because it was not raised in accordance with state procedural requirements. Rather, federal law should expressly provide that in matters of procedural default, as in other matters, death is different").

Indeed, the Court has recognized that even the *threat* of a death penalty may, in certain circumstances, exert a special pull in favor of the exercise of the federal court's undisputed statutory power to entertain a habeas corpus writ on a claim that was procedurally defaulted. In *Fay* v. *Noia,* 372 U. S., at 440, the Court was willing to excuse Noia's deliberate decision not to appeal because Noia perceived that a death sentence might result: "His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence." See also *Wainwright* v. *Sykes,* 433 U. S. 72, 83 (1977) (emphasizing Noia's " `grisly choice' between acceptance of his life sentence and pursuit of an appeal which might culminate in a sentence of death").

[12] See *Murray* v. *Carrier, ante,* at 506-515 (STEVENS, J., concurring in judgment); Meltzer, *supra,* at 1223-1225; Note, Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review, 38 Stan. L. Rev. 463 (1986).

[13] See Brief for Post-Conviction Assistance Project of the University of Virginia Law School as *Amicus Curiae*in No. 780293, pp. 56-61 (arguing that the Fifth Amendment required suppression of psychiatrist's testimony).

[14] Cf. *Mapp* v. *Ohio,* 367 U. S. 643, 646, n. 3 (1961) (addressing issue raised by *amicus*); *Schwinden* v.*Burlington Northern, Inc.,* ____ Mont. ____, ____, 691 P. 2d 1351, 1358 (1984) ("We determine here not to follow the usual rule that issues raised by amici that are part of the underlying action will not be considered by this Court").

[15] See *Gibson* v. *Zahradnick,* 581 F. 2d 75 (CA4) (holding that the *Gibson* v. *Commonwealth* analysis violates Constitution and that writ of habeas corpus should issue), cert. denied, 439 U. S. 996 (1978). In fact, although the Court of Appeals for the Fourth Circuit decided *Gibson* after the briefs in petitioner's case had been filed, the*Gibson* opinion was issued *before* the initial Virginia Supreme Court opinion refusing to address the issue.

[16] See state habeas opinion, App. 147 ("[B]oth *Gibson* v. *Zahradnick* and *Smith* v. *Estelle* were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. . . . In light of these facts and of the differences noted above, I find sufficient reason for counsel not to

have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection on appeal").

[17] State habeas order, Record 204 (Fifth Amendment issue "was waived and forfeited and cannot now be considered").

[18] See, *e. g., Pembaur* v. *Cincinnati,* 475 U. S. 469, 484-485, n. 13 (1986); *Regents of University of Michigan* v.*Ewing,* 474 U. S. 214, 224, n. 10 (1985); *United States* v. *S. A. Empresa de Viacao Aerea Rio Grandense,* 467 U. S. 797, 815, n. 12 (1984); *Bishop* v. *Wood,* 426 U. S. 341, 345-347 (1976); *Propper* v. *Clark,* 337 U. S. 472, 486-487 (1949).

[19] See *Jenkins* v. *Anderson,* 447 U. S. 231, 234, n. 1 (1980) ("The applicability of the *Sykes* `cause'-and-`prejudice' test may turn on an interpretation of state law. . . . This Court's resolution of such a state-law question would be aided significantly by views of other federal courts that may possess greater familiarity with [state] law"); *Rummel* v. *Estelle,* 445 U. S., at 267, n. 7 ("Deferring to the Court of Appeals' interpretation of Texas law, we decline to hold that *Wainwright* bars Rummel from presenting his claim").

[20] See, *e. g.,* Ala. Rule App. Proc. 39(k) ("In all cases in which the death penalty has been imposed, . . . the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner"); Arkansas Rev. Stat. Ann. § 43-2725 (1977) ("[W]here either a sentence for life imprisonment or death [is present], the Supreme Court shall review all errors prejudicial to the rights of the appellant"); *Cave* v. *State,* 476 So. 2d 180, 183, n. 1 (Fla. 1985) (In capital cases, "[w]e will, of course, continue to review every issue presented and to conduct our own review in accordance with Florida Rule of Appellate Procedure 9.140(f)"); Georgia Unified Appeal Rule IV B(2) (In capital cases, "[t]he Supreme Court shall review each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the Supreme Court"); *State* v. *Osborn,*102 Idaho 405, 410-411, 631 P. 2d 187, 192-193 (1981) ("Death is clearly a different kind of punishment from any other that [might] be imposed, and [Idaho Code] § 19-2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below"); *People* v. *Holman,* 103 Ill. 2d 133, 176, 469 N. E. 2d 119, 140 (1984) ("Ordinarily, a contention not made in the trial court is waived on appeal. . . . However, because of the qualitative difference between death and other forms of punishment. . . this court has elected to address errors in death penalty cases which might have affected the decision of the sentencing jury"), cert. denied, 469 U. S. 1220 (1985); *Lowery* v.*State,* 478 N. E. 2d 1214, 1229 (Ind. 1985) ("The failure to properly raise issues in the Motion to Correct Errors generally results in a waiver of the claimed errors. . . . Since the death penalty was imposed in this case, however, we will review the state of the record concerning these

questions"); *Ice* v. *Commonwealth,* 667 S. W. 2d 671, 674 (Ky. 1984) ("[I]n a death penalty case every prejudicial error must be considered, whether or not an objection was made in the trial court"), cert. denied, 469 U. S. 860 (1984); *State* v. *Hamilton,* 478 So. 2d 123, 127, n. 7 (La. 1985) ("In death penalty cases, this court has reviewed assignments of error, despite the absence of a contemporaneous objection, in order to determine whether the error `render[ed] the result unreliable,' thus avoiding later consideration of the error in the context of ineffective assistance of counsel"); *State* v. *Nave,* 694 S. W. 2d 729, 735 (Mo. 1985) ("Several states hold that the general rule that allegations of court error not assigned in a motion for new trial are not preserved for appellate review, codified in Missouri Rule 29.11(d) with exceptions not applicable here, is inapplicable in death penalty cases. Even though the assignment of error has been improperly preserved, we review, ex gratia, the point relied on for plain error . . . to determine if manifest injustice or a miscarriage of justice resulted from the denial of Nave's request for continuance"); *Commonwealth*v. *McKenna,* 476 Pa. 428, 440-441, 383 A. 2d 174, 181 (1978) ("Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed be constitutionally beyond reproach. . . . The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue — the propriety of allowing the state to conduct an illegal execution"); *State* v. *Patterson,* 278 S. C. 319, 320-321, 295 S. E. 2d 264, 264-265 (1982) ("On appeal from a murder conviction in which the death penalty is imposed, this Court reviews the entire record for prejudicial error *in favorem vitae,* regardless of whether the error was properly preserved for review"); *State* v. *Brown,* 607 P. 2d 261, 265 (Utah 1980) ("[N]o objection was made to the omission. Nevertheless, as this is a capital case, we consider the defendant's contention on appeal").

Indeed, Virginia law itself recognizes the special obligations attendant on reviewing death penalties by providing for automatic Virginia Supreme Court review of the death penalty, Va. Code § 17-110.1A (1982), and giving capital cases priority on the court's docket, § 17-110.2. Some State Supreme Courts interpret such statutes to impose an obligation on the court to review the transcript for all possible errors. See, *e. g., State* v. *Osborn, supra.*

[21] See Prosecutor's Closing Argument at Sentencing Phase, App. 30-31 ("Now, as I said, you all, the Court has instructed you that you all may fix his punishment at death, if the Commonwealth proved its case — proved the prior history that he would commit criminal acts of violence that would constitute a continuous serious threat to society. Now, what has the Commonwealth proved? The Commonwealth has proved that prior to the crime you all convicted him of yesterday, that he assaulted a person on the bus. He said he did it. . . . Tore her clothes off, and then decided not to do it").

[22] The state trial court's rejection of petitioner's trial objection to the psychiatrist's testimony stands in sharp contrast to THE CHIEF JUSTICE's *Estelle* analysis: "I don't believe that Doctor Pile has any duty to inform him that anything he may say to him may be used for or against him in a Court of Law, as a police officer does under the Miranda." App. 5.

[23] The State argues that petitioner's case is distinguishable from *Estelle* because the defense requested the psychiatric examination. In view of the fact that Dr. Pile related the account to the prosecution and the court, and testified for the prosecution, he was quite clearly an "agent of the State" in the same sense in which the psychiatrist in *Estelle* was an agent of the State. See 451 U. S., at 467 ("When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting").

Petitioner and *amici,* in turn, argue that, because the examination was to assist the defense, an absolute guarantee of confidentiality, rather than *Miranda* warnings, should have been required. They contend that such confidentiality is especially important to effectuate the due process right to consult with a psychiatrist that was recognized in *Ake* v. *Oklahoma,* 470 U. S. 68 (1985). Since, at a minimum, *Estelle* required that Dr. Pile give*Miranda* warnings, we need not consider the possibility that disclosure would have been inappropriate in any circumstances. For it is at least clear that, under *these* circumstances, his testimony violated petitioner's Fifth Amendment right. Moreover, we need not decide whether, under these circumstances, in which the psychiatrist may have actually been acting as an agent of the defense, his transformation into an agent of the State was itself constitutionally invalid under the Sixth Amendment.

[24] "But the invalid aggravating circumstance found by the jury in this case was struck down in *Arnold* because the Georgia Supreme Court concluded that it fails to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed. See nn. 5 and 16, *supra. The underlying evidence is nevertheless fully admissible at the sentencing phase*. . . .

.....

"Thus, any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he has been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant." 462 U. S., at 886-887(emphasis added).

We continued:

"Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We accept that court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty, having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary and capricious. 250 Ga., at 101, 297 S. E. 2d, at 4. The Georgia Supreme Court, in its response to our certified question, expressly stated: `A different result might be reached in a case where evidence was submitted in

support of a statutory aggravating circumstance *which was not otherwise admissible* and thereafter the circumstance failed.' *Ibid.*" *Id.,* at 890 (emphasis added).

Smith v Murray

477 U.S. 527 (1986)

SMITH

v.

MURRAY, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS

No. 85-5487.

Supreme Court of United States.

Argued March 4, 1986

Decided June 26, 1986

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

528*528 *J. Lloyd Snook III,* by appointment of the Court, 474 U. S. 993, argued the cause for petitioner. With him on the briefs was *Richard J. Bonnie.*

James E. Kulp, Senior Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief were *William G. Broaddus,* Attorney General, and *Frank S. Ferguson,* Assistant Attorney General.[*]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether and, if so, under what circumstances, a prosecutor may elicit testimony from a mental health professional concerning the content of an interview conducted to explore the possibility of presenting psychiatric defenses at trial. We also agreed to review the 529*529 Court of Appeals' determination that any error in the admission of the psychiatrist's evidence in this case was irrelevant under the holding of *Zant* v. *Stephens,* 462 U. S. 862 (1983). On examination, however, we conclude that petitioner defaulted his underlying constitutional claim by failing to press it before the Supreme Court of Virginia on direct appeal. Accordingly, we decline to address the merits of petitioner's claims and affirm the judgment dismissing the petition for a writ of habeas corpus.

I

Following a jury trial, petitioner was convicted of the May 1977 murder of Audrey Weiler. According to his confession, petitioner encountered Ms. Weiler in a secluded area near his home and raped her at knifepoint. Fearing that her testimony could send him back to prison, he then grabbed her by the neck and choked her until she fell unconscious. When he realized that she was still alive, he dragged her into a nearby river, submerged her head, and repeatedly stabbed her with his knife. A subsequent medical examination indicated that the death was attributable to three clusters of lethal injuries: asphyxia from strangulation, drowning, and multiple stab wounds.

Prior to the trial, petitioner's appointed counsel, David Pugh, had explored the possibility of presenting a number of psychiatric defenses. Towards that end, Mr. Pugh requested that the trial court appoint a private psychiatrist, Dr. Wendell Pile, to conduct an examination of petitioner. Aware that psychiatric reports were routinely forwarded to the court and that such reports were then admissible under Virginia law, Mr. Pugh had advised petitioner not to discuss any prior criminal episodes with anyone. App. 134. See *Gibson* v. *Commonwealth,* 216 Va. 412, 219 S. E. 2d 845 (1975). Although that general advice was intended to apply to the forthcoming psychiatric examination, Mr. Pugh later testified that he "did not specifically tell [petitioner] not to say anything to Doctor Pile about the offense or any offenses." 530*530 App. 132. During the course of the examination, Dr. Pile did in fact ask petitioner both about the murder and about prior incidents of deviant sexual conduct. Tr. of State Habeas Hearing 19. Although petitioner initially declined to answer, he later stated that he had once torn the clothes off a girl on a school bus before deciding not to carry out his original plan to rape her. App. 44. That information, together with a tentative diagnosis of "Sociopathic Personality; Sexual Deviation (rape)," was forwarded to the trial court, with copies sent both to Mr. Pugh and to the prosecutor who was trying the case for the Commonwealth. *Id.,* at 43-45. At no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and

to have counsel present if he so desired. *Id.,* at 90. Cf. *Estelle* v. *Smith,* 451 U. S. 454 (1981).

At the sentencing phase of the trial, the Commonwealth called Dr. Pile to the stand. Over the defense's objection, Dr. Pile described the incident on the school bus. Tr. 934-935. On cross-examination, he repeated his earlier conclusion that petitioner was a "sociopathic personality."*Id.,* at 936. After examining a second psychiatrist, the Commonwealth introduced petitioner's criminal record into evidence. It revealed that he had been convicted of rape in 1973 and had been paroled from the penitentiary on that charge less than four months prior to raping and murdering Ms. Weiler. The defense then called 14 character witnesses, who testified that petitioner had been a regular churchgoer, a member of the choir, a conscientious student in high school, and a good soldier in Vietnam. After lengthy deliberation, the jury recommended that petitioner be sentenced to death.

Petitioner appealed his conviction and sentence to the Supreme Court of Virginia. In his brief he raised 13 separate claims, including a broad challenge to the constitutionality of Virginia's death penalty provisions, objections to several of the trial court's evidentiary rulings, and a challenge to 531*531 the exclusion of a prospective juror during *voir dire.* Petitioner did not, however, assign any error concerning the admission of Dr. Pile's testimony. At a subsequent state postconviction hearing, Mr. Pugh explained that he had consciously decided not to pursue that claim after determining that "Virginia case law would [not] support our position at that particular time." App. 143. Various objections to the Commonwealth's use of Dr. Pile's testimony were raised, however, in a brief filed by *amicus curiae* Post-Conviction Assistance Project of the University of Virginia Law School.

The Supreme Court of Virginia affirmed the conviction and sentence in all respects. *Smith* v.*Commonwealth,* 219 Va. 455, 248 S. E. 2d 135 (1978). In a footnote, it noted that, pursuant to a rule of the court, it had considered only those arguments advanced by *amicus* that concerned errors specifically assigned by the defendant himself. *Id.,* at 460, n. 1, 248 S. E. 2d, at 139, n. 1. Accordingly, it did not address any issues concerning the prosecution's use of the psychiatric testimony. This Court denied the subsequent petition for certiorari, which, again, did not urge the claim that admission of Dr. Pile's testimony violated petitioner's rights under the Federal Constitution. 441 U. S. 967 (1979).

In 1979, petitioner sought a writ of habeas corpus in the Circuit Court for the City of Williamsburg and the County of James City. For the first time since the trial, he argued that the admission of Dr. Pile's testimony violated his privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Federal Constitution. The court ruled, however, that petitioner had forfeited the claim by failing to press it in earlier proceedings. At a subsequent evidentiary hearing, conducted solely on the issue of ineffective assistance of counsel, the court heard testimony concerning the reasons underlying Mr. Pugh's decision not to pursue the Fifth Amendment claim on appeal. On the basis of that testimony, the court found that Pugh and his assistant had researched the question, but had determined that the claim was 532*532unlikely to succeed. Thus,

the court found, "counsel exercised reasonable judgment in deciding not to preserve the objection on appeal, and . . . this decision resulted from informed, professional deliberation." App. to Pet. for Cert. 71. Petitioner appealed the denial of his habeas petition to the Supreme Court of Virginia, contending that the Circuit Court had erred in finding that his objection to the admission of Dr. Pile's testimony had been defaulted. The Supreme Court declined to accept the appeal, *Smith* v. *Morris,* 221 Va. cxliii (1981), and we again denied certiorari. 454 U. S. 1128 (1981).

Having exhausted state remedies, petitioner sought a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. In an unpublished order, the court denied the petition, holding that the objection to the admission of Dr. Pile's testimony was "clearly barred" under this Court's decision in *Wainwright* v. *Sykes,* 433 U. S. 72 (1977). App. 158. In reaching that conclusion, the District Judge noted that "the default resulted not from the trial attorney's ignorance or inadvertence, but because of a deliberate tactical decision." *Ibid.*

The Court of Appeals for the Fourth Circuit affirmed, but on different grounds. *Smith* v.*Procunier,* 769 F. 2d 170 (1985). Finding it unnecessary to rely on procedural default or to address the merits of the substantive constitutional claim, the court held that admission of Dr. Pile's testimony, even if erroneous, could not be the basis for invalidating petitioner's sentence. It noted that the jury had relied on two distinct aggravating factors in its decision to recommend the death penalty. The psychiatric testimony, however, only bore on one of those factors, the likelihood that petitioner would "constitute a continuing serious threat to society." Va. Code § 19.2-264.2 (1983); Tr. 1102. In that circumstance, the Court of Appeals believed, our decision in*Zant* v. *Stephens,* 462 U. S., at 884, required the conclusion that the error, if any, was irrelevant to the overall validity of the sentence. 533*533 We granted certiorari, *Smith* v. *Sielaff,* 474 U. S. 918 (1985), and now affirm on the authority of our decision in *Murray* v. *Carrier, ante,* p. 478.

II

Under Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding. See, *e. g., Coppola* v.*Warden of Virginia State Penitentiary,* 222 Va. 369, 282 S. E. 2d 10 (1981); *Slayton* v.*Parrigan,* 215 Va. 27, 205 S. E. 2d 680 (1974). In the present case, the Virginia courts have enforced that rule by declining to consider petitioner's objection to the admission of Dr. Pile's testimony, a claim concededly not included in his initial appeal from his conviction and sentence. Consistent with our earlier intimations in *Reed* v. *Ross,* 468 U. S. 1, 11 (1984), we held in *Murray* v. *Carrier, ante,* p. 478, that a federal habeas court must evaluate appellate defaults under the same standards that apply when a defendant fails to preserve a claim at trial. Accordingly, although federal courts at all

times retain the power to look beyond state procedural forfeitures, the exercise of that power ordinarily is inappropriate unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and "actual prejudice resulting from the alleged constitutional violation." *Wainwright* v. *Sykes, supra,* at 84; *Murray* v.*Carrier, ante,* at 485. As we explained more fully in *Carrier,* this congruence between the standards for appellate and trial default reflects our judgment that concerns for finality and comity are virtually identical regardless of the timing of the defendant's failure to comply with legitimate state rules of procedure.

We need not determine whether petitioner has carried his burden of showing actual prejudice from the allegedly improper admission of Dr. Pile's testimony, for we think it self-evident that he has failed to demonstrate cause for his noncompliance with Virginia's procedures. We have declined in 534*534 the past to essay a comprehensive catalog of the circumstances that would justify a finding of cause. *Reed* v. *Ross, supra,* at 13; see also *Wainwright* v. *Sykes, supra,* at 91. Our cases, however, leave no doubt that a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that would warrant excusing a defendant's failure to adhere to a State's legitimate rules for the fair and orderly disposition of its criminal cases. As the Court explained in *Reed:*

> *"[D]efense counsel may not make a tactical decision to forgo a procedural opportunity — for instance, to object at trial or to raise an issue on appeal — and then when he discovers that the tactic has been unsuccessful, pursue an alternative strategy in federal court. The encouragement of such conduct by a federal court on habeas corpus review would not only offend generally accepted principles of comity, but would undermine the accuracy and efficiency of the state judicial systems to the detriment of all concerned. Procedural defaults of this nature are, therefore, inexcusable, and cannot qualify as `cause' for purposes of federal habeas corpus review." 468 U. S., at 14 (internal quotation and citation omitted).*

Here the record unambiguously reveals that petitioner's counsel objected to the admission of Dr. Pile's testimony at trial and then consciously elected not to pursue that claim before the Supreme Court of Virginia. The basis for that decision was counsel's perception that the claim had little chance of success in the Virginia courts. With the benefit of hindsight, petitioner's counsel in this Court now contends that this perception proved to be incorrect. Cf. *Gibson* v.*Zahradnick,* 581 F. 2d 75 (CA4 1978) (repudiating reasoning of *Gibson* v. *Commonwealth,* 216 Va. 412, 219 S. E. 2d 845 (1975)). Even assuming that to be the case, however, a State's subsequent acceptance of an argument deliberately abandoned on direct appeal is irrelevant to the question whether the default should be excused on federal habeas. 535*535 Indeed, it is the very prospect that a state court "may decide, upon reflection, that the contention is valid" that undergirds the established rule that "perceived futility alone cannot constitute cause," *Engle* v.*Isaac,* 456 U. S. 107, 130, and n. 36 (1982); for "[a]llowing criminal defendants to deprive the state courts of [the] opportunity" to reconsider previously rejected constitutional claims is fundamentally at odds with the principles of comity that animate *Sykes* and its progeny. *Id.,* at 130.

Notwithstanding the deliberate nature of the decision not to pursue his objection to Dr. Pile's testimony on appeal — a course of conduct virtually dispositive of any effort to satisfy *Syke*'s "cause" requirement — petitioner contends that the default should be excused because Mr. Pugh's decision, though deliberate, was made in ignorance. Had he investigated the claim more fully, petitioner maintains, "it is inconceivable that he would have concluded that the claim was without merit or that he would have failed to raise it." Reply Brief for Petitioner 3.

The argument is squarely foreclosed by our decision in *Carrier,* which holds that "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default." *Ante,* at 486-487. See also *Engle* v. *Isaac, supra,* at 133-134. Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington,* 466 U. S. 668 (1984). *Carrier* reaffirmed that "the right to effective assistance of counsel . . . may in a particular case be violated by even an isolated error. . . if that error is sufficiently egregious and prejudicial." *Ante,* at 496; see also *United States* v. *Cronic,* 466 U. S. 648, 657, n. 20 (1984). But counsel's deliberate decision not to pursue his objection to the admission of Dr. Pile's testimony falls far short of meeting that rigorous standard. After conducting 536*536 a vigorous defense at both the guilt and sentencing phases of the trial, counsel surveyed the extensive transcript, researched a number of claims, and decided that, under the current state of the law, 13 were worth pursuing on direct appeal. This process of "winnowing out weaker arguments on appeal and focusing on" those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy. *Jones* v. *Barnes,* 463 U. S. 745, 751-752 (1983). It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland* v. *Washington* made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U. S., at 689. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Pile's testimony fell well within the "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. *Id.,* at 690.

Nor can petitioner rely on the novelty of his legal claim as "cause" for noncompliance with Virginia's rules. See *Reed* v. *Ross,* 468 U. S., at 18 ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). Petitioner contends that this Court's decisions in *Estelle* v. *Smith,* 451 U. S. 454 (1981), and *Ake* v. *Oklahoma,* 470 U. S. 68 (1985), which were decided well after the affirmance of his conviction and sentence on direct appeal, lend support to his position that Dr. Pile's testimony should have been excluded.537*537 But, as a comparison of *Reed* and *Engle* makes plain, the question is not whether subsequent legal developments have

made counsel's task easier, but whether at the time of the default the claim was "available" at all. As petitioner has candidly conceded, various forms of the claim he now advances had been percolating in the lower courts for years at the time of his original appeal. Brief for petitioner 20-21, n. 12; Reply Brief for Petitioner 3. Moreover, in this very case, an *amicus* before the Supreme Court of Virginia specifically argued that admission of Dr. Pile's testimony violated petitioner's rights under the Fifth and Sixth Amendments. Brief for Post-Conviction Assistance Project of the University of Virginia Law School as *Amicus Curiae*in No. 780293, pp. 53-62. Under these circumstances, it simply is not open to argument that the legal basis of the claim petitioner now presses on federal habeas was unavailable to counsel at the time of the direct appeal.

We conclude, therefore, that petitioner has not carried his burden of showing cause for noncompliance with Virginia's rules of procedure. That determination, however, does not end our inquiry. As we noted in *Engle* and reaffirmed in *Carrier,* " `[i]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice `must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray* v. *Carrier, ante,* at 495, quoting *Engle* v. *Isaac, supra,* at 135. Accordingly, "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray* v.*Carrier, ante,* at 496.

We acknowledge that the concept of "actual," as distinct from "legal," innocence does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense. Nonetheless, we think it clear on this record that application of the cause and prejudice test will not result 538*538 in a "fundamental miscarriage of justice." *Engle,* 456 U. S., at 135. There is no allegation that the testimony about the school bus incident was false or in any way misleading. Nor can it be argued that the prospect that Dr. Pile might later testify against him had the effect of foreclosing meaningful exploration of psychiatric defenses. While that concern is a very real one in the abstract, here the record clearly shows that Dr. Pile did ask petitioner to discuss the crime he stood accused of committing as well as prior incidents of deviant sexual conduct. Although initially reluctant to do so, ultimately petitioner was forthcoming on both subjects. In short, the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones. Thus, even assuming that, as a legal matter, Dr. Pile's testimony should not have been presented to the jury, its admission did not serve to pervert the jury's deliberations concerning the ultimate question whether *in fact* petitioner constituted a continuing threat to society. Under these circumstances, we do not believe that refusal to consider the defaulted claim on federal habeas carries with it the risk of a manifest miscarriage of justice.

Nor can we concur in JUSTICE STEVENS' suggestion that we displace established procedural default principles with an amorphous "fundamental fairness" inquiry. *Post,* at 542-543. Precisely which parts of the Constitution are "fundamental" and which are not is left for future elaboration. But, for JUSTICE STEVENS, when a defendant in a capital case raises a "substantial, colorable" constitutional claim, a federal court should entertain it no matter how egregious the violation of state procedural rules, and regardless of the fairness of the opportunity to raise that claim in the course of his trial

and appeal. *Post,* at 546. We reject the suggestion that the principles of *Wainwright* v. *Sykes* apply differently depending on the nature of the penalty a State imposes for the violation of its criminal laws. We similarly reject the suggestion that there is anything "fundamentally unfair" 539*539 about enforcing procedural default rules in cases devoid of any substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination. In view of the profound societal costs that attend the exercise of habeas jurisdiction, such exercise "carries a serious burden of justification." H. Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 146 (1970); see also *Engle* v. *Isaac, supra,* at 126-129. When the alleged error is unrelated to innocence, and when the defendant was represented by competent counsel, had a full and fair opportunity to press his claim in the state system, and yet failed to do so in violation of a legitimate rule of procedure, that burden has not been carried.

Accordingly, we affirm the judgment of the Court of Appeals upholding the dismissal of petitioner's application for a writ of habeas corpus.

Affirmed.

[For dissenting opinion of JUSTICE BRENNAN, see *ante,* p. 516.]

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join and with whom JUSTICE BRENNAN joins as to Parts II and III, dissenting.

The record in this case unquestionably demonstrates that petitioner's constitutional claim is meritorious, and that there is a significant risk that he will be put to death *because* his constitutional rights were violated.

The Court does not take issue with this conclusion. It is willing to assume that (1) petitioner's Fifth Amendment right against compelled self-incrimination was violated; (2) his Eighth Amendment right to a fair, constitutionally sound sentencing proceeding was violated by the introduction of the evidence from that Fifth Amendment violation; and (3) those constitutional violations made the difference between life and death in the jury's consideration of his fate. Although the constitutional violations and issues were sufficiently serious 540*540 that this Court decided to grant certiorari, and although the Court of Appeals for the Fourth Circuit decided the issue on the merits, this Court concludes that petitioner's presumably meritorious constitutional claim is procedurally barred and that petitioner must therefore be executed.

In my opinion, the Court should reach the merits of petitioner's argument. To the extent that there has been a procedural "default," it is exceedingly minor — perhaps a kind of "harmless" error. Petitioner's counsel raised a timely objection to the introduction of the evidence obtained in violation of the Fifth Amendment. A respected friend of the Court — the University of Virginia Law School's Post-Conviction Assistance Project — brought the issue to the attention of the Virginia Supreme Court in an extensive *amicus curiae* brief. Smith's counsel also raised the issue in state and federal habeas corpus proceedings, and, as noted, the Court of Appeals decided the case on the merits. Consistent with the well-established principle that appellate arguments should be

carefully winnowed,[1] however, Smith's counsel did not raise the Fifth Amendment issue in his original appeal to the Virginia Supreme Court — an unsurprising decision in view of the fact that a governing Virginia Supreme Court precedent, which was then entirely valid and only two years old, decisively barred the claim.[2]

Nevertheless, the Court finds the lawyer's decision not to include the constitutional claim "virtually dispositive." *Ante,* at 535. The Court offers the remarkable explanation that "[u]nder these circumstances" — in which petitioner's death penalty will stand despite serious Fifth and Eighth Amendment violations that played a critical role in the determination that death is an appropriate penalty — "we do not believe that refusal to consider the defaulted claim on federal541*541 habeas carries with it the risk of a manifest miscarriage of justice." *Ante,* at 538.

I fear that the Court has lost its way in a procedural maze of its own creation and that it has grossly misevaluated the requirements of "law and justice" that are the federal court's statutory mission under the federal habeas corpus statute.[3] To understand the nature of the Court's error, it is necessary to assess the Court's conclusion that the claim is procedurally defaulted; to consider the Fifth Amendment violation; and to consider the Eighth Amendment violation.

I

We begin with the common ground. The historic office of the Great Writ as the ultimate protection against fundamental unfairness is well know.[4] That mission is reflected in the statutory requirement that the federal court "dispose of the matter as law and justice require." 28 U. S. C. § 2243. It is by now equally clear that the application of the Court's "cause and prejudice" formulation as a rigid bar to review of fundamental constitutional violations has no support in the statute, or in Federal Rule of Criminal Procedure 12 (b)(2), from which it was initially imported;[5] the standard thus represents judicial lawmaking of the most unabashed form. The Court nonetheless reaffirms today, as it has consistently held in the past,[6] that federal courts retain the 542*542 *power* to entertain federal habeas corpus requests despite the absence of "cause and prejudice," *ante,* at 537; the only question is whether to exercise that power. Despite the rigor of its cause-and-prejudice standard, moreover, the Court continues to commit itself to maintaining the availability of habeas corpus under certain circumstances, even in the absence of "cause," *ibid.;* indeed, this Term, the Court has emphasized the importance of that availability by remanding a case to consider the merits of a prisoner's claim even though the prisoner failed to show "cause" for the default. *Murray* v. *Carrier, ante,* p. 478.

The Court concludes in this case that no miscarriage of justice will result from a refusal to entertain Smith's challenge to his death sentence. This conclusion is flawed in three respects. First, the Court mistakenly assumes that only a claim implicating "actual

innocence" rises to the level of a miscarriage of justice. Second, the Court does not properly assess the force of a claim that a death penalty is invalid. Finally, the Court vastly exaggerates the state interest in refusing to entertain this claim.

The Court accurately quotes the holding in *Murray* v. *Carrier:* " `[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.' " *Ante,*at 537. The Court then seeks to transfer this "actual innocence" standard to capital sentencing proceedings, and concludes that, in petitioner's sentencing hearing, "the alleged constitutional error neither precluded the development of true facts nor resulted in the admission of false ones." *Ante,* at 538. The Court does not explain, however, why *Carrier*'s clearly correct holding about the propriety of the writ in a case of innocence must also be a *limiting* principle on the federal court's ability to exercise its statutory authority to entertain federal habeas corpus actions; more specifically, the Court 543*543 does not explain why the same principle should not apply when a constitutional violation is claimed to have resulted in a lack of fundamental fairness, either in a conviction or in a death sentence.

This analysis is far removed from the traditional understanding of habeas corpus. For instance, in *Moore* v. *Dempsey,* 261 U. S. 86 (1923), the Court considered a claim that the murder convictions and death sentences of five black defendants were unconstitutional. The federal District Court had dismissed the writ of habeas corpus. In his opinion for the Court, Justice Holmes explained that in view of the allegations — systematic exclusion of blacks from the jury and threatened mob violence — the Federal District Court should not have dismissed the writ without considering the factual allegations. The Court noted the presence of a clear procedural default — the Arkansas Supreme Court had refused to entertain the challenge to discrimination in the jury because the objection "came too late." *Id.,* at 91. The Court nevertheless held that the Federal District Court should have entertained the petition. *Id.,* at 92.

Although the allegations clearly implicated questions about the accuracy of the truth-finding process, the Court's opinion cannot be fairly read to rest on the kind of "innocence" inquiry that the Court propounds today. For the Court specifically rejected the notion that its inquiry into the presence of a serious constitutional violation was actually an inquiry into the guilt or innocence of the petitioners: "The petitioners say that [the victim] must have been killed by other whites [rather than by the black petitioners], but that we leave on one side *as what we have to deal with is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved.*" *Id.,* at 87-88 (emphasis added). Today, the Court adopts the converse of Justice Holmes' proposition: it leaves to one side the question 544*544 whether constitutional rights have been preserved, and considers only petitioner's innocence or guilt.[7]

The majority's reformulation of the traditional understanding of habeas corpus appears to be premised on the notion that only constitutional violations which go to guilt or innocence are sufficiently serious to implicate the "fundamental fairness" alluded to in *Engle* v. *Isaac,* 456 U. S. 107, 126 (1982).[8] If accuracy in the determination of guilt or

innocence were the only value of our criminal justice system, then the Court's analysis might have a great deal of force. If accuracy is the only value, however, then many of our constitutional protections — such as the Fifth Amendment right against compelled self-incrimination and the Eighth Amendment right against cruel and unusual punishment, the very claims asserted by petitioner — are not only irrelevant, but possibly counterproductive.[9] Our Constitution, however, and 545*545 our decision to adopt an "accusatorial," rather than an "inquisitorial" system of justice,[10] reflect a different choice. That choice is to afford the individual certain protections — the right against compelled self-incrimination and the right against cruel and unusual punishment among them — even if those rights do not necessarily implicate the accuracy of the truth-finding proceedings. Rather, those protections are an aspect of the fundamental fairness, liberty, and individual dignity that our society affords to all, even those charged with heinous crimes.

In my opinion, then, the Court's exaltation of accuracy as the only characteristic of "fundamental fairness" is deeply flawed. Our criminal justice system, and our Constitution, protect other values in addition to the reliability of the guilt or innocence determination, and the statutory duty to serve "law and justice" should similarly reflect those values.

Thus, the Court begins with a conception of "fundamental fairness" that is far too narrow and that conflicts with the nature of our criminal justice system. The Court similarly fails to give appropriate weight to the fact that capital punishment is at stake in this case. It is now well settled that "death is a different kind of punishment from any other which may be imposed in this country." *Gardner* v. *Florida,* 430 U. S. 349, 357 (1977) (STEVENS, J.).[11] It is of vital importance to 546*546 the defendant and to the community that any decision to impose the death sentence be, and appear to be, the consequence of scrupulously fair procedures. When a condemned prisoner raises a substantial, colorable Eighth Amendment violation, there is a special obligation, consistent with the statutory mission to "dispose of the matter as law and justice require," to consider whether the prisoner's claim would render his sentencing proceeding fundamentally unfair. Indeed, it was precisely this concern that prompted the Court of Appeals to consider petitioner's argument on the merits: "[W]e give weight to the consideration that we have before us a matter of life and death. The imminent execution of Smith serves as sufficient grounds to review the issue." *Smith* v. *Procunier,* 769 F. 2d 170, 172 (1985).

Finally, as in every habeas corpus decision, the magnitude of the State's interest must be considered. In this case, several 547*547 factors suggest that the State's interest is not adequate to obstruct federal habeas corpus consideration of petitioner's claim. First, petitioner made a timely objection at trial, and the state interest in enforcing procedural default rules at trial is far greater than the State's interest in enforcing procedural default rules on appeal.[12] Second, the issue was raised before the state court in an *amicus curiae* brief.[13] Since this is a matter on which courts ordinarily may exercise discretion,[14] the discretionary decision not to address the issue hardly rises to a state interest of sufficient magnitude that a man should die even though his Fifth and Eighth Amendment rights were violated to achieve that objective. Third, the issue was

presented to the state courts in state habeas proceedings — *after* the precedent blocking petitioner's claim had been repudiated[15] — and the state habeas court, while finding that the decision by Smith's counsel not to raise the issue with a governing Virginia precedent squarely against 548*548 him was entirely reasonable,[16] concluded that the Fifth Amendment claim was procedurally barred and thus did not address it.[17] Fourth, the Court of Appeals for the Fourth Circuit addressed the merits and did not rest on any notion of procedural default; this Court customarily defers to federal courts of appeals on questions of state law,[18] including questions about "cause" for failure to comply with state procedural rules.[19] Finally, and most importantly, the inadequacy of the state interest in this death penalty context is decisively shown by the prevailing practice in many States that appellate courts have a special duty in capital cases to overlook procedural defaults and review the trial record for reversible error, before affirming that most severe of all sentences.[20]

549*549 Thus, the Court is mistaken in its narrow definition of fundamental fairness, in its failure to appreciate the significance of a challenge to a death penalty, and in its exaggeration of 550*550the State's interest in refusing to entertain a claim that was raised at trial, on appeal by an*amicus,* and in state habeas proceedings; that was addressed on the merits by the Court of Appeals (and briefed and argued on the merits in this Court); and that must be assumed to make the difference between life and death. Because I disagree with the Court's evaluation of these matters, I would address the merits of petitioner's argument that constitutional violations render his sentence of death fundamentally unfair.

551*551 II

The introduction of petitioner's comments to the court-appointed psychiatrist clearly violated the Fifth Amendment. As the majority points out, psychiatric reports by court-appointed psychiatrists "were routinely forwarded to the court and . . . were then admissible under Virginia law." *Ante,* at 529. However, "[a]t no point prior to or during the interview did Dr. Pile inform petitioner that his statements might later be used against him or that he had the right to remain silent and to have counsel present if he so desired." *Ante,* at 530. Moreover, the court-appointed psychiatrist related petitioner's description of an earlier sexual assault in a letter to the court and to the prosecution, as well as to the defense, and testified about the description, at the State's request, at petitioner's capital sentencing hearing. The State thus relied on Dr. Pile's testimony as evidence of "future dangerousness," one of the two aggravating circumstances found by the jury to justify a sentence of death.[21]

CHIEF JUSTICE BURGER'S opinion for the Court in *Estelle* v. *Smith,* 451 U. S. 454 (1981),makes it absolutely clear that the introduction of this evidence by the prosecution at the sentencing stage violated the Fifth Amendment. As THE CHIEF

JUSTICE explained, the Fifth Amendment fully applies to a capital sentencing proceeding: "Just as the Fifth Amendment prevents a criminal defendant from being made ` "the deluded instrument of his own conviction,"' *Culombe* v. *Connecticut,* 367 U. S. [568,] 581, quoting 2 W. Hawkins, Pleas 552*552of the Crown 595 (8th ed. 1824), it protects him as well from being made `the deluded instrument' of his own execution." *Id.,* at 462. As THE CHIEF JUSTICE also explained, prosecutorial use of evidence from a psychiatric interrogation in a capital sentencing proceeding requires the protections, and warnings, accorded the Fifth Amendment right in other contexts: "Because [the defendant] did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to [the psychiatrist] to establish his future dangerousness." *Id.,*at 468.

Thus, the use of petitioner's statements clearly violated the Fifth Amendment.[22] In view of the majority's willingness to assume that the constitutional violation is present but that the failure to address it does not affect the fundamental fairness of petitioner's sentence, moreover, it is instructive to recall the importance of the Fifth Amendment right at issue. Again, THE CHIEF JUSTICE'S opinion in *Estelle* v. *Smith* provides guidance:

> *"Miranda held that `the prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.'. . . The purpose of these admonitions is to combat what the Court saw as `inherently compelling pressures' at work on the person and to provide him with an awareness of the Fifth Amendment privilege and the consequences of forgoing it, which is the prerequisite for `an intelligent decision as to its exercise.'*
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> *.....*
>
> *553*553 "The Fifth Amendment privilege is `as broad as the mischief against which it seeks to guard,' Counselman v. Hitchcock, 142 U. S. 547, 562 (1892), and the privilege is fulfilled only when a criminal defendant is guaranteed the right `to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty . . . for such silence.' Malloy v. Hogan, 378 U. S., at 1, 8 (1964)." Id., at 466-468.*

Given the historic importance of the Fifth Amendment, and the fact that the violation of this right made a significant difference in the jury's evaluation of petitioner's "future dangerousness" (and consequent death sentence), it is not only proper, but imperative, that the federal courts entertain petitioner's entirely meritorious argument that the introduction of the psychiatrist's testimony at his sentencing hearing violated that fundamental protection.[23]

554*554 III

It is also quite clear that the introduction of the evidence violated his Eighth Amendment right to a fair sentencing proceeding. In this respect, I disagree with the Court of Appeals' reading of the opinion that I authored for the Court in *Zant* v. *Stephens,* 462 U. S. 862 (1983). The Court of Appeals concluded that, because the jury also found an aggravating circumstance of "vileness," the death sentence could stand even if Dr. Pile's testimony represented a flagrant Fifth Amendment violation.

In *Zant,* we held that the Georgia Supreme Court's invalidation of one of the three aggravating circumstances found by the jury did not require that the death penalty be set aside. But that conclusion was reached only after we satisfied ourselves that the evidence relating to the invalid aggravating circumstance had been properly admitted.[24] We 555*555 did not conclude, as the Court of Appeals seems to have assumed, that any evidence concerning the invalid circumstance was simply irrelevant because the valid circumstances were, in all events, sufficient to support the death penalty. The fact that the record adequately establishes one valid aggravating circumstance may make the defendant eligible for the death penalty but it does not justify the conclusion that a death sentence should stand even though highly prejudicial inadmissible evidence was presented to the jury at the sentencing hearing. The introduction of such highly prejudicial, inadmissible evidence — evidence that itself represents an independent constitutional violation — quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment.

IV

Thus, I would not only reach the merits of petitioner's constitutional claim but also would conclude that it has merit. The question that remains is the one the Court addresses in the last two paragraphs of its opinion — whether the constitutional error warrants the conclusion that the death penalty should be set aside in this habeas corpus proceeding. I think that question should be answered by reference to the language of the governing statute — the writ should issue "as law and justice require." To hold, as the Court does today, that petitioner's death sentence must stand despite the fact that blatant constitutional violations presumably made the difference between the jury's recommendation of life or death, violates not only "law," but, quite clearly, "justice" as well.

I respectfully dissent.

[*] Briefs of *amici curiae* urging reversal were filed for the American Psychiatric Association et al. by *Joel I. Klein, Joseph N. Onek,* and *Peter E. Scheer;* for the American Psychological Association by *Bruce J. Ennis, Jr.,*and *Donald N. Bersoff;* and for the New Jersey Department of the Public Advocate by *Linda G. Rosenzweig.*

[1] See *Jones* v. *Barnes,* 463 U. S. 745, 751-752 (1983); *ante,* at 536.

[2] See *Gibson* v. *Commonwealth,* 216 Va. 412, 219 S. E. 2d 845 (1975), cert. denied, 425 U. S. 994 (1976).

[3] See 28 U. S. C. § 2243 ("The court shall . . . dispose of the matter as law and justice require").

[4] See, *e. g., Engle* v. *Isaac,* 456 U. S. 107, 126 (1982) ("The writ of habeas corpus indisputably holds an honored position in our jurisprudence.. . . Today, as in prior centuries, the writ is a bulwark against convictions that violate `fundamental fairness' ").

[5] See *Murray* v. *Carrier, ante,* at 501-505 (STEVENS, J., concurring in judgment). Indeed, the Court in *Murray*conceded that "[t]he cause and prejudice test may lack a perfect historical pedigree," *ante,* at 496, and noted that "the Court acknowledged as much in *Wainwright* v. *Sykes*." *Ibid.*

[6] See, *e. g., Reed* v. *Ross,* 468 U. S. 1, 9 (1984); *Francis* v. *Henderson,* 425 U. S. 536, 538 (1976); *Fay* v. *Noia,*372 U. S. 391, 398-399 (1963).

[7] In doing so, the Court goes a long way toward eliminating the distinction, in procedural default cases, between the request for habeas relief and the ultimate issue for a trial court — a distinction that has long been central to our understanding of the Great Writ. See, *e. g., Ex parte Bollman,* 4 Cranch 75, 101 (1807) (Marshall, C. J.) ("It has been demonstrated at the bar, that the question brought forward on a *habeas corpus,* is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts").

[8] See n. 4, *supra.*

[9] Expressing this view, William Howard Taft once observed that, precisely because of the central value of accuracy in guilt or innocence determinations, the Fifth Amendment might have been ill advised. See Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 8 (1905) ("When examined as an original proposition, the prohibition that the defendant in a criminal case shall not be compelled to testify seems, in some aspects, to be of doubtful utility. If the administration of criminal law is for the purpose of convicting those who are guilty of crime, then it seems natural to follow in such a process the methods that obtain in ordinary life").

[10] See *Moran* v. *Burbine,* 475 U. S. 412, 434, and n. 1 (1986) (STEVENS, J., dissenting); *Miller* v. *Fenton,* 474 U. S. 104, 110 (1985); *Malloy* v. *Hogan,* 378 U. S. 1, 7-8 (1964); *Rogers* v. *Richmond,* 365 U. S. 534, 540-541 (1961); *Bram* v. *United States,* 168 U. S. 532, 543-545 (1897).

[11] See also *California* v. *Ramos,* 463 U. S. 992, 998-999 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination"); *Zant*v. *Stephens,* 462 U. S. 862, 884 (1983) ("[T]here is a qualitative difference between death and any other permissible form of punishment"); *Rummel* v. *Estelle,* 445 U. S. 263, 272 (1980) ("This theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions. . . . [A] sentence of death differs in kind from any sentence of imprisonment"); *Lockett* v. *Ohio,* 438 U. S. 586, 605 (1978) (BURGER, C. J.) ("[T]he imposition of death by public authority is . . . profoundly different from all other penalties"). Cf. Meltzer, State Court Forfeitures of Federal Rights, 99 Harv. L. Rev. 1128, 1222 (1986) ("[W]hen a capital defendant raises a nonfrivolous constitutional question, neither state nor federal courts should be free to refuse to decide it simply because it was not raised in accordance with state procedural requirements. Rather, federal law should expressly provide that in matters of procedural default, as in other matters, death is different").

Indeed, the Court has recognized that even the *threat* of a death penalty may, in certain circumstances, exert a special pull in favor of the exercise of the federal court's undisputed statutory power to entertain a habeas corpus writ on a claim that was procedurally defaulted. In *Fay* v. *Noia,* 372 U. S., at 440, the Court was willing to excuse Noia's deliberate decision not to appeal because Noia perceived that a death sentence might result: "His was the grisly choice whether to sit content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence." See also *Wainwright* v. *Sykes,* 433 U. S. 72, 83 (1977) (emphasizing Noia's " `grisly choice' between acceptance of his life sentence and pursuit of an appeal which might culminate in a sentence of death").

[12] See *Murray* v. *Carrier, ante,* at 506-515 (STEVENS, J., concurring in judgment); Meltzer, *supra,* at 1223-1225; Note, Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review, 38 Stan. L. Rev. 463 (1986).

[13] See Brief for Post-Conviction Assistance Project of the University of Virginia Law School as *Amicus Curiae*in No. 780293, pp. 56-61 (arguing that the Fifth Amendment required suppression of psychiatrist's testimony).

[14] Cf. *Mapp* v. *Ohio,* 367 U. S. 643, 646, n. 3 (1961) (addressing issue raised by *amicus*); *Schwinden* v.*Burlington Northern, Inc.,* ____ Mont. ____, ____, 691 P. 2d 1351, 1358 (1984) ("We determine here not to follow the usual rule that issues raised by amici that are part of the underlying action will not be considered by this Court").

[15] See *Gibson* v. *Zahradnick,* 581 F. 2d 75 (CA4) (holding that the *Gibson* v. *Commonwealth* analysis violates Constitution and that writ of habeas corpus should

issue), cert. denied, 439 U. S. 996 (1978). In fact, although the Court of Appeals for the Fourth Circuit decided *Gibson* after the briefs in petitioner's case had been filed, the*Gibson* opinion was issued *before* the initial Virginia Supreme Court opinion refusing to address the issue.

[16] See state habeas opinion, App. 147 ("[B]oth *Gibson* v. *Zahradnick* and *Smith* v. *Estelle* were decided after petitioner's trial. Thus, regardless of their usefulness in theory to sustain an appeal, neither was in fact available to counsel when needed. . . . In light of these facts and of the differences noted above, I find sufficient reason for counsel not to have raised on appeal the arguments presented here. I thus conclude that counsel exercised reasonable judgment in deciding not to preserve the objection on appeal").

[17] State habeas order, Record 204 (Fifth Amendment issue "was waived and forfeited and cannot now be considered").

[18] See, *e. g., Pembaur* v. *Cincinnati,* 475 U. S. 469, 484-485, n. 13 (1986); *Regents of University of Michigan* v.*Ewing,* 474 U. S. 214, 224, n. 10 (1985); *United States* v. *S. A. Empresa de Viacao Aerea Rio Grandense,* 467 U. S. 797, 815, n. 12 (1984); *Bishop* v. *Wood,* 426 U. S. 341, 345-347 (1976); *Propper* v. *Clark,* 337 U. S. 472, 486-487 (1949).

[19] See *Jenkins* v. *Anderson,* 447 U. S. 231, 234, n. 1 (1980) ("The applicability of the *Sykes* `cause'-and-`prejudice' test may turn on an interpretation of state law. . . . This Court's resolution of such a state-law question would be aided significantly by views of other federal courts that may possess greater familiarity with [state] law"); *Rummel* v. *Estelle,* 445 U. S., at 267, n. 7 ("Deferring to the Court of Appeals' interpretation of Texas law, we decline to hold that *Wainwright* bars Rummel from presenting his claim").

[20] See, *e. g.,* Ala. Rule App. Proc. 39(k) ("In all cases in which the death penalty has been imposed, . . . the supreme court may notice any plain error or defect in the proceeding under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial rights of the petitioner"); Arkansas Rev. Stat. Ann. § 43-2725 (1977) ("[W]here either a sentence for life imprisonment or death [is present], the Supreme Court shall review all errors prejudicial to the rights of the appellant"); *Cave* v. *State,* 476 So. 2d 180, 183, n. 1 (Fla. 1985) (In capital cases, "[w]e will, of course, continue to review every issue presented and to conduct our own review in accordance with Florida Rule of Appellate Procedure 9.140(f)"); Georgia Unified Appeal Rule IV B(2) (In capital cases, "[t]he Supreme Court shall review each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the Supreme Court"); *State* v. *Osborn,*102 Idaho 405, 410-411, 631 P. 2d 187, 192-193 (1981) ("Death is clearly a different kind of punishment from any other that [might] be imposed, and [Idaho Code] § 19-2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that

might be proposed to justify refusal to consider errors not objected to below"); *People* v. *Holman,* 103 Ill. 2d 133, 176, 469 N. E. 2d 119, 140 (1984) ("Ordinarily, a contention not made in the trial court is waived on appeal. . . . However, because of the qualitative difference between death and other forms of punishment. . . this court has elected to address errors in death penalty cases which might have affected the decision of the sentencing jury"), cert. denied, 469 U. S. 1220 (1985); *Lowery* v.*State,* 478 N. E. 2d 1214, 1229 (Ind. 1985) ("The failure to properly raise issues in the Motion to Correct Errors generally results in a waiver of the claimed errors. . . . Since the death penalty was imposed in this case, however, we will review the state of the record concerning these questions"); *Ice* v. *Commonwealth,* 667 S. W. 2d 671, 674 (Ky. 1984) ("[I]n a death penalty case every prejudicial error must be considered, whether or not an objection was made in the trial court"), cert. denied, 469 U. S. 860 (1984); *State* v. *Hamilton,* 478 So. 2d 123, 127, n. 7 (La. 1985) ("In death penalty cases, this court has reviewed assignments of error, despite the absence of a contemporaneous objection, in order to determine whether the error `render[ed] the result unreliable,' thus avoiding later consideration of the error in the context of ineffective assistance of counsel"); *State* v. *Nave,* 694 S. W. 2d 729, 735 (Mo. 1985) ("Several states hold that the general rule that allegations of court error not assigned in a motion for new trial are not preserved for appellate review, codified in Missouri Rule 29.11(d) with exceptions not applicable here, is inapplicable in death penalty cases. Even though the assignment of error has been improperly preserved, we review, ex gratia, the point relied on for plain error . . . to determine if manifest injustice or a miscarriage of justice resulted from the denial of Nave's request for continuance"); *Commonwealth*v. *McKenna,* 476 Pa. 428, 440-441, 383 A. 2d 174, 181 (1978) ("Because imposition of the death penalty is irrevocable in its finality, it is imperative that the standards by which that sentence is fixed be constitutionally beyond reproach. . . . The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue — the propriety of allowing the state to conduct an illegal execution"); *State* v. *Patterson,* 278 S. C. 319, 320-321, 295 S. E. 2d 264, 264-265 (1982) ("On appeal from a murder conviction in which the death penalty is imposed, this Court reviews the entire record for prejudicial error *in favorem vitae,* regardless of whether the error was properly preserved for review"); *State* v. *Brown,* 607 P. 2d 261, 265 (Utah 1980) ("[N]o objection was made to the omission. Nevertheless, as this is a capital case, we consider the defendant's contention on appeal").

Indeed, Virginia law itself recognizes the special obligations attendant on reviewing death penalties by providing for automatic Virginia Supreme Court review of the death penalty, Va. Code § 17-110.1A (1982), and giving capital cases priority on the court's docket, § 17-110.2. Some State Supreme Courts interpret such statutes to impose an obligation on the court to review the transcript for all possible errors. See, *e. g., State* v. *Osborn, supra.*

[21] See Prosecutor's Closing Argument at Sentencing Phase, App. 30-31 ("Now, as I said, you all, the Court has instructed you that you all may fix his punishment at death, if the Commonwealth proved its case — proved the prior history that he would commit criminal acts of violence that would constitute a continuous serious threat to society. Now, what has the Commonwealth proved? The Commonwealth has proved that prior

to the crime you all convicted him of yesterday, that he assaulted a person on the bus. He said he did it. . . . Tore her clothes off, and then decided not to do it").

[22] The state trial court's rejection of petitioner's trial objection to the psychiatrist's testimony stands in sharp contrast to THE CHIEF JUSTICE's *Estelle* analysis: "I don't believe that Doctor Pile has any duty to inform him that anything he may say to him may be used for or against him in a Court of Law, as a police officer does under the Miranda." App. 5.

[23] The State argues that petitioner's case is distinguishable from *Estelle* because the defense requested the psychiatric examination. In view of the fact that Dr. Pile related the account to the prosecution and the court, and testified for the prosecution, he was quite clearly an "agent of the State" in the same sense in which the psychiatrist in *Estelle* was an agent of the State. See 451 U. S., at 467 ("When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting").

Petitioner and *amici,* in turn, argue that, because the examination was to assist the defense, an absolute guarantee of confidentiality, rather than *Miranda* warnings, should have been required. They contend that such confidentiality is especially important to effectuate the due process right to consult with a psychiatrist that was recognized in *Ake* v. *Oklahoma,* 470 U. S. 68 (1985). Since, at a minimum, *Estelle* required that Dr. Pile give*Miranda* warnings, we need not consider the possibility that disclosure would have been inappropriate in any circumstances. For it is at least clear that, under *these* circumstances, his testimony violated petitioner's Fifth Amendment right. Moreover, we need not decide whether, under these circumstances, in which the psychiatrist may have actually been acting as an agent of the defense, his transformation into an agent of the State was itself constitutionally invalid under the Sixth Amendment.

[24] "But the invalid aggravating circumstance found by the jury in this case was struck down in *Arnold* because the Georgia Supreme Court concluded that it fails to provide an adequate basis for distinguishing a murder case in which the death penalty may be imposed from those cases in which such a penalty may not be imposed. See nn. 5 and 16, *supra. The underlying evidence is nevertheless fully admissible at the sentencing phase*. . . .

.....

"Thus, any evidence on which the jury might have relied in this case to find that respondent had previously been convicted of a substantial number of serious assaultive offenses, as he concedes he has been, was properly adduced at the sentencing hearing and was fully subject to explanation by the defendant." 462 U. S., at 886-887(emphasis added).

We continued:

"Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. We accept that court's view that the subsequent invalidation of one of several statutory aggravating circumstances does not automatically require reversal of the death penalty, having been assured that a death sentence will be set aside if the invalidation of an aggravating circumstance makes the penalty arbitrary and capricious. 250 Ga., at 101, 297 S. E. 2d, at 4. The Georgia Supreme Court, in its response to our certified question, expressly stated: `A different result might be reached in a case where evidence was submitted in support of a statutory aggravating circumstance *which was not otherwise admissible* and thereafter the circumstance failed.' *Ibid.*" *Id.,* at 890 (emphasis added).

Smith v Stewart

241 F.3d 1191 (2001)

Robert Douglas SMITH, Petitioner-Appellant,

v.

Terry STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.

Nos. 96-99025, 96-99026.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted August 17, 2000.

Filed March 6, 2001.

1192*1192 S. Jonathan Young, Tucson, Arizona; John F. Palumbo, Law Offices Pima County Public Defender, Tucson, Arizona, for the petitioner-appellant.

1193*1193 Scott Bales, Solicitor General, Phoenix, Arizona, for the respondent-appellee.

Before: FERGUSON, REINHARDT, DAVID R. THOMPSON, Circuit Judges.

FERGUSON, Circuit Judge:

Robert Douglas Smith ("Smith") appeals from the district court's dismissal of his habeas corpus petition on the ground of procedural default. He claims that his trial counsel failed to investigate his mental condition or to present adequate mitigating testimony during the sentencing phase of his trial, despite clear indications at the time of the presence of a mental disorder. We reverse the district court's ruling that federal habeas review is barred. Because Smith has made a colorable claim to relief, we order an evidentiary hearing in the district court.

I.

In March of 1982, Smith and accomplice Joe Leonard Lambright were convicted of sexual assault, kidnaping, and first-degree murder.[1] The principal witness against them at trial was another accomplice, Kathy Foreman ("Foreman"), who exchanged her testimony on the Government's behalf for freedom from prosecution.

After the guilt phase of Smith's trial, the prosecution sought the death penalty on the theory that the murder had been committed in an especially heinous, cruel, or depraved manner under Ariz.Rev.Stat. Ann. § 13-703(F)(6). The government called Smith's former cell-mate to the stand who, in seeking to reduce his own sentence, had told a criminal investigator that Smith laughed while fully confessing to the crime. When the government next called the investigator to testify about the conversation, she confirmed that Smith had described the crime to his cell-mate in exceptional detail, showed no remorse, and snickered throughout. In addition to presenting testimonial evidence, the prosecution displayed photographs of how the crime scene looked at night and during the day so that the court could fully grasp the victim's terror before she died.

Smith's counsel took less than a day to present the mitigating evidence he had gathered in support of sparing his client's life. Despite obvious indications that his client suffered from a mental disorder, the lawyer neither obtained nor presented any evidence of his psychiatric history and continuing mental impairment. He also failed to collect or present records relating to Smith's horrific childhood. Instead, his evidence consisted entirely of the testimony of Smith's mother-in-law and two sisters. Each witness was

brief. Each offered only a general characterization of Smith as a nice and generous person who, along with his sisters, had grown up in an unstable household.

In closing argument, Smith's lawyer offered the court some reasons not to impose the death penalty. He opened by saying, "[f]irst of all, the most mitigating factor in the case is the fact that Kathy Foreman wasn't prosecuted at all." He made passing reference to Smith's "abusive childhood." Apparently believing that evidence of Smith's mental disorder might constitute a justification for the death penalty, the lawyer asserted:

> *I'm told today by Jim Meyers there is a report from the hospital in Houston, which I haven't seen yet.... The reports I have are that he has problems with depression. He is a person of average intelligence. I don't know, and I'm making the statements on the reports I have seen so far, I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated.*

1194*1194 Next, he asked the court to consider the *victim's family's* "great loss" in deciding Smith's punishment. He returned again to the government's failure to prosecute Foreman, spoke abstractly of his personal opposition to the death penalty, and promptly closed by saying, "[f]inally, again, I question how the Court could agree with the government, which is asking for the death penalty for Robert Smith, when it was the same government agency that chose to let Kat Foreman go without any prosecution at all.... I don't think that's justice."

The state trial judge sentenced Smith to death. He rejected the lawyer's argument that Foreman's treatment at the government's hands warranted a lesser sentence for Smith because he did not "believe that any of the ramifications of her grant of immunity have diminished the moral, legal or ethical culpability or responsibility of either Mr. Smith or Mr. Lambright by any degree whatsoever." He justified his decision to impose death by stressing that, "I have, in fact, searched the record, the file, the pre-sentence report, my trial notes and recollections for any and all other factors which might conceivably mitigate your culpability for offenses of kidnaping and sexual assault and found none."

II.

The same office that represented Smith at trial continued to represent him unsuccessfully on appeal and in post-conviction proceedings. On direct appeal, the Arizona Supreme Court affirmed both Smith's conviction and sentence. *See State v. Smith,* 138 Ariz. 79, 673 P.2d 17 (Ariz. 1983). Smith's counsel then filed a series of state and federal post-conviction petitions, none of which included an ineffective assistance of counsel claim, and all of which were denied.

After exhausting available state remedies, Smith's lawyer filed an amended federal petition for writ of habeas corpus. Soon after, District Judge Bilby received a letter from Smith himself, complaining that he had instructed his lawyer to raise a claim of ineffective assistance of counsel, but that his lawyer had failed to do so. In the letter, Smith wrote:

> *My attorney says he can't rais [sic] or file the issue of enafective [sic] assisdants [sic] of countsaling [sic] cause he is empoleed [sic] by the same office as the attorney that handeled [sic] my trial. I'm under the inpresstion [sic] from him that if all the issue [sic] is denied, that I could then get the courts to apoint [sic] me another attorney to file this issue for me, IS THIS TRUE? To my understandig [sic] from everyone I've ask [sic], wrote [sic] to tells [sic] me diffrant [sic] things. I've written Denise Young and ask [sic] her about this, it took her a long time to respond cause she's so bissy [sic] and still did'nt [sic] answer my qustions [sic]. Sorry to have to bother you with this but I feel this is a very inportant [sic] issue, Is'nt [sic] it also true that all issues has [sic] to be rased [sic] and filed at one time acording [sic] to the new apeals [sic] law passed a cuppall [sic] of year [sic] ago? I would like this court to know that I want this issue inclouded [sic] in my apeals [sic]. I would like to take this to [sic] time to respectfuly [sic] ask this Honorable Court to apoint [sic] me a FEDERAL ATTORNEY to work with my attorney Mr. John F. Palumbo at the PIMA COUNTY PUBLIC DEFENDERS OFFICE TUCSON AZ. if this is possible, if not, please apoint [sic] me new Federal Apeal [sic] ATTORNEYS. THANK YOU! very much for your concederation [sic], time and help with this matter.*

Smith's counsel confirmed in an affidavit to the court that the claim had not been raised because his employer, a state agency, prohibited its lawyers from attacking each other's performance as a matter of policy.

In response to Smith's letter, the district court appointed a lawyer in private practice to litigate his claim of ineffective assistance of trial counsel. Smith then filed a state post-conviction petition alleging for the first time several instances of ineffective assistance at trial and sentencing, which the court dismissed as procedurally 1195*1195 barred. The federal district court also refused to adjudicate Smith's ineffective assistance of counsel claim on the ground that "the [state] trial court found the claims precluded as a matter of state law."

III.

We review de novo a district court's decision to deny a petition for writ of habeas corpus. *See* *Mayfield v. Calderon,* 229 F.3d 895, 2000 WL 1514610, at * 4 (9th Cir. October 13, 2000).

IV.

Smith raised an ineffective assistance of counsel claim for the first time in his third state post-conviction petition. The state court dismissed the claim in October of 1995. Two months later, the state court revisited Smith's claim in an order denying his motion for reconsideration. In the order, the court wrote:

> *Counsel's assertion on page 4, line 3 through 6 of his Motion for Rehearing, that "each of the deputies of the Public Defender's Office have been appointed... to `conduct the affairs' of the Pima County Public Defender's Office rather than to independently represent Mr. Smith" is either outrageous or ridiculous, whichever adjective is most appropriate. Deputies in the Public Defender's Office do not represent the Public Defender's Office. They are attorneys for and have an attorney-client relationship with the actual defendant charged with the crime. It may, indeed, be correct that it would be inappropriate for a public defender to allege a different public defender was ineffective at trial (although it has been done by this Public Defender's Office in the past). However, this does not absolve an attorney representing a client in an appellate matter from ineffective assistance of counsel. That is an absolute and undelegable duty. Failure to do so is at the very best malpractice and malfeasance. An attorney who discovers a colorable claim of ineffective assistance of counsel must immediately withdraw, notify the Court that there is such a claim, and allow the Court to appoint an attorney who has no conflict in representing that client. To suggest that one could wait for ten years, from 1985 to the present, and never even examine the case to see if the client had such a claim is an admission of the grossest malpractice.*
>
> *It is HEREBY ORDERED Defendant's Motion for Rehearing is denied.*
>
> *The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).*

We must determine whether the state court judgment in Smith's case bars federal review of his Sixth Amendment claim. *See Coleman v. Thompson,* 501 U.S. 722, 736, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state court's procedural ruling will bar our review only if its basis is separate and distinct from the federal question. *See Ylst v. Nunnemaker,* 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *see also Coleman,* 501 U.S. at 729-30, 111 S.Ct. 2546.[2] The State contends that the Arizona court's procedural default ruling in this case constitutes an independent state ground that bars us from reviewing Smith's ineffectiveness claim.[3]

1196*1196 In *Ake v. Oklahoma,* 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that when a state's procedural default rule depends on an assessment of a federal claim, federal review is not barred. The state court in that case explicitly held that Ake had waived his federal constitutional claim by omitting it from his motion for a new trial. *Id.* at 74, 105 S.Ct. 1087. That court had ruled in another state case, however, that the waiver rule did not apply in cases of fundamental trial error. *Id.* By creating such an exception, "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." The Supreme Court concluded that because "resolution of the state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Id.* at 75, 105 S.Ct. 1087.

We have similarly held that federal habeas review is not barred when a state makes the application of its default rule depend on a consideration of federal law. *See, e.g.*, *Park v. California,* 202 F.3d 1146 (9th Cir.2000), *cert. denied,* ___ U.S. ___, 121 S.Ct. 277, 148 L.Ed.2d 202 (2000); *McKenna v. McDaniel,* 65 F.3d 1483 (9th Cir.1995); *Russell v. Rolfs,* 893 F.2d 1033, 1035-36 (9th Cir.1990). In *Park,* 202 F.3d at 1149, the state court refused to consider the petitioner's federal constitutional claim because he had failed to raise it on direct appeal. Despite the state court's explicit reliance on procedural default in its ruling, we held that Park's federal claim was cognizable in federal habeas corpus proceedings because the California Supreme Court had held in another case that a petitioner could overcome the procedural bar if he could show a violation of "fundamental constitutional rights." *Id.* at 1152. As we explained, "in light of [the California Supreme Court's] acknowledgment that the constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the [procedural] bar to any federal constitutional claims raised in Park's state habeas petition." *Id.* at 1153.

We also held in *McKenna v. McDaniel,* 65 F.3d at 1489, that a state court judgment explicitly invoking Nevada's procedural default rule as the basis for dismissing a post-conviction petition did not preclude federal review because the state court had explained in another case that it enjoyed the discretion to address errors of "constitutional dimension." We concluded that the existence of a discretionary exception in cases of constitutional dimension rendered the court's statelaw procedural ruling "necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and does not constitute a clear statement of independent and adequate state grounds for the decision." *Id.* at 1489.

It is unclear from the order denying rehearing of Smith's ineffective assistance of counsel claim whether the court invoked a procedural bar as the basis of its ruling. 1197*1197 The court suggested that Smith's lawyer would have raised an ineffective assistance of counsel claim if Smith had a colorable one. In other words, the court implied that the record failed to demonstrate that Smith had a colorable claim of ineffective assistance of counsel. Such a holding does not satisfy the requirement that a

state court clearly and explicitly invoke a state procedural rule to bar federal habeas review.

Moreover, it is clear that at the time of the state's procedural ruling, Arizona courts were required to consider the merits of a claim. Ariz. R.Crim. Pro. 32.2(a) generally bars a defendant from obtaining relief from his conviction on a ground that he waived at trial, on appeal, or in any previous collateral proceeding.[4] At the time of the state court's procedural ruling, however, Arizona courts were required to examine the nature of a claim to determine whether the state's procedural default rule applied. *See State v. Curtis,* 185 Ariz. 112, 912 P.2d 1341, 1344 (Ct.App.1995); *see also State v. French,* 198 Ariz. 119, 7 P.3d 128, 130 (Ct.App.2000). Under Arizona's procedural default rule, "[a] claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the asserted claim is of sufficient constitutional magnitude." *Curtis,* 912 P.2d at 1344 (internal quotation marks omitted).[5] Thus, Rule 32.2's procedural default rule applies where a petitioner's "belated focus" on an alleged error "lacks sufficient constitutional magnitude to revive an issue." *Id.* at 1344.[6]

Given Arizona's exception for errors of "constitutional magnitude," the state court's finding of procedural default in Smith's case necessarily included an evaluation of the strength of his federal claim. Indeed, like the procedural rulings in *Ake, Park,* and *McKenna,* the state court's procedural ruling in this case was necessarily intertwined with its implicit determination that the merits of his claim were of insufficient constitutional magnitude. Thus, federal review is not barred.

V.

Smith contends that he is entitled to an evidentiary hearing to develop his ineffective assistance of counsel claim. "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who 1198*1198 has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court." *Siripongs v. Calderon,* 35 F.3d 1308, 1310 (9th Cir.1994).[7] No court has given Smith an opportunity to develop a factual record on his Sixth Amendment claim.

To establish that his counsel was ineffective at sentencing, Smith must satisfy the standard the Supreme Court announced in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland,* he must show that his counsel's performance was deficient; that is, that it was "outside the wide range of professionally competent assistance."*Id.* at 690, 104 S.Ct. 2052 Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S.Ct. 2052. In addition to demonstrating counsel's deficient performance, a petitioner must establish a "reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052; *see also Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000).

"It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon,* 165 F.3d 1223, 1227 (9th Cir.1999), *cert. denied,*527 U.S. 1049, 119 S.Ct. 2414, 144 L.Ed.2d 811 (1999). As the Supreme Court recently made clear, counsel's failure to investigate and present evidence of a person's mental impairment and social history constitutes deficient performance. *See Williams,* 120 S.Ct. at 1513-15(concluding that counsel was deficient in failing to conduct an investigation that would have uncovered records describing a "nightmarish childhood" and borderline mental retardation); *see also Smith v. Stewart,* 189 F.3d 1004, 1008-09 (9th Cir.1999), *cert. denied,* ___ U.S. ___, 121 S.Ct. 358, 148 L.Ed.2d 288 (2000) (No. 00-110); *Caro,* 165 F.3d at 1225; *Bean v. Calderon,* 163 F.3d 1073, 1080-81 (9th Cir.1998), *cert. denied,* 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); *Correll v. Stewart,* 137 F.3d 1404, 1412 (9th Cir.1998), *cert. denied,* 525 U.S. 996, 119 S.Ct. 465, 142 L.Ed.2d 418 (1998).

There can be no doubt that Smith has asserted a colorable claim to relief entitling him to an evidentiary hearing. Smith alleges that his lawyer failed to investigate, let alone present evidence of, his miserable childhood, mental disabilities, and mental impairment at the time of the offense. The thin transcript of Smith's sentencing hearing reveals that his lawyer offered only the brief testimony of three lay witnesses who gave merely a vague description of his personality and childhood. When the time came to argue to the court that Smith's life was worth sparing, his lawyer asserted that the best mitigating factor in the case was Foreman's immunity agreement. Inexplicably, he also suggested that the court consider "how 1199*1199Sandra Owen's [the victim] family has sustained a great loss" in deciding whether Smith deserved to be put to death. The lawyer then offered a rambling explanation of his moral opposition to the death penalty and promptly returned to the State's failure to prosecute Foreman. This was a woefully inadequate presentation in support of saving Smith from a sentence of death.

If Smith's allegations are true, his counsel's failure to conduct any investigation is particularly egregious in light of indications at the time of trial of the presence of a mental disability. We have explained that, "where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance."*Hendricks v. Calderon,* 70 F.3d 1032, 1043 (9th Cir.1995); *see also Smith v. Stewart,* 140 F.3d 1263, 1269 (9th Cir.1998) (concluding that counsel was deficient for failing to "perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface"), *cert. denied,* 525 U.S. 929, 119 S.Ct. 336, 142 L.Ed.2d 277 (1998). This appears to be the case here. In a report assessing Smith's competency to stand trial, for example, Dr. Martin Levy noted that he had been hospitalized in a psychiatric unit and opined that, "Mr. Smith does have a history of psychiatric difficulties. Those difficulties have been primarily depressive in nature and have involved suicide attempts." Another report examining

Smith's competency described him as "significantly anxious and depressed" and recommended further psychiatric evaluation.

The presentence report similarly signaled that Smith might have a mental disability. It noted that, as a child, Smith suffered from polio, a disease which can cause brain damage, and later underwent psychiatric treatment at a youth community mental health agency. It described Smith's numerous attempts to run away from his family beginning at age nine and his history of impulsive behavior. The report also revealed that Smith had used broken glass to cut through his skin and slash his veins in just one of several attempts to end his life. On another occasion, he shot himself in the stomach. Eventually, Smith began to abuse drugs, including LSD, marijuana, cocaine, psilocybin, heroin, PCP, and amphetamines. In conclusion, the report urged the court that, "[m]ental health counseling should be made available in the prison setting, keeping in mind that the defendant seems to be a high suicide risk." Rather than pursue an investigation, Smith's lawyers allegedly failed to develop any of this evidence, and in fact failed to either present argument relating to it or connecting it to any of Arizona's enumerated mitigating factors. We have previously found that the failure to present any argument based on a presentence report remarkably similar to the one in this case constituted deficient performance. *Smith,* 140 F.3d at 1269.

Smith alleges that his counsel would have uncovered substantial mitigating evidence if he had conducted an investigation. Smith has an IQ of 71, which is in the range of mental retardation. In a report prepared just two years after trial, moreover, Dr. David Gurland wrote that, "[i]n reviewing the data with regards to Mr. Smith, it becomes obvious that this is a man who is a marginally functioning individual who has been ever since his childhood." He noted that Smith was raised in a broken home and suffered both psychological and physical abuse. In commenting on his withdrawal from school in the eighth grade, Dr. Gurland wrote that, "[i]t is hard to know just how he managed to stay in school as long as he did." Smith's low I.Q. makes him "more of a follower than a leader. He is also easily influenced by others whom he may feel like him or admire him or want to be with him." Dr. Gurland concluded that the "patient should not, under the law, be given the death penalty as I think there are enough mitigating circumstances to, at worst, give him a life sentence." In addition to presenting 1200*1200 evidence that he suffered from a mental disorder, Smith also recounted to the district court that four inmates in a county jail took turns gang raping him when he was just eighteen years old. Smith's lawyer presented none of this powerful and potentially life-saving evidence at sentencing.

Apart from allegedly failing to conduct any investigation into Smith's social and mental history, it appears from the transcript that his lawyer also failed to research the law on capital sentencing. In Arizona, a psychological disorder is a specifically enumerated mitigating circumstance. Ariz.Rev.Stat. § 13-703(G)(1). But when a report hinting at a possible mental impairment surfaced, Smith's lawyer minimized his client's mental disability and told the court, "I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated." It appears from this assertion that Smith's lawyer not only failed to recognize that a mental impairment could be mitigating, but also argued against his

client's interests under the mistaken belief that the presence of a mental disorder was an aggravating factor. A misapprehension of the law that leads a lawyer to argue against his client's interests during the sentencing phase of a capital trial constitutes an "inadequac[y] in rudimentary trial preparation and presentation" that falls outside the range of competent assistance. *Bean,* 163 F.3d at 1080; *see also Huynh v. King,* 95 F.3d 1052 (1996);*Scarpa v. DuBois,* 38 F.3d 1 (1st Cir.1994); *Morris v. California,* 966 F.2d 448, 454-55 (9th Cir.1991); *Blackburn v. Foltz,* 828 F.2d 1177 (6th Cir.1987). In short, Smith has presented a colorable claim of counsel's deficient performance.

Smith has, moreover, made a "colorable claim" that his counsel's deficient performance prejudiced him. The Supreme Court recently held that an attorney's failure to conduct an investigation into a petitioner's abusive childhood, borderline mental retardation, and prison record satisfied *Strickland*'s prejudice prong. *See Williams,* 120 S.Ct. at 1515. This was because, as the Court explained, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 1516; *see also Smith,* 189 F.3d at 1013 ("We previously have found Strickland's prejudice prong met where we concluded that defense counsel effectively presented no mitigating evidence at sentence, despite the presence of aggravating factors.");*Correll,* 137 F.3d at 1413 ("[B]ecause trial counsel failed to present any evidence of Correll's purported mental illness which may have satisfied Ariz. Rev. St. § 13-703(E), Correll has `undermined confidence in the outcome' of the sentencing, thereby establishing the requisite Strickland prejudice.") (quoting *Strickland,* 466 U.S. at 694-95, 104 S.Ct. 2052). Prejudice is especially likely where, as here, "this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances." *Bean* 163 F.3d at 1081; *see also**Clabourne v. Lewis,* 64 F.3d 1373, 1387 (9th Cir.1995). In this case, the prosecution argued that only one aggravating factor existed. In response, Smith's lawyer not only allegedly failed to investigate his horrific childhood, mental retardation and possible brain damage, but also failed to do basic legal research. Smith has not only presented abundant evidence of deficient performance, but also of prejudice. There can be no question that he has satisfied the standard for obtaining an evidentiary hearing.

VI.

We reverse the judgment of the district court and remand for an evidentiary hearing. We remand so that the district court can determine whether Smith's allegations that his attorney neither investigated his mental condition nor presented adequate mitigating psychiatric testimony during the sentencing phase are true and, if so, 1201*1201 whether he was denied effective assistance of counsel.

Concurrently herewith we file a memorandum disposition in which we affirm the petitioner's conviction and the district court's ruling that the especially heinous,

atrocious, and cruel aggravating factor applies in this case for the reasons stated therein. Accordingly, the judgment below is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for further proceedings consistent with this opinion.

[1] Because the facts of the offense are set forth in our en banc opinion, we do not repeat them here. *See*Lambright v. Stewart, 191 F.3d 1181, 1182-83 (9th Cir.1999) (en banc).

[2] To bar our review, a state's procedural default rule must also be adequate, which means that it is "strictly or regularly" followed. *See Johnson v. Mississippi,* 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); *see also Hathorn v. Lovorn,* 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). We have held that Arizona's procedural default rule is regularly followed in several cases. *See, e.g., Ortiz v. Stewart,* 149 F.3d 923, 931-32 (9th Cir.1998); *Poland v. Stewart,* 117 F.3d 1094, 1106 (9th Cir.1997).

[3] "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."*Coleman,* 501 U.S. at 750, 111 S.Ct. 2546. Because we conclude that the state court's ruling did not rest on an independent state ground, we do not address Smith's argument that the policy preventing employees from attacking the competency of any of the agency's lawyers constitutes cause because it was an "objective factor" that was "external" to the petitioner and that "cannot fairly be attributed to him." *Id.,* 501 U.S. at 753, 111 S.Ct. 2546. We note however, that his argument appears to have merit under our recent decision in *Manning v. Foster,*224 F.3d 1129, 1134 (9th Cir.2000), where we held that "a conflict of interest, independent of a claim of ineffective assistance of counsel ... constitute[s] cause where the conflict caused the attorney to interfere with the petitioner's right to pursue his habeas claim."

[4] Since 1992, Rule 32.2 provides, in pertinent part:

a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

(1) Still raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;

(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;

(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

[5] Arizona's exception for overcoming procedural default in cases of constitutional dimension or egregiousness remains in effect. *See French,* 7 P.3d at 131 (applying the procedural default rule to petitioner's ineffectiveness claim because "[n]one of these omissions constitutes ineffectiveness so egregious and of such constitutional dimensions that it may not be precluded")

[6] The Arizona Supreme Court's 1992 comment to Rule 32.2(a)(3) makes clear that the application of the amended procedural default rule requires a separate examination of a claim's constitutional magnitude. The comment provides, in pertinent part, that "[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant `knowingly, voluntarily and intelligently' waived the claim." Ariz. R.Crim. Pro. 32.2(a)(3) comment (West 2000). Thus, since 1992, Arizona's procedural default rule applies in two circumstances: first, when a claim is of insufficient constitutional magnitude and was forfeited at trial, on appeal, or in any previous proceeding; second, when a claim is of sufficient constitutional magnitude and the State proves that the person seeking relief knowingly, voluntarily, and intelligently waived it at trial, on appeal, or in any previous proceeding. In both cases, the state court must consider the nature of the claim before finding that the petitioner procedurally defaulted it. Because an Arizona procedural ruling in this context necessarily includes an evaluation of the constitutional stature of the claim, it does not rest on an independent state ground.

[7] In *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 8-9, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), the Supreme Court held that petitioners must show cause and prejudice for failing to develop the material facts relating to a claim of ineffective assistance of counsel in state court. In his third Rule 32 petition, Smith attempted to develop the theory that his counsel provided ineffective assistance at sentencing. The court refused, however, to appoint a psychological expert to assist Smith in developing his argument. Despite Smith's attempt to have the court "consider his allegations of ineffective assistance," the court dismissed the claims without a hearing. Under these circumstances, Smith has satisfied the cause prong of *Tamayo-Reyes. See Jones v. Wood,* 114 F.3d 1002, 1012 (9th Cir.1997). The prejudice prong of *Tamayo-Reyes* is "coextensive with the prejudice prong of *Strickland.*"*Correll,* 137 F.3d at 1414. For the reasons set forth below, we find that Smith has made a colorable claim of prejudice, and is therefore entitled to an evidentiary hearing on this question.

Taylor v Illinois

484 U.S. 400 (1988)

TAYLOR

v.

ILLINOIS

No. 86-5963.

Supreme Court of United States.

Argued October 7, 1987

Decided January 25, 1988

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

401*401 *Richard E. Cunningham* argued the cause for petitioner. With him on the briefs were *Paul P. Biebel, Jr., Robert P. Isaacson,* and *Emily Eisner.*

Michael Shabat argued the cause for respondent. On the brief were *Neil F. Hartigan,* Attorney General of Illinois, *Jill Wine-Banks,* Deputy Attorney General, *Roma J. Stewart,* Solicitor General, and *Joan G. Fickinger,* Assistant Attorney General.[*]

JUSTICE STEVENS delivered the opinion of the Court.

As a sanction for failing to identify a defense witness in response to a pretrial discovery request, an Illinois trial 402*402 judge refused to allow the undisclosed witness to testify. The question presented is whether that refusal violated the petitioner's constitutional right to obtain the testimony of favorable witnesses. We hold that such a sanction is not absolutely prohibited by the Compulsory Process Clause of the Sixth Amendment and find no constitutional error on the specific facts of this case.[1]

I

A jury convicted petitioner in 1984 of attempting to murder Jack Bridges in a street fight on the south side of Chicago on August 6, 1981. The conviction was supported by the testimony of Bridges, his brother, and three other witnesses. They described a 20-minute argument between Bridges and a young man named Derrick Travis, and a violent encounter that occurred over an hour later between several friends of Travis, including petitioner, on the one hand, and Bridges, belatedly aided by his brother, on the other. The incident was witnessed by 20 or 30 bystanders. It is undisputed that at least three members of the group which included Travis and petitioner were carrying pipes and clubs that they used to beat Bridges. Prosecution witnesses also testified that petitioner had a gun, that he shot Bridges in the back as he attempted to flee, and that, after Bridges fell, petitioner pointed the gun at Bridges' head but the weapon misfired.

Two sisters, who are friends of petitioner, testified on his behalf. In many respects their version of the incident was consistent with the prosecution's case, but they testified that it was Bridges' brother, rather than petitioner, who possessed a firearm and that he had fired into the group hitting 403*403 his brother by mistake. No other witnesses testified for the defense.

Well in advance of trial, the prosecutor filed a discovery motion requesting a list of defense witnesses.[2] In his original response, petitioner's attorney identified the two sisters who later testified and two men who did not testify.[3] On the first day of trial, defense counsel was allowed to amend his answer by adding the names of Derrick Travis and a Chicago police officer; neither of them actually testified.

On the second day of trial, after the prosecution's two principal witnesses had completed their testimony, defense counsel made an oral motion to amend his "Answer to Discovery" to include two more witnesses, Alfred Wormley and Pam Berkhalter. In support of the motion, counsel represented that he had just been informed about them and that they had probably seen the "entire incident."[4]

404*404 In response to the court's inquiry about defendant's failure to tell him about the two witnesses earlier, counsel acknowledged that defendant had done so, but then represented that he had been unable to locate Wormley.[5] After noting that the witnesses' names could have been supplied even if their addresses were unknown, the trial judge directed counsel to bring them in the next day, at which time he would decide whether they could testify. The judge indicated that he was concerned about the possibility "that witnesses are being found that really weren't there."[6]

The next morning Wormley appeared in court with defense counsel.[7] After further colloquy about the consequences of a violation of discovery rules, counsel was permitted to make an offer of proof in the form of Wormley's testimony outside the

presence of the jury. It developed that Wormley had not been a witness to the incident itself. He testified that prior to the incident he saw Jack Bridges and his brother with two guns in a blanket, that he heard them say "they were after Ray [petitioner] and the other people," and that on his way home he "happened to run into Ray and them" and warned them "to watch out because they got 405*405 weapons."[8] On cross-examination, Wormley acknowledged that he had first met defendant "about four months ago" (*i. e.,* over two years after the incident). He also acknowledged that defense counsel had visited him at his home on the Wednesday of the week before the trial began. Thus, his testimony rather dramatically contradicted defense counsel's representations to the trial court.

After hearing Wormley testify, the trial judge concluded that the appropriate sanction for the discovery violation was to exclude his testimony. The judge explained:

> *"THE COURT: All right, I am going to deny Wormley an opportunity to testify here. He is not going to testify. I find this is a blatent [sic] violation of the discovery rules, willful violation of the rules. I also feel that defense attorneys have been violating discovery in this courtroom in the last three or four cases blatantly and I am going to put a stop to it and this is one way to do so.*
>
> *"Further, for whatever value it is, because this is a jury trial, I have a great deal of doubt in my mind as to the veracity of this young man that testified as to whether he was an eyewitness on the scene, sees guns that are wrapped up. He doesn't know Ray but he stops Ray.*
>
> *"At any rate, Mr. Wormley is not going to testify, be a witness in this courtroom." App. 28.*

406*406 The Illinois Appellate Court affirmed petitioner's conviction. 141 Ill. App. 3d 839, 491 N. E. 2d 3 (1986). It held that when "discovery rules are violated, the trial judge may exclude the evidence which the violating party wishes to introduce" and that "[t]he decision of the severity of the sanction to impose on a party who violates discovery rules rests within the sound discretion of the trial court." The court concluded that in this case "the trial court was within its discretion in refusing to allow the additional witnesses to testify." *Id.,* at 844-845, 491 N. E. 2d, at 7. The Illinois Supreme Court denied leave to appeal and we granted the petition for certiorari, 479 U. S. 1063 (1987).

In this Court petitioner makes two arguments. He first contends that the Sixth Amendment bars a court from ever ordering the preclusion of defense evidence as a sanction for violating a discovery rule. Alternatively, he contends that even if the right to present witnesses is not absolute, on the facts of this case the preclusion of Wormley's testimony was constitutional error. Before addressing these contentions, we consider the State's argument that the Compulsory Process Clause of the Sixth Amendment is merely a guarantee that the accused shall have the power to subpoena witnesses and simply does not apply to rulings on the admissibility of evidence.[9]

407*407 II

In the State's view, no Compulsory Process Clause concerns are even raised by authorizing preclusion as a discovery sanction, or by the application of the Illinois rule in this case. The State's argument is supported by the plain language of the Clause, see n. 1, *supra,* by the historical evidence that it was intended to provide defendants with subpoena power that they lacked at common law,[10] by some scholarly comment,[11] and by a brief excerpt from the legislative history of the Clause.[12] We have, however, consistently 408*408 given the Clause the broader reading reflected in contemporaneous state constitutional provisions.[13]

As we noted just last Term, "[o]ur cases establish, at a minimum, that criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt." *Pennsylvania* v. *Ritchie,* 480 U. S. 39, 56 (1987). Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, *e. g.,Chambers* v. *Mississippi,* 410 U. S. 284, 302 (1973). Indeed, this right is an essential attribute of the adversary system itself.

> *"We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and 409*409 comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." United States v. Nixon, 418 U. S. 683, 709 (1974).*

The right to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment even though it is not expressly described in so many words:

> *"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." Washington v. Texas, 388 U. S. 14, 19 (1967).*

The right of the defendant to present evidence "stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States." *Id.,* at 18. We cannot accept the State's argument that this constitutional right may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness.

410*410 III

Petitioner's claim that the Sixth Amendment creates an absolute bar to the preclusion of the testimony of a surprise witness is just as extreme and just as unacceptable as the State's position that the Amendment is simply irrelevant. The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly.

There is a significant difference between the Compulsory Process Clause weapon and other rights that are protected by the Sixth Amendment — its availability is dependent entirely on the defendant's initiative. Most other Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case.[14] While those rights shield the defendant from potential prosecutorial abuses, the right to compel the presence and present the testimony of witnesses provides the defendant with a sword that may be employed to rebut the prosecution's case. The decision whether to employ it in a particular case rests solely with the defendant. The very nature of the right requires that its effective use be preceded by deliberate planning and affirmative conduct.

The principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right. The adversary process could not 411*411 function effectively without adherence to rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony. Neither may insist on the right to interrupt the opposing party's case, and obviously there is no absolute right to interrupt the deliberations of the jury to present newly discovered evidence. The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.[15]

The defendant's right to compulsory process is itself designed to vindicate the principle that the "ends of criminal justice would be defeated if judgments were to be founded on

a partial or speculative presentation of the facts." *United States* v. *Nixon,* 418 U. S., at 709. Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose.[16] Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, 412*412 misleading, or even deliberately fabricated testimony. The "State's interest in protecting itself against an eleventh-hour defense"[17] is merely one component of the broader public interest in a full and truthful disclosure of critical facts.

To vindicate that interest we have held that even the defendant may not testify without being subjected to cross-examination. *Brown* v. *United States,* 356 U. S. 148, 156 (1958). Moreover, in *United States* v. *Nobles,* 422 U. S. 225 (1975), we upheld an order excluding the testimony of an expert witness tendered by the defendant because he had refused to permit discovery of a "highly relevant" report. Writing for the Court, Justice Powell explained:

> *"The court's preclusion sanction was an entirely proper method of assuring compliance with its order. Respondent's argument that this ruling deprived him of the Sixth Amendment rights to compulsory process and cross-examination misconceives the issue. The District Court did not bar the investigator's testimony. Cf. Washington v. Texas, 388 U. S. 14, 19 (1967). It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the 413*413 right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth.Deciding, as we do, that it was within the court's discretion to assure that the jury would hear the full testimony of the investigator rather than a truncated portion favorable to respondent, we think it would be artificial indeed to deprive the court of the power to effectuate that judgment. Nor do we find constitutional significance in the fact that the court in this instance was able to exclude the testimony in advance rather than receive it in evidence and thereafter charge the jury to disregard it when respondent's counsel refused, as he said he would, to produce the report." Id., at 241 (emphasis added).*

Petitioner does not question the legitimacy of a rule requiring pretrial disclosure of defense witnesses, but he argues that the sanction of preclusion of the testimony of a previously undisclosed witness is so drastic that it should never be imposed. He argues, correctly, that a less drastic sanction is always available. Prejudice to the prosecution could be minimized by granting a continuance or a mistrial to provide time for further investigation; moreover, further violations can be deterred by disciplinary sanctions against the defendant or defense counsel.

It may well be true that alternative sanctions are adequate and appropriate in most cases, but it is equally clear that they would be less effective than the preclusion sanction and that there are instances in which they would perpetuate rather than limit the prejudice to the State and the harm to the adversary process. One of the purposes of the discovery rule itself is to minimize the risk that fabricated testimony will be believed. Defendants who are willing to fabricate a defense may also be willing to

fabricate excuses for failing to comply with a discovery requirement. The risk of a contempt violation 414*414 may seem trivial to a defendant facing the threat of imprisonment for a term of years. A dishonest client can mislead an honest attorney, and there are occasions when an attorney assumes that the duty of loyalty to the client outweighs elementary obligations to the court.

We presume that evidence that is not discovered until after the trial is over would not have affected the outcome.[18] It is equally reasonable to presume that there is something suspect about a defense witness who is not identified until after the 11th hour has passed. If a pattern of discovery violations is explicable only on the assumption that the violations were designed to conceal a plan to present fabricated testimony, it would be entirely appropriate to exclude the tainted evidence regardless of whether other sanctions would also be merited.

In order to reject petitioner's argument that preclusion is *never* a permissible sanction for a discovery violation it is neither necessary nor appropriate for us to attempt to draft a comprehensive set of standards to guide the exercise of discretion in every possible case. It is elementary, of course, that a trial court may not ignore the fundamental character of the defendant's right to offer the testimony of witnesses in his favor. But the mere invocation of that right cannot automatically and invariably outweigh countervailing public interests. The integrity of the adversary process, which depends both on the presentation of reliable evidence and the415*415 rejection of unreliable evidence, the interest in the fair and efficient administration of justice, and the potential prejudice to the truth-determining function of the trial process must also weigh in the balance.[19]

A trial judge may certainly insist on an explanation for a party's failure to comply with a request to identify his or her witnesses in advance of trial. If that explanation reveals that the omission was willful and motivated by a desire to obtain a tactical advantage that would minimize the effectiveness of cross-examination and the ability to adduce rebuttal evidence, it would be entirely consistent with the purposes of the Compulsory Process Clause simply to exclude the witness' testimony.[20] Cf. *United States* v. *Nobles,* 422 U. S. 225 (1975).

The simplicity of compliance with the discovery rule is also relevant. As we have noted, the Compulsory Process Clause cannot be invoked without the prior planning and affirmative conduct of the defendant. Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas 416*416 on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation.[21]

It would demean the high purpose of the Compulsory Process Clause to construe it as encompassing an absolute right to an automatic continuance or mistrial to allow presumptively perjured testimony to be presented to a jury. We reject petitioner's argument that a preclusion sanction is never appropriate no matter how serious the defendant's discovery violation may be.

IV

Petitioner argues that the preclusion sanction was unnecessarily harsh in this case because the *voir dire* examination of Wormley adequately protected the prosecution from any possible prejudice resulting from surprise. Petitioner also contends that it is unfair to visit the sins of the lawyer upon his client. Neither argument has merit.

More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself. The trial judge found that the discovery violation in this case was both willful and blatant.[22] In view of the fact that petitioner's counsel 417*417 had actually interviewed Wormley during the week before the trial began and the further fact that he amended his Answer to Discovery on the first day of trial without identifying Wormley while he did identify two actual eyewitnesses whom he did not place on the stand, the inference that he was deliberately seeking a tactical advantage is inescapable. Regardless of whether prejudice to the prosecution could have been avoided in this particular case, it is plain that the case fits into the category of willful misconduct in which the severest sanction is appropriate. After all, the court, as well as the prosecutor, has a vital interest in protecting the trial process from the pollution of perjured testimony. Evidentiary rules which apply to categories of inadmissible evidence — ranging from hearsay to the fruits of illegal searches — may properly be enforced even though the particular testimony being offered is not prejudicial. The pretrial conduct revealed by the record in this case gives rise to a sufficiently strong inference that "witnesses are being found that really weren't there," to justify the sanction of preclusion.[23]

The argument that the client should not be held responsible for his lawyer's misconduct strikes at the heart of the attorney-client relationship. Although there are basic rights 418*418 that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client,[24] the lawyer has — and must have — full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval. Moreover, given the protections afforded by the attorney-client privilege and the fact that extreme cases may involve unscrupulous conduct by both the client and the lawyer, it would be highly impracticable to require an investigation into their relative responsibilities before applying the sanction of preclusion. In responding to discovery, the client has a duty to be candid and forthcoming with the lawyer, and when the lawyer responds, he or she speaks for the client. Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial. In this case, petitioner has no greater right to disavow his lawyer's decision to conceal Wormley's identity until after the trial had commenced than he has to disavow the decision to refrain from

adducing testimony from the eyewitnesses who were identified in the Answer to Discovery. Whenever a lawyer makes use of the sword provided by the Compulsory Process Clause, there is some risk that he may wound his own client.

The judgment of the Illinois Appellate Court is *Affirmed.*

419*419 JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

Criminal discovery is not a game. It is integral to the quest for truth and the fair adjudication of guilt or innocence. Violations of discovery rules thus cannot go uncorrected or undeterred without undermining the truthseeking process. The question in this case, however, is not whether discovery rules should be enforced but whether the need to correct and deter discovery violations requires a sanction that itself distorts the truthseeking process by excluding material evidence of innocence in a criminal case. I conclude that, at least where a criminal defendant is not personally responsible for the discovery violation, alternative sanctions are not only adequate to correct and deter discovery violations but are far superior to the arbitrary and disproportionate penalty imposed by the preclusion sanction. Because of this, and because the Court's balancing test creates a conflict of interest in every case involving a discovery violation, I would hold that, absent evidence of the defendant's personal involvement in a discovery violation, the Compulsory Process Clause *per se* bars discovery sanctions that exclude criminal defense evidence.

I

Before addressing the merits, I pause to explicate what I take as implicit in the Court's conclusion that the defendant's constitutional claims were "sufficiently well presented to the state courts to support our jurisdiction." *Ante,* at 407, n. 9. I quite agree with the Court that the constitutional claims were not waived in the Appellate Court of Illinois, both because the defendant's appellate brief adequately presented the Sixth Amendment claim, see *ibid.,* and because the analysis in this case would essentially be the same under the Due Process Clause, see *ante,* at 406-407, n. 9. The Court does not, however, explain its conclusion that the constitutional claims were not waived at trial. I conclude that, although as a matter of Illinois law the defendant waived his federal constitutional 420*420 claims at trial, as a matter of federal law that waiver does not bar review in this Court.

The only legal challenge to the witness preclusion that the defendant raised at trial was one sentence in his motion for new trial stating: "The Court erred by not letting a witness for defendant testify before the Jury." Record 412. The Appellate Court of Illinois stated that the only witness preclusion issue before it on appeal was whether "the trial

court abused its discretion by excluding the testimony of a defense witness as a sanction for violation of the discovery rules." 141 Ill. App. 3d 839, 841, 491 N. E. 2d 3, 4-5 (1986). The Appellate Court never addressed either the compulsory process or due process claims concerning witness preclusion, *id.,* at 844-845, 491 N. E. 2d, at 6-7, even though the briefs implicitly presented the former claim and expressly asserted the latter. This alone may not warrant the assumption that the Appellate Court implicitly held that a motion for new trial stating that "the court erred" preserved only an abuse of discretion claim and waived any constitutional claims. But the Appellate Court of Illinois had already reached that holding in an identical case. See *People* v.*Douthit,* 51 Ill. App. 3d 751, 366 N. E. 2d 950 (1977). The court in *Douthit* stated:

> *"Despite appellate counsel's excellent brief on the issue of the constitutionality, as applied to a criminal defendant of that portion of Supreme Court Rule 415(g)(i) (Ill. Rev. Stat. 1975, ch. 110A, par. 415(g)(i)) authorizing exclusion of evidence for failure to comply with a discovery rule, we deem that issue, raised for the first time on appeal, to have been waived. There is nothing in the record to indicate that defense counsel ever raised any constitutional objection during the extensive inchambers discussion summarized above, nor did he do so in his post-trial motion, which requests a new trial solely on the ground that `[t]he court erred in ruling that the defendant could not call Glen Muench and Rocky Reed to testify to defendant's state of intoxication at the time 421*421 of the commission of the alleged burglary.' As we read this motion, it raises only the non-constitutional question whether the trial court abused its discretion in exercising the exclusion sanction.Failure to raise an issue, including a constitutional issue, in the written motion for a new trial constitutes waiver of that issue and it cannot be urged as a ground for reversal on review." Id., at 753-754, 366 N. E. 2d, at 952-953 (citations and footnotes omitted; emphasis added).*

Although different districts of the Appellate Court of Illinois decided *Douthit* and this case, given that at trial both defendants presented identical challenges to the identical provision in the identical fashion, both appellate briefs raised the identical constitutional and nonconstitutional claims, and both districts considered only the abuse of discretion claim, I am constrained to conclude that in this case, like in *Douthit,* the Appellate Court of Illinois deemed the constitutional claims waived as a matter of Illinois law.

The conclusion that the Appellate Court of Illinois deemed the federal constitutional claims waived as a matter of state law does not, of course, mean that they are waived as a matter of federal law. "[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question." *Henry* v. *Mississippi,* 379 U. S. 443, 447 (1965). Specifically, it is well established that where a state court possesses the power to disregard a procedural default in exceptional cases, the state court's failure to exercise that power in a particular case does not bar review in this Court. *Williams* v. *Georgia,* 349 U. S. 375, 383-384 (1955); see also *Sullivan*v. *Little Hunting Park, Inc.,* 396 U. S. 229, 233-234 (1969); *Henry, supra,* at 449, n. 5. The Illinois Supreme and Appellate Courts possess such a power. Illinois Supreme Court Rule 615(a) provides: "Plain errors or defects affecting substantial rights may be noticed [on appeal] even though they were not

brought to the 422*422 attention of the trial court." Those courts frequently rely on this provision to address, in their discretion, issues that have been waived at trial. See Jenner, Tone, & Martin, Historical and Practice Notes following Ill. Ann. Stat., ch. 110A, ¶ 615 (1985) (citing 16 appellate cases decided between 1979 and 1981 as examples of cases invoking plain error alone); see also, *e. g., People* v. *Visnack,* 135 Ill. App. 3d 113, 118, 481 N. E. 2d 744, 748 (1985) (invoking substantial rights exception despite waiver). Apparently, the Appellate Court below declined to exercise this discretion and deemed the waiver binding. Since, under *Williams* v. *Georgia,* such a decision does not bar our review, we are free to address the merits despite the state-law waiver.

II

A

On the merits, I start from the same premise as the Court — that the Compulsory Process Clause of the Sixth Amendment embodies a substantive right to present criminal defense evidence before a jury. See *ante,* at 408-409; see also, *e. g., Pennsylvania* v. *Ritchie,* 480 U. S. 39, 56 (1987). Although I thus join the Court in rejecting the State's argument that the Clause embodies only the right to subpoena witnesses, I cannot agree with the Court's assertion that "[t]he State's argument is supported by the plain language of the Clause." *Ante,* at 407. The Compulsory Process Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." This plain language supports the State's argument only if one assumes that the most natural reading of constitutional language is the least meaningful. For the right to subpoena defense witnesses would be a hollow protection indeed if the government could simply refuse to allow subpoenaed defense witnesses to testify. As this Court has recognized for the last 20 years, the right to subpoena witnesses must mean the right to subpoena them for a useful 423*423 purpose, and thus necessarily implies a substantive limitation on the government's power to prevent those witnesses from testifying.

> *"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U. S. 14, 19 (1967)(emphasis added).*

> *"The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use." Id., at 23.*

The substantive limitation on excluding criminal defense evidence secured by the plain terms of the Compulsory Process Clause is also grounded in the general constitutional guarantee of due process. See *Chambers* v. *Mississippi,* 410 U. S. 284, 298-302 (1973); see also *Rock* v.*Arkansas,* 483 U. S. 44, 51 (1987); *Crane* v. *Kentucky,* 476 U. S. 683, 690-691 (1986).

The Compulsory Process and Due Process Clauses thus require courts to conduct a searching substantive inquiry whenever the government seeks to exclude criminal defense evidence. After all, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers, supra,* at 302. The exclusion of criminal defense evidence undermines the central truthseeking aim of our criminal justice system, see *United States* v. *Nixon,* 418 U. S. 683, 709 (1974), because it deliberately distorts the record at the risk of misleading the jury into convicting an innocent person. Surely the paramount value our criminal justice system places on acquitting the innocent, see, *e. g., In re Winship,* 397 U. S. 358 (1970), demands close scrutiny of any law preventing the jury from hearing evidence favorable 424*424 to the defendant. On the other hand, the Compulsory Process Clause does not invalidate every restriction on the presentation of evidence. The Clause does not, for example, require criminal courts to admit evidence that is irrelevant, *Crane, supra,* at 689-690, testimony by persons who are mentally infirm, see *Washington* v. *Texas, supra,* at 23, n. 21, or evidence that represents a half-truth, see *United States* v. *Nobles,* 422 U. S. 225, 241 (1975). That the inquiry required under the Compulsory Process Clause is sometimes difficult does not, of course, justify abandoning the task altogether.

Accordingly, this Court has conducted searching substantive inquiries into the rationales underlying every challenged exclusion of criminal defense evidence that has come before it to date. That scrutiny has led the Court to strike as constitutionally unjustifiable "rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief," such as a rule against introducing the testimony of an alleged accomplice, *Washington* v. *Texas, supra,* at 22-23; an application of the hearsay rule to statements that "were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability," *Chambers, supra,* at 300; the exclusion of evidence bearing on the credibility of a voluntary confession, *Crane, supra,* at 688-691; and a *per se* rule excluding all posthypnosis testimony, *Rock, supra,* at 56-62. Based on a thorough review of the relevant case law, this Court defined the standard governing the constitutional inquiry just last Term in *Rock* v. *Arkansas,* concluding that restrictions on the right to present criminal defense evidence can be constitutional only if they " `accommodate other legitimate interests in the criminal trial process' " and are not "arbitrary or disproportionate to the purposes they are designed to serve." *Rock* v. *Arkansas, supra,* at 55-56, quoting*Chambers, supra,* at 295.[1]

425*425 B

The question at the heart of this case, then, is whether precluding a criminal defense witness from testifying bears an arbitrary and disproportionate relation to the purposes of discovery, at least absent any evidence that the defendant was personally responsible for the discovery violations. This question is not answered by merely pointing out that discovery, like compulsory process, serves truthseeking interests. Compare *ante,* at 411-412. I would be the last to deny the utility of discovery in the truthseeking process. See Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U. L. Q. 279. By aiding effective trial preparation, discovery helps develop a full account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise from influencing the outcome at the expense of the merits of the case. But these objectives are accomplished by compliance with the discovery rules, not by the exclusion of material evidence. Discovery sanctions serve the objectives of discovery by correcting for the adverse effects of discovery violations and deterring future discovery violations from occurring. If sanctions other than excluding evidence can sufficiently correct and deter discovery violations,[2] then there is no reason to resort to a sanction that itself constitutes "a conscious mandatory distortion of the fact-finding process whenever applied." Weinstein, Some Difficulties in Devising Rules for 426*426Determining Truth in Judicial Trials, 66 Colum. L. Rev. 223, 237 (1966).

(1)

The use of the preclusion sanction as a corrective measure — that is, as a measure for addressing the adverse impact a discovery violation might have on truthseeking in the case at hand — is asserted to have two justifications: (1) it bars the defendant from introducing testimony that has not been tested by discovery, see *ante,* at 411-413; and (2) it screens out witnesses who are inherently suspect because they were not disclosed until trial, see *ante,* at 413-416. The first justification has no bearing on this case because the defendant does not insist on a right to introduce a witness' testimony without giving the prosecution an opportunity for discovery. He concedes that the trial court was within its authority in requiring the witness to testify first out of the presence of the jury, and he concedes that the trial court could have granted the prosecution a continuance to give it sufficient time to conduct further discovery concerning the witness and the

proffered testimony. See Brief for Petitioner 18-19. He argues only that he should not be completely precluded from introducing the testimony.

Nobles and *Brown* v. *United States,* 356 U. S. 148, 156 (1958) are thus inapposite. Compare*ante,* at 412-413. In *Nobles* the defendant sought to impeach the credibility of prosecution witnesses with testimony from a defense investigator regarding statements those witnesses had made in interviews with the investigator. 422 U. S., at 227-229. The trial court ruled that the investigator could not testify unless the defense disclosed the report the investigator had written summarizing the interviews. *Ibid.* This Court properly rejected the defendant's claim that his right to compulsory process had been violated because:

> *"The District Court did not bar the investigator's testimony. Cf. Washington v.Texas, 388 U. S. 14, 19 (1967). 427*427 It merely prevented respondent from presenting to the jury a partial view of the credibility issue by adducing the investigator's testimony and thereafter refusing to disclose the contemporaneous report that might offer further critical insights. The Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." Id., at 241 (emphasis added).*

Here, by contrast, the trial court *did* bar the proffered defense testimony. It did not, as in*Nobles,* simply condition the right to introduce the testimony on the defendant's disclosure of evidence that might demonstrate weaknesses in the testimony. The authority of trial courts to prevent the presentation of a "half-truth" by ordering further discovery is thus not at issue here. For similar reasons, the holding in *Brown* (that a person who testifies at her own denaturalization proceeding waives her Fifth Amendment right not to answer questions on cross-examination) can have no bearing on this case.

Nor, despite the Court's suggestions, see *ante,* at 414-417, is the preclusion at issue here justifiable on the theory that a trial court can exclude testimony that it presumes or finds suspect. In the first place, the trial court did not purport to rely on any such presumption or finding in this case. Rather, *after* ruling that he would exclude the testimony because of the discovery violation, the judge stated:

> *"Further, for whatever value it is, because this is a jury trial, I have a great deal of doubt in my mind as to the veracity of this young man that testified as to whether he was an eyewitness on the scene, sees guns that are wrapped up. He doesn't know Ray but he stops Ray.*
>
> *428*428 "At any rate, Mr. Wormley is not going to testify, be a witness in this courtroom." App. 28 (emphasis added).*

The judge gave no indication that he was willing to exclude the testimony based solely on its presumptive or apparent lack of credibility. Nor, apparently, would Illinois law allow him to do so. See generally, *e. g., People* v. *Van Dyke,* 414 Ill. 251, 254, 111 N. E. 2d 165, 167 ("The credibility of the witnesses presented, as well as the weight of the

evidence, [is] for the jury to determine and the court will not substitute its judgment therefor"), cert. denied, 345 U. S. 978 (1953); *Village of DesPlaines* v. *Winkelman,* 270 Ill. 149, 159, 110 N. E. 417, 422 (1915) ("[I]t is . . . for the jury to determine. . . to which witnesses they will give the greatest weight, and not for the court to tell them"). Indeed, far from being able to prevent the jury from hearing the testimony of witnesses that the trial court deems untrustworthy, Illinois trial courts are not even permitted to *comment* on the credibility of witnesses to the jury.[3] No Illinois case interpreting Rule 415(g) suggests that the Rule gives a trial judge special authority to exclude criminal defense witnesses based on their apparent or presumed unreliability.

In addition, preventing a jury from hearing the proffered testimony based on its presumptive or apparent lack of credibility would be antithetical to the principles laid down in *Washington* v.*Texas,* 388 U. S., at 20-23, and reaffirmed in *Rock* v. *Arkansas,* 483 U. S., at 53-55. We there criticized rules that disqualified witnesses who had an interest in the 429*429 litigation as having the "effect of suppressing the truth," *Washington* v. *Texas, supra,* at 20, noting that:

> *"[D]isqualifications for interest . . . rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue.*
>
> *" `. . . [T]he conviction of our time is that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court.' . . .*
>
> *". . . [W]e believe that [the latter] reasoning [is] required by the Sixth Amendment." 388 U. S., at 21-22, quoting Rosen v. United States, 245 U. S. 467, 471 (1918).*

See also *Rock* v. *Arkansas, supra,* at 53-55 (quoting and restating the above). The Court in*Washington* v. *Texas* accordingly concluded that "arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief" are unconstitutional. 388 U. S., at 22.

Although persons who are not identified as defense witnesses until trial may not be as trustworthy as other categories of persons, surely any presumption that they are so suspect that the jury can be prevented from even listening to their testimony is at least as arbitrary as presumptions excluding an accomplice's testimony, *Washington* v. *Texas, supra,* hearsay statements bearing indicia of reliability, *Chambers* v. *Mississippi,* 410 U. S. 284 (1973), or a defendant's posthypnosis testimony, *Rock, supra* — all of which have been declared unconstitutional. Compare *ante,* at 414-417. 430*430 The proper method, under Illinois law[4] and*Washington* v. *Texas, supra,* for addressing the concern about reliability is for the prosecutor to inform the jury about the circumstances casting doubt on the testimony, thus allowing the jury to determine the credit and weight it wants to attach to such testimony.[5] The power of the court to take that kind of corrective measure is undisputed; the defendant concedes that the court could have

allowed the prosecutor to comment on the defense's failure to disclose the identity of the witness until trial. See Brief for Petitioner 18-19.

Leaving deterrence aside for the moment, then, precluding witness testimony is clearly arbitrary and disproportionate to the purpose discovery is intended to serve — advancing the quest for truth. Alternative sanctions — namely, granting the prosecution a continuance and allowing the prosecutor to comment on the witness concealment — can correct for any adverse impact the discovery violation would have on the truthseeking process. Moreover, the alternative sanctions, unlike the preclusion sanction, do not distort the truthseeking process by excluding material evidence of innocence.

(2)

Of course, discovery sanctions must include more than corrective measures. They must also include punitive measures that can deter future discovery violations from taking place. Otherwise, parties will have little reason not to seek 431*431 tactical advantages by purposefully violating discovery rules and orders. Those violations that are not caught and corrected will then impose a significant cost on the truthseeking process, see *supra,* at 425; *ante,* at 411-412, that, in the long run, could conceivably outweigh the burden on truthseeking imposed by the preclusion sanction. Without some means of deterring discovery violations, moreover, the criminal system would continually be interrupted and distracted by continuances and other corrective measures. See *ante,* at 411.

In light of the availability of direct punitive measures, however, there is no good reason, at least absent evidence of the defendant's complicity, to countenance the arbitrary and disproportionate punishment imposed by the preclusion sanction. The central point to keep in mind is that witness preclusion operates as an effective deterrent only to the extent that it has a possible effect on the outcome of the trial. Indeed, it employs in part the possibility that a distorted record will cause a jury to convict a defendant of a crime he did not commit. Witness preclusion thus punishes discovery violations in a way that is both disproportionate — it might result in a defendant charged with a capital offense being convicted and receiving a death sentence he would not have received but for the discovery violation — and arbitrary — it might, in another case involving an identical discovery violation, result in a defendant suffering no change in verdict or, if charged with a lesser offense, being convicted and receiving a light or suspended sentence. In contrast, direct punitive measures (such as contempt sanctions or, if the attorney is responsible, disciplinary proceedings) can gradate the punishment to correspond to the severity of the discovery violation.

The arbitrary and disproportionate nature of the preclusion sanction is highlighted where the penalty falls on the defendant even though he bore no responsibility for the discovery violation. In this case, although there was ample evidence that the defense attorney willfully violated Rule432*432 413(d),[6] there was no evidence that the defendant played any role in that violation. Nor did the trial court make any effort to determine whether the defendant bore any responsibility for the discovery violation. Indeed, reading the record leaves the distinct impression that the main reason the trial court excluded Wormley's testimony was the belief that the defense counsel had purposefully lied about when he had located Wormley. App. 25-28.

Worse yet, the trial court made clear that it was excluding Wormley's testimony not only in response to the defense counsel's actions in this case but also in response to the actions of other defense attorneys in other cases. The trial court stated:

> *". . . All right, I am going to deny Wormley an opportunity to testify here. He is not going to testify. I find this a blatent [sic] violation of the discovery rules, willful violation of the rules. I also feel that defense attorneys have been violating discovery in this courtroom in the last three or four cases blatently [sic] and I am going to put a stop to it and this is one way to do so." Id., at 28.*

Although the Court recognizes this problem, it offers no response other than the cryptic statement that "[u]nrelated discovery violations . . . would not . . . normally provide a proper basis for curtailing the defendant's constitutional right to present a complete defense." *Ante,* at 416, n. 22. We are left to wonder either why this case is abnormal or why an exclusion founded on an improper basis should be upheld.

433*433 In the absence of any evidence that a defendant played any part in an attorney's willful discovery violation, directly sanctioning the attorney is not only fairer but *more* effective in deterring violations than excluding defense evidence. Compare *ante,* at 413-414. The threat of disciplinary proceedings, fines, or imprisonment will likely influence attorney behavior to a far greater extent than the rather indirect penalty threatened by evidentiary exclusion. Such sanctions were available here. Rather than punishing the defendant under Rule 415(g)(i), the trial court could have sanctioned the attorney under Rule 415(g)(ii), which provides that "Wilful violation by counsel of an applicable discovery rule . . . may subject counsel to appropriate sanctions by the court." See also App. 28 (threatening disciplinary proceedings). Direct sanctions against the attorney would have been particularly appropriate here since the discovery rule violated in this case places the obligation to comply with discovery not on the defendant, but directly on the attorney: providing that, upon motion by the State, a "*defense counsel* . . . shall furnish the State with . . . the names and last known addresses of persons he intends to call as witnesses . . . ." Ill. Sup. Ct. Rule 413(d) (emphasis added).

The situation might be different if the defendant willfully caused the discovery violation because, as the Court points out, see *ante,* at 413-414, some defendants who face the prospect of a lengthy imprisonment are arguably impossible to deter with direct punitive sanctions such as contempt. But that is no explanation for allowing defense

witness preclusion where there is no evidence that the defendant bore any responsibility for the discovery violation. At a minimum, we would be obligated to remand for further factfinding to establish the defendant's responsibility. Deities may be able to visit the sins of the father on the son, but I cannot agree that courts should be permitted to visit the sins of the lawyer on the innocent client.

434*434 Nor is the issue resolved by analogizing to tactical errors an attorney might make such as failing to put witnesses on the stand that would have aided the defense. Compare *ante,* at 410, 417-418. Although we have sometimes held a defendant bound by tactical errors his attorney makes that fall short of ineffective assistance of counsel, we have not previously suggested that a client can be punished for an attorney's *misconduct.* There are fundamental differences between attorney misconduct and tactical errors. Tactical errors are products of a legitimate choice among tactical options. Such tactical decisions must be made within the adversary system, and the system requires attorneys to make them, operating under the presumption that the attorney will choose the course most likely to benefit the defendant. Although some of these decisions may later appear erroneous, penalizing attorneys for such miscalculations is generally an exercise in futility because the error is usually visible only in hindsight — at the time the tactical decision was made there was no obvious "incorrect" choice, and no prohibited one. In other words, the adversary system often cannot effectively deter attorney's tactical errors and does not want to deter tactical decisions. Thus, where a defense attorney makes a routine tactical decision not to introduce evidence at the proper time and the defense seeks to introduce the evidence later, deterrence measures may not be capable of preventing the untimely introduction of evidence from systemically disrupting trials, jury deliberations, or final verdicts. In those circumstances, treating the failure to introduce evidence at the proper time as a procedural default that binds the defendant is arguably the only means of systemically preventing such disruption — not because binding the defendant deters tactical errors any better than direct punitive sanctions but because binding the defendant to defense counsel's procedural default, by definition, eliminates the disruption. The actual operation of the adversary system generally bears out the analysis outlined above. Direct punitive sanctions are 435*435 not available to punish and deter routine tactical errors. If, however, the erroneous nature of the attorney's decision was sufficiently evident at the time, then the system does want to deter the attorney's behavior, and can and does do so by directly sanctioning the attorney for malpractice. It does not bind the defendant, who by establishing malpractice would have also established ineffective assistance of counsel.

The rationales for binding defendants to attorneys' routine tactical errors do not apply to attorney misconduct. An attorney is never faced with a legitimate choice that includes misconduct as an option. Although it may be that "[t]he adversary process could not function effectively if every tactical decision required client approval," *ante,* at 418, that concern is irrelevant here because a client has no authority to approve misconduct. Further, misconduct is not visible only with hindsight, as are many tactical errors. Consequently, misconduct is amenable to direct punitive sanctions against attorneys as a deterrent that can prevent attorneys from systemically engaging in misconduct that would disrupt the trial process. There is no need to take steps that will inflict the

punishment on the defendant. Direct punitive sanctions are also more appropriate since the determination that misconduct occurred (and the level of penalty imposed) primarily turns on an assessment of the attorney's culpability rather than, as with procedural defaults, an assessment of the potential for disrupting the trial system. In this case there is no doubt that willfully concealing the identity of witnesses one intends to call at trial is attorney misconduct, that the government seeks to deter such behavior in all instances, and that the attorney knows such behavior is misconduct and not a legitimate tactical decision at the time it occurs. Direct punitive sanctions against the attorney are available. See Rule 415(g)(ii). And the decision to impose the evidentiary exclusion penalty in this case clearly turned on an assessment of the attorney's culpability. See App. 25-28; *People*v. *Rayford,* 43 Ill. App. 3d 283, 286, 356 N. E. 2d 1274, 1277 436*436 (1976) (exclusion only justifiable if the discovery violation is deliberate). No one contends that the same exclusion would have been justified if the failure to disclose Wormley's identity had been inadvertent.[7]

C

In short, I can think of no scenario that does not involve a defendant's willful violation of a discovery rule where alternative sanctions would not fully vindicate the purposes of discovery without distorting the truthseeking process by excluding evidence of innocence. Courts can couple corrective measures that will subject the testimony at issue to discovery and adverse credibility inferences with direct punitive measures that are both proportional to the discovery violation and directed at the actor responsible for it. Accordingly, absent evidence that the defendant was responsible for the discovery violation, the exclusion of criminal defense evidence is arbitrary and disproportionate to the purposes of discovery and criminal justice and should be *per se* unconstitutional. I thus cannot agree with the Court's case-by-case balancing approach or with its conclusion in this case that the exclusion was constitutional.

The Court's balancing approach, moreover, has the unfortunate effect of creating a conflict of interest in every case involving a willful discovery violation because the defense counsel is placed in a position where the best argument he can make on behalf of his client is: "Don't preclude the defense witness — punish me personally." In this very case, for example, the defense attorney became noticeably timid once the judge threatened to report his actions to the disciplinary 437*437 commission. App. 28-29. He did not argue: "Sure, bring me before the disciplinary commission; that's a much more appropriate sanction than excluding a witness who might get my client acquitted." I cannot see how we can expect defense counsel in this or any other case to act as vigorous advocates for the interests of their clients when those interests are adverse to their own.[8]

It seems particularly ironic that the Court should approve the exclusion of evidence in this case at a time when several of its Members have expressed serious misgivings about the evidentiary costs of exclusionary rules in other contexts. Surely the deterrence of constitutional violations cannot be less important than the deterrence of discovery violations. Nor can it be said that the evidentiary costs are more significant when they are imposed on the prosecution. For that would turn on its head what Justice Harlan termed the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship,* 397 U. S., at 372 (concurring opinion).

Discovery rules are important, but only as a means for helping the criminal system convict the guilty and acquit the innocent. Precluding defense witness testimony as a sanction for a defense counsel's willful discovery violation not only directly subverts criminal justice by basing convictions on a partial presentation of the facts, *United States* v. *Nixon,* 418 U. S., at 709, but is also arbitrary and disproportionate to any of the purposes served by discovery rules or discovery sanctions. The Court today thus sacrifices the paramount values of the criminal system in a misguided and unnecessary effort to preserve the sanctity of discovery. We may never 438*438 know for certain whether the defendant or Bridges' brother fired the shot for which the defendant was convicted. We do know, however, that the jury that convicted the defendant was not permitted to hear evidence that would have both placed a gun in Bridges' brother's hands and contradicted the testimony of Bridges and his brother that they possessed no weapons that evening — and that, because of the defense counsel's 5-day delay in identifying a witness, an innocent man may be serving 10 years in prison. I dissent.

JUSTICE BLACKMUN, dissenting.

I join JUSTICE BRENNAN'S dissenting opinion on the understanding — at least on my part — that it is confined in its reach to general reciprocal-discovery rules. I do not wish to have the opinion express for me any position as to permissible sanctions for noncompliance with rules designed for specific kinds of evidence as, for example, a notice-of-alibi rule. In a case such as that, the State's legitimate interests might well occasion a result different from what should obtain in the factual context of the present case.

[*] *Solicitor General Fried, Assistant Attorney General Weld, Deputy Solicitor General Bryson, Paul J. Larkin, Jr.,* and *Sidney M. Glazer* filed a brief for the United States as *amicus curiae* urging affirmance.

[1] The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." This right is applicable in state as well as federal prosecutions. *Washington* v. *Texas,* 388 U. S. 14, 17-19 (1967).

[2] Illinois Supreme Court Rule 413(d) provides in pertinent part:

"Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses

which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

"(i) *the names and last known addresses of persons he intends to call as witnesses* together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him . . ." (emphasis added).

[3] These two men, Earl Travis, the brother of Derrick Travis, and Luther Taylor, petitioner's brother, were identified by prosecution witnesses as participants in the street fight.

[4] "During the direct testimony of the witnesses, your Honor, called by the State, I was informed of some additional witnesses which could have and probably did, in fact, see this entire incident. We at this time would ask to amend our Answer to include two additional witnesses.

"THE COURT: Who are they?

"MR. VAN: One is a guy named Alfred Wrdely of which —

"THE DEFENDANT: Excuse me, W-r-d-e-l-y.

"MR. VAN: Whose address I do not have. I'm going to have to see if I can locate him tonight. And Pam Berkhalter." App. 12.

[5] "THE COURT: Yeah, but the defendant was there, and the defendant is now telling you Pam Berkhalter, and he's now telling you Alfred Wrdely. Why didn't he tell you that sometime ago? He's got an obligation to tell you.

"MR. VAN: That is correct, Judge. He, in fact, told me about Alfred sometime ago. The problem was that he could not locate Alfred." *Id.,* at 12-13.

[6] "There's all sorts of people on the scene, and all of these people should have been disclosed before.

"When you bring up these witnesses at the very last moment, there's always the allegation and the thought process that witnesses are being found that really weren't there. And it's a problem in these types of cases, and it should be — should have been put on that sheet a long time ago.

"At any rate, I'll worry about it tomorrow." *Id.,* at 13-14.

[7] The record does not explain why Pam Berkhalter did not appear.

[8] "Q. What, if anything did you learn by standing there in the crowd?

"A. Well, Jack had a blanket. It was two pistols in there and he gave it to —

"Q. And then what, if anything, did they say at that time, if you can recall?

"A. Well, they were saying what they were going to do to the people. Say they were after Ray and the other people.

"Q. What, if anything, did you do at that time?

"A. At that time I left. I was on my way home and I happened to run into Ray and them and so I told them what was happening and to watch out because they got weapons." *Id.,* at 19.

[9] The State also argues that we should decline to exercise jurisdiction over petitioner's Sixth Amendment claim because it was inadequately presented in the state court. As respondent points out, petitioner did not specifically articulate his claim as based on the Compulsory Process Clause until he filed a petition for rehearing in the Illinois Appellate Court. Moreover, at trial petitioner merely argued that the trial court erred by not letting his witness testify. On appeal, however, petitioner asserted that the error was constitutional: "The trial judge abused his discretion and denied [petitioner] due process by excluding a material defense witness from testifying as a sanction for a discovery violation." Brief and Argument For Appellant in No. 84-1073 (App. Ct. Ill.), p. 28. Although petitioner expressly asserted only a due process violation, his reliance on the Sixth Amendment was clear. He cited and relied upon, through a quotation from an Illinois Appellate Court decision, two of our Compulsory Process Clause cases, *Washington* v. *Texas,* 388 U. S. 14 (1967), and *Chambers* v. *Mississippi,* 410 U. S. 284 (1973). The state-court decision from which petitioner quoted, *People* v. *Rayford,* 43 Ill. App. 3d 283, 356 N. E. 2d 1274 (1976), was also a Compulsory Process Clause case. The court in *Rayford* asserted that use of the preclusion sanction in criminal cases should be limited to extreme situations because in criminal cases "*due process* requires that a defendant be permitted to offer testimony of witnesses in his defense," *id.,* at 286-287, 356 N. E. 2d, at 1277 (emphasis added), citing *Washington, supra.*

A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights, but in this case the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts make it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction.

[10] See Clinton, The Right to Present a Defense: An Emergent Constitutional Guarantee In Criminal Trials, 9 Ind. L. Rev. 711, 767 (1976).

[11] 8 J. Wigmore, Evidence § 2191, pp. 68-70 (J. McNaughton rev. 1961).

[12] "Mr. BURKE moved to amend this proposition in such a manner as to leave it in the power of the accused to put off the trial to the next session, provided he made it appear to the court that the evidence of the witnesses, for whom process was granted but not served, was material to his defence.

"Mr. HARTLEY said, that in securing him the right of compulsory process, the Government did all it could; the remainder must lie in the discretion of the court.

"Mr. SMITH, of South Carolina, thought the regulation would come properly in, as part of the Judicial system.

"The question on MR. BURKE's motion was taken and lost; ayes 9, noes 41." 1 Annals of Cong. 756 (1789).

[13] "Particulars varied from state to state, but the provisions reflected a common principle. Three states emphasized the right to present evidence, guaranteeing the accused the right `to call for evidence in his favour.' Two emphasized the subpoena power, giving the defendant the right to produce `all proofs that may be favorable' to him. North Carolina combined the right to put on a defense with the right of confrontation, guaranteeing the right `to confront the accusers and witnesses with other testimony.' Delaware emphasized the defendant's interest in sworn testimony, giving him the right `to examine evidence on oath in his favour.' New Jersey opted for a principle of equality between the parties: `[A]ll criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are or shall be entitled to.' Maryland consolidated several interests, guaranteeing the defendant the right `to examine [his] witnesses . . . on oath,' and `to have process for his witnesses.'

"Some of the state provisions originated in English statutes, some in colonial enactments, and some were original. Regardless, they all reflected the principle that the defendant must have a meaningful opportunity, at least as advantageous as that possessed by the prosecution, to establish the essential elements of his case. The states pressed the principle so vigorously that the framers of the federal Bill of Rights included it in the sixth amendment in a distinctive formulation of their own." Westen, The Compulsory Process Clause, 73 Mich. L. Rev. 71, 94-95 (1974) (footnotes omitted).

[14] As one commentator has noted:

"The defendant's rights to be informed of the charges against him, to receive a speedy and public trial, to be tried by a jury, to be assisted by counsel, and to be confronted with adverse witnesses are designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused. They apply in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own. Compulsory process, on the other hand, comes into play at the close of the prosecution's case. It operates exclusively at the defendant's initiative and provides him with affirmative aid in presenting his defense." *Id.,* at 74.

[15] "In the exercise of [the right to present witnesses], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Chambers* v. *Mississippi,* 410 U. S., at 302.

[16] "Notice-of-alibi rules, now in use in a large and growing number of States, are based on the proposition that the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. See, *e. g.,* Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963

Wash. U. L. Q. 279; American Bar Association Project on Standards for Criminal Justice, Discovery and Procedure Before Trial 23-43 (Approved Draft 1970); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 69 Yale L. J. 1149 (1960). The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system." *Wardius* v.*Oregon,* 412 U. S. 470, 473-474 (1973).

[17] "Given the ease with which an alibi can be fabricated, the State's interest in protecting itself against an eleventh-hour defense is both obvious and legitimate. Reflecting this interest, notice-of-alibi provisions, dating at least from 1927, are now in existence in a substantial number of States. The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played. We find ample room in that system, at least as far as `due process' is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence."*Williams* v. *Florida,* 399 U. S. 78, 81-82 (1970) (footnotes omitted).

[18] *Lloyd* v. *Gill,* 406 F. 2d 585, 587 (CA5 1969) (motion for new trial based on newly discovered evidence "may not be granted unless . . . the facts discovered are of such nature that they will probably change the result if a new trial is granted, . . . they have been discovered since the trial and could not by the exercise of due diligence have been discovered earlier, and . . . they are not merely cumulative or impeaching"); *Ragnar Benson, Inc.* v.*Kassab,* 325 F. 2d 591, 594 (CA3 1963) ("[C]ourts will indulge all presumptions in favor of the validity of a verdict"); *Rowlik* v. *Greenfield,* 87 F. Supp. 997, 1001 (ED Pa. 1949) ("[N]ew trials should not be allowed simply because after the verdict the losing party has come upon some witness or information theretofore unknown to him or his attorney").

[19] See, *e. g., Fendler* v. *Goldsmith,* 728 F. 2d 1181, 1188-1190 (CA9 1983) (giving consideration to the effectiveness of less severe sanctions, the impact of preclusion on the evidence at trial and the outcome of the case, the extent of prosecutorial surprise or prejudice, and whether the violation was willful).

[20] There may be cases in which a defendant has legitimate objections to disclosing the identity of a potential witness. See Note, The Preclusion Sanction — A Violation of the Constitutional Right to Present a Defense, 81 Yale L. J. 1342, 1350 (1972). Such objections, however, should be raised in advance of trial in response to the discovery request and, if the parties are unable to agree on a resolution, presented to the court. Under the Federal Rules of Criminal Procedure and under the rules adopted by most States, a party may request a protective order if he or she has just cause for objecting to a discovery request. See, *e. g.,* Fed. Rule Crim. Proc. 16(d)(1); Ill. Sup. Ct. Rule 412(i). In this case, there is no issue concerning the validity of the discovery requirement or petitioner's duty to comply with it. There is also no indication that petitioner ever objected to the prosecution's discovery request.

[21] "In the case before us, the notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself." *Williams* v. *Florida,* 399 U. S., at 85.

[22] The trial judge also expressed concern about discovery violations in other trials. If those violations involved the same attorney, or otherwise contributed to a concern about the trustworthiness of Wormley's 11th-hour testimony, they were relevant. Unrelated discovery violations in other litigation would not, however, normally provide a proper basis for curtailing the defendant's constitutional right to present a complete defense.

[23] It should be noted that in Illinois, the sanction of preclusion is reserved for only the most extreme cases. In*People* v. *Rayford,* the Illinois Appellate Court explained:

"The exclusion of evidence is a drastic measure; and the rule in civil cases limits its application to flagrant violations, where the uncooperative party demonstrates a `deliberate contumacious or unwarranted disregard of the court's authority.' (*Schwartz* v. *Moats,* 3 Ill. App. 3d 596, 599, 277 N. E. 2d 529, 531; *Department of Transportation* v. *Mainline Center, Inc.,* 38 Ill. App. 3d 538, 347 N. E. 2d 837.) The reasons for restricting the use of the exclusion sanction to only the most extreme situations are even more compelling in the case of criminal defendants, where due process requires that a defendant be permitted to offer testimony of witnesses in his defense. (*Washington* v. *Texas,* 388 U. S. 14 . . . .) `Few rights are more fundamental than that of an accused to present witnesses in his own defense.' (*Chambers* v. *Mississippi,* 410 U. S. 284, 302 . . . .)" 43 Ill. App. 3d, at 286-287, 356 N. E. 2d, at 1277.

[24] See, *e. g., Brookhart* v. *Janis,* 384 U. S. 1, 7-8 (1966) (defendant's constitutional right to plead not guilty and to have a trial where he could confront and cross-examine adversary witness could not be waived by his counsel without defendant's consent); *Doughty* v. *State,* 470 N. E. 2d 69, 70 (Ind. 1984) (record must show "personal communication of the defendant to the court that he chooses to relinquish the right [to a jury trial]");*Cross* v. *United States,* 117 U. S. App. D. C. 56, 325 F. 2d 629 (1963) (waiver of right to be present during trial).

[1] Although the Court in *Rock* was addressing the specific issue of the defendant's right to offer his own testimony, it derived the standard it articulated from general compulsory process case law on the theory that the right to present one's own testimony extended at least as far as the right to present the testimony of others. 483 U. S., at 52-53.

[2] Illinois Supreme Court Rule 415(g) alone supplies a broad array of available discovery sanctions:

"(i) If . . . a party has failed to comply with an applicable discovery rule. . . the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, exclude such evidence, or enter such other order as it deems just under the circumstances.

"(ii) Wilful violation by counsel of an applicable discovery rule . . . may subject counsel to appropriate sanctions by the court."

[3] See, *e. g., People* v. *Santucci,* 24 Ill. 2d 93, 98, 180 N. E. 2d 491, 493 (1962) ("Ultimate decisions of fact must fairly be left to the jury, as must be the determination of the credibility of witnesses and the weight to be afforded their testimony, and to this end it is not the province of the judge, in a criminal case, to convey his opinions on such matters to the jurors by word or deed"); *People* v. *Heidorn,* 114 Ill. App. 3d 933, 936, 449 N. E. 2d 568, 572 (1983) ("While the trial judge has wide discretion in the conduct of trial, he must not make comments or insinuations, by word or conduct, indicative of an opinion on the credibility of a witness . . .").

[4] Cf. *People* v. *Rayford,* 43 Ill. App. 3d 283, 288, 356 N. E. 2d 1274, 1278 (1976). The reasons cited by Illinois courts for forbidding judicial comment do not apply with the same force to prosecutorial comment. See, *e. g.,Santucci, supra,* at 98, 180 N. E. 2d, at 493; *Heidorn, supra,* at 937, 449 N. E. 2d, at 572.

[5] Precluding a witness based solely on a judge's belief that the witness lacks credibility might also implicate the constitutional right to a jury trial in that it usurps the jury's central function of assessing the credibility of witnesses. The constitutional right to a jury trial would mean little if a judge could exclude any defense witness whose testimony he or she did not credit.

[6] On the second day of trial, Tuesday, March 27, 1984, defense counsel moved to amend his "Answer to Discovery" to include Alfred Wormley as a defense witness, stating that the defendant had told him about Wormley earlier but that he had not been able to locate Wormley previously. App. 12-13. The next day Wormley testified that defense counsel had visited him at his home and served him with a subpoena on Wednesday, March 21, 1984, five days before the trial began. *Id.,* at 22.

[7] The witness preclusion sanction thus cannot be justified on the theory that the defendant waived his right to introduce Wormley by failing to name him prior to trial. Indeed, far from being a procedural default, the exclusion of evidence is an unusual sanction applied only in drastic cases, *People* v. *Rayford,* 43 Ill. App. 3d, at 286-287, 356 N. E. 2d, at 1277, and the decision whether to apply it lies in the discretion of the trial court, 141 Ill. App. 3d 839, 844-845, 491 N. E. 2d 3, 7 (1986) (case below).

[8] I also note that a case-by-case balancing approach will create uncertainty, spawn unnecessary litigation, and make it difficult to supervise the lower courts. Moreover, any exclusion of criminal defense evidence also has the important disadvantage of inviting an ineffective-assistance-of-counsel claim in every case in which it is applied. Direct sanctions against the attorney would yield no such opportunity to disrupt final verdicts.

United States Fourteenth Amendment

Article XIV

1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2: Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,[15] and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number ofmale citizens twenty-one years of age in such State. *affects 2*

3: No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

4: The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

United States Sixth Amendment

Article [VI]

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

United States v Decoster

624 F.2d 196 (1976)

UNITED STATES of America

v.

Willie DECOSTER, Jr., (Decoster III), Appellant.

No. 72-1283.

United States Court of Appeals, District of Columbia Circuit.

October 19, 1976.

As Amended October 21, November 16 and 24, 1976.

Argued May 26, 1977.

Judgment Filed May 14, 1979.[*]

Opinions Filed July 10, 1979.

197*197 198*198 199*199 Calvin Davison, Washington, D. C. (appointed by this Court), for appellant.

Earl J. Silbert, U. S. Atty., Washington, D. C., at the time of oral argument, with whom Carl S. Rauh, Principal Asst. U. S. Atty., Henry F. Greene, Executive Asst. U. S. Atty., and John A. Terry and Larry C. Willey, Asst. U. S. Attys., Washington, D. C., were on the brief for appellee.

John Townsend Rich and Mark W. Foster, Washington, D. C., were on the brief for amicus curiae Division V of the District of Columbia Bar.

Leon E. Irish, Washington, D. C., was on the brief for amicus curiae Division IV of the District of Columbia Bar.

Robert J. Paul, Washington, D. C., was on the brief for amicus curiae National Legal Aid and Defender Association.

Before WRIGHT, Chief Judge, and BAZELON, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MacKINNON, ROBB and WILKEY, Circuit Judges.

Argued En Banc May 26, 1977.

On Petition for Rehearing En Banc[*]

Opinion in which McGOWAN, TAMM, and WILKEY, Circuit Judges, join filed by LEVENTHAL, Circuit Judge.

Opinion in which TAMM and ROBB, Circuit Judges, join filed by MacKINNON, Circuit Judge.

Opinion concurring in the result filed by SPOTTSWOOD W. ROBINSON, III, Circuit Judge.

Dissenting opinion in which J. SKELLY WRIGHT, Chief Judge, joins filed by BAZELON, Circuit Judge.

Statement in which BAZELON and SPOTTSWOOD W. ROBINSON, III, Circuit Judges, join filed by J. SKELLY WRIGHT, Chief Judge.

LEVENTHAL, Circuit Judge, who is joined in this opinion by McGOWAN, TAMM and WILKEY, Circuit Judges:

This case gives the court en banc the opportunity to present its views on the requirement of effective assistance of counsel in criminal prosecutions, with principal focus on the duty of counsel to make due investigation prior to trial. We conclude that appellant has not made the showing requisite for reversal of his conviction.

A. Proof at Trial

At trial, Roger Crump, a soldier, testified that he was accosted by three men at about 6 p. m. on May 29, 1970, on the sidewalk at 8th and K Streets, N.W., near the parking lot of the Golden Gate Bar. He was yoked from behind by one man, threatened with a razor by another, while a third rifled his pockets and took his wallet which contained over $100 in cash.

Two plainclothes policemen cruising in an unmarked car saw the robbery in progress, alighted and gave chase. One officer followed the man later identified as Fred Eley. Officer Box testified that he followed appellant Decoster — whom he identified as the robber who went through Crump's pockets — from the scene to and into the 200*200 D.C. Annex Hotel, found him at the lobby desk and arrested him. He testified that the chase lasted two to three minutes, that he did not lose sight of appellant and that Crump, who had been following along, immediately identified Decoster as one of the robbers. Crump was unable to identify Decoster at trial, because in the meanwhile his sight had been impaired in an accident, but he testified that he had been positive of his identification when he made it in the hotel. A search of appellant's pockets did not turn up any money, and the wallet was never recovered.

Appellant testified he had met and had a few drinks with Crump at the Golden Gate Club bar, but had left Crump in the bar, walked back to the hotel about a block away, and was getting his key from the desk clerk when he was arrested.

The defense called Eley. He (as well as the other codefendant, Taylor) had already pleaded guilty at a time when Decoster, having jumped bail, was a fugitive from justice. Eley corroborated that Decoster had met Crump in the bar (a point on which Crump was unsure). However, he also testified that he had seen appellant fighting with Crump in the parking lot across from the bar — and as to this contradicted appellant.

Decoster's conviction for aiding and abetting an armed robbery, which resulted in a 2-8 year sentence, is on appeal to this court.

B. Subsequent Proceedings

When the appeal was first before this court, the panel, while rejecting the contentions presented by appellate counsel, remanded for a hearing on the issue of ineffective assistance of counsel, an issue that it raised *sua sponte* and directed be presented to the district court on motion for a new trial.[1] The panel ruled that a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate. Giving content to this standard, the panel adopted duties owed by counsel to his client derived in large part from the guidelines for the defense function promulgated by the American Bar Association Project on Standards for Criminal Justice.[2] The panel then held that once the appellant had shown a substantial violation of a duty owed to him by counsel, the burden was on the government to demonstrate lack of prejudice.

Pursuant to the remand, the motion for new trial was filed November 1, 1973. In February, 1974, District Judge Joseph Waddy held three days of supplementary hearings on the adequacy of trial counsel. On April 23, 1975, with findings of fact and conclusions of law, he entered an order denying the motion for a new trial.

On October 19, 1976, the panel of this court, one member dissenting, reversed the judgment of conviction, holding that appellant had been denied the effective assistance of counsel. Essentially, the panel opinion (referred to as *Decoster II*) concluded that trial counsel had violated his duty to conduct a factual investigation. On March 17, 1977, the court granted the government's motion for rehearing en banc, vacated the panel opinion, and provided for supplemental briefs and oral argument.

C. Guiding Principles

The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." In giving content to this provision, the courts have recognized the need for differing approaches depending on the nature of the particular claim of denial of assistance in each case. These differences stem from the courts' perceptions of the exactness with which a denial can be identified and remedied, as well as their views of the need for a showing of prejudice.

201*201 The cases present a continuum. At one end are cases of structural or procedural impediments by the state that prevent the accused from receiving the benefits of the constitutional guarantee. The most obvious example is, of course, the

failure of the state to provide any counsel whatever. The Supreme Court long ago held that the Sixth Amendment requires that the federal courts provide counsel for indigent defendants charged with felonies under federal law.[3] As to the states, the Court first defined the right to counsel as an aspect of a fair trial,[4] with the eventual result that the right was restricted to less than that provided in the federal courts.[5] *Gideon*[6] made the Sixth Amendment applicable to the states by incorporation into the Fourteenth Amendment. Today the Sixth Amendment requires that counsel be provided not only in all felony prosecutions,[7] but also in all prosecutions for misdemeanors that result in imprisonment.[8]

The right to have counsel provided is so fundamental that, like the admission in evidence of a coerced confession,[9] or trial before an interested judge,[10] the violation of the constitutional right mandates reversal "even if no particular prejudice is shown and even if the defendant was clearly guilty."[11] In this area, the doctrine applied is more stringent than that applicable to most denials of constitutional rights — permitting affirmance when the government shows beyond a reasonable doubt that the violation did not affect the conviction.[12]

"Effective" assistance of counsel[13] is denied by a statute that, while permitting a defendant to make an unsworn statement, bars the defendant from having his testimony elicited by counsel through direct examination;[14] by a statute that restricts counsel in deciding when to put the defendant on the stand;[15] by a statute that gives the judge in a non-jury trial the power to deny defense counsel closing summation;[16] and by a trial court order directing a defendant not to consult with his attorney during an overnight recess that falls between direct and cross examination.[17] These state-created procedures impair the accused's enjoyment of the Sixth Amendment guarantee by disabling his counsel from fully assisting and representing him. Because these impediments constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate.

202*202 A less clearcut rule emerges from the cases on multiple representation. The principle is stated categorically — to require an attorney to represent co-defendants whose interests may conflict denies the right to effective assistance of counsel.[18] No showing of prejudice is necessary. However, because there is no absolute requirement that every defendant have his own attorney,[19] the application of the rule requires some factual analysis to determine whether divergent interests that justify separate counsel may in fact exist. The factual analysis will not be exhaustive. As the Supreme Court has recently indicated, the courts must rely, by and large, on the representations of defense counsel that potential conflicts exist, since a thorough scrutiny might require the attorney to reveal the confidences of his client.[20]

The problem of late appointment moves us farther along the continuum. The Supreme Court has long recognized that sufficient time to prepare a defense is a vital element of effective assistance.[21] Late appointment of counsel resembles the state-created restrictions on counsel's ability to assist and represent his client. Yet in its 1970 *Chambers* opinion,[22] the Supreme Court indicated categorical rules were not appropriate

in this area. Although the Court's treatment was cursory, it made clear that determining whether counsel was ineffective due to late appointment turned on the facts of the case. The Court emphasized, "we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel."[23]

At the other end of the continuum are cases, including the present one, in which the issue is counsel's performance when he is "untrammelled and unimpaired"[24] by state action. The Supreme Court has never addressed this issue frontally, though it has indicated — albeit in abbreviated fashion — that it does not contemplate simplistic or categorical approaches.

The Court has twice held that reliance on the erroneous advice of counsel does not negate an intelligent and voluntary guilty plea, so long as the advice fell "`within the range of competence demanded of attorneys in criminal cases.'"[25] The Court recognized the "inherent uncertainty in guiltyplea advice" and rejected any requirement of a *per se* rule invalidating guilty pleas. It emphasized that to undo a guilty plea, the defendant must show "serious derelictions on the part of counsel."[26] In the 1976 *Agurs* case,[27] the Court ruled that defense counsel's failure to request the criminal record of a murder victim did not demonstrate 203*203 ineffective assistance.[28] The Court's opinion is without explication but is significant, since what was apparently involved was a failure of defense counsel to pursue potential sources of aid to the defense available without inordinate effort — and yet the Court abruptly negatived the possibility of a constitutional claim.

While the reasons for a non-categorical approach were not developed in *Agurs,* they are not difficult to discern. 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.

Over and above — or should one say below — the Supreme Court opinions, there has emerged a considerable body of circuit and state court law on the issue of ineffective assistance. Several reflective judges have recognized that differing approaches are pertinent where different aspects of the assistance of counsel are involved. Judge Bright, writing for the Eighth Circuit, has noted that while the total absence of counsel cannot but be harmful, when a defendant is represented by counsel and the performance of counsel has fallen below the accepted standard, "the seriousness of this constitutional violation must be judged in terms of the particular factual circumstances of that case."[29]

Recently, Judge Browning, writing for the Ninth Circuit en banc in *Cooper v. Fitzharris,*[30] pointed out that the rulings that a defendant need not show prejudice involved an absolute denial of counsel or a structural impediment to counsel's effective performance. In a case involving the quality of performance, as reflected in acts or omissions at trial, the accused must prove not mere errors but "serious derelictions"[31]

and that counsel's errors prejudiced the defense. Judge Hufstedler's dissent put it that a defendant with a "totally inept counsel" would not also have to show "precisely" how he was affected,[32] but this opinion acknowledged that courts consider "prejudicial impact of attorney behavior" in determining whether the attorney was constitutionally competent,[33] and further recognized that in many cases the outcome would be the same under both majority and dissenting approaches.

The task remains of delineating the noncategorical criteria that are to be applied in evaluating claims of inadequate performance by counsel. It is now clear that the courts will not abstain completely from some oversight of counsel's performance. At one time this court came close to abstention, in the 1945 *Diggs* case[34] adopting the "farce and mockery" standard. Even under that standard counsel's performance was on occasion found so delinquent as to prompt judicial correction,[35] but the occasions were rare. In the 1958 *Mitchell* opinion,[36] Judge Prettyman in effect defended an approach of nonintrusion into the attorney/client relationship. Some of his observations still have merit, but they survive today as reasons for limiting the degree of judicial intrusion, not as a brief for abstention. 204*204 Judge Fahy dissented, on the ground that a hearing was required on the ultimate question whether the conviction "rests in substantial degree" upon a course reflecting a lack of professional skill.[37]

Our 1967 *Bruce* opinion,[38] which Judge Bazelon joined as to this issue, laid down a standard that recognized the need for more judicial oversight. It was put that "ineffective assistance" was established where "there has been gross incompetence of counsel and . . . this has in effect blotted out the essence of a substantial defense."[39] *Bruce* thus departed from *Diggs* and*Mitchell,* as has been recognized by this court[40] and others.[41] Although not stated explicitly, the *Bruce* departure was obviously away from Fifth Amendment due process concepts to a Sixth Amendment approach to the problem of ineffective assistance.[42] And *Bruce* went beyond that to state that a less powerful showing of ineffectiveness was required on direct appeal than that necessary to support a collateral attack.

We pause to take note of the formulations adopted by the other circuits. As Justice White has put it, the circuits are in "disarray."[43]

One prominent formulation appears in the Third Circuit's 1970 *Moore* opinion as a standard of "normal competency:" "the exercise of the customary skill and knowledge which normally prevails at the time and place."[44] This is essentially a negligence standard. Indeed the Third Circuit cited the American Law Institute's formulation of the standard for civil liability of an attorney.[45] However, as the ALI points out, the mere fact that performance falls below average does not equal negligence. Thus, the question remains of what departures from a potential "norm" are so egregious as to call for judicial interposition.

Other circuits have adopted variations on a notion of "reasonable" competence,[46] using 205*205tests that suffer from the same uncertainties as the Third Circuit's. The Seventh Circuit has held that a defendant is entitled to assistance of counsel that meets a "minimum professional standard."[47] In the last analysis, all the circuits recognize that

the performance of counsel must fall below a minimum, not just an abstract "norm." There must be "serious derelictions."[48]

Some circuits have attempted to give content to their standards by adopting, explicitly or by implication, specific duties the violation of which amounts to ineffective assistance. The panel of this court that wrote *DeCoster I* employed — with some embellishment — the standards for the defense function promulgated by the American Bar Association.[49] In *Decoster II* the panel referred to these *DeCoster I* requirements as "the minimal components of `reasonably competent assistance,'"[50] although in both opinions the panel qualified these duties by requiring a "substantial" violation.[51]

The ABA Standards, however, were not put forward by the ABA as either exclusively "minimum" standards or as "a set of per se rules applicable to post-conviction procedures."[52] Rather, they constitute a "blend of description of function, functional guidelines, ethical guidelines and recommended techniques,"[53] a mixture of the aspirational and the obligatory.

Even those circuits that formulated an apparently categorical approach to these problems have shown restraint in actual application to the specific facts presented. While in *Coles v. Peyton*[54] the Fourth Circuit laid down duties of defense counsel, including an unqualified duty to investigate, in *Jackson v. Cox,*[55] the court apparently limited *Coles,* by distinguishing it as a case of virtually complete lack of investigation that was not controlling in a case where there were shortfalls in investigation, yet counsel had performed more than a "perfunctory" investigation. Similarly, the Third Circuit's 1971 *Green* opinion[56] has tempered any implication of *Moore* that it sufficed to identify specific aspects of incompetency. The District Court had granted habeas corpus because of unfairness due to the consolidation of rape and assault indictments arising out of unrelated events.[57] In reversing, the Third Circuit stressed that the acquiescence of defense counsel in the consolidation was based on information furnished by the client that suggested a connection between the events. This course was accepted as not outside "the range of normally competent representation," even though defense counsel acknowledged that he was not aware that the police version of the events differed significantly from that of his client.[58]

Finally, we find support in the recent 1979 decision of the California Supreme 206*206 Court in the*Pope*[59] case. As we have already noted, both majority and dissenting opinions of the Ninth Circuit's 1978 en banc decision in *Cooper v. Fitzharris* acknowledged that the determination of lack of competence requires an assessment of both materiality and likely prejudice, with the opinions differing only as to the rule applicable to a defendant with a "totally inept counsel."[60] The California state court in *Pope* also disclaimed a categorical approach. In discarding the "farce or sham" standard, the court articulated "basic duties" of defense counsel that it characterized as "constitutional obligations," using the *DeCoster I* approach of the "reasonably competent attorney acting as a diligent, conscientious advocate." However, after establishing that defense counsel had failed to perform in accordance with that standard, defendant still had the additional burden of establishing that "counsel's acts or omissions related in the withdrawal of a potentially meritorious defense."[61] This differs in degree but not in

kind from *Bruce*("blott[ing] out the essence of a substantial defense"), and requires a showing of likely effect on outcome.

This brief survey underscores that generalized standards may be little more than a "semantic merry-go-round."[62] Our *Bruce* opinion was one formulation and other courts have used others — but in the last analysis they are necessarily limited efforts to describe that courts will condemn only a performance that is egregious and probably prejudicial. As put by Justice Kaplan in the Massachusetts *Saferian* case:

> *Whatever the attempted formulation of a standard in general terms, what is required in the actual process of decision of claims of ineffective assistance of counsel, and what our own decisions have sought to afford, is a discerning examination and appraisal of the specific circumstances of the given case to see whether there has been serious incompetency, inefficiency, or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer — and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence.*[63]

For the first condition of judicial intervention, *Saferian* speaks of "serious incompetency, inefficiency or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer." This may fairly be regarded as a refinement of the "gross incompetence" language of *Bruce.* The other condition is more important. *Bruce*required that the accused show that the deficiency "blotted out the essence of a substantial defense." But *Saferian* requires only that the accused show that counsel's deficiency "likely" deprived him "of an otherwise available, substantial ground of defense." This is an appropriate modification of *Bruce.*[64] Overarching concepts of justice tug on the court whenever it is seriously troubled by likelihood of injustice, even though there is no concrete establishment of injustice as a fact.

207*207 In effect this consideration was identified in *Bruce,* where the court noted that on direct appeal the accused would be held to a lesser showing than that required for collateral attack.*Bruce* was in harmony with a similar observation by Judge Fahy, dissenting in *Mitchell.*[65] In general, including matters totally unrelated to performance of counsel, a federal appellate court has statutory authority to reverse convictions when this is "just under the circumstances."[66]Exercise of this authority may depend in some measure on a concern over the way the case was handled. It does not depend on a determination that there has been a lack of "effective assistance of counsel" in the constitutional sense. Indeed, in the *Dyer* case,[67] cited in*Bruce,*[68] the court noted counsel's general competence and the difficulties of "trying circumstances" and "an uncooperative client." Nonetheless, the court had "misgivings" as to the adequacy of the defense "in net result" that caused it to reverse, on direct appeal, without any statement that the defendant had been denied effective assistance of counsel. On direct appeal the appellate court has latitude to exercise its supervisory function over the administration of justice in the court(s) subject to its review.[69] That latitude is not fully available when a challenge is presented on collateral attack.[70]

Collateral attack requires a showing of violation of constitutional rights — save for the "exceptional circumstance" of a claim that both could not have been raised on appeal and that constituted a "fundamental defect which inherently results in a complete miscarriage of justice."[71] It may also be noted, without now attempting any doctrinal declarations, that the availability of collateral attack is also affected by concerns such as respect for finality of judgments and conservation of judicial resources, concerns that emerged in *Stone v. Powell.*[72] Although the distinction between direct appeal and collateral attack, in terms of scope of cognizable problems, was not made the subject of separate discussion and justification in *Bruce,* it has been reaffirmed[73] and has current vitality.

Although direct appeal gives more latitude to the court, the difference is likely 208*208 one of application rather than formulation of standards. On direct appeal, as on collateral attack, the court is still concerned with the two considerations focused in *Saferian.* The claimed inadequacy must be a serious incompetency that falls measurably below the performance ordinarily expected of fallible lawyers. And the accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial. Once the appellant has made this initial showing, the burden passes to the government, and the conviction cannot survive unless the government demonstrates that it is not tainted by the deficiency, and that in fact no prejudice resulted.[74]

The need for a criterion that requires defendant to show at least probable effect on outcome has been identified even by judges seeking to liberalize Sixth Amendment protection.[75] Such a criterion achieves a realistic resolution of the pertinent legal tensions.

The court's appraisal requires a judgmental rather than a categorical approach. It must be wary lest its inquiry and standards undercut the sensitive relationship between attorney and client and tear the fabric of the adversary system. A defense counsel's representation of a client encompasses an almost infinite variety of situations that call for the exercise of professional judgment. A shortfall by defense counsel that is perceptible but is modest rather than egregious is no basis for judicial interposition — as appears from *Agurs, Bruce, Saferian* and the other cases cited. This limitation preserves the freedom of counsel to make quick judgments, and avoids the possibility that there will be frequent and wide-ranging inquiries into the information and reasoning that prompted counsel to pursue a given course. The problem is complicated by the fact that these decisions often derive from the information supplied by the client.

For the law to encourage a wide-ranging inquiry, even after trial, into the conduct of defense counsel would undercut the fundamental premises of the trial process and transform its essential nature.[76] The resulting upheaval in the role of the trial judge, widely recognized as a serious difficulty,[77] would in itself call into question any broad doctrine of ineffective assistance. And the prosecution in a criminal case would in turn ask to oversee defense counsel's conduct at trial — to ensure against reversal.

An even more difficult problem would be posed by the supervision of defense counsel's development of the case before trial. Even if we had the authority, it would be unwise to embark upon a doctrine that would open the door to a fundamental reordering of the adversary system into a system more inquisitorial in nature. The adversary system, warts and all, has worked to provide salutary protection for the rights of the accused. Efforts to improve the 209*209performance of defense counsel should not imperil that protection.

The approach we have outlined is congruent with most of the decisions of this court, including*United States v. Pinkney*.[78] An exception should be noted for *DeCoster I* — not for the result, but some of the broad observations.

D. The Duty To Investigate

The duty to investigate is a subset of the overall duty of defense counsel. A conscientious defense attorney will naturally investigate possible defenses. As part of this process, witnesses who may have information relevant to the case should be identified and interviewed. However, any claim of ineffectiveness must turn not on abstractions as to duty, but on an appraisal of consequences. And the development of the case before trial is an area of peculiar sensitivity in the attorney/client relationship.

Some failures to investigate may be so egregious as to command judicial correction without more. In *McQueen v. Swenson,*[79] the defense counsel had adopted a blanket policy which he adhered to even in the face of requests by the defendant that certain persons be interviewed. This was held "an absurd and dangerous policy which can only be viewed as an abdication — not an exercise — of his professional judgment."[80] Counsel's defect was subject to a simple, workable remedy and thus was a proper subject for judicial intervention.

Most claims of failure to investigate will not involve such clearcut situations. They must be appraised in light of the information available to the attorney. A claim of failure to interview a witness may sound impressive in the abstract, but it cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel. This is the teaching of our 1974 *Clayborne* opinion.[81] As Judge MacKinnon, joined by Judge McGowan, and writing over Judge Bazelon's dissent, pointed out: "[T]rial counsel had their own clients as sources of information."[82]

Realistically, a defense attorney develops his case in large part from information supplied by his client. As the Third Circuit indicated in *Green,*[83] 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 210*210relationship, and should be reserved for extreme cases where an effect on the outcome can be demonstrated. And so in *Matthews v. United States,*[84] involving a claim that counsel was ineffective in failing to introduce evidence or call witnesses, then Circuit Judge Stevens focused on the failure to allege that such witnesses or evidence existed, adding:

> *Petitioners have not told us what was said in their conference with counsel. Perhaps, for all we know, they merely explained that they had indeed forged the 35 ballot applications which were placed in evidence by the government and that they were indeed guilty as charged. Surely, if that were the case, counsel had no duty to search for witnesses, expert or otherwise, who might falsely testify to the contrary.*[85]

Our reflections on this point are congruent with the standard applicable when counsel for an indigent defendant seeks funds to obtain investigative services to assist in the preparation of the defense. While in general effective assistance of counsel embraces such an allowance it is far from automatic and "depends on the facts and circumstances of a particular case," with funds provided when counsel makes a showing of necessity of the specific subjects to be explored and of their likely materiality.[86]

Finally, claims based on a duty to investigate must be considered in light of the strength of the government's case. "When, . . . the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do."[87] It is all well and good for a millionaire to retain counsel with the instruction to "leave not the smallest stone unturned." But it goes too far to insist that such a course is a general constitutional mandate.

E. Appellant's Claims

We turn from general questions of principle and approach to the matter of application to the case at hand. As focused in the remand proceedings, appellant makes some seven allegations of defective performance by his counsel.[88] Following three days of 211*211 hearings, Judge Waddy found that appellant had not been denied the effective assistance of counsel. We affirm. While we do not commend counsel's performance, we have no serious misgivings that would lead us to reverse in the interest of justice.

1. Failure To Interview Potential Witnesses

We turn first to the claim that defense counsel failed to interview potential witnesses prior to trial. This is the claim that is most vigorously pressed on appeal, and by its nature requires somewhat detailed development.

Admittedly, defense counsel did not attempt prior to trial to interview the three prosecution witnesses — complainant Crump, and Officers Box and Ehler. However, at appellant's preliminary hearing counsel did hear Officer Ehler testify that he and Officer Box were together when they witnessed the crime, and that Box pursued appellant to the hotel where he was apprehended. Ehler further testified that within minutes after the assault, Crump had identified appellant in the hotel lobby — a point appellant has never contested. Defense counsel was aware, therefore, of the main points of the likely testimony of the witnesses at trial.

Appellant attacks defense counsel's failure to interview the desk clerk at the D.C. Annex Hotel, and his failure to make an effort to locate and interview potential eyewitnesses that might have been in the hotel at the time appellant entered and was apprehended. These are abstractions without context. Appellant himself testified at trial that he had just entered the lobby when he was arrested. Counsel was aware that there would be, as indeed there was, testimony of the police officer that he had not lost sight of appellant from the time of the robbery to the time of his apprehension. Appellant makes no claim that he advised counsel of any occurrence that would generate a significant issue as to his entry into the hotel.

If given an unrestricted budget and freed of any constraints as to probable materiality or accountability, a lawyer might have cheerfully logged in many hours looking for the legal equivalent of a needle in a haystack. As already noted, a millionaire might have retained counsel to leave not a single stone unturned. However, a defendant is not entitled to perfection but to basic fairness.[89] In the real world, expenditure of time and effort is dependent on a reasonable indication of materiality. In the circumstances of this case, appellant has singularly failed to make a meaningful demonstration that counsel's omission probably affected the outcome of the trial. It is argued that potential witnesses might have testified to appellant's demeanor as he entered the lobby. This abstract possibility is not only speculative but remote in the extreme. It cannot fairly be said to undercut materially the positive police testimony.

Appellant goes on to challenge counsel's failure to seek out and interview potential witnesses in the Golden Gate Club. It would be extravagant to require counsel to seek out the anonymous patrons of a bar in order to testify that two persons were having a drink — a point that is, incidentally, undisputed as far as appellant and Crump are concerned. Appellant makes no offer as to what more could have been learned.

We turn next to the failure of defense counsel to interview appellant's co-defendants, Eley and Taylor, prior to trial, and his belated interview of Eley shortly before Eley testified on the second day of trial.

212*212 The record reveals that appellant consistently maintained to his attorney that his defense was alibi[90] — that he had not been present at the scene of the crime, but rather had returned directly to the hotel from the bar where he had had a drink with Crump. This was the essence of appellant's eventual testimony at trial.

We may assume for present purposes that appellant's lawyer should have made some timely effort prior to trial to learn of the accounts of the co-defendants, beginning with consultation with their counsel. However, counsel subsequently did interview Eley and called him to the stand. At this time, be it noted, appellant had recently written to his counsel and raised a possible self-defense claim, altering his previous account (that he had left Crump in the bar) to claim that outside the bar Crump had assaulted him, and that Eley and Taylor would testify that they had come to his aid in fighting off Crump.

At the insistence of appellant, Eley was subpoenaed to appear at trial.[91] Eley, who was in jail, was brought to the courthouse in the same bus as Decoster and placed in the cellblock behind the courtroom with Decoster. At the remand hearing, defense trial counsel testified that he had interviewed Eley, and that Eley had told him Decoster was not present at the scene of the crime. This narrative was consistent with Decoster's trial testimony, and defense counsel called Eley as a witness. On the stand, however, Eley gave a different account, testifying that he had seen Crump and Decoster fighting. At the remand hearing Decoster and Eley both admitted that counsel had visited the cellblock prior to calling Eley as a witness. Decoster stated that he could not recall whether counsel had interviewed Eley, and Eley denied that he had spoken to counsel. The District Court found Eley's testimony "incredible" and credited the testimony of defense counsel as to his interview of Eley.

As already indicated, we do not approve the belated effort to interview the co-defendants. However, appellant has not demonstrated a likelihood that counsel's omission affected the outcome of trial. Counsel did interview Eley, and at a time when Eley could at least be asked to exculpate appellant without fear of self-injury, for by this time Eley's own fate was set, following the plea of guilty he had made during the period appellant had eloped. Appellant was insisting that Eley be called, and Eley's interview provided a glimmer of hope of corroborating appellant against a phalanx of credible prosecution witness. Neither appellant nor his counsel was in an enviable position at any time. Although appellant now claims ineffective assistance of counsel, what this conviction reflects is the clear-cut prosecution evidence, appellant's weak contradiction, and Eley's turnabout.

As a variant on the claim of failure to investigate, appellant points to counsel's apparent confusion at the beginning of the trial. After defense counsel had announced "ready" for trial, the government demanded the names of alibi witnesses. Counsel stated that he might present alibi witnesses, but he sought the full twenty day period permitted by

local rules to respond to such a demand. When this was denied, defense counsel announced he would proceed without alibi witnesses.

The effort of defense counsel to keep his options open was hardly unusual, but even if this indicated uncertainty as to theory of defense, some degree of confusion would not be unexpected in view of appellant's shifting accounts and demands. In any event, there is no indication of likely effect on outcome. Counsel's responses came before 213*213 the jury was impanelled. At the trial, counsel did call Eley as a witness he understood would support defendant's alibi defense.

2. Other Claims of Ineffective Assistance

As to appellant's other claims, the District Court's findings, while framed in response to the*Decoster I* mandate, are generally in accord with the principles we have developed in this opinion.

a. *The Bond Review Motion.* Appellant was arrested on May 29, 1970. A judge of the District of Columbia Court of General Sessions set bond at $5,000. Appellant could not meet that figure and remained incarcerated. On October 12, 1970, the Black Man's Development Center accepted third-party custody. On November 9, 1970, counsel filed a motion for bond review in the District Court. The issue was disputed at the remand hearing, but Judge Waddy apparently found that this motion had included the condition of third-party custody. However, it was not until December 8, 1970, that defense counsel filed in the correct court (General Sessions) a motion for bond review explicitly reflecting the third-party custody condition.[92] Appellant was eventually released on January 14, 1971.

The District Court found that counsel's deficiencies did not affect the result of the trial in the slightest degree, did not "limit defendant's ability to contact witnesses and inform his counsel of them if there were any; nor did it frustrate his defense, nor affect his guilt or innocence." While lack of diligence in obtaining a criminal defendant's pretrial release cannot be condoned, reversal of a conviction is not the appropriate remedy where the trial itself was not affected by the default.[93]

b. *Failure To Obtain Transcript.* Defense counsel did not obtain a copy of the transcript of the preliminary hearing. At the remand hearing, he testified that it was his normal practice to read the prosecutor's copy. This practice, and their cooperation, was substantiated by the prosecutors' testimony. We cannot say that counsel's practice was impermissible. He had not only access to a transcript, but his own memory of the preliminary hearing that he had attended. Appellant argues that Officer Ehler's testimony at trial differed from his testimony at the preliminary hearing on the exact role of each of the defendants in the robbery. These variations were not "substantial" —

Judge Waddy's term — insofar as the alibi defense was concerned. There is no showing of likely impact on the trial result.

c. *Offer To Waive Jury Trial.* Appellant's effort to condemn defense counsel for the offer to waive jury trial is frivolous. Appellant was in fact tried by a jury. Moreover, as the District Court found, appellant himself demanded that his attorney offer to waive jury trial, and appellant persisted in this demand even after the court advised him of his constitutional rights and explained that the court had heard part of the evidence against him.

We are moved to add a word. The trial judge, the late Honorable Joseph Waddy, had a distinguished record at the bar as a compassionate and effective defense counsel, and on the bench as a patient, fair and conscientious judge. Appellant's wish for a trial by him was neither unusual nor such as to require conscientious counsel to set himself in opposition to his client.

d. *Waiver of Opening Statement and Failure To See Sentence Properly Executed.* As the District Court found, there is no merit in the claims of ineffectiveness on 214*214 the ground of waiver of opening statement and failure to see that appellant's sentence was properly executed. Waiver of an opening statement is a tactical decision. There was no effort to demonstrate that the waiver had, or was likely to have had, a substantial effect on the outcome. As to the sentencing issue, defense trial counsel had withdrawn from the case before the issue had arisen, an appeal had been taken, and appellate counsel had been appointed. And of course an omission would justify at most a reconsideration of sentence, not a reversal of the conviction.[94]

F. Conclusion

The several claims, both seriatim and in combination, do not raise in our minds serious misgivings as to whether justice was done. We certainly do not commend counsel's performance as ideal. Yet some of the complaints border on the frivolous. And ultimately there was a total failure of appellant to show that it was likely that counsel's deficiencies had any effect on the outcome of this trial. As the District Court found:

> *While it may be that defense counsel herein was lax in his duty to conduct as thorough a factual investigation as possible, we find that counsel did raise the only defense available to him, which defense was putting the government to its proof.*

In the absence of a governmental impediment to effective assistance of counsel, the court cannot lightly vacate a conviction on the basis of its own appraisal of the performance of defense counsel. The door is open, but only for cases of grievous deficiency and where the court has serious misgivings that justice has not been done. Our adversary system will be tortured out of shape if defense counsel must

contemplate from the beginning that the judge will subsequently retrace his conversations with his client, and his evolving perceptions of the problems and possibilities presented by the assignment.

We support efforts to upgrade performance of defense trial counsel. We commend the programs of the last decade in clinical education for law students. We approve the American Bar Association's efforts to clarify the defense and prosecution functions. More should be done. But more is not better if it undercuts the adversary system.

So far as the present case is concerned, ultimately dispositive of the appeal are the strength of the government's case and failure of appellant to demonstrate a likelihood of effect on the outcome.

* * * * * *

As Jan Deutsch has recently noted, it is often in the nature of a dissent to present a political statement.[95]

Judge Bazelon's characteristic eloquence destines his remarks to stand as an oft-quoted expression of aspirations for the legal system. In our view, that eloquence is not matched by tenable standards.

1. Starting from the ABA Standards Relating to the Defense Function,[96] Judge Bazelon propounds a list of "duties owed by counsel to client" as representing the "minimum requirements of competent performance."[97] The ABA issued its standards — dropping the term "minimum" — as a "blend of description of function, functional guidelines, ethical guidelines and recommended techniques."[98] They were not designed as a hard and fast checklist of duties for defense counsel. In application there must be room for judgment, and for consideration of context.

Our analytic structure permits reversal in the interest of justice, but without inappropriate rigidity. The claimed deficiency 215*215 must fall measurably below accepted standards. To be "below average" is not enough, for that is self-evidently the case half the time. The standard of shortfall is necessarily subjective, but it cannot be established merely by showing that counsel's acts or omissions deviated from a checklist of standards.

What is all-important is significance in terms of context. This has been understood by virtually every court and judge that has spoken to the issue.[99] We resolve the problem of taking context into account without imposing an undue burden on the defense. We do not require that defendant bear the burden of proving actual prejudice.[100] What defendant must demonstrate is a likelihood of effect on the outcome. In that event, the

government would have the burden of showing that there was in fact no prejudice in the particular case.

Judge Bazelon qualifies his formulation by asserting that his "checklist" does not compel automatic reversal, as it applies only if the violation is "substantial." In *DeCoster I,* the meaning of "substantial" was left ambiguous, but a fair reading of the opinion suggests that it referred to the magnitude of the violation, either in terms of egregiousness or frequency, rather than to the violation's impact or likely impact. In Judge Bazelon's panel opinion in *Decoster II* — later vacated by the en banc order — the defendant's burden was expanded to include a reference to impact. Judge Bazelon stated that *Pinkney*[101] made clear that "for a violation to be substantial, it must [have been] `consequential,' that is, it in some way must have impaired the defense."[102] Judge Bazelon's dissent now appears to recede from the concept of burden on defendant to show impairment of the defense. While Judge Bazelon's dissent acknowledges that "the `reasonably competent' attorney must tailor his actions to fit the unique circumstances presented by a given case,"[103] defendant's nominal burden to show "substantiality" is structured so that, realistically, deviation from the checklist makes out a prima facie case, leaving the actual burden on the government (or defense trial counsel) to show that the departure was "excusable" or "justifiable." Judge Bazelon's difficulties with the substantiality concept suggest that it is unsound to make this the analytical cutting edge.

Judge Bazelon recognizes that the government can always defend by showing beyond a reasonable doubt that the violation was harmless — a rule prescribed by *Chapman*[104] even for established constitutional violations. The realistic thrust of Judge Bazelon's approach, however, is a rule structured toward a conclusion of prejudice from any deviation from the checklist of standards concerning preparation, whatever 216*216 the likely or actual consequence. Omissions of investigation lead to new trials on the rationale that one can never be certain what might have happened had counsel performed better. A new trial is needed if exculpatory information might have been turned up (obviously), and also if the fruits of the investigation would have proved neutral or even inculpatory, for defense counsel could have been in a stronger position to lead his client to plead guilty. This kind of speculation renders no error harmless.

3. The crucial difference between our views of this case is not the shortfall of counsel so much as the analysis of effect on outcome. The critical point is the duty to investigate. Since the defendant's account to his counsel of his entry into the hotel was so close to that of the police, the speculation that something might have been turned up by interviewing the hotel clerk is tantamount to an obligation to turn over each and every stone. This is even clearer for the extreme suggestion that defense counsel should have made inquiries, of persons unknown, at the bar where defendant and the victim were drinking.

There is more force to the objection that counsel rested with the preliminary hearing, and did not interview the policemen or the victim. However, a notably conscientious trial judge has found that there was no effect on outcome. Finally, co-defendant Eley was interviewed prior to trial. Eley's damaging testimony on the witness stand was a turnabout, defense trial counsel submitted. When one also factors in the reality of the

turnabout in defendant's own statements to counsel, the notion that counsel's shortfall contributed to the outcome is comminuted.

4. Judge Bazelon's premise is that the Sixth Amendment dictates an inevitable progression toward categorical rules governing the assistance of counsel. The Supreme Court decisions, however, establish a variable and judgmental approach depending on the nature of the claimed deprivation of the right. In particular, *Chambers v. Maroney*[105] clearly, if briefly, rejected the proposition that *per se* rules were appropriate, and implicitly accepted an outcome requirement. In the cases where the Court rejected any kind of prejudice requirement,[106] the violation could easily be remedied by a categorical prohibition of a state-erected impediment to effective assistance. Those cases did not involve intrusion into the more sensitive area of pretrial preparation. We are constrained by *Chambers* and the signals in *Agurs.*[107] In the law, "leadership requires lieutenants as well as captains."[108] On an intermediate court we have some latitude to initiate approaches and to interpret Supreme Court decisions, but we must abide by their constraints.

5. Judge Bazelon is animated by a view of the adversary system as so impaired in practice as to warrant a thorough reordering, with extensive supervision by the trial judge through a pretrial "checklist" to ensure that counsel has met his duties of preparation, and oversight of the conduct of the trial. The manifest consequence would be inevitable and increasing intrusion into the development and presentation of the defense case by the trial judge, and (out of self-protection) by the prosecution.

The adversary system is neither sacrosanct nor impervious to change. But Judge Bazelon has not pointed to any system — let alone the inquisitorial system of the Continent — that guarantees better protection against injustice. We do not think he has made a case for the drastic overhaul of a system that historically has heightened protection 217*217 of the accused. Perhaps the spectre of disruption will lead to increased appropriations to the criminal justice system, but such a tactical approach to the judicial function would be perilous.

6. Starting with *Bruce*[109] in 1967, this circuit has evolved and refined Sixth Amendment protections against the ineffectiveness of counsel. Judge Bazelon fashioned an important advance in the ruling of *DeCoster I*[110] that established a procedure by which the trial court could take a fresh look within the structure of a direct appeal.[111] This opinion modifies the*Bruce* requirement of a showing that a substantial defense has in fact been "blotted out" by requiring only a showing of a likelihood of effect on outcome. We cannot accept the more radical departure outlined in the *Decoster II* panel opinion and reiterated in the dissent.

* * * * * *

The concurring opinion subsequently received from Judge Robinson is subject to the comments addressed to Judge Bazelon's dissenting opinion insofar as those two opinions are congruent. In key aspects the concurring opinion differs from Judge Bazelon's dissent, notably Judge Robinson's appraisal[112] of the limited utility of the checklist approach of *DeCoster I,* and basically his assessment of the particular case before us.

* * * * * *

The judges of this court are emphatically not indifferent to the plight of the poor in the criminal justice system. Certainly there is need for the allocation of additional resources. Certainly there is need to cull out incompetent counsel or to call them to account. Responses are primarily required from the bodies that can supply resources — the legislature and the bar. Judge Bazelon's bold but single-valued approach would tolerate disruption of the administration of justice and a reordering of the adversary system, with little guarantee of improved performance and impassivity as to the uncharted and likely noxious consequences.

Our approach toward the minimum legal obligations of our democratic society to ward off injustice may be more earthbound, but in our view it is more salutary.

Affirmed.

MacKINNON, Circuit Judge, with whom TAMM and ROBB, Circuit Judges, join, concurring.

This case has a tortuous history. It started with a *sua sponte* remand from this Court to the District Court for determination of issues that were not raised on appeal and which were not apparent in the record. *United States v. DeCoster,* 159 U.S.App. D.C. 326, 487 F.2d 1197 (1973) [*DeCoster I*]. I dissented in part. On remand, the trial judge (Waddy, J.) held an extensive hearing. His findings and conclusions did not support the preconceived fears of the majority of the appellate panel that counsel had been ineffective. However, on appeal in a far reaching opinion that attempted to write new law the majority of the panel set aside Judge Waddy's findings and conclusions and reversed the conviction. *United States v. Decoster,* 199 U.S.App.D.C. ___, 624 F.2d 196 (1976), [*Decoster II*]. The factual and legal deficiencies of the reversal of Decoster's

conviction by the panel were set forth at length in my dissent, 199 U.S. App.D.C. ___, 624 F.2d 196, and that opinion covers a number of points that need not be covered here. The full court subsequently ordered *en banc* rehearing of the case. Now the court*en banc* affirms the conviction.

In Judge Leventhal's plurality opinion, which was prepared after my earlier original 218*218 draft, many issues raised by the earlier panel majority are now subordinated to a discussion of more general law, and the specific factual issues of this case, which support the finding of guilt and the effectiveness of counsel, receive less attention. I reach the same result as the opinions by Judges Leventhal and Robinson, but on several issues those opinions do not make as complete and conclusive a case against the theories and analysis of the dissent as the record supports, and, in some respects, I differ from their analysis. However, since such theories are now relegated to a dissent from an *en banc* opinion the need for an opinion to completely refute them is diminished. Thus, to avoid repetition, I have withdrawn a large portion of my original opinion and instead will make a few observations with respect to the dissent beyond those of Judge Leventhal's opinion, and discuss the issues surrounding the burden of proof which I believe should be set forth with greater clarity and precision. I stand by my earlier statements which are accurately quoted in the dissent. I vote to affirm the conviction.

I. THE BURDEN OF PROOF IN SIXTH AMENDMENT RIGHT TO COUNSEL CASES

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."[1] In addition to the right to not be *actually* denied the "Assistance of Counsel" it has long been recognized that a defendant has a right to the*effective* assistance of counsel, for courts have understood that a defense may be so ineffective as to constitute a *constructive* denial of the assistance of counsel. Obviously, the two types of cases are composed of radically different essential elements. This case turns on the nature of the showing that must be made in order to reverse a conviction because of alleged *ineffective*representation. I believe that *a defendant who alleges that his counsel was ineffective must show that substantial prejudice to his defense resulted from the alleged violation of duty owed him by counsel.*[2] I base my conclusion on four considerations: (1) precedent in this Circuit; (2) the Supreme Court's approach in the analogous Fifth Amendment area; (3) traditional common law principles governing the burden of proof; and (4) respect for the adversary system.

A. Precedent

1. Before DeCoster I

The early cases in this Circuit held that the Sixth Amendment only established a 219*219defendant's right to appointment of competent counsel. Subsequent negligence of that counsel did not implicate the Sixth Amendment. However, the Fifth Amendment's due process clause guarantees the accused a fair trial, and the early cases recognized that the performance of counsel might have been so inept that the defendant did not receive a fair trial. Thus, initially, the adequacy of counsel was considered to involve a Fifth Amendment question.[3]

The Sixth Amendment, however, guarantees more than the appointment of competent counsel. By its terms, one has a right to "Assistance of Counsel in his defence." Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to "have Assistance of Counsel" is denied. Thus, in *Scott v. United States,* 138 U.S. App.D.C. 339, 340, 427 F.2d 609, 610 (1970) we recognized that the right to adequate assistance of counsel is derived from the Sixth Amendment as well as from the Fifth.[4]

In addition to applying the Sixth Amendment to the adequate assistance of counsel area, the pre-*DeCoster I* cases established two principles. First, they delineated a constitutional standard by which the adequacy of attorney representation can be tested. Second, they clearly allocated the burden of proof in adequacy of representation cases.

(a) *The Standard.* In our earliest decisions on the subject, we stated that a defendant's constitutional right to adequate representation is violated when counsel is shown to be so inept that the trial is a "farce and a mockery of justice."[5] Later cases stated that the "farce and mockery of justice" test was meant as an example of a constitutional violation; it was not intended to restrict the Sixth Amendment's application to only those cases in which the trial could be called a "farce." *See Mitchell v. United States,* 104 U.S.App.D.C. 57, 63, 259 F.2d 787, 793 (1958).[6]

220*220 Once the ambiguity surrounding the "farce and mockery of justice" test was cleared up, this court consistently held that a defendant's right to assistance of counsel

is violated when his attorney's ineptness substantially prejudiced defendant's ability to receive a fair trial. In*United States v. Hammonds,* 138 U.S.App.D.C. 166, 169, 425 F.2d 597, 600 (1970) we stated that "`[t]he question * * * is whether [counsel's] representation was so ineffective that Appellant was denied a fair trial.'" Similarly, in *Scott v. United States,* 138 U.S.App.D.C. 339, 340, 427 F.2d 609, 610 (1970) the court held that the "appropriate standard for ineffective assistance of counsel . . . is whether gross incompetence blotted out the essence of a substantial defense."

(b) *Burden of Proof.* The pre-*DeCoster I* cases also established that the burden rests on the defendant to show that he did not receive a fair trial. In *Bruce v. United States,* 126 U.S.App.D.C. 336, 339-40, 379 F.2d 113, 116-17, 121 (1967) (emphasis added) Judge Leventhal wrote for the Court:

> *In earlier cases it was said that a claim based on counsel's incompetence cannot prevail unless the trial has been rendered a mockery and a farce. These words are not to be taken literally, but rather as a vivid description of the principle thatthe accused has a heavy burden in showing requisite unfairness. Although the cases are rare and extraordinary, it appears that an accused may obtain relief under 28 U.S.C. § 2255 if he shows that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense either in the District Court or on appeal.*
>
> . . . . .
>
> *A claim of ineffective assistance of counsel might be made out if the wishes of the appellant were in fact diverted by clearly erroneous legal advice and he was substantially prejudiced thereby.*

221*221 The defendant in *Bruce* was seeking habeas corpus release. Since his constitutional claim was made as a collateral attack on his conviction, Judge Leventhal acknowledged that a "more powerful" factual showing was necessary than would have been required were defendant seeking a new trial on direct appeal.[7] But the fact that *Bruce* was a collateral attack case does not denigrate the relevance of its holding that *the defendant bears the burden of showing prejudice.*[8]

Judge Leventhal in a concurring opinion filed on petition for rehearing in *Matthews v. United States,* 145 U.S.App.D.C. 323, 449 F.2d 985 (1971) reiterated that the defendant must show prejudice. He wrote:

> *I have taken the trouble of outlining the prejudice I think occurred, because I am by no means of the view, as suggested in the Petition for Rehearing, that in these cases no possibility of prejudice need be shown. Where defendant has not been provided with counsel, that fact in and of itself establishes the need for reversal without regard to any other possibility of prejudice. Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 86 L.Ed. 680 (1942), but when the claim is posed in terms of ineffective assistance of counsel, then I think the ineffectiveness has to be measured in terms of whether the attorney has in effect blotted out the substance of a defense, Bruce v. United States, 126 U.S.App.D.C. 336, 340, 379 F.2d 113, 117 (1967).*

145 U.S.App.D.C. at 332, 449 F.2d at 994. This excerpt expresses the basic difference between those cases in which the defendant was *actually* denied counsel and those in which it is asserted that his counsel was ineffective: in the ineffectiveness types of claims the burden of proving prejudice rests on the defendant.

Judge Fahy's majority opinion in *Matthews,* joined by Judge Wright, rested explicitly on *United States v. Hammonds,* 138 U.S.App.D.C. 166, 425 F.2d 597 (1970). *Hammonds,* which involved a direct appeal, reaffirmed the earlier case law in this circuit that required the defendant to show prejudice. 138 U.S.App.D.C. at 169, 425 F.2d at 600. *Hammonds* was decided in favor of the defendant. But this was because "[a]ppellant ha[d] sustained *his burden* of establishing his claim that he was deprived of his constitutional right to effective assistance of counsel." 138 U.S.App.D.C. at 173, 425 F.2d at 604 (emphasis added).[9]

222*222 *Hammonds* relied heavily on then Judge (now Chief Justice) Burger's opinion for the court in *Harried v. United States,* 128 U.S. App.D.C. 330, 389 F.2d 281 (1967). Though *Harried*involved a direct appeal, the court relied on *Bruce, supra,* and *Mitchell, supra,* and explicitly stated that the

> *burden on the Appellant to establish his claim of ineffective assistance of counsel is heavy. The question . . . is whether his representation was so ineffective that appellant was denied a fair trial.*

128 U.S.App.D.C. at 333-34, 389 F.2d at 284-85 (citations omitted) (emphasis added).

Finally, in *Scott v. United States,* 138 U.S.App.D.C. 339, 340, 427 F.2d 609, 610 (1970) the court held that the District of Columbia Court of Appeals properly applied the "standard in*Bruce*" in a direct appeal case. *Scott* is significant both because it is a direct appeal case and because it was the first case to acknowledge that inadequate assistance of counsel claims have Sixth Amendment underpinnings. By relying on *Bruce,* the *Scott* court held that in the Sixth Amendment context, as well as under the Fifth Amendment, the *burden is on the defendant* to show prejudice from the acts or omissions of his counsel.

To recapitulate, both the Fifth and the Sixth Amendments are implicated in cases involving alleged ineffectiveness of counsel. The Fifth Amendment is violated if counsel's performance is so inadequate that defendant is denied a fair trial. The Sixth Amendment is violated when the performance of counsel is so inadequate that, in effect, the required "Assistance of Counsel" in his behalf has not been afforded. Under either Amendment, the pre-*DeCoster I* cases indicate that *the defendant has the burden of showing that he was prejudiced by his counsel's inadequacy.* The *DeCoster I* opinion and subsequent cases in this Circuit do not abandon — nor do they provide a basis for abandoning — the decisions in this Circuit as to the burden of proof.[10]

2. DeCoster I

DeCoster I stated that under the Sixth Amendment an attorney has a duty to his client to be a diligent and conscientious advocate and to provide reasonably competent assistance. This standard of conduct is almost self evident. The court gave this general duty more specific content by listing some of counsel's responsibilities toward his client.[11]

223*223 No itemization of general duties, however, can serve as a check-off list of absolute, hard and fast rules such that the slightest deviation will constitute a constitutional error.[12] It would be wrong to construe *DeCoster I* as establishing such rigid guidelines. The duties listed in*DeCoster I* were phrased generally,[13] and most of them require the exercise of considerable judgment, discretion and adjustment to the widely varying facts of criminal cases. The borderline between the adequate assistance (required by the Constitution) and inadequate assistance may vary greatly with the factual circumstances of each case.[14] In recognition of this, the American Bar Association Standards for the Defense Function, which the *DeCoster I*guidelines incorporate by reference, explicitly provide that they are *not* intended "as criteria for judicial evaluation of the effectiveness of counsel to determine the validity of a conviction."[15]224*224 Thus, while counsel has certain general duties to his client, the exact nature of these duties varies with the case, and counsel's competent judgment exercised in the best interests of his client should be afforded great weight, as should that of the trial judge with his first hand knowledge of the proceedings. In short, whether counsel has breached his duty depends upon the facts in each case.

Once a defendant establishes a breach of duty by his counsel, *DeCoster I, supra,* still requires that the defendant demonstrate that this breach constitutes a "substantial violation."

> *If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government, "on which is cast the burden of proof once a violation of these 225*225 precepts is shown, can establish lack of prejudice thereby." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.1968).*

159 U.S.App.D.C. at 333, 487 F.2d at 1204 (emphasis added). The deficiencies in this formulation are set out in the plurality opinion. In addition, what was meant by "substantial violation" is not clearly articulated in *DeCoster I. United States v. Pinkney,* 177 U.S.App.D.C. 423, 543 F.2d 908 (1976), decided subsequently, indicates that "substantial violation" contemplates a showing that counsel's duty to the defendant was breached substantially and that this prejudiced the defendant.

In *Pinkney,* appellant alleged inadequate assistance of counsel. The court rejected Pinkney's claim, holding that a *DeCoster I* motion is one for a new trial in which the

defendant bears the same obligation to show prejudice to his cause as in any other new trial motion:

> *The vehicle [for raising an inadequate assistance of counsel claim], we said [inDeCoster I], was a motion for a new trial, obviously one presenting new evidence in the sense of evidence outside the record — in other words, a new-trial motion based on newly discovered evidence. An essential characteristic of such a motion is a disclosure of evidence portraying the movant's claim materially and resolutely, and evincing a capability of mounting a serious challenge. By the same token, a motion charging ineffective assistance of counsel must set forth evidence upon which the elements of a constitutionally deficient performance might properly be found.*

177 U.S.App.D.C. at 431, 543 F.2d at 916 [footnote omitted] (emphasis added). The court then cited several cases, each of which unambiguously states that a defendant must show prejudice to sustain his new trial motion.[16] According to *Pinkney,* therefore, 226*226 prejudice to the accused is a necessary element of a claim of a "constitutionally deficient performance" by counsel.[17]

In summary, under *DeCoster I* and our prior decisions, the defendant lacks a substantial claim unless he makes out a *prima facie* case showing (1) that counsel's constitutional duty toward him was breached and (2) that he suffered unfair prejudice as a result of that breach. The burden of proof to make this showing falls squarely on the defendant.[18]

B. Fifth Amendment Analysis

A defendant's right to adequate assistance of counsel is derived from both the Fifth and the Sixth Amendments. Therefore, the Supreme Court's treatment of cases involving purported violations of the Fifth Amendment is relevant. In such cases the Court has required that defendants prove prejudice.[19]

227*227 In *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), for example, petitioner claimed that his rights were violated when members of the jury heard news accounts about his case. The Supreme Court found no violation of his constitutional right:

> *Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury-selection process of which he complains permits an inference of actual prejudice.*

421 U.S. at 803, 95 S.Ct. at 2038 (emphasis added). The court thus refers to the two types of prejudice that must be shown — inherent and actual prejudice. In *Murphy,* the Court refused to presume that the trial was unfair. The defendant was required to bear

the initial burden of showing prejudice; only after such proof would the government be required to show the lack of prejudice or harmless error.

Similarly, in *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), which emanated from this court, defendant claimed that her rights were violated by prosecutor's failure to inform her of her victim's criminal record. The Supreme Court rejected this argument even though she had not been so informed:

> *[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial. . . .*
>
> *If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial.*

427 U.S. at 108, 112-13, 96 S.Ct. at 2400, 2402 (emphasis added). Since the victim's criminal activities did not cast doubt on the verdict, the defendant's conviction was upheld — obviously because of the defendant's failure to prove prejudice.

While *Agurs* does not explicitly deal with the burden of proof issue, it strongly indicates that the Supreme Court would be reluctant to presume the existence of a constitutional violation from the mere failure to comply with a single guideline where "there is no reasonable doubt about guilt." The *Agurs* court indicated that it was concerned with the "justice of the finding of guilt."427 U.S. at 112, 96 S.Ct. at 2401.[20] If the logic of the dissent here had been followed in*Agurs,* once it was shown that the government had not disclosed the victim's criminal record, the government would have been required to bear the burden of proving lack of prejudice to the defendant. The Supreme Court refused to impose such a completely impractical burden.

There will be a few cases in which, because of the inadequacy of counsel, exculpatory evidence is lost. But in light of Fifth Amendment cases like *Murphy* and *Agurs,* courts should be wary of declaring certain acts or omissions of counsel, without proof of prejudice, to be *per se* constitutional violations that in the absence of refutation are sufficient to negate a criminal conviction. Where the Sixth Amendment is relied upon, the defendant must always show by direct or indirect evidence that the complained of acts or omissions by counsel were the legal equivalent of the denial of his right "to have the Assistance of Counsel for his defence." That is what the Sixth Amendment is all about.

C. Common Law Principles

The dissent argues that once a violation of any duty is demonstrated, even though no prejudice is shown, the government has the burden of showing that the defendant was

not prejudiced. This shifting of the burden of proof from the proponent to the Government is inconsistent with common law principles.[21] In *Nader v. Allegheny Airlines, Inc.*, 167 U.S.App.D.C. 350, 361, 512 F.2d 527, 538 (1975), *rev'd on other* 228*228 *grounds*, 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976) we delineated two criteria for allocating the burden of persuasion.

> *[1] Although a plaintiff generally carries the burden of persuasion on each element of his cause of action, special circumstances may lead a court to shift the burden of persuasion to the defendant on some part of the claim. [2] One special circumstance commonly accepted is that the burden will be shifted where the material necessary to prove or disprove an element "lies particularly within the knowledge" of the defendant.*

167 U.S.App.D.C. at 361, 512 F.2d at 538. Thus, normally the burden should lie on the person pressing the claim;[22] an exception may be made when the other party has sole access to the facts.

In the instant case, Decoster has the primary access to the relevant facts; the government is highly restricted in its ability to discover them because of the attorney-client privilege and the Fifth Amendment privilege against self-incrimination. Moreover, normally it is the defendant who raises the inadequate assistance of counsel claim (here it was raised by the appellate court*sua sponte*). Therefore, the twin policies of placing the burden of proof on the person pressing the claim and placing the burden on the person with access to the facts are both satisfied by holding that Decoster bears the burden of proving a *prima facie* Sixth Amendment violation which includes a showing of prejudice.

D. Attorney-Client Relationship and the Adversary System

The formula suggested by the dissent for determining when a defendant has not received effective assistance of counsel — *presuming* prejudice from scanty evidence and then shifting the normal burden of proof to the Government to disprove the existence of prejudice — would have very detrimental consequences to the adversary system. The Government would be forced to attempt to produce proof entirely from the acts and privileged discussions of the accused and his counsel and to make its showing long after the trial, when memories have faded — as they have here.[23] In addition to creating an almost impenetrable obstacle to sustaining convictions in many cases, such requirement would lead to highly objectional intrusions into the adversary system in most cases. Shifting the burden to the Government would force it to get very involved in a relationship that it should stay out of.

If the Government were required to prove that its adversary defense counsel was adequate, it would be strongly motivated and well advised during a criminal trial, in order to protect the prospect of guilty verdicts, to oversee the major decisions and activities of defense counsel and the accused that affect the trial. Performing this function would, as a practical matter, require the prosecution to probe what has heretofore been a sacrosanct area — the highly confidential relationship between a criminal defendant and his lawyer. Some 229*229 tension in this area unavoidably exists when the defendant makes a *prima facie* showing of prejudicial conduct constituting a constitutional violation, and the Government seeks to rebut that showing. Presuming prejudice from certain minimal facts that do not constitute a full *prima facie* case and then switching the burden of proof to the Government (which has limited access to the defendant's information) to prove that no prejudice resulted would heighten that tension inexorably.

To the extent that the prosecutor during trial might implore the trial judge to correct or direct the decisions or acts of defense counsel, or the accused, to prevent presumptive prejudice which would redound against the Government (though it in no way participated in such conduct or decisions), the result could well be judicial supervision of many of the tactical trial decisions of defense counsel. The hazards of creating such a rule were described by Judge Prettyman in*Mitchell v. United States, supra:*

> *[T]he constitutional right of an accused to the assistance of counsel might well be destroyed if counsel's selections upon tactical problems were supervised by a judge. The accused is entitled to the trial judgment of his counsel, not the tactical opinions of the judge. Surely a judge should not share the confidences shared by client and counsel. An accused bound to tactical decisions approved by a judge would not get the due process of law we have heretofore known. And how absurd it would be for a trial judge to opine that such-and-such a course was ineffective or incompetent because it persuaded him (the judge) to decide thus-and-so adversely to the accused.*

104 U.S.App.D.C. at 63, 259 F.2d at 793. These difficulties can be avoided by leaving the burden of proof in most cases on the defendant to show substantial unfair prejudice from the acts or omissions of counsel. Such showing would constitute a *prima facie* case of a Sixth Amendment violation, and the burden of proceeding would then be cast on the Government to disprove the *prima facie* case and failing that the accused would prevail.[24]

E. Sixth Amendment Framework

To summarize, Sixth Amendment right to "assistance of counsel" cases can be divided into two categories: (1) those in which the accused is actually denied the assistance of 230*230counsel, and (2) those in which his constitutional right to the assistance of

counsel is denied by virtue of the ineffective representation that counsel rendered. The classic case involving the actual denial of counsel is *Gideon v. Wainwright*:[25] no defense counsel 231*231 was appointed. Other examples in which the assistance of counsel was actually denied include *Geders v. United States*[26] and *Herring v. New York*.[27] In both of those cases the defendant did not have the assistance of a lawyer at a critical stage in his trial.

The second category, which may be termed a constructive denial of counsel, includes cases in which defense counsel was present and able to participate in every aspect of the trial, but for one reason or another the defense presented is viewed as the equivalent of a denial of the constitutional right to the "assistance of counsel." Cases in which the defense lawyer was ineffective fall into this second category: though the defendant was actually represented, his lawyer's performance was so ineffective that it was tantamount to a denial of his constitutional right.

If a defendant is denied the actual assistance of counsel, his constitutional right is violated without any further showing. A showing of such denial is all the prejudice that the Constitution requires, so when he is denied the "presence and assistance" of counsel at a critical phase of his trial a defendant need not prove further exactly how he was harmed.[28] But cases where232*232 counsel was present and assisting, and which involve allegations that a defendant's constitutional right to assistance of counsel was constructively denied as a result of the defense lawyer's ineffectiveness, are different. In these cases the question is: was the attorney's performance so deficient as to constitute the equivalent of a denial of the accused's constitutional right? And in case after case involving an alleged constructive denial of the assistance of counsel it has been held that a lawyer's ineffectiveness is not tantamount to denial of the constitutional right to the assistance of counsel unless the defendant can show that he was prejudiced.[29] Therefore in order to establish that his lawyer's ineffectiveness amounted to a Sixth Amendment violation, a defendant must show substantial unfair prejudice to his defense resulting from a substantial violation of duty owed him by his counsel.

To illustrate: suppose defense counsel, as frequently happens in criminal cases, does not call any witnesses.[30] Such an allegation would have no force unless it were shown that witnesses to beneficial material facts exist and the lawyer's failure to produce their testimony worked some substantial unfair prejudice to defendant's cause. If the defendant makes the requisite*prima facie* showing of a substantial violation of the constitutional duty owed him by counsel that resulted in substantial unfair prejudice to his defense, the burden of proceeding shifts to the Government.[31] Then the Government has a right to show, for example, that the alleged witnesses did not exist or could not be located, or that counsel was given no indication that such witnesses did exist, or that the testimony of the witnesses was irrelevant or otherwise deficient.[32] If 233*233 despite the Government's effort to rebut the evidence presented by the defendant, the defendant eventually carries his burden — he demonstrates that a substantial violation of a duty owed him by counsel resulted in substantial unfair prejudice to his defense — then a constitutional violation has occurred.[33]

Applying this test to the instant case, it is clear that Decoster's Sixth Amendment right was not infringed. First, Decoster has great difficulty demonstrating that there was a substantial breach of duty by his lawyer. Judge Waddy's findings to the contrary have not been shown to be clearly erroneous. I agree that counsel is under an obligation to investigate non-fabricated defenses, but the facts here overwhelmingly support Judge Waddy's finding that the only possible defense for Decoster was to put the Government to its proof. From the entire record, it is my view that Decoster's lawyer concluded that he was guilty after: (1) participating in the preliminary hearing;[34] (2) six interviews with appellant;[35] (3) studying the government's file, to which he had access;[36] (4) reviewing the grand jury testimony;[37] (5) reading the transcript of the preliminary hearing;[38] and (6) receiving a letter from Decoster in which he admitted that he was fighting with the victim at the time of the robbery.[39] In 234*234 addition, counsel, who acted for all defendants at the preliminary hearing,[40] knew that both men who were with Decoster at the time of the robbery had pleaded guilty to that charge on June 18, 1971. Under such circumstances, an extensive investigation was not warranted.

More important, there is not a shred of evidence in the record suggesting that Decoster was prejudiced in any way by the conduct of his counsel. We now know, on the basis of Decoster's admission at sentencing on March 3, 1972, that he was guilty, and this is corroborated by a letter he wrote to the Judge which the court referred to at sentencing and which Decoster then acknowledged.[41] Even without Decoster's admissions, it would be hard to imagine a case with more certain proof of guilt and with less room for creditable contrary evidence. Two policemen actually observed Decoster committing the robbery in broad daylight; one of them chased him and *without losing sight of him,* arrested him. (The dissent shades the facts by stating that the police officers "found" Decoster. Dissent page ___ of 199 U.S.App.D.C., page 267 of 624 F.2d.) Decoster was identified on the spot by the victim and one of Decoster's confederates contradicted Decoster's alibi when he testified that Decoster was present at the scene of the robbery. With this factual background, it is not, and cannot be, contended that Decoster was innocent. Even the most extensive investigation could not have discovered exculpatory facts, for there were none to find. Since any failure on the part of defense counsel to investigate was not prejudicial to Decoster, Decoster's Sixth Amendment right to have the assistance of counsel was not violated.

II. THE DISSENT'S POSITION ON THE BURDEN OF PROOF

Since Decoster has been wholly unable to show that he was prejudiced as a result of his lawyer's alleged inadequacies, the dissent is forced to argue that the burden of proof is on the government to show that 235*235 Decoster was not prejudiced.[42] In addition to

DeCoster I[43] and the dissenting opinion in *Cooper v. Fitzharris,* 586 F.2d 1325 (9th Cir. 1978) (en banc),[44] which are obviously not controlling, my dissenting colleagues rely primarily on three cases:*Geders v. United States,*[45] *Holloway v. Arkansas,*[46] and *Chapman v. California.*[47] They conclude, on the basis of these decisions, that "[r]ecent Supreme Court decisions affirm that a distinct showing of prejudice is unnecessary to establish a Sixth Amendment violation."[48] That conclusion is unwarranted in the context of a claim based on *ineffective* assistance of counsel.

A. Geders v. United States

Geders is easily distinguished from this case. It was *not* based on ineffectiveness. In that case the defendant was not permitted to consult with his attorney during the overnight recess between his direct- and cross-examination. This prevented the accused from having the *actual*assistance of counsel during a critical stage of his trial. When a person is *actually* denied counsel at an important point in his trial, his constitutional right is violated without any further showing of prejudice. This case, which involves an alleged *constructive* denial of counsel because of the defense lawyer's ineffectiveness, involves different considerations.[49] Accordingly, *Geders* is not controlling here.

B. Holloway v. Arkansas

In *Holloway,* three defendants were charged in connection with a rape and robbery incident. The public defender who was appointed to represent all three defendants informed the court that his clients had conflicting interests, but the trial court insisted on joint representation. The Supreme Court reversed the defendants' convictions, holding "that whenever a trial court improperly requires joint representation over timely objection reversal is automatic."[50]

The facts in *Holloway* have a superficial similarity to those involved here. In both cases the defendants were actually represented by counsel throughout their trials. Nevertheless, the two reasons why the Supreme Court presumed that there was prejudice in *Holloway,* and dispensed with the requirement that the defendant show it, are plainly inapplicable here.

First, the Supreme Court noted that a defense counsel's statement that his clients have conflicting interests is extremely strong evidence that joint representation will prejudice

them by preventing their counsel from being able to fully represent one of them at all stages of the trial. Chief Justice Burger wrote:

> *[M]ost courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted.. .*
>
> *An "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." State v. Davis [110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973)]. Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. 236*236 Ibid. Finally, attorneys are officers of the court, and " `when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'" State v. Brazile [226 La. 254, 266, 75 So.2d 856, 860-61 (1954)]. We find these considerations persuasive.*

435 U.S. at 485-86, 98 S.Ct. at 1179-1180 (footnotes omitted). In effect, the Court was able to determine from counsel's statement that the accused had been denied full representation by his counsel because of the lawyer's conflicting loyalties. Since the conflict of interest creates a presumption of prejudice, a further showing of prejudice was not required.[51]

In addition, the Supreme Court recognized that it would be virtually impossible for an accused to show prejudice in the joint representation context.

> *[A] rule requiring a defendant to show that a conflict of interests — which he and his counsel tried to avoid by timely objections to the joint representation — prejudiced him in some specific fashion would not be susceptible of intelligent, even handed application. In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. Compare Chapman v. California, supra, [386 U.S.] at 24-26 [87 S.Ct. 824, at 828-829], with Hamling v. United States, 418 U.S. 87, 108 [94 S.Ct. 2887, 2902, 41 L.Ed.2d 590] (1974), and United States v. Valle-Valdez, 554 F.2d 911, 914-917 (CA9 1977). But in a case of joint representation of conflicting interests the evil — it bears repeating — is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.*

435 U.S. at 490-91, 98 S.Ct. at 1182.

These two reasons do not support a presumption of prejudice in cases that, like this one, involve allegations that defense counsel was ineffective. Unlike the joint representation cases, there is no showing that a defense lawyer's mistakes usually cause prejudice to an accused. This case is a good example in which a defendant was not even slightly harmed as a result of his counsel's alleged errors.

Perhaps more important, in cases involving alleged inadequacy of representation, it will not be as difficult for the defendant to prove prejudice. For example, if (as the dissent asserts) an attorney fails to undertake a thorough investigation, the defendant 237*237 could readily prove prejudice simply by showing that the evidence that would have been found was exculpatory. Unlike the joint representation cases, the defendant would not be forced to engage in "unguided speculation."[52]

In short, while the facts in *Holloway* (the trial court ignored counsel's warning that his clients had conflicting interests) establish inherent prejudice so that "a distinct showing of prejudice [was] unnecessary,"[53] that ruling does not constitute a precedent for presuming prejudice from a defendant's allegations that his counsel provided ineffective representation.

C. Chapman v. California

According to the dissent, *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) establishes that "the burden in each case rests squarely on the government to prove beyond a reasonable doubt that [the] error was harmless."[54] I have no quarrel with that interpretation of *Chapman*: once a constitutional error is proven the burden of proceeding does shift to the government to prove that the error is harmless. But it begs the question for the dissent to rely on *Chapman* here because *Chapman* does not address who has the burden of proof with respect to whether a constitutional error has been committed.

Before the burden of proof shifts to the government under *Chapman,* whatever prejudice the constitutional error involves must first be established by the claimant. Thus, in *Chapman* itself, the Government was not required to show that the error was harmless until the defendants had shown that a prejudicial error had been committed. Mr. Justice Black wrote:

> *Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.*

386 U.S. at 24, 87 S.Ct. at 828 (emphasis added). *Chapman,* therefore, only supports the dissent's position if one assumes that counsel's alleged breach of duty alone constitutes

a constitutional violation. Since that is the question at issue in this case, such an assumption is obviously inappropriate.

D. Chambers v. Maroney

While neither *Geders, Holloway,* nor *Chapman* is precedent for the view adopted by the dissent, another Supreme Court opinion, *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970), is strong authority for the rule that the burden of proving prejudice rests on the accused.[55] In *Chambers,* the defendant asserted that he "was not afforded the effective assistance of counsel" because his new counsel at his second trial[56] did not confer "with [him] until a few minutes before the second trial began." 399 U.S. at 53, 90 S.Ct. at 1982. The defendant contended that because his lawyer was "unprepared," he failed to make an adequate effort "to have [certain] guns and ammunition excluded from evidence." 399 U.S. at 54, 90 S.Ct. at 1982. The district court rejected petitioner's claim without a hearing and the court of appeals affirmed, noting that "the guns and other materials seized from the 238*238 car were admissible evidence." Id. In light of the defendant's inability to show that he was prejudiced, the Supreme Court (7-1) affirmed the conviction. Mr. Justice White wrote for the Court:

> *Unquestionably, the court should make every effort to effect early appointments of counsel in all cases. But we are not disposed to fashion a per se rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel.*

399 U.S. at 54, 90 S.Ct. at 1982-1983. From the foregoing it is obvious that a mere breach of duty to an accused is not a constitutional violation unless the defendant proves that he was prejudiced. If the principles advocated in the dissent had been applied in *Chambers,* then the failure of counsel to confer with the accused before trial (a violation of the American Bar Association guidelines) would have been sufficient to establish a constitutional error, thereby forcing the prosecution to prove beyond a reasonable doubt that the defendant was not prejudiced. Thus, *Chambers* is contrary to the basic contention of the dissent.[57]

III. THE PHILOSOPHY OF THE DISSENT

There are a great many assertions in the dissent that are not supported by the record and which are unsound factually, legally and logically. These are set forth in considerable detail in my dissent to the panel opinion in *Decoster II,* (1976), 199 U.S.App. D.C. ___, 624 F.2d 196. The plurality opinion ignores many of these and only partially deals with others. Lest silence be interpreted as recognizing their validity a few are hereinafter replied to.

A. Adequacy of Investigation

The principal contention of the dissent is that counsel's investigation was inadequate because certain witnesses or possible witnesses were not interviewed. The supposed witnesses fit into five categories: (1) witnesses at the Golden Gate Bar, (2) witnesses who were in the D.C. Annex, (3) the two policemen, (4) the victim, and (5) the co-defendants.

1. *Golden Gate Bar.* There is no controversy as to what happened in the bar; no proffer as to what witnesses in the bar could have said; and Decoster told his counsel, and so testified, that there was "nobody [in the bar] who could testify [he was] there."[58]

2. *D.C. Annex.* There is no dispute as to what transpired at the hotel, and there has never been any indication that exculpatory evidence could have been obtained from witnesses in the Annex.

3. *Policemen.* Counsel examined officer Ehler at the preliminary hearing.[59] In addition, the United States Attorney furnished Decoster's lawyer with all Jencks Act material and grand jury testimony in advance of the trial. From this, he knew that the testimony of all three of the Government's witnesses was substantially the same, and very prejudicial to defendant's case.

4. *Victim.* After the incident, Crump moved away from the Washington area. There is no indication that he was available to be interviewed by defense counsel. In 239*239 addition, a witness need not consent to pretrial interviews by defense counsel, and there is no assurance that Crump would have done so. Finally, Crump was seriously injured in an automobile accident, and his ability to recollect the incident at the trial was hampered. His only testimony at the trial was as to his identification at the scene of the

crime. In light of the limited nature of his testimony, a lengthy interrogation of Crump would have been useless.

5. *Co-defendants.* Decoster's counsel was familiar with their versions of the events because he had represented two of the defendants at the preliminary hearing. Counsel's probing cross-examination of the government's witnesses proves his familiarity with the facts of the case.

Even now, the dissent and appellant do not and cannot point to any exculpatory evidence that could have been found if Decoster's lawyer had conducted the unnecessarily thorough investigation that the dissent demands. Judge Bazelon concedes that "[m]y colleagues may be correct that no material information could be elicited from such an investigation."[60] His whole argument rests on the assertion that "it is . . . possible" that exculpatory evidence could have been found. From this he concludes that an enormous investigation should have been conducted so that we would not have to "speculate, post hoc, as to what the witnesses would have said."[61]

On this record, it is clear that it is only my dissenting colleagues who are engaging in speculation. Decoster's counsel knew from the information available to him that his client was guilty.[62] This knowledge was confirmed after the trial when Decoster admitted his guilt. Thus, without speculating at all, it can be said that no investigation, however exhaustive, could have discovered evidence that would have helped Decoster. When as here a defense attorney knows his client is guilty, I wholeheartedly agree with then Judge (now Justice) Stevens' statement that "counsel ha[s] no duty to search for witnesses, expert or otherwise, who might falsely testify to the contrary." *Matthews v. United States,* 518 F.2d 1245, 1246 (7th Cir. 1975). This statement contradicts the dissent's claim that counsel was required to search for alibi witnesses. Dissent nn.107, 110.

B. Duty to Investigate Accused's Contradictory Statements

The dissent contends that defense counsel are obligated to investigate contradictory statements by an accused. Dissent n.110. To apply that law here, an accused like Decoster who initially told his attorney that he was present at the scene of the robbery, but later contradicted himself and said that he was not present, would thereby force his counsel to conduct an independent investigation for evidence that might support either statement to determine which version should be presented as a defense.[63] This suggestion is incredible. It grossly overstates 240*240 the duty to investigate and is symptomatic of the unreasonable duties that the dissent is attempting to foist on defense lawyers. Without any investigation, the defendant's contradictory statements

are conclusive proof that one of them is false and defense counsel owes no duty to a prevaricating accused to straighten out an obviously crooked story.*See* Dissent nn.22, 49, 112, page ___ of 199 U.S.App.D.C., page 272 of 624 F.2d.

C. Duty to Investigate for a Guilty Client

The dissent states: "[T]he suggestion that a client whose lawyer believes him to be guilty deserves less pretrial investigation is simply wrong. An attorney's duty to investigate is not relieved by his own perception of his client's guilt or innocence."[64] This pronouncement is foreign to a lawyer's basic obligation to the court and his profession. When, as here, defense counsel has reasonable grounds for believing his client guilty, that perception *must* influence his representation of the client. My dissenting colleagues recognize that a lawyer's obligation is only to make "reasonable" inquiries (dissent n.112), but then they ignore the reasonableness requirement and dissent because of counsel's failure to investigate in support of a fabricated defense. Dissent pages ___, ___, ___, ___ of 199 U.S.App. D.C., pages 285, 286, 292, 294 of 624 F.2d. The dissent would "brand as ineffective any conduct falling below the minimum standards of competent lawyering, without regard to the client's guilt or innocence." Dissent n.131. While the quality of counsel's performance may not depend on the guilt or innocence of his client, that does not contradict the principle that in determining whether a counsel has breached a duty, the guilt or innocence of his client may affect what he was required to do to satisfy the requirement of a reasonably competent lawyer.

Defense counsel are not required to close their eyes to the obvious and search for alibis for defendants who would like assistance in the fabrication of a defense, for that would be a violation of the ethical standards of the legal profession. As Chief Justice Burger wrote for the Court: there is "an important limitation on a defendant's right to the assistance of counsel: counsel *ethically* cannot assist his client in presenting *what the attorney has reason to believe is false testimony." United States v. Grayson,* 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582, 592 (1978) (emphasis added). Thus, when the dissent states that an attorney cannot be guided by "his own perception of his client's guilt or innocence,"[65] it contradicts the Supreme Court.

D. Bond Review

The dissent contends that defense counsel's delay in seeking bond review is an example of his ineffectiveness. It is clear, however, that such delay was entirely irrelevant to the outcome of the case, for when the bond review motion was filed it was denied. Even assuming that counsel had unreasonably delayed filing for bond review, Decoster was not prejudiced in any way.

In addition, on the facts of this case it is apparent that it was unnecessary for defense counsel to file for bond review at all. Counsel, however, cannot be blamed for filing such a frivolous motion as this court is partially responsible because of the ever increasing list of unreasonable burdens some of our opinions place on defense counsel. On the facts the merit of the decision to deny bond reduction cannot be questioned. When Decoster was arrested on this charge, (1) he was already being sought as a fugitive on a bench warrant issued in 241*241 another case; (2) he had no fixed address, no community ties, and no employment whatsoever; (3) he was an admitted narcotics user; (4) he had previously been arrested for carrying a dangerous weapon and had jumped bail while under a $600 bond; (5) as a juvenile he had been involved in a robbery and was sent to the Receiving Home from which he escaped;[66] and (6) the Bail Agency did not recommend release, even on conditions.

The wisdom of the decision to continue Decoster's incarceration was borne out when his trial was postponed. As a result of this delay, Decoster was released to the Black Man's Development Center. As might have been expected from his history of escapes, appellant promptly became a fugitive from justice. Under these circumstances, all of which were known to Decoster's counsel, it is folly to suggest that a motion for release should have been filed or that any prejudice resulted from trial counsel not immediately moving for Decoster's release. It was a complete waste of judicial effort for the panel, knowing all of this, to remand the case for a hearing on this frivolous point.

E. Decoster as a Fugitive from Justice

The dissent comments critically about the seventeen month period between the date of the offense and appellant's trial. It fails to recognize that over eight months of this delay was caused by Decoster jumping bail and remaining a fugitive. The facts are delineated in the Government's Supplemental Brief 3:

> *On January 21 appellant absconded from the Black Man's Development Center and never returned. [The] Bail Agency then reported that appellant had further violated the conditions of his release by reporting only once since being released. When the case was called for trial on February 9, appellant did not appear, and a bench warrant issued. Appellant was not rearrested until September 1971, after his codefendants in this case had pleaded guilty [at their trial] on June 18, 1971.*

The trial was also delayed because one of the primary prosecution witnesses, Mr. Crump, was seriously injured in an automobile accident. The seventeen month delay, therefore, was not caused by any fault on the part of the Government.

F. Avoiding Futile Retrials

The dissent states:

> *Although the question of prejudice remains part of the court's inquiry, it is distinct from the determination of whether the defendant has received effective assistance. Rather, prejudice is considered only in order to spare defendants, prosecutors and the courts alike a truly futile repetition of the pretrial and trial process.*[67]

Decoster was found guilty on clear, uncontradicted evidence. Prior to trial his letters in effect admitted his participation in the robbery and thereafter, at sentencing, he practically admitted his guilt. If this case is a good example of how my dissenting colleagues would apply their rule, then it is hard to imagine what it would take to convince them that a retrial would be futile. This illustrates part of the problem presented by the issues here. Courts can agree on language for standards for counsel but some judges, as in the dissent, give the standards such an unreasonable construction that the actual standard becomes meaningless.

G. Decoster's Participation in the Events of the Robbery

There is considerable doubt about what story Decoster was telling when he was first arrested. The dissent states: "Decoster claimed that he was not with [his co-defendants]." Dissent n.110. Yet in his letter to Judge Waddy filed November 13, 1970, Decoster wrote: "I can prove that I am only guilty of assault by self defence." *See* dissent

n.22. And in his letter to his counsel, which Decoster testified he mailed 242*242 between May and November, 1970, he admitted his participation in the events of the robbery. Dissent page — of 199 U.S.App. D.C., page 273 of 624 F.2d. These letters obviously contradict the statements of the dissent at n.110 because if Decoster were "guilty of assault by self defence" he would have had to be in Crump's presence when he assaulted him in "self defence." So to the extent that the dissent relies on any claim by Decoster that he was not with the co-defendants it is of questionable validity.

H. Sentencing

The dissent states that the Department of Corrections "clarified Decoster's sentence" because it was allegedly not properly executed.[68] This confuses the role of trial and appellate counsel and what is referred to as a "clarification" is nothing more than the routine computation of a legally adjudged sentence.

The dissent also implies that "counsel's failure to offer any allocution" caused "the trial judge's decision to sentence Decoster to a prison term of 2-8 years while his co-defendants received only probation."[69] The lesser sentences for the co-defendants, however, were justified by (1) their guilty pleas, and because they did not (2) use narcotics, (3) jump bail, and (4) have a substantial criminal record, as Decoster did.[70]

I. Reversible Error

The trial court found after an extensive and complete hearing that Decoster's counsel, in putting the Government to its proof, had presented Decoster's only defense and that Decoster had failed to demonstrate any prejudice from his counsel's conduct of his defense. The dissent has failed to demonstrate wherein the trial court's findings and conclusions are clearly erroneous. In material respects, the dissent understates incriminating evidence, seeks to avoid evaluating "the precise effect" of omissions by defense counsel, dissent 26, grossly exaggerates the probative effect of evidence that might favor the defendant, claims impeachment on the basis of immaterial variances, dissent n.106, indulges in a great deal of unwarranted speculation, grossly misstates my position, dissent n.102, places unwarranted reliance on dissenting opinions and its prior opinion in this case, goes outside the record, raises new issues, dissent n.38, 89, 105, refuses to recognize that Decoster was attempting to force his counsel to assert a perjured defense, relies on immaterial and irrelevant evidence, and would rigidly apply

erroneous legal theories and arbitrary *per se* and "automatic reversal" rules, dissent page ___ of 199 U.S.App.D.C., page 293 of 624 F.2d, n.149. Thus, no reversible error has been shown.

J. Changing Judges' Duties

The dissent argues that the "adversary system is . . . in shreds,"[71] and suggests that trial judges should greatly expand their intervention in the trial of criminal cases, allegedly to protect defendants. This overlooks the rule that a judge's obligation is to see that justice is done — *to all parties.* The dissent would ignore the rights of the public.

K. Extraneous Considerations

Most extraordinarily, the dissent sees merit in a "rule requiring *automatic reversal*" in order to "provide the deterrent effect necessary to insure that all defendants — innocent or guilty — receive the effective assistance of counsel" according to the extreme standards of the dissent. It argues: "Reversing convictions [automatically] is likely to have a significant *prophylactic effect* for several reasons . . . [among them] . . . frequent reversals 243*243 are likely to *attract the attention of the public* and may enhance the likelihood of legislative reform[s]." Dissent page ___ of 199 U.S.App.D.C., page 293 of 624 F.2d and n.145. (Emphasis added). However, it is fundamental to the proper administration of justice that criminal convictions should only be reversed for legal error and never for the *"prophylactic effect".* I cannot agree with the outrageous suggestion that freeing convicted criminals is an appropriate way to go about securing legislation from Congress that conforms to the desires of individual judges.

L. Ready for Trial

The dissent finds fault with Decoster's lawyer because

> *even after receiving appellant's letter [stating that he was only guilty of assault by self-defense] counsel was ready to go to trial without having attempted to contact the co-defendants to learn their version of the events on the night of the robbery.*[72]

This criticism is preposterous. Defense counsel had been acting for Decoster since May 30, 1970, and was ready to go to trial in November, 1971: while the record is not clear, it is my analysis that counsel's defense was that Decoster was only fighting not robbing, the victim. The testimony of two accomplices who had pled guilty would obviously not be helpful. The day before trial in 1972 Decoster changed his story and claimed that he was not at the scene of the robbery. On these facts, counsel had no choice but to announce ready for trial. What else could he have done: ask for a continuance and tell the court that he needed extra time because his client was changing his story? Of course not. The trial date had been set after Decoster's long fugitivity and Decoster's attempt to change his story on the eve of a reset trial was no justification for a continuance. No Judge would or should grant a continuance under such circumstances. In short, counsel's difficulties were caused by Decoster's eleventh hour attempt to fabricate an alibi. Counsel simply had to do as well as he could with a bad situation.[73] The dissent in this complaint thus unsuccessfully scratches in barren ground to find some basis to criticize counsel.

M. Representation of Indigents

The dissent plays the theme from *Griffin v. Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956), that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." But there is nothing in the record to indicate that Decoster's poverty caused him to commit robbery or prevented him from receiving a fair trial.[74] Increased billions have been spent in recent years to alleviate 244*244 poverty, but during this period all forms of crime have soared. And under the Criminal Justice Act most defendants in this court are as well, if not better represented than the Government. Thus, the dissent's reference to poverty is an injudicial appeal to sympathy.

Those of us who have been familiar through the years with the massive efforts of the members of the bar to represent indigent defendants, most times without any fee, deny categorically the assertion by the dissent that criminal defendants are poorly served by the bar. Dissent, 2, 6, n.3, n.80, n.89. We specifically resent the inference that appointed counsel scrimp on requesting investigative expense because of an alleged fear that their own fees would thereby be lessened. Dissent n.80. And the claim that some writers and reports support its position, when it is based on partial statements, is unseemly. For instance, Tague, The Attempt To Improve Criminal Defense Representation, 15 Am. Crim.L.Rev. 109, 131 (1977) is cited, Dissent n.80. But the statement is ignored that "The relationship that an attorney has with his client and with

the court can be further strained if the attorney must be ordered to investigate." *Id.* at 133.

The dissent purports to be concerned with "equal justice" for the poor. But its myopic view of justice overlooks justice for the public, and for that far larger number of poor Americans who are the victims of crime. It has also been a boon to some defendants who are not only not poor but are extremely wealthy. Illicit drug dealers, many of whom are rolling in illegal wealth, are equal beneficiaries with the poor.[75] The ease with which a post trial claim of ineffective assistance of counsel can be made is evidenced by the reported claim of Patty Hearst, not normally thought of as poor, that her defense counsel, the famed F. Lee Bailey, had provided her with ineffective assistance.[76]

It is hardly an exaggeration to say that under the arguments of the dissent, the principle issue in a criminal appeal is whether the accused is poor, rather than whether his guilt was properly determined in a fair trial. Thankfully, this Circuit has now definitively rejected that approach. Neither a rich man nor a poor man has a right to use perjured testimony in his defense. Neither a rich nor a poor defendant has a right to compel his counsel to investigate perjured alibis. And no defendant, be he rich or poor, has a right to have his conviction set aside because his lawyer did not investigate to obtain witnesses who would support a phony defense.

IV. CONCLUSION

While purporting to explore standards for defense counsel in their representation of criminal defendants, *Decoster I* was in fact a bold attempt to shift the burden of proof to the Government. The intolerable results that inevitably follow from such a shift are well illustrated by the position taken by the panel below and the dissent here.

We now repudiate this misguided attempt to change the law and reaffirm the well established rule in this Circuit that the burden of proving prejudice from defense counsel's ineffectiveness rests on the accused. Counsel in this Circuit need not search for non-existent witnesses who might support perjured alibis conjured up by defendants on the eve of trial.

Thus fails the attempt of my dissenting colleagues to create a standard of law that would result in a retrial for an obviously guilty defendant, supposedly because his lawyer's investigation of the crime was not thorough enough, despite the defendant's failure to produce a single witness who 245*245 would testify to a single truthful exculpatory fact. Decoster was found guilty by a jury. The trial judge twice concurred in that judgment. The accused in effect admitted his participation in the robbery and his guilt and on appeal to this court did not contend that his counsel had been ineffective. That claim was initiated by the other members of the original panel. It would be

unthinkable for this court to reverse such a conviction because defense counsel failed to investigate every possible fabricated defense.

SPOTTSWOOD W. ROBINSON, III, Circuit Judge, concurring in the result:

I agree with the majority of my brethren that the conviction in this case should be affirmed. I am unable, however, to subscribe to one link in the chain of reasoning they forge in reaching this result. While I applaud the collective action of the full court in now assuring to those accused of crime a level of legal assistance commensurate with the demands of the Sixth Amendment, I deplore the court's allocation to the accused of a burden of demonstrating that he was jeopardized by established dereliction of duty on the part of his counsel. Judges Leventhal and MacKinnon, and my colleagues concurring with them, make prejudice to the defense — likely harm in the one instance and actual injury in the other — an indispensable prerequisite to any finding of ineffective assistance, and assign the onus of proof on that score to the defendant.[1] In so holding they stray rather widely, I believe, from established principles of pertinent jurisprudence.

These considerations summon this opinion, and dictate the general course it will take. I first summarize in brief fashion the position of the court.[2] Next I set forth my understanding of the test imposed by the Sixth Amendment for measuring the sufficiency of the service rendered by counsel for an accused.[3] I then elucidate my stand on burden of proof of prejudice in ineffective-assistance cases.[4] Lastly, I explain why I conclude that counsel's performance in this case was constitutionally ineffective but nevertheless was harmless error.[5]

I. THE COURT'S POSITION

The critical issue we are convened to resolve is the standard appropriately to be utilized in evaluating claims that defense counsel's performance was constitutionally infirm. Early cases in this circuit shunned the Sixth Amendment as a source of entitlement to effective aid by a member of the bar.[6] Relying instead upon the Fifth, those decisions measured counsel's adequacy by the impact of any deficiency on the fairness of the trial;[7] resultantly, there was concern only if execution of the defense function was so abominable that it rendered the trial "a farce and a mockery of justice."[8] As late as *Bruce v. United States*[9] in 1967, this court maintained that while "[t]hese words [were] not to be taken literally," they nevertheless were "a vivid description of the principle that the accused has a heavy burden in showing requisite 246*246unfairness."[10] And though it is now said that *Bruce* implicitly took a Sixth Amendment approach to the problem,[11] the *Bruce* court acknowledged no more than that in "rare and extraordinary" instances "an accused may obtain relief . . . if he shows both that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense

either in the District Court or on appeal."[12] That was then the court's concept of the accused's constitutional due, at least where the question was presented by collateral attack upon a conviction.[13]

As Judge Leventhal's survey of judicially-enunciated formulae for gauging ineffective-assistance claims discloses, every test thus far developed in this and other circuits, however expressed in words, has imposed an initial burden on the defendant to establish that his counsel's performance at trial was abnormally deficient.[14] Every opinion announced today espouses a standard incorporating that thesis centrally as a hurdle that the defendant must first clear. Judge Leventhal, for a plurality of the court, insists upon proof of "serious incompetency, inefficiency or inattention of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer."[15] Judges Bazelon and MacKinnon would require the defendant to demonstrate, not merely a violation of particular duties, but a "substantial" violation.[16] I myself believe that the defendant must point to some substantial deviation from a norm of reasonable competence.[17] Despite the terminological differences in the heft of the showing to be made, each formulation emphasizes that counsel's breach must be serious, and that the defendant bears the onus of making it out.

Perhaps more importantly, the court is agreed that the "gross incompetence" standard of *Bruce*is dead, and that in my view is how it should be. For nearly four decades the guaranty of competent representation in federal criminal proceedings has had Sixth[18] as well as Fifth Amendment[19] underpinnings, a verity long calling for a thorough reexamination of this circuit's criteria for proving and assessing asserted violations. 247*247 So, while a defendant must show some substantial dereliction in his counsel's performance in order to qualify for relief, the level of the representation required is now considerably higher than it once was. On the other hand, a majority of my colleagues retain in some form the other aspect of *Bruce* — the defendant's burden of proof *vis-a-vis* resulting prejudice — as a constitutional element in the adjudication of ineffective-assistance contests. A plurality of the court sets the required showing as likely harm; Judge MacKinnon says it should be actual harm.[20] I am unable to perceive any sound justification for saddling the defendant with the additional obligation of establishing that a demonstrated transgression of his right to effective aid by a lawyer either probably or actually influenced the outcome of his case.

II. THE CONSTITUTIONAL TEST

The Sixth Amendment solemnly proclaims that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[21] So plain and potent an injunction obviously demands a great deal more than mere appointment and physical presence of a legal representative. Indeed, it has long been recognized that one accused of crime must be afforded, even apart from the Sixth

Amendment mandate, a lawyer's help in substance as well as form. In *Powell v. Alabama*[22] in 1932, the Supreme Court held that, simply as a matter of due process, it was not enough that counsel for a defendant in a state capital prosecution is "assign[ed] at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[23] And during the nearly half-century since *Powell* was decided, it has become increasingly clear that the Sixth Amendment entitlement to "assistance of counsel," no less than its due process counterpart, is fully the right to *effective* assistance of counsel.[24]

The Supreme Court has never undertaken to delineate the content of the "effective aid" of which*Powell* spoke, or to comprehensively define the standard of counsel-aid constitutionally demanded. That might be taken as good reason for believing that the expression is to have its natural and ordinary meaning; in any event, its connotation can hardly be mistaken. Counsel, to be sure, is not required to win the case, but "effective aid" certainly contemplates that counsel will endeavor to pursue a course reasonably calculated to achieve for the accused the most advantageous resolution of the case possible under the circumstances. Equally certain it is that an accused is due more than a lawyer whose performance barely escapes the label "grossly incompetent" 248*248 — the standard espoused in *Bruce.*[25] In my view, "effective" assistance is a call for reasonably competent assistance,[26] for anything less robs "effective" of far too much of its evident meaning.

That the Supreme Court intends "effective aid" to signify reasonable competence is evident from a number of its decisions. In *McMann v. Richardson,*[27] the Court declared that "defendants . . . are entitled to the effective assistance of competent counsel,"[28] and that counsel's advice must be "within the range of competence demanded of attorneys in criminal cases."[29]Moreover, the Court has utilized the term "effective" to zealously guard from outside interference activities of counsel designed to maintain the representation at a wholesome level.[30] Defense counsel must be free to decide whether and when to put his client on the witness stand.[31] He must be permitted to present a closing summation.[32] He must be allowed to confer with his client during an overnight recess.[33] It would be incongruous for the Court to protect so scrupulously the right to effective assistance when it is endangered by outside tampering but contemporaneously to ignore all but gross incompetence when substantially deficient service is traced directly to shortfalls in counsel's ability or effort.

The farce-and-mockery test of effective assistance, to which the gross-incompetence test is first cousin, is definitely on the wane.[34] A majority of the federal circuits now have adopted some version of reasonable competence.[35] With that I agree, and I 249*249 cannot improve on the *DeCoster I* formulation: "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[36] All of the standard-of-performance rhetoric in today's opinions seems to come down ultimately to essentially this yardstick for measurement of defense counsel's performance.

I perceive no policy consideration sufficiently forceful to persuade me that utilization of this standard bodes ill for either the attorney-client relationship or the adversary

system. Reasonable competence is the concept traditionally and universally employed as the measure of the lawyer's civil liability, without apparent untoward effect.[37] I cannot see how it could take on a destructive propensity merely because the object is reversal of a conviction rather than an assessment of damages.[38] And even assuming that resort to the familiar doctrine of reasonableness upon judicial evaluation of defense counsel's performance may lead to a modicum of trial-court involvement in defense activities, some policing of counsel's rendition is both necessary and appropriate.[39] As the Supreme Court has admonished,

> *if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . .. [J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.*[40]

Nor do I have any quarrel with the plurality's position that the criterion for measuring effectiveness of the assistance must preserve counsel's freedom "to make quick judgment,"[41] and that a "shortfall by defense counsel that is perceptible but is modest . . . is no basis for judicial interposition."[42] A reasonableness standard is eminently consistent with these concerns, for it is breached only when counsel's conduct deviates so substantially from an acceptable norm as to merit the label "unreasonable." Plainly, neither "quick judgments" 250*250nor "modest shortfalls," merely by reason of their character, are sufficiently off the mark to beckon the hand of the courts.[43]

Lastly, there is the query on the caliber of counsel's performance in the instant case, and for myself it is enough to give a short answer. Whatever the full range of his constitutional duty to his client,[44] it is clear that counsel was obligated to conduct a suitable investigation into the facts of the case and to plot the defensive strategy accordingly.[45] For reasons subsequently appearing, I am satisfied that he did not properly discharge that responsibility,[46] and on this at least seven members of the court concur.[47] Where I part company with the majority is the point at which we come to consider whether it was incumbent upon the client to discharge a burden of demonstrating more.

III. THE BURDEN OF PROOF ON PREJUDICE

The burden of proving unconstitutionality is upon him who asserts it.[48] "That burden," we have said, "extends to production of the facts essential to a determination respecting the constitutional claim."[49] Resultantly, the defendant who would charge ineffective representation "must," we have added, "set forth evidence upon which the elements of a constitutionally 251*251deficient performance might properly be found."[50] We remain divided, however, on the question whether the demonstration

incumbent upon the defendant includes a showing that his counsel's allegedly subpar rendition actually or potentially affected the outcome of the case.

A majority of the court considers detriment to the defendant's interests an indispensable ingredient of his constitutional claim, and thus a factor for him to prove. For them, the defendant must establish adversity resulting from the deficient conduct, else there is no infringement of the constitutional right. For Judge Leventhal and subscribers to his opinion, the crucial item is likely prejudice,[51] for Judge MacKinnon and those who join him, it is actual prejudice.[52] Judge MacKinnon goes so far as to insist that overwhelming evidence of guilt relieves defense counsel of the duty to conduct any more than minimal investigation on his client's behalf.[53]

I cannot agree with either of these formulations. Careful review of the caselaw convinces me that the burden-of-proof allocation they direct is an unwarranted distortion of the role that prejudice ordinarily plays in constitutional determinations and an impermissible expansion of the limited function of harmless error. In my view, the defendant establishes a constitutional violation when he makes out a substantial breach of duty by his counsel, and it is then up to the Government to demonstrate lack of ensuing prejudice if it can.

A. The General Role of Prejudice in Constitutional Adjudications

In *Chapman v. California*,[54] the Supreme Court was asked to decide whether a violation of the Federal Constitution can ever be considered innocuous. The Court's response, in essence, was that the answer depends upon the nature of the constitutional entitlement at stake. The Court declared that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[55] The Court refused, however, "to hold that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful."[56] Rather, said the Court, "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[57] Thus an absence of prejudice may or may not be a valid judicial concern when a federal constitutional transgression is under investigation.

Chapman also addressed the allocation of burden of proof in those instances where harmlessness is entitled to some role. "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments," the Court cited as an example, "casts on someone other than the person prejudiced by it a burden to show that it was harmless";[58] [i]t is for that reason," the Court noted, "that the original commonlaw

harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment."[59] And not only is the burden thus to be assigned but, when the asserted error is of constitutional dimension, it is a burden 252*252 of peculiar weight. The rule appropriate, the Court declared, "requir[es] the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[60] So it was that, for cases wherein harmlessness is a factor at all,[61] the bottom line was drawn: "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[62]

Chapman did not, of course, speak to the precise question dividing us today — whether the defendant must prove prejudice as an element of his constitutional ineffective-assistance claim. But indubitably implicit in *Chapman* is the central theme that for a great many constitutional violations — and for perhaps the decided majority — the defendant need not demonstrate harm, either actual or potential, in order to obtain relief. Rather, it may be permissible, but only in some instances, for the Government to attempt to show lack of prejudice, and even then the proof must establish it beyond a reasonable doubt.

Chapman remains the seminal precedent today,[63] and obviously it demands two vital inquiries in the case at bar. Is prejudice a legitimate consideration in the assessment of a charge of ineffective assistance of counsel? If so, upon whom rests the burden of proof? Stating the second question somewhat differently, is a showing of threatened or consummated harm from a proven breach of counsel's duties an essential element of the defendant's claim, or is a demonstration of actual harmlessness a matter for the Government to undertake?

Many constitutional errors in criminal trials invoke a per se rule. The constitutional violation triggers spontaneous reversal of an ensuing conviction without any exploration into its real or probable effect upon the trial. Just when that will be the case is a question answerable only upon careful analysis of the nature of the right invaded and its capacity to withstand the inherent fallibility of an investigation into prejudice. From a host of diverse considerations that may deserve attention in the analysis, several come immediately to the fore.

One is the constitutional, statutory or judicial recognition the right has been accorded,[64] as well as the purpose the right subserves.[65] Another is the degree of prejudicial propensity of a trespass upon the right.[66] Still another is the feasibility of an 253*253 effort to measure the impact of the constitutional violation upon the outcome of the trial.[67] Not the least may be an uncompromising policy of deterring repetition of the same unconstitutional conduct in the future.[68] A modest sampling of Supreme Court decisions will illustrate the interplay of these and other factors.

Conviction by a judge having personally a direct and substantial interest in convicting necessitates reversal "[n]o matter what the evidence was against" the accused because "he had the right to have an impartial judge"[69] stemming from long-standing judicial

realization that a biased tribunal violates fundamental due process.[70] Conviction by a jury selected through use of discriminatory techniques demands the same result because "[i]t is in the nature of [that evil] that proof of actual harm, or lack of harm, is virtually impossible to adduce," and "there is no way to determine what jury would have been selected under a constitutionally valid selection system, or how that jury would have decided the case."[71] Inflammatory publicity massively and pervasively surrounding a trial vitiates it without any special showing of consequent harm when "the totality of circumstances" indicates inherent prejudice.[72] Televising courtroom proceedings in a criminal case has been held violative of due process even absent proof of injury because it is innately harmful,[73] its adverse effects are too subtle to prove[74] and the practice has met widespread condemnation.[75]

Similarly, admission into evidence of a coerced confession requires reversal as the sanction responsive to offensive police activity, irrespective of evidence of guilt dooming any argument that the admission was actually prejudicial.[76] Committing the 254*254 jury to continuous custody by deputy sheriffs who also were the principal prosecution witnesses denies due process "even if it could be assumed that the deputies never did discuss the case directly with any members of the jury," for "it would be blinking reality not to recognize the extreme prejudice inherent in [the] continual association . . . ."[77] And incorporation of an unconstitutional presumption into the court's instructions to the jury invalidates the verdict even though it is amply sustained by evidence apart from the presumption; the reason is that "[i]n view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."[78] And we ourselves have held that denial of the accused's fundamental statutory, quasi-constitutional right to appear *pro se* is not redeemed by "the subsequent conclusion that [his] practical position [was not] disadvantaged,"[79] for the right "is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process."[80]

As *Chapman* made clear, however, not every mistake of constitutional magnitude in a criminal trial leads inexorably to reversal. The majority opinion was careful to point out "that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless . . . ."[81] The concurring opinion similarly noted that "constitutional rights are not fungible goods," and that "[t]he differing values which they represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another."[82] Indeed, the particular violation dealt with in*Chapman*[83] was held to invoke, not the per se rule of automatic reversal, but the special federal harmless-error rule fashioned in that case for infringements of those constitutional rights that might tolerate it.[84] It bears repeating, however, that when harmlessness is permitted any sway at all, a much higher-than-normal standard for affirmance obtains: "[B]efore a federal constitutional error can be held harmless, the 255*255 court must be able to declare a belief that it was harmless beyond a reasonable doubt."[85]

Since *Chapman's* day, decisions holding constitutional errors harmless are legion.[86] Usually, they have involved transgressions in the presence of the court,[87] instances in which assessment of the harm can be made with relative safety.[88] As the Supreme Court recently remarked,

> *[i]n the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury.*[89]

It is evident, however, that there are out-of-court contexts in which it is entirely feasible to ascertain whether the accused almost assuredly would have been convicted even absent the cited error.[90] One such occasion rather clearly is when "the case against [the defendant is] . . . so overwhelming that [the court can] conclude that [the] violation . . . was harmless beyond a reasonable doubt . . . ."[91]

B. The Role of Prejudice in Right-to-Counsel Cases

Supreme Court decisions on the function of prejudice in right-to-counsel cases reflect essentially the same considerations pertinent in other areas of constitutional error.[92] 256*256 Two factors combine to frequently render *Chapman's* special harmless-error rule inappropriate. First, entitlement to assistance of counsel is explicitly conferred by the Sixth Amendment,[93] with effectiveness of the assistance as its soul.[94] Second, harm to the accused's interests is inherent in many denials of the right,[95] and the scope of consequent injury all too often is not readily identifiable or probable.[96]

Thus, where the defendant had no counsel at all at a critical stage of his trial, automatic reversal of his conviction is usually in order.[97] That result follows also when counsel became available too late for adequate preparation,[98] or when he labored under a conflict of interest precluding completely loyal and effective service to his client.[99] In these instances, harm to the accused is well nigh inescapable,[100] and intelligent assessment of its range is elusive because the effects of the violation might well permeate the entire trial.[101]

In some circumstances, however, not even a total lack of counsel necessarily commands these conclusions. Prejudice may not approach the plane of inevitability, or an acceptable judicial appraisal thereof may not be out of reach.[102] Examples of resort 257*257 to the harmless-error rule are to be found when the sole consequence of the violation is the admission of evidence tainted by the absence of counsel at the time of its acquisition. An identification of an unrepresented suspect at a pretrial lineup is

legally inadmissible,[103] as is an in-court identification attributable only to the lineup,[104] but the use of such an identification does not necessitate reversal if the Government proves its harmlessness beyond a reasonable doubt.[105] The admission into evidence of a voluntary confession taken from an uncounselled arrestee without constitutionally-required warnings,[106] or out of the presence of counsel after his appointment,[107] may similarly be cured,[108] in both instances, if the error is discrete and its adverse effects measurable. Want of counsel at some other pretrial proceedings — preliminary hearing,[109] arraignment,[110] entry of a not-guilty plea[111] — or even during short periods of the trial itself[112] may be found to be harmless. In each situation, by reason of the nature of the proceeding or the brevity of counsel's absence, the range of possible negative consequences is limited[113] and possibly amenable to evaluation.

Impairment of the right to effective assistance of counsel shares the characteristics of other right-to-counsel violations treatable as harmless error. Prejudice may not be invariably a concomitant of counsel's delinquency, or the presence and extent of injury may be susceptible to an acceptable 258*258 degree of accurate measurement.[114] It is worth noting in this connection that in meeting his burden of showing inadequate representation, it is not enough that the defendant merely protest that his counsel was incompetent; he must stake out the shortfalls of which he complains.[115] This sort of particularization, in turn, supplies the specific points of reference that facilitate the inquiry on prejudice. In *Chambers v. Maroney*,[116] for example, upon a charge that counsel was inadequate because he was appointed too close to trial to permit preparation, the Supreme Court examined the deficiencies cited and found that in each instance the blunder, if any, was noninjurious.[117]

I conclude, then, that the right to effective assistance of counsel is amenable to the harmless-error rule. This is not to say, however, that prejudice to the accused, either threatened or consummated, is a *sine qua non* of the constitutional claim. The defendant must demonstrate a substantial failure by counsel to discharge an important duty, but when he does so I think the claim is sustained although counsel's mistake may be inconsequential — and thus may not incur reversal — because as matters turn out it doubtless did not influence the end result.

C. Allocation of the Burden of Proof on Prejudice

Proof of actual or potential harm is not normally an element of the showing prerequisite to establishing a violation of a right specifically enumerated in the Constitution.[118] To be sure, prejudice is a factor relevant though not indispensable to a determination respecting observance of the Sixth Amendment right to speedy trial;[119]

certainly, too, "in most cases involving claims of due process deprivations . . . a showing of identifiable prejudice to the accused" is required.[120] But prejudice is 259*259 presumed for many due process denials,[121] and so too it generally is for trespasses on the Sixth Amendment right to counsel.[122] Sometimes, as has been seen, that presumption is conclusive in the sense that any effort to demonstrate an absence of injury-in-fact is totally foreclosed.[123] And even when the presumption is not fully preclusive, it permits no more than an attempted showing by the accused's adversary that the constitutional transgression was harmless beyond a reasonable doubt.[124]

In no uncertain terms, a positive guaranty of assistance of counsel is enshrined in the Sixth Amendment.[125] It is, I reiterate, unmistakably a pledge of the effective assistance of counsel.[126] I perceive no reason why that right, like the vast majority of others that the Constitution makes explicit, should not be fully honored upon the usual presumption, as distinguished from proof of prejudice from its denial.

The right we deal with was first articulated by the Supreme Court nearly a half century ago.[127] It has enjoyed full stature in the Court ever since.[128] It has been proclaimed with regularity in every federal circuit.[129] Though sometimes attributed to the exigencies of due process, its Sixth Amendment origin has long been recognized;[130] though originally construed narrowly,[131] it has in recent years received increased 260*260 judicial attention and protection.[132] The implication is that once it is realized that the right to effective assistance of counsel is grounded on the express command of the Sixth Amendment as well as encompassed in the generality of the due process concept, no justification for requiring the defendant to prove prejudice is apparent.

Ineffective assistance of counsel has a built-in potential for harm to the client. The right to effective assistance thus shares with most other constitutional guaranties a characteristic which normally obviates any need for proof of prejudice, and sometimes even forecloses consideration of arguments that in the particular situation a denial of the right might have been wholly innocuous.[133] Indeed, ineffective assistance is not far removed from total lack of assistance, which frequently calls for automatic reversal.[134] And while the harmless-error rule is in vogue when there was counsel — though inadequate counsel[135] — the Supreme Court has yet to levy on the defendant a burden of showing that demonstrated incompetence threatened or wrought damage to his cause.[136] Nothing in the nature of this fundamental constitutional right suggests to me that we should make such an imposition today.[137]

In sum, I cannot accept the theory that proof of actual or potential harm to the accused is an element of an ineffective-assistance 261*261 claim. I think the claim is established by a suitable showing that counsel defaulted on an obligation owed the accused,[138] and that any asserted lack of injury therefrom is to be treated here just as it normally is in any other instance of curable constitutional error.[139] This means, of course, that the burden rests upon the Government to prove absence of harm to the accused, and to prove it beyond a reasonable doubt.[140]

The Leventhal-MacKinnon approach, I submit, confuses two independent questions commonly arising in ineffective-assistance litigation. One is whether defense counsel

measured up to the constitutional standard of reasonably competent representation. This entails scrutiny of the quality of the service rendered. The other is whether proven deficiency in counsel's performance clearly lacked adverse impact. The task here is simply to determine whether the error could have contributed in any material way to the result reached in the case. Harm is the focal point of the second; it has no bearing whatever on the first. And harmlessness is a doctrine serving only to avoid needless retrials where, owing to the innocuousness of the violation, the outcome would likely be the same.[141]

The critical distinction between the defendant's burden to show a constitutional transgression and the Government's burden to demonstrate lack of ensuing prejudice becomes apparent when we look back three years to our *Pinkney* decision.[142] Following a conviction on two drug charges and before sentencing thereon, the Government filed an "allocution memorandum" containing information purporting to link Pinkney with narcotics trafficking and advocating the maximum penalty. After imposition of less severe though stiff sentences, Pinkney moved the District Court to reconsider them, insisting that his counsel had not discussed the Government's memorandum with him and reminding that counsel had not disputed its contents at sentencing. The motion was denied and on appeal we declined to upset that ruling.[143] We acknowledged the constitutional implications of the asserted breach of duty[144] but deemed it unimportant because "[t]he record . . . [did] not support the contention that counsel's alleged derelictions frustrated [Pinkney's] opportunity to present his side of the controversy."[145] We pointed to Pinkney's obligation at this juncture to "set forth evidence upon which the elements of a constitutionally deficient performance might properly be found,"[146] and we found that Pinkney's motion did not survive this requirement for two reasons. In the first place, he did not verify the deficiency complained of.[147] Beyond that, after learning of the central allegation of the allocution memorandum, he did not utilize open opportunities to convey to the sentencing judge anything he might have wished to say.[148]

These omissions are very different from a failure to carry the burden on an issue of prejudice from an established violation.[149] 262*262 Although, we did not reach the question of prejudice in*Pinkney,*[150] we took pains to explain the distinction:

> *Our conclusion . . . in no way impinges upon the rule . . . that once a substantial violation of counsel's duties is shown, the Government's burden is to demonstrate lack of prejudice therefrom. . . . In the case before us, we deal only with a procedural prerequisite to a hearing on appellant's assertion that the representation afforded at sentencing fell below the constitutional norm. The essence of appellant's contention is that sentencing counsel deprived him of the opportunity to combat allegations of the Government's allocution memorandum by failing to inform him of the memorandum. . . . Only if the evidentiary elements of that claim had appeared in appellant's motion would he have been entitled to a hearing, and only if evidence offered at a hearing tended to establish the elements would the Government have been summoned to disestablish prejudice. But if, on the other hand, appellant had met these preconditions, the Government would then have encountered the burden of proving that counsel's dereliction did not harm appellant —*

> *for example, because the allocution memorandum actually had no effective role in the sentencing process.*[151]

This is the major point of deviation between the position of a majority of the court's members and mine. In my view, the claimant before us needed only to show that his counsel fell substantially short of the standard of reasonable competence; in theirs, threatened or consummated injury therefrom is an additional required part of the showing. I believe the majority err in their approach and denude the constitutional right to effective assistance of counsel of a great deal of the value it was intended to have.

IV. THE PRESENT CASE

Turning now to Decoster's arguments that the assistance furnished by his trial counsel was constitutionally ineffective, I find inescapable the conclusion that counsel failed miserably in responding to his obligation to conduct a reasonably competent investigation into the facts of the case. Prior to trial, as Judge Bazelon studiously recounts,[152] counsel made no real effort to tap known or likely sources of information, which included codefendants as well as prosecution witnesses. The duty to investigate is vital, and its violation is obviously fraught with danger to the interests of the client.[153] Here the investigative responsibility was almost wholly unmet, and I cannot view the dereliction as less than appalling.

I am equally convinced, however, that the record firmly establishes the violation as harmless. Two police officers witnessed the robbery in progress. One chased Decoster from the spot the short distance to the hotel lobby wherein he was apprehended, never losing sight of him for so much as a moment. Within minutes the robbery victim, in the presence of both officers, identified Decoster as one of the culprits, as the officers themselves were later to do. Decoster's own testimony aside, no basis for impeaching these witnesses on these vital points surfaces on the record either of the preliminary hearing or the trial.[154] In sharp contrast, Decoster's alibi, initially feeble, met disaster after he called 263*263 to the stand one of his codefendants only to hear him testify that he saw Decoster in a fight with the victim at the scene of the crime. This is not to say that every prosecutorial presentation in which the evidence is so lopsided may fairly be characterized as overwhelming,[155] for that appearance may be attributable, at least in part, to counsel's deficiencies. But considering here the Government's direct and positive proof, the number of Government witnesses,[156] the consistency of their testimony, and the improbability of misinterpretation of the criminal activity or misidentification of Decoster as a participant, I see no reason for supposing that pretrial interviews with these witnesses would have turned up anything but ominous news for the defense.

Counsel's omission to hunt for alibi witnesses was similarly unhurtful. Aside from the clerk on duty in the hotel lobby when Decoster was taken into custody, there is little to indicate that the prospect of locating any such witnesses was better than highly remote. More importantly, I cannot hypothesize any appreciable probability that the jury's verdict would have differed had counsel found someone able to testify that Decoster and the victim drank together at a bar shortly before the robbery occurred, or someone who had seen Decoster enter the hotel lobby shortly after the robbery transpired.[157] No witness in one or the other place could possibly have established Decoster's absence from the scene of the offense at the instant it was perpetrated. It is clear, of course, that at that point in time Decoster was somewhere between the bar and the lobby, but the question is whether that somewhere was the site of the crime. The most that can be said is that such a witness might have tended weakly and circumstantially to corroborate Decoster's claim that he was not there. But it would blink reality to seriously suggest that, in the face of the Government's powerful eyewitness case, so little would have carried the day.[158]

I think, then, that in the area of pretrial investigation counsel's performance was 264*264substantially deficient and therefore constitutionally ineffective. But I believe, too, that in the circumstances counsel's inadequacies were harmless beyond a reasonable doubt.[159] On that ground, I concur in affirmance of the conviction.

BAZELON, Circuit Judge, with whom J. SKELLY WRIGHT, Chief Judge, joins, dissenting:

Willie Decoster was denied the effective assistance of counsel guaranteed by the Sixth Amendment because he could not afford to hire a competent and conscientious attorney. His plight is an indictment of our system of criminal justice, which promises "Equal Justice Under Law," but delivers only "Justice for Those Who Can Afford It." Though purporting to address the problem of ineffective assistance, the majority's decision ignores the sordid reality that the kind of slovenly, indifferent representation provided Willie Decoster is uniquely the fate allotted to the poor. Underlying the majority's antiseptic verbal formulations is a disturbing tolerance for a criminal justice system that consistently provides less protection and less dignity for the indigent. I cannot accept a system that conditions a defendant's right to a fair trial on his ability to pay for it. Like Justice Black, I believe that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[1] The Constitution forbids it. Morality condemns it. I dissent.

I.

The evolution of the right to the Assistance of Counsel reflects a growing awareness of the barriers faced by the indigent defendant seeking a fair trial, and of the challenge these obstacles pose to our ideal of justice without regard to wealth. By any reckoning,

the barriers are formidable. The "street crime" that clogs our courts is bred by poverty and discrimination. It is committed by the dispossessed, the disadvantaged and the alienated of our society — those who most need the advice of a trained advocate. In the words of Justice Sutherland:

> *Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He requires the guiding hand of counsel at every step in the proceedings against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.*[2]

And the cruel irony, of course, is that the indigent are the very people who are least able to obtain competent representation. For the most part, "you get what you pay for" in legal representation.[3]

265*265 Only recently have we even recognized that the lack of effective counsel inevitably deprives the poor of the right to a fair trial. For a great many years, the shameful truth was that only the rich could obtain counsel, since only the rich could afford to pay counsel. One hundred and forty-one years after the adoption of the Bill of Rights, the Supreme Court first held, in*Powell v. Alabama*,[4] that due process requires the appointment of counsel for an indigent defendant in a capital case. Not until *Gideon v. Wainwright*,[5] more than thirty years later, did the Court acknowledge that the "noble ideal" of equal and fair justice could not be realized "if the poor man charged with crime has to face his accusers without a lawyer to assist him."[6]Only then did the Court extend the right to counsel to all state felony prosecutions. And not until 1972, in *Argersinger v. Hamlin*,[7] did the Court affirm the right to counsel in all criminal prosecutions resulting in the deprivation of the accused's liberty.

The Supreme Court's effort to eliminate second-class justice for the poor has not been confined to providing counsel for the indigent.[8] But the right to counsel is most essential in assuring fair and equal justice,[9] 266*266 for without the conscientious and knowledgeable advice of a trained legal advocate, an accused can secure none of the safeguards of the criminal process intended to protect *all* defendants. "The [right to] counsel is often a requisite to the very existence of a fair trial."[10] To the extent that the indigent defendant receives inadequate representation, markedly inferior to that available to a defendant who can afford "competent and conscientious counsel," a dual system of justice endures.

Inevitably there will be disparities in the quality of representation; some lawyers are simply more able or more conscientious than others. What offends the Constitution, however, is not merely that there are variations in the quality of representation, but that the burden of less effective advocacy falls almost exclusively on a single subclass of society — the poor. In constructing standards for assessing the ineffective assistance of counsel, we must therefore consider not only what measures are necessary to assure a fair trial in the case of any particular defendant. We also must structure our approach to eliminate the gross disparities of representation that make a mockery of our commitment to equal justice. We must institutionalize and enforce standards of attorney competence designed to assure adequate representation for *all* defendants.

Because my colleagues in the majority divorce their analysis from the economic and social reality underlying the problem of ineffective assistance of counsel, their decision leaves indigent defendants nothing more than an empty promise in place of the Sixth Amendment's commitment to adequate representation for all defendants, rich and poor. At best, the majority's approach might help to rectify a few cases of blatant injustice. But their standards do nothing to help raise the quality of representation provided the poor to a level anywhere approaching that of the more affluent. On the contrary, my colleagues condone callous, back-of-the-hand representation by dismissing the basic duties of competent lawyering as "aspirational." The majority thus provides no incentive or structure to improve the caliber of defense advocacy. By focusing exclusively on the consequences of counsel's dereliction, their approach encourages an attorney who believes that his client is guilty to "cut corners," with little risk that he will be held accountable for the inadequacies of his representation. The majority opinions may say "we don't commend this," or "we don't approve of that," but their bottom line is *"Affirmed."*

In its holding, the majority turns its back on the evolution in this circuit of the standard for evaluating claims of ineffective assistance.[11] In the earliest cases, we approached the problem solely from a due process-fundamental fairness viewpoint, requiring a defendant seeking relief to show that the proceedings were a "farce and a mockery of justice."[12] In *Bruce v. United*267*267 *States,*[13] we reconsidered that standard. We explained that the "farce and mockery" requirement was not to be taken literally, but was meant only to demonstrate that in order to obtain relief the accused bears a heavy burden of showing that "there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense . . . ."[14] Shortly after *Bruce,* however, we explicitly recognized that the requirement of effective assistance of counsel derives not only from the Due Process Clause, but from the Sixth Amendment itself.[15] Consequently, in our original opinion in this case, *United States v. DeCoster (DeCoster I),*[16] this court adopted a standard for direct appeals consistent with the Sixth Amendment's "more stringent requirements":[17] *"a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."*[18]

DeCoster I represented a major advance in this court's recognition of the realities of ineffective assistance. In that case, this court shifted the focus of judicial inquiry away from the prejudice to the defendant in any particular case and toward the task of articulating basic duties counsel owes his client. This approach, for the first time, gave content to what previously had been empty verbal formulations. Even more importantly, it recognized that the very lack of effective trial counsel might preclude a defendant from later establishing prejudice. Thus the court concluded that the only way to assure that every defendant receives a fair trial is to promulgate and enforce standards of adequate representation that apply across-the-board. Underlying*DeCoster I,* therefore, was a commitment to the basic principle that every defendant — rich or poor, innocent or guilty — is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate.

II.

Appellant Willie Decoster and two codefendants, Douglas Eley and Earl Taylor, were arrested for the robbery of Roger Crump on the evening of May 29, 1970. Two police officers on plainclothes patrol observed three men accosting Crump in the parking lot of the Golden Gate Bar. When the officers jumped from their car, the robbers fled and were pursued by the police. Officer Box and the victim found Decoster in the lobby of a nearby hotel, the D.C. Annex, where he was immediately arrested and identified by Crump.[19]

At his trial on November 15, 1971, appellant testified that on the evening of the crime he had been drinking with Crump at the Golden Gate Bar.[20] Decoster claimed that he left Crump at the bar and walked directly to his hotel, where, while standing by the desk waiting to obtain his room key, he was arrested. One of appellant's alleged 268*268 accomplices, Douglas Eley, was also called as a defense witness but his testimony contradicted Decoster's in several respects. Most importantly, on direct examination he claimed to have seen appellant and Crump fighting in the parking lot outside the bar at the time of the alleged robbery. Following the trial, appellant was convicted of armed robbery and sentenced to 2-8 years.[21]

On appeal, this court was troubled by a number of actions taken by Decoster's court-appointed counsel which, taken together, suggested that Decoster may not have received the effective assistance of counsel. The record showed that on Nov. 4, 1970, several months after appellant's arrest, the trial judge received a letter from Decoster in which he requested new counsel because his attorney was not providing adequate representation.[22] Decoster charged that although he had been accepted for pretrial custody by the Black Man's Development Center on October 12, defense counsel had not kept his promise to file for bond review.[23] Appellant also requested a copy of the transcript of his preliminary hearing, which he had been unable to obtain through his attorney.[24]

Although Decoster's counsel finally filed the requested bond review motion on November 9,[25] he not only failed to mention that third-party custody had been arranged, but he also filed the motion in the wrong court.[26] On November 18, the district court advised counsel of his error and continued the motion to await review by the proper court, as required by law.[27] Again, however, counsel delayed filing; not until December 269*269 9, did he file a motion for bond review in the proper court.[28]

We also noted that events at the beginning of trial raised serious questions about the adequacy of counsel's pretrial preparation and communication with his client. As the trial was about to start, and after counsel had asserted that he was prepared to proceed, appellant himself stepped forward and asked if the court would subpoena his

two codefendants,[29] explaining that he "didn't have a chance" to discuss the matter with his lawyer. Defense counsel then told the court that he had considered the possibility of issuing subpoenas, "except for the fact that we have no address for the other defendants."[30] The prosecutor immediately volunteered that codefendant Eley was in jail with Decoster;[31] an address for Taylor was subsequently provided from the court records.[32] The court thereupon ordered defense counsel to "take care of the situation."[33]

Moments later, after defense counsel again announced that he was ready for trial, the prosecutor informed the court that the Government had not received any response to its alibi-notice demand. Defense Counsel replied that although he might rely on an alibi defense, no response was needed because the Government had not given the twenty days' notice required by the local rules. The trial judge ordered the defense to provide the names of alibi witnesses anyway, whereupon defense counsel relented and stated, "We will proceed without the alibi witnesses."[34]

Defense counsel then informed the court that his client wished to waive jury trial. When asked if he was aware that the trial 270*270 judge already had heard evidence concerning Decoster's case while presiding over the trial of his codefendants, counsel responded that he was not.[35] After attempting unsuccessfully to find another judge who could hear the case at such a late date, the trial judge ruled that he could not hear the case himself but would instead preside over a jury trial. Appellant's case thereupon proceeded to trial before a jury.

In the midst of all this confusion, Decoster again complained to the court about his attorney's efforts on his behalf.

> *THE DEFENDANT: Your Honor, I feel that this case should be continued because this is, I can't get proper representation that I should be getting and too I think I should have an accurate statement of what happened here when the other two defendants was in court.*[36]

Defense counsel then requested to withdraw from the case "because apparently I have caused some dissatisfaction to the defendant. . . ."[37] The district judge, however, did not inquire into the basis of the defendant's complaints. Instead, after receiving counsel's assurances that he had prepared the case and was ready to go to trial, the court denied the request for a continuance and refused to appoint new counsel.[38]

271*271 In view of the foregoing, in our original opinion[39] we remanded for supplementary hearings on the adequacy of trial counsel's representation and granted leave for appellate counsel to move for a new trial. At the hearings on remand,[40] the district court elicited further information about trial counsel's preparation and his explanations for his actions. Counsel admitted that he had not interviewed the robbery victim or either of the police officers.[41] He also admitted that he had made no attempt to contact or interview the hotel desk clerk or, for that matter, anyone else at either the D.C. Annex hotel or the Golden Gate bar.[42]

As for the codefendants, counsel conceded that he had not interviewed Taylor,[43] but claimed that he had talked with Eley in the cellblock behind the courtroom on the 272*272 second day of the trial.[44] Counsel also admitted that he never obtained a

transcript of the preliminary hearing, but stated that since he had conducted most of the cross-examination at that hearing, he saw no need for the transcript.[45] Moreover, counsel testified that the U.S. Attorney's Office usually makes a copy of the transcript available during discovery. Although he did not specifically remember Decoster's case,[46] counsel said he assumed that the government's copy had been available and that he had read it.[47]

In attempting to defend his actions, counsel testified that he had not interviewed any witnesses because, until shortly before trial, appellant had never mentioned any possible alibi witnesses. Counsel explained that, to the best of his recollection, Decoster had continuously maintained that he had joined Crump for a drink in the bar, had left him there, and had just returned to his hotel when he was arrested.[48] Then, on the eve of trial,[49] counsel received a letter in which appellant changed his story, alleged 273*273 that he had fought with Crump but did not rob him, and asserted that his codefendants would support this version of the offense.[50] Explaining why he had not interviewed Decoster's codefendants even after receiving this letter, counsel stated that "it was my feeling at that time that any testimony that might be given by either of these defendants might be contradictory to what I had already heard from the Defendant."[51] Counsel claimed that he did interview Eley after appellant insisted at trial that his codefendants be subpoenaed, and that Eley told him that Decoster was not at the scene of the crime.[52]Believing that Eley would say this in court, counsel decided to put him on the stand, but Eley instead testified that he saw Decoster and Crump fighting outside the bar.[53]

Counsel also was asked at the remand hearing to explain the reasons underlying certain "tactical decisions" he had made. He could not recall why the motion for bond review was filed in the wrong court, or why he failed to mention appellant's acceptance by the Black Man's Development Center in the original motion. With respect to the waiver of jury trial, counsel said that although he opposed the idea, he had requested a bench trial at his client's insistence.[54]Finally, counsel stated that he gave no opening statement because he had felt it to be unnecessary, and not because he had no defense theory at the time the trial started. However, counsel could not recall why he had concluded that an opening statement was unnecessary.[55]

In its findings on remand, the district court isolated seven[56] particular acts or 274*274 omissions by defense counsel that were alleged to have deprived appellant of the effective assistance of counsel.[57] With respect to three of the allegations — counsel's waiver of opening statement, his attempt to waive jury trial, and his failure to see that Decoster was given credit for time served as ordered by the sentencing judge[58] — the district court found no ineffective assistance.[59] Two other claims — the delay in moving for bond review and the failure to obtain a transcript of the preliminary hearing — were rejected because the court found that the appellant had not been prejudiced by the violations.[60] On the final two allegations — counsel's failure to interview witnesses and his premature announcement that he was ready for trial — the district court's conclusions can be interpreted as holding either that there was no constitutional275*275 violation or simply that no prejudice to appellant was shown.[61]

III.

The analysis of this case should be guided by the principles established in *DeCoster I.*[62] We there held that upon showing a substantial violation of any of counsel's specified duties, a defendant establishes that he has been denied effective representation and the burden shifts to the government to demonstrate that the violation did not prejudice the defendant. Thus,*DeCoster I* prescribed a three-step inquiry for determining whether a claim of ineffective assistance of counsel warrants reversing a conviction:

> *1) Did counsel violate one of the articulated duties?*
>
> *2) Was the violation "substantial" ?*
>
> *3) Has the government established that no prejudice resulted?*

The heart of this approach lies in defining ineffective assistance in terms of the *quality of counsel's performance,* rather than looking to the effect of counsel's actions on the outcome of the case. If the Sixth Amendment is to serve a central role in eliminating second-class justice for the poor, then it must proscribe second-class performances by counsel, whatever the consequences in a particular case. Moreover, by focusing on the quality of representation and providing incentives in all cases for counsel to meet or exceed minimum standards, this approach reduces the likelihood that any particular defendant will be prejudiced by counsel's shortcomings. In this way, courts can safeguard the defendant's rights to a constitutionally adequate trial without engaging in the inherently difficult task of speculating about the precise effect of each error or omission by an attorney. Although the question of prejudice remains part of the court's inquiry, it is distinct from the determination of whether the defendant has received effective assistance. Rather, prejudice is considered only in order to spare defendants, prosecutors and the courts alike a truly futile repetition of the pretrial and trial process.

A. Violation of Articulated Duties

In *DeCoster I,* this court attempted to give substantive content to the Sixth Amendment's mandate by setting forth minimum requirements of competent performance[63] 276*276 The obligations were described as "duties owed by counsel to client,"[64] and thus were not offered as merely "aspirational" guidelines to which attorneys should strive. Indeed,

the duties announced in *DeCoster I* represent the rudiments of competent lawyering guaranteed by the Sixth Amendment to every defendant in a criminal proceeding.[65]

The duties set forth in *DeCoster I* were derived from the American Bar Association's Standards for the Defense Function.[66] These ABA Standards summarize the consensus of the practicing Bar on the crucial elements of defense advocacy in our adversary system. Even though these standards were not intended by their drafters to serve "as criteria for judicial evaluation of effectiveness[,]"[67] this court noted that "they are certainly relevant guideposts in this largely uncharted area."[68] Naturally, given the complexities of each case and the constant call for professional discretion, it would be a misguided endeavor to engrave in stone any rules for attorney performance.[69] Nonetheless, preserving flexibility 277*277 is not incompatible with establishing minimum components of effective assistance, and the ABA Standards give helpful guidance in pursuing both aims.[70]

In *DeCoster I* this court was sensitive to these concerns and so did not attempt to prescribe categorical standards of attorney performance. Instead, we took pains to note that the articulated duties were "meant as a starting point for the court to develop, on a case by case basis, clearer guidelines for courts and for lawyers as to the meaning of effective assistance."[71] We recognized, however, that there were certain tasks, such as the ones we enumerated in our decision, that can never be ignored: conferring with the client without delay and as often as necessary; fully discussing potential strategies and tactical choices; advising the client of his rights and taking all actions necessary to preserve them; and conducting appropriate factual and legal investigations.[72] I submit that no one can dispute that a reasonably competent lawyer, absent good cause,[73] would or should do less. Counsel should proceed in the representation of his client under the guidance of these minimal duties, departing only when the particular needs of his client compel a different course of action.

Prominent among the duties of defense counsel is the obligation to "conduct appropriate investigations, both factual and legal, to determine what matter of defense can be developed."[74] As the Commentary of the ABA Standards stresses, "[I]nvestigation and preparation are the keys to effective representation . . . . It is impossible to overemphasize the importance of appropriate investigation to the effective and fair administration of criminal justice."[75]

Investigation is crucial for several reasons. First, the proper functioning of our adversary system demands that both sides prepare and organize their case in advance 278*278 of trial. There can be no justice where one party to the battle has made no effort to arm itself with the pertinent facts and law.[76] Second, in a very practical sense, cases are won on the facts. Proper investigation is critical not only in turning up leads and witnesses favorable to the defense, but in allowing counsel to take full advantage of trial tactics such as cross-examination and impeachment of adverse witnesses. And of course, adequate legal investigation is necessary to ensure that all available defenses are raised and that the government is put to its proof.[77] "[I]t is axiomatic among trial lawyers and judges that cases are not won in the courtroom but by the long hours of laborious

investigation and careful preparation and study of legal points which precede the trial."[78]

Moreover, the necessity for exhaustive investigation is not limited to its value in preparation for trial. As a leading manual for defense lawyers emphasizes:

> *"The facts are counsel's most important asset not only in arguing before a jury but in every other function counsel performs: seeking advantageous terms of bail, urging the prosecutor to drop or reduce charges, negotiating with him about a plea, urging a favorable sentence recommendation on a probation officer or sentencing disposition on a judge."*[79]

At a minimum, the duty to investigate requires counsel (or his investigator)[80] to 279*279 contact persons whom he has or should have reason to believe were witnesses to the events in question, to seek witnesses in places where he has or should have reason to believe the events occurred, and to conduct these interviews and investigations as promptly as possible, before memories fade or witnesses disappear.[81]

In the present case, Decoster's attorney did none of these things. Although the failure to interview a particular witness, by itself, may not rise to the level of inadequate assistance, defense counsel's investigation and preparation for this case was so perfunctory that it clearly violated his duties to his client.[82] The prosecution called three witnesses at trial — Roger Crump and Officers Box and Ehler. Despite the cardinal rule that proper investigation begins with interviews of those witnesses whom the government intends to call,[83] particularly the arresting and investigating officers,[84] defense counsel made no attempt to interview any of these witnesses at any time prior to trial. Nor did he request or obtain a transcript of the preliminary hearing where these witnesses testified.[85] Defense counsel did not even contact and interview Decoster's codefendants, Eley and Taylor, before trial. Nor did he seek or talk to any witnesses at the hotel or bar. In fact, defense counsel made absolutely no effort to discover, contact, or interview *a single witness* prior to trial.[86] Apparently, he was willing to go to trial without having made any real effort to determine what could be elicited by way of defense or to evaluate the strengths and weaknesses of his client's case.[87]

280*280 Moreover, defense counsel's violations of the duties owed to his client were not limited to an egregious failure to investigate. There are several indications that counsel did not "confer with his client . . . as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable."[88] Surely, many of the problems that developed at and just prior to trial could have been eliminated had counsel more fully prepared himself and discussed the case with his client.[89] In addition, counsel 281*281 was derelict in his duty to "promptly advise his client of his rights and take all actions necessary to preserve them."[90] For example, 50 days elapsed from the time appellant was accepted for third-party custody until his attorney filed a proper bond review motion.[91] Finally, counsel's representation of his client at the sentencing hearing was anything but diligent and conscientious. Despite the critical need for effective advocacy at what "may well be the most important part of the entire

proceeding,"[92] counsel's total contribution at appellant's hearing consisted of the following "allocution":

> *If the Court please, Counsel is aware that Your Honor has a fully comprehensive a [sic] detailed probation report, and Counsel is aware of the report and would submit based on said report.*[93]

In sum, counsel violated each of the duties enunciated in *DeCoster I* as the prerequisites of a reasonably competent performance. Appellant's court-appointed attorney provided the kind of shoddy representation that none of us would tolerate for ourselves — a slovenly, slipshod job, almost totally lacking in preparation, characterized by repeated failures to protect his client's rights and an obvious indifference to his client's fate.

B. "Substantial" Violations

Contrary to the intimations of the majority, we do not contend that the slightest departure from a checklist of counsel's duties establishes ineffectiveness and requires reversal.[94] Since counsel's decisions must be adapted to the complexities of a given case, the proper performance of an attorney's obligations necessarily entails considerable discretion. Moreover, the human animal is too fallible and the task of defense counsel too complex to expect that every action taken by an attorney will prove correct on hindsight. We have repeatedly cautioned that "[t]his court does not sit to second guess strategic and tactical choices made by [defense] counsel."[95] The Sixth Amendment demands that counsel's conduct be conscientious, reasonable, and informed by adequate investigation and preparation; it does not demand that counsel's performance be flawless.

Thus, like the majority, we recognize that counsel's conduct must be evaluated in the 282*282context of a particular case and that not every deviation from a perfect, or even average performance makes out a claim of ineffective assistance. Instead, counsel's violations must be substantial to offend the Sixth Amendment right to effective assistance of counsel.[96] The duties articulated in *DeCoster I,* like the ABA Standards and the obligations prescribed by the Fourth Circuit in *Coles v. Peyton,*[97] describe the minimum components of a competent performance and provide the court with an objective basis for assessing the adequacy of representation. A demonstration that counsel has violated one of these duties compels further inquiry into counsel's conduct to determine whether, in this specific case, counsel's departure from the prescribed standards was either "excusable" or "justifiable." The first of these inquiries recognizes that even the most diligent and conscientious attorney may occasionally falter in fulfilling his responsibility; one minor error in an otherwise commendable performance does not automatically render the representation inadequate.[98] The second inquiry is necessary because the "reasonably competent" attorney must tailor his actions to fit the

unique circumstances presented by a given case; some particular situations may justify or even mandate a course of action that transgresses the general list of duties, a list that of necessity was designed to govern defense counsel's conduct in the typical criminal case.

In this case, the frequency and pervasiveness of defense counsel's omissions and failures certainly belie any notion that these actions were isolated and excusable events. The violation in this case was not simply that counsel failed to interview certain named witnesses. The record reveals that counsel conducted almost no investigation whatsoever in the 17 months preceding trial. Consequently, he began trial unaware of what the prosecution witnesses would say and as a result was unable to refute their stories, was ignorant of the possible defenses and witnesses he might present, and was even unsure of his own client's version of the events.

Nor do any special circumstances justify counsel's breach of his obligations. In some cases prudential judgments or tactical considerations may be involved in counsel's decision about whom to interview.[99] In the present case, however, there simply is no 283*283 possible justification for counsel's near-total lack of investigation and preparation.

Defense counsel's failure to investigate cannot be justified on the basis that he felt he was familiar enough with the facts of this case to judge for himself that his client was guilty. To begin with, the assertion that defense counsel had sufficient knowledge of what an investigation would reveal is manifestly unsupportable. From all that appears affirmatively in the record, defense counsel's entire knowledge of the events in question derived solely from two sources: conversations he may have had with his client and his representation of the defendant at the preliminary hearing. As to the former, the record reveals only that appellant and his attorney appeared in court together on six occasions;[100] counsel presented no evidence on remand on the extent of his communications with his client. As to the latter, the preliminary hearing occurred 17 months before trial, lasted all of 20 minutes and consisted entirely of the testimony of Officer Ehler, who was not even the arresting officer. Thus, defense counsel's total knowledge of the case in fact consisted entirely of two conflicting versions of the events — one from a police officer and the other from his own client.[101]

Perhaps counsel concluded from this limited information that his client had no alibi defense and was guilty, and that therefore counsel was excused from conducting any investigation.[102] But the suggestion that a client whose lawyer believes him to be guilty deserves less pretrial investigation is simply wrong. An attorney's duty to investigate is not relieved by his own perception of his client's guilt or innocence.[103] I can think of nothing more destructive of the284*284 adversary system than to excuse inadequate investigation on the grounds that defense counsel — the accused's only ally in the entire proceedings — disbelieved his client and therefore thought that further inquiry would prove fruitless.[104] The Constitution entitles a criminal defendant to a trial in court by a jury of his peers — not to a trial by his court-appointed defense counsel.[105]

In this case, however, court-appointed counsel failed to interview even the prosecution witnesses, ostensibly because he was already "aware" of the main points of their likely testimony. By virtue of his attendance at the preliminary hearing perhaps counsel obtained a good indication of Officer Ehler's likely testimony at trial.[106] But there can be no justification for counsel's 285*285 failure to interview either complainant Crump or Officer Box, the critical witnesses to the circumstances surrounding the arrest of appellant.[107]

As for the codefendants Taylor and Eley, the district court concluded that, "[a]s a result of the information the defendant had given him and his knowledge of the prior `guilty' pleas of the co-defendants, [counsel] considered that their testimony might be contradictory to that of the defendant."[108] My colleagues apparently believe that this finding justifies counsel's failure to interview the codefendants. But counsel's speculations and beliefs are no substitutes for facts. No matter how experienced an attorney is, no matter how astute his predictions of the content of the witnesses' testimony might be, it is inexcusable not to interview such key potential witnesses on the ground that counsel *feels* that their testimony might contradict what the defendant has told him. Counsel's reasoned and informed judgment that a witness' testimony would not aid the defense may justify not calling that witness to testify, but it cannot excuse the failure even to interview him.[109]

It is true that appellant complicated defense counsel's task when, sometime before trial, he sent counsel a letter suggesting a new version of what happened on the day of his arrest.[110] Again, however, this has no 286*286 bearing on counsel's failure to investigate.[111] By his own account, counsel did not learn of the self-defense theory until the day before or the day of the trial. Appellant's conflicting stories, therefore, obviously cannot excuse counsel's inaction during the previous seventeen months. If anything, appellant's differing accounts should have emphasized the need for an independent investigation to determine which, if either, version was accurate and could be presented as a defense.[112] Yet, even after receiving appellant's letter, counsel was ready to go to trial without having attempted to contact the codefendants to learn their version of the events on the night of the robbery.

In the end, the majority's conclusion that appellant was not denied the effective assistance of counsel rests on their perception that the record contains overwhelming evidence of appellant's guilt.[113] [U]ltimately, "there was a total failure of appellant to show that it was likely that counsel's deficiencies had any effect on the outcome of [the] trial."[114] The logic of their position seems to be as follows: If the accused was probably guilty, then nothing helpful could have been found even through a properly conducted investigation. Thus, any violation of that duty — no matter how egregious — was inconsequential and hence excusable.[115]

287*287 Even on its own terms, such reasoning is faulty. It assumes that the value of investigation is measured only by information it yields that will exonerate the defendant. Yet, even if an investigation produces not a scintilla of evidence favorable to the defense — an unlikely hypothesis — appellant still will benefit from a full investigation. One of the essential responsibilities of the defense attorney is to conduct

an independent examination of the law and facts so that he can offer his professional evaluation of the strength of the defendant's case.[116] If this full investigation reveals that a plea of guilty is in the defendant's best interests, then the attorney should so advise his client and explore the possibility of initiating plea discussions with the prosecutor.[117] It is no secret that in the majority of criminal prosecutions the accused is in fact guilty, notwithstanding any initial protestations of innocence. It is also no secret that the vast majority of criminal prosecutions culminating in conviction are settled through plea bargaining.[118] Indeed, the Supreme Court has recognized that plea bargaining will remain "an essential component of the administration of justice" in this country until the courts' resources are greatly expanded.[119] In many cases, therefore, perhaps the most valuable function that defense counsel can perform is to advise the defendant candidly that a thorough investigation — conducted by his own representative and seeking any glimmer of exonerating evidence — has turned up empty. Only then can the defendant truly evaluate his position and make an informed decision whether to plead guilty or whether to continue to assert his innocence at trial.[120]

More importantly, the majority's position confuses the defendant's burden of showing that counsel's violation was "substantial" with the government's burden of proving that the violation was not "prejudicial." The former entails a forward-looking inquiry into whether defense counsel acted in the manner of a diligent and competent attorney; it asks whether, at the time the events occurred, defense counsel's violations 288*288 of the duties owed to his client were justifiable. In contrast, the inquiry into "prejudice" requires an after-the-fact determination of whether a violation that was admittedly "substantial," nevertheless did not produce adverse consequences for the defendant.

All that the accused must show to establish a Sixth Amendment violation is that counsel's acts or omissions were substantial enough to have deprived him of the effective assistance of counsel in his defense. He need not prove that counsel's violations were ultimately harmful in affecting the outcome of his trial.[121] Quite simply, the inquiry into the adequacy of counsel is distinct *from the inquiry into guilt or innocence.* The Constitution entitles every defendant to counsel who is "an active advocate in behalf of his client."[122] Where such advocacy is absent, the accused has been denied effective assistance, regardless of his guilt or innocence. The majority opinions nevertheless force the appellant to shoulder the burden of proving that counsel's acts or omissions actually or likely affected the outcome of the trial.[123] To thus condition 289*289 the right to effective assistance of counsel on the defendant's ability to demonstrate his innocence is to assure that only the constitutional rights of the innocent will be vindicated. Our system of criminal justice does not rest on such a foundation.

Recent Supreme Court decisions affirm that a distinct showing of prejudice is unnecessary to establish a Sixth Amendment violation. In *Geders v. United States,*[124] for example, the defendant had been ordered not to consult with his attorney during the overnight recess between his direct and cross-examination. The Court of Appeals affirmed the conviction on the grounds that the defendant failed to claim any prejudice from his inability to confer with counsel.[125] The Supreme Court, however, found that the petitioner had been deprived of his Sixth Amendment right and made no inquiry into

whether he had been prejudiced in any way by the trial court's order. That the defendant had been deprived of the assistance of counsel established the constitutional violation; no showing of prejudice was necessary.[126]

More recently, in *Holloway v. Arkansas,*[127] the Court found a violation of the Sixth Amendment in the trial court's failure to appoint separate counsel in the face of the defense attorney's assertions that conflicting interests might prevent him from providing effective assistance for each of three codefendants. In *Holloway,* as in *Geders,* the petitioners' appeal below had been rejected on the ground that the record demonstrated no actual conflict of interest or prejudice to the defendants. Again, however, the Supreme Court did not inquire into whether the defendants were prejudiced or even into whether trial counsel's claim of possible conflicting interests was valid. Because the trial court failed, in the face of counsel's objections, either to appoint separate counsel or to ascertain whether the risk of conflict of interests was too remote to require such appointment, the defendants were deprived of their right to the effective assistance of counsel.[128] Upon finding a constitutional violation, the Court then proceeded, in a separate part of its 290*290 opinion, to determine whether reversal of the petitioners' convictions was required.[129]

C. Was the Substantial Violation Prejudicial?

Having determined in this case that counsel's violation of his duty to his client was substantial,[130] and that appellant consequently was denied the effective assistance of counsel, we now must consider whether this violation of the Sixth Amendment mandates reversing appellant's conviction.[131] Our inquiry is governed by *Chapman* 291*291 *v. California,*[132] in which the Supreme Court concluded that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may . . . be deemed harmless . . . ."[133] For these errors, a return to earlier stages in the criminal process would merely be an exercise in futility because the second proceedings would be certain to reach the same result as the first.

Under *Chapman* the burden in each case rests squarely on the government to prove beyond a reasonable doubt that an error was harmless before the defendant's conviction can be allowed to stand.[134] To place the burden on the defendant would require him to establish the likelihood of his innocence. The presumption of innocence[135] that cloaks the accused cannot be stripped by a conviction obtained in something less than a constitutionally adequate trial.

To satisfy its burden of establishing lack of prejudice, it is not enough for the government simply to point to the evidence of guilt adduced at trial, no matter how overwhelming such evidence may be.[136] In the first place, "proof of prejudice may well be absent from the record precisely because counsel has been ineffective."[137] When, as

in this case, ineffectiveness is founded upon gross omissions of counsel rather than specific 292*292 errors, counsel's violations so permeate the trial that they necessarily cast doubt on the entire adjudicative process.[138] Even where the consequences of counsel's omissions are less pervasive, it will generally be impossible to know precisely how the proceedings were affected,[139] and the resulting prejudice will be "incapable of any sort of measurement."[140] As the Supreme Court has emphasized, "`The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in 293*293 nice calculations as to the amount of prejudice resulting from its denial.'"[141]

Moreover, "prejudice" to the defendant may take many forms. The likelihood of acquittal at trial is not the only touchstone against which the consequence of counsel's failures is to be measured. The duties of an attorney extend to many areas not necessarily affecting the outcome of trial. As the present case highlights, inadequate investigation and preparation may prejudice the defendant not only *at* trial but *before* trial — in counsel's inability to offer informed, competent advice on whether to plead guilty and whether to demand a jury trial — as well as*after* trial — in providing ineffective representation at sentencing.[142]

These principles, in fact, might suggest that a per se rule is appropriate in all cases in which counsel's representation fails to meet the standards of the Sixth Amendment.[143] It may be that the prejudice to the defendant from the denial of effective assistance of counsel is so great, and the likelihood that the government can prove lack of prejudice so small, that reversal should be required whenever a substantial violation of counsel's duties is shown. Indeed, the Supreme Court has frequently emphasized that "the assistance of counsel is among those `constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'"[144] And it may be that only a rule requiring automatic reversal can provide the deterrent effect necessary to insure that all defendants — innocent or guilty — receive the effective assistance of counsel.[145]

Nevertheless, there may be cases — however few — in which the reviewing court can isolate specific deficiencies in counsel's performance and can accurately gauge the consequences of counsel's acts or omissions.[146] 294*294 For example, when a defendant alleges ineffectiveness because his counsel has failed to object to the introduction of arguably inadmissible evidence, the consequences of counsel's violation may readily be measured. There, the government may be able to prove harmlessness either by showing that a suppression motion would not have succeeded (and the evidence would have been admitted anyway),[147] or by proving that there was no "reasonable possibility that the evidence complained of might have contributed to the conviction."[148] Similarly, where counsel violates his duties by failing to interview a particular witness, the government may be able to carry its burden by proving, through proffer of the witness' testimony, that the witness had nothing relevant to offer even if he had been interviewed. As these examples demonstrate, in appropriate circumstances, reversing the defendant's conviction may not be required because rectifying counsel's errors could not possibly benefit the defendant.[149]

On the record before us in the present case, I would conclude that the government has failed to discharge its burden of proving that no adverse consequences resulted from

counsel's gross violations of his duties to his client. Several important questions on the matter of prejudice remain unanswered, and in the absence of any evidence on these critical issues, I am unable to find that counsel's violations were "so unimportant and insignificant"[150] that reversing appellant's conviction would be a futile exercise. No inquiry was made for example, on the relationship between counsel's failure to investigate and DeCoster's decision to go to trial rather than to seek and possibly accept a plea bargain comparable to that of his codefendants.[151] Nor was there exploration 295*295 of whether counsel's failure to offer any allocution at the sentencing hearing had any bearing on the trial judge's decision to sentence Decoster to a prison term of 2-8 years while his codefendants received only probation.[152]

In *DeCoster I,* the court expressly stated that reversal would be required, "unless the government, `*on which is cast the burden of proof once a violation of these precepts is shown,*can establish lack of prejudice thereby.'"[153] Thus, any doubts about the harmlessness of counsel's violations in this case would ordinarily be resolved against the government, and the case would be reversed and remanded for a new trial. Yet, despite our prior remand, it is not clear that the government was ever required to satisfy its burden of proving that the denial of Decoster's right to the effective assistance of counsel was harmless beyond a reasonable doubt. In ruling on several of appellant's contentions the district court found that counsel had not violated any duty owed to his client. As to these issues, therefore, the question of the prejudicial effect of counsel's conduct was never reached. On several other allegations, the district judge appears to have required appellant to demonstrate that he was prejudiced by counsel's actions in order to establish a constitutional violation. Thus, the government was not put to its proof in establishing harmlessness. Moreover, the initial remand hearing was conducted without benefit of this opinion's elucidation of the principles set forth in *DeCoster I*governing questions of ineffective assistance. I therefore would remand the case to allow the government an opportunity to satisfy its burden of proving harmlessness.

IV

Of course, even reversing Decoster's conviction would not remedy the pervasive problem of ineffective representation of the indigent.[154] The disparity between representation of the poor and of the well-to-do reflects the larger inequality of riches in our affluent society. The imbalance in the quality of legal assistance provided for the indigent and the wealthy is only one of a host of inequities in our society — inequality of educational opportunity, of jobs, of housing, of health care.

It is not the province of the judiciary to remedy all these inequities. We have neither the means nor the competence to redress all of society's imbalances. We however do have the duty, entrusted to us by the Bill of Rights, to assure that no individual is deprived of

liberty by our courts of 296*296 law without a constitutionally adequate trial. We violate this duty when we place our imprimatur of "Equal Justice Under Law" on the incompetent performance of court-appointed counsel in cases like the one before us.[155]

An appellate court's role is limited. We can promulgate standards that specify the minimum requirements of the constitutionally mandated competent performance. We can closely scrutinize the records of those cases in which effectiveness is at issue, carefully monitoring trial counsel's performance to ensure that the attorney's obligation have been fulfilled.[156] When substantial violations are uncovered, we can enforce the Sixth Amendment's guarantee by vacating the defendant's conviction and remanding for a new trial in which the effective assistance of counsel will be provided.

The real battle for equal justice, however, must be waged in the trenches of the trial courts. Although reversing criminal convictions can have a significant deterrent effect, an appellate court necessarily depends upon the trial courts to implement the standards it announces. No amount of rhetoric from appellate courts can assure indigent defendants effective representation unless trial judges — and ultimately defense counsel themselves — fulfill their responsibilities. The Supreme Court, too, has recognized the duty of the trial court to fulfill the Sixth Amendment's promise:

> *[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their court.*[157]

Because, as this case demonstrates, ineffective representation is often rooted in inadequate preparation, a first step that a trial judge can take is to refuse to allow a trial to begin until he is assured that defense counsel has conducted the necessary factual and legal investigation. The simple question, "Is defense ready?" may be insufficient to provide that assurance. Instead, we should consider formalizing the procedure by which the trial judge is informed about the extent of counsel's preparation.[158] Before the trial begins — or before a guilty 297*297 plea is accepted[159] — defense counsel could submit an investigative checklist certifying that he has conducted a complete investigation and reviewing the steps he has taken in pretrial preparation, including what records were obtained, which witnesses were interviewed, when the defendant was consulted, and what motions were filed.[160] Although a worksheet alone cannot assure that adequate preparation is undertaken, it may reveal gross violations of counsel's obligations; at a minimum, it should heighten defense counsel's sensitivity to the need for adequate investigation and should provide a record of counsel's asserted actions for appeal.

The trial judge's obligation does not end, however, with a determination that counsel is prepared for trial. Whenever during the course of the trial it appears that defense counsel is not properly fulfilling his obligations, the judge must take appropriate action to prevent the deprivation of the defendant's constitutional rights. "It is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair and lawful trial."[161]

My colleagues fear that judicial "inquiry and standards . . . [may] tear the fabric of [our] adversary system."[162] *But for so very many indigent defendants, the adversary system is*

already in shreds. Indeed, until judges are willing to take the steps necessary to guarantee the indigent defendant "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate,"[163] we will have an adversary system in name only. The adversary system can "provide salutary protection for the rights of the accused"[164] only if 298*298 both sides are equally prepared for the courtroom confrontation.[165]

Some of my colleagues are also concerned that a wide-ranging inquiry into the conduct of defense counsel would transform the role of the trial judge. To emphasize the supposed hazards of such a result, the majority refers to the warning of Judge Prettyman in *Mitchell v. United States*:[166]

> *If the trial judge were required, after a trial has been concluded, to judge the validity of the trial by appraising defense decisions, he would also be under an obligation to protect those rights of an accused as the trial progressed.[Emphasis added]*

Yet this is the very role that the Constitution has assigned the trial judge. His is the ultimate responsibility for ensuring that the accused receives a fair trial, with all the attendant safeguards of the Bill of Rights. It is no answer to say that defense counsel will fulfill the function of protecting the accused's interest; the very essence of the defendant's complaint is that he has been denied effective assistance of counsel.[167] The trial judge simply cannot "stand idly by while the fundamental rights of a criminal defendant are forfeited through the inaction of ill-prepared counsel . . . ."[168]

299*299 However vigilant the judge, the problem of inadequate representation of the indigent cannot be solved by the courts alone. The bench, bar and public must jointly renew our commitment to equal justice.[169] The bar certainly must increase its efforts to monitor the performances of its members and to take appropriate disciplinary action against those attorneys who fail to fulfill their obligations to their clients.[170] Additional 300*300 funding is needed to increase the number of public defender positions and to provide those organizations with better support services. We must increase the compensation of court-appointed counsel to attract high-quality legal talent and to ensure that those who represent the indigent on a regular basis do not have to sacrifice all economic security to perform this vital role. We must reduce the caseloads of both public defenders and court-appointed counsel to manageable levels. And we must establish procedures to insulate appointed counsel from the pressure to curry favor with the judges who appoint them and fix their compensation.

That the ultimate solution does not lie exclusively within the province of the courts does not justify our ignoring the situation nor our accepting it as immutable. The people have bestowed upon the courts a trust: to ensure that the awesome power of the State is not invoked against anyone charged with a crime unless that individual has been afforded all the rights guaranteed by the Constitution. We fail that trust if we sit by silently while countless indigent defendants continue to be deprived of liberty without the effective assistance of counsel.

J. SKELLY WRIGHT, Chief Judge, joined by BAZELON and SPOTTSWOOD W. ROBINSON, III, Circuit Judges:

I write only to note that while there is no majority opinion of the court, Judges Bazelon and Robinson and I agree on the two fundamental principles dispositive of this case: (1) The constitutional standard of effective assistance of counsel in a criminal case is the reasonably competent assistance of an attorney acting as the defendant's diligent, conscientious advocate; and (2) where that standard is shown by the defendant not to have been satisfied, the defendant has been denied his constitutional right to counsel and his conviction must be reversed unless the Government proves beyond a reasonable doubt that the ineffective assistance of counsel was harmless. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

APPENDIX

Opinion After Remand (Criminal 2002-71).

Before BAZELON, Chief Judge, and WRIGHT and MacKINNON, Circuit Judges.

Opinion for the Court filed by BAZELON, Chief Judge.

Dissenting Opinion filed by MacKINNON, Circuit Judge.

BAZELON, Chief Judge:

Appellant was convicted of armed robbery and was sentenced to 2-8 years.[1] On 301*301 appeal, this court *sua sponte* noticed several indications that appellant's sixth amendment right to the effective assistance of counsel had been violated. *United States v. DeCoster,* 159 U.S.App.D.C. 326, 328-330, 487 F.2d 1197, 1199-1201 (1973). Unwilling to speculate about whether these indications would reveal a failure to provide effective assistance, we remanded the record for supplementation.

Appellant moved in the district court for a new trial. After holding evidentiary hearings and oral argument, the district judge denied the motion. The record has been returned to us, and we find that appellant's conviction must be reversed because his Sixth Amendment rights were infringed.

I

The facts surrounding the offense are set forth in our first opinion and can be briefly summarized. The victim, Roger Crump, testified that on May 27, 1970, his wallet

containing $110 was taken by three men, one of whom held a knife. He further testified that while this was occurring, two persons, who he later learned were plain-clothes officers Box and Ehler, jumped out of a car and chased the three men. Because his eyesight was impaired as a result of an automobile accident occurring months after the alleged offense, Crump was unable to identify the appellant at trial. He stated, however, that immediately after the alleged robbery he had identified all three persons who were arrested.

Officers Box and Ehler did identify appellant as one of the persons they had seen robbing the victim. Officer Box also testified that he had chased the appellant into a nearby hotel, the D.C. Annex, where appellant was arrested while standing at the hotel desk. At the hotel, Box stated, Crump had identified appellant. Officer Ehler testified that he had chased, arrested, and searched Earl Taylor and had found a straight razor in his pockets. The wallet and money were never found.

In his own defense, appellant testified that on the afternoon of the crime he had been drinking with Crump at the Golden Gate bar, near the scene of the alleged crime. (Crump admitted having been in the bar but could not recall whether he had seen appellant there.) Appellant claimed that after leaving the bar he had walked to the hotel where he was staying, and was arrested while obtaining his key from the desk clerk. He denied having been with Earl Taylor, and denied even knowing the third alleged robber, Douglas Eley, at the time of the offense. The only other defense witness was Eley; he agreed that appellant and Crump had been together at the bar but stated that he had subsequently seen them fighting outside the bar.

The facts surrounding trial counsel's efforts require a more detailed statement. The appellant was arraigned in the Court of General Sessions on May 30, 1970, and bond was set at $5,000. At that time the lawyer who was to represent appellant at trial was appointed. A preliminary hearing was held on June 8 at which trial counsel represented appellant and did most of the questioning. On the basis of Officer Ehler's testimony, the three defendants were held for the Grand Jury.

After being indicted, the three defendants were arraigned in United States District Court, where appellant's counsel's appointment was reaffirmed. On November 4, appellant wrote to the district judge claiming he was guilty only of "assault by self defence" [sic] and requesting a new lawyer. The only specific charge leveled against counsel was that appellant had been accepted for pretrial custody by the Black Man's Development Center on October 12, and no bond review motion had been filed. On November 9 counsel filed such a motion in district court, but did not mention the acceptance by Black Man's. One week later, appellant filed a *pro se*motion for bond review (which also did not mention Black Man's). On November 18, 1970, the district judge, as required by law,[2] continued the 302*302 motions to await review by the Court of General Sessions, which had originally set the bail. Counsel did not make the motion for review in General Sessions until December 8, and it was denied December 12.

On January 12, 1971, the case was called for trial in district court, but a continuance was granted after the prosecutor indicated Crump was hospitalized following his automobile

accident. Two days later, the district judge granted the bond review motion and released appellant to Black Man's. On January 21, 1971, appellant absconded, and shortly thereafter a bench warrant issued. On June 17, trial of the two codefendants commenced, but in the middle of trial they pleaded guilty.

Appellant was rearrested on September 2, 1971, on unrelated charges for which he was ultimately convicted in Superior Court. Trial was set in this case for November 15, 1971. On the day of the trial, appellant asked the court to subpoena the two codefendants, explaining that he "didn't have a chance" to talk to his lawyer about this. Counsel indicated he had considered the possibility of subpoenas, but did not have the codefendants' addresses. The prosecutor reported that Eley was in jail (where he had been for six weeks);[3] the court read from the court file the address Earl Taylor had listed at the time of his release on personal recognizance eleven months earlier. That address proved out of date.

After counsel announced he was ready for trial, the prosecutor informed the court that the Government had served an alibi-notice demand and received no response. Defense counsel argued that while he might rely on an alibi, no response was necessary because the Government had not given 20 days notice as required by the local rules. The court decided that although the Government had been dilatory, the names of alibi witnesses should be provided nonetheless. Counsel then announced that he would "proceed without the alibi witnesses."[4]

Counsel next informed the court that his client wished to be tried without jury. When asked if he had considered the fact that the trial judge already had listened to some of the evidence in the codefendants' trial, counsel stated that he thought their pleas had been entered before any evidence was heard. At this point the defendant requested a continuance because he felt, "I can't get proper representation." Counsel then requested to withdraw because of his client's dissatisfaction, but his motion was denied. Defendant was convicted on November 16 and sentenced March 3, 1972. Our opinion issued October 4, 1973.

This much was clear to us on the original appeal and aroused our concern.[5] At the hearings on remand, held February 6, 11, and 13, 1974, additional information was elicited concerning counsel's preparation and his explanation for his actions. Counsel admitted that he had *not*interviewed the victim, at least one and perhaps both of 303*303 the police officers,[6] anyone at the Golden Gate bar or D.C. Annex Hotel,[7] or the codefendant Taylor. Counsel claimed that he had interviewed codefendant Eley on the morning of the second day of trial, and that Eley had maintained that appellant was not present during the robbery.[8] Counsel also admitted he had not obtained a transcript of the preliminary hearing, but stated that he had held several conferences with the prosecutors, and surmised, based on their usual practice, that they had made the transcript available to him and that he had read it.[9] He also guessed, based on his usual practice, that he had obtained the 251 Form from the police department.

By way of explanation counsel testified that not until shortly before trial had appellant ever mentioned any witnesses, and then just the two codefendants. Counsel further

stated that at about the same time he had received a letter from appellant in which appellant admitted he had fought with Crump but denied having robbed him.[10] The letter indicated that the codefendants would support this claim. Counsel testified that this letter — which was consistent with Decoster's earlier letter to the district judge and with Eley's trial testimony — was the first time appellant had indicated to counsel that appellant had seen Crump after leaving the bar. Until that time, counsel testified, appellant had maintained, as he testified at trial, that he had gone directly to the hotel.[11] Based on the letter, counsel concluded that the testimony of the codefendants "might be devastating" (presumably to the alibi defense). He nevertheless agreed at trial to subpoena the codefendants, and called Eley after interviewing him and establishing that Eley would support appellant's alibi testimony.[12]

In denying the new trial request, the district court identified seven acts or omissions by counsel which appellant alleged had deprived him of his right to effective assistance of counsel.[13] With respect to two allegations — the delay in moving for bond review and the failure to obtain a transcript of the preliminary hearing — the court found that the defendant had not been prejudiced by the violations. With respect 304*304 to three other allegations — counsel's attempt to waive jury trial, his waiver of an opening statement, and his failure to see that Lorton Reformatory gave appellant credit for time served as ordered by the sentencing judge — the court found no ineffective assistance. And with respect to the final two allegations — the failure to interview witnesses and counsel's premature announcement that he was ready — the court made findings of fact and several conclusions of law, reprinted in pertinent part in the margin.[14] These conclusions can be read as either holding that there was no constitutional violation and in any event no prejudice, or simply holding that no prejudice was shown.

II

A.

The benchmarks for adjudicating this case are set forth in our original opinion. In *DeCoster I* we unanimously held that, at least when counsel's performance is challenged on a direct appeal, appellants need not show that "the proceedings were a farce and a mockery of justice"[15] or that "gross incompetence of counsel . . . has in effect blotted out the essence of a substantial defense."[16] Rather, following a number of other circuits,[17] we adopted a more stringent standard: "*a defendant is entitled to the reasonably*

competent assistance of an attorney acting as his diligent conscientious advocate." 159 U.S.App.D.C. at 331, 487 F.2d at 1202. Moreover, recognizing that "`reasonably competent assistance' is only a shorthand label, and not subject to ready application," we articulated several duties owed by counsel to a client:

> *In General — Counsel should be guided by the American Bar Association Standards for the Defense Function. . .*
>
> *305*305 Specifically — (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.*
>
> *(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . .*
>
> *(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . [I]n most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research. (Footnotes omitted.)*

Id. at 332-33, 487 F.2d at 1203-04. And we stated that these duties are only "a starting point for the court to develop, on a case by case basis, clearer guidelines for courts and for lawyers as to the meaning of effective assistance." *Id.* at 332 n.23, 487 F.2d at 1203 n.23.

The requirements set forth in *DeCoster I* are indisputably the minimal components of "reasonably competent assistance." Even so, not every violation of one of the duties warrants reversing a conviction for ineffective assistance. Rather, *DeCoster I* contemplates a three step inquiry: did counsel violate one of his articulated duties; was the violation "substantial"; and was the substantial violation "prejudicial." *Id.* at 333, 487 F.2d at 1204.

If all defense attorneys had the dedication, skill and experience of a Clarence Darrow, or if all clients had the sophistication and resources of an Andrew Carnegie, then perhaps the concern embodied in *DeCoster I* might be unnecessary. This is not to say that such lawyers always will render, or such clients always receive effective assistance of counsel; the task of criminal representation is too difficult and the human animal too fallible. But in a world of Darrows and Carnegies, perhaps it would be tolerable for judges to assume a more passive role.

We do not live in that kind of world, however. In the real world of criminal justice, the vast majority of defendants lack the means to afford effective representation and/or the sophistication to vindicate their right to it. The governing principle is clear: "There can

be no equal justice where the kind of trial a man gets depends on the amount of money he has."*Griffin v. Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956).

B.

"[I]nvestigation and preparation," as the Commentary to the ABA Standards for the Defense Function recognize, "are the keys to effective representation. . . ."

> *[I]t is axiomatic among trial lawyers and judges that cases are not won in the courtroom but by the long hours of laborious investigation and careful preparation. . . . The adversary process assumes and its proper functioning demands that both sides have prepared and organized their case in advance of trial.*[18]

Moreover, as the Standards themselves state, the "duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt."[19]

The duty to investigate is not necessarily fulfilled simply by interviewing those persons whom a client names as defense witnesses;[20] it demands that counsel "make an 306*306 independent examination of the facts, circumstances, pleadings and laws involved. . . ."[21] Minimally, this requires counsel (or his investigator) to contact persons whom he has or should have reason to believe were witnesses to the events in question; to seek witnesses in places in which he has or should have reason to believe the events occurred; and to conduct these interviews and investigations as promptly after his appointment as is possible, before memories fade or witnesses disappear.[22]

In this case, according to his own admissions — and the district court's factual findings — neither trial counsel nor an investigator did any of these things. He did not interview codefendant Taylor, and delayed interviewing Eley until the second day of trial.[23] He did not interview the complainant or the arresting officers, and he failed to search for witnesses at the hotel or the bar. From all that appears in the record, counsel advised his client on whether to go to trial, and then conducted the trial, without making any real effort to determine what could be elicited by way of defense.

The dissent argues at length that counsel knew all along that the codefendants would say the alibi was false, and that appellant had participated in the crime to which they pleaded guilty. There is nothing in counsel's testimony at the hearing on remand, however, to support this conclusion. Instead of evidence, the dissent relies on logic, reasoning that counsel's "decision not to contest the finding of probable cause [at the preliminary hearing] necessarily involved knowledge by defense counsel for Decoster and Taylor (the counsel whose conduct is here in question) that could only have been obtained by prior discussion of the offense with these men and by consultation with Eley or his counsel." Dissent at ___ of 199 U.S.App.D.C., at 319 of 624 F.2d. The circularity

of this deduction is transparent: by assuming precisely what is at issue here — namely, that counsel rendered reasonably effective assistance — the dissent is able to spin a web of facts, which, if supported by the record, would at least present a more difficult question. As matters stand, there is no basis for assuming that counsel had discussions with the codefendants 307*307 that he failed to mention at the hearing on remand.

Although counsel conducted no interview, it is possible that special circumstances justify this omission, and that therefore the duty to investigate was not breached. To be sure, there is less need or room for tactical decisions in deciding who not to interview than, for example, in deciding who not to call. But tactical and prudential judgments still may be involved,[24] and this court does not sit to "second guess" *informed* judgments of this sort unless they are manifestly unreasonable.[25] In this case, however, we find the explanations proffered by counsel or hypothesized by the government lack plausibility.[26]

1. *Codefendants Taylor and Eley.* Three arguments are offered by the Government to support the failure to or delay in interviewing the codefendants:

> *(a) It is argued that the fact that appellant gave his counsel conflicting accounts of the events — the alibi and the claim of a fight — somehow excuses the lack of prompt interviews. While the existence of these conflicts might be relevant were counsel's failure to call witnesses at issue, the conflicts can hardly justify the failure to interview. The defendant did not offer the self-defense claim to his counsel until a day or two before trial, long after the interviews should have been conducted. Moreover, even if defendant had contradicted himself earlier, the importance of careful investigation would have been heightened, rather than lessened, since counsel would have needed to determine which defense could or should have been presented.*
>
> *(b) The Government argues that locating Taylor would have been a "formidable task" after appellant's flight. But before the flight, from September 1970 to January 1971 when trial was scheduled to begin, Taylor was available in the D.C. Jail. Moreover, one week after appellant was rearrested, and three days before a trial date was set, Taylor was sentenced in district court to probation. It strains credulity to believe that Taylor could not have been found had appellant's counsel contacted Taylor's on-and-off employer who had written a letter on Taylor's behalf prior to sentencing; Taylor's probation officer, with whom the record reveals Taylor was in regular contact at the time of appellant's trial; or perhaps even Taylor's lawyer.*
>
> *(c) The district court found that not until the day of trial had appellant suggested to his counsel that the codefendants might be helpful to the defense. But counsel knew that the codefendants were alleged to have participated in a robbery with his client, and knew that his client claimed not to have been there. Surely counsel should have realized that the codefendants were at least potentialwitnesses in support of the alibi, and they should have been interviewed.*

308*308 2. *The Government witnesses.* The district court found that counsel was justified in not interviewing Officer Ehler because counsel had examined him at the preliminary hearing. We agree. But with respect to Officer Box, the district court noted only that his

testimony was "generally consistent with that of Officer Ehler," and with respect to the victim, Crump, that "[t]here was nothing incredible about [his] testimony." Whatever relevance the substance of their trial testimony may have to the question of the effect of the failure to interview, it can hardly provide a tactical justification for not conducting *pretrial* interviews.[27] The government contends that after appellant's flight, interviewing Crump was "impracticable," since he was living in Georgia. But again, the Government ignores the failure to interview for the several months between the time of the offense and the accident, even though the very occurrence of the accident demonstrates the importance of prompt interviews.

3. *The desk clerk at the hotel.* The district court found no reason to seek out the desk clerk because "[t]here was no dispute as to when the defendant entered the D.C. Annex or when and where he was arrested." However, the trial record reveals that appellant claimed he had walked from the bar to the hotel and into the lobby, while Office Box testified that he had chased appellant. Surely the desk clerk should have been contacted to ascertain whether he saw the appellant enter the hotel or remembered anything relevant about appellant's demeanor while at the desk.

4. *Other witnesses.* No other potential witnesses were identified by name or job position. Nevertheless, the record reveals two potentially fruitful places for investigation that were not tapped: the hotel lobby and the bar. For the same reasons that the hotel clerk's recollections might have been useful, *i. e.,* to resolve the dispute as to how appellant reached the hotel, guests or residents who had been in the lobby at the time should have been interviewed. At the very least, the clerk should have been asked for the names of persons he remembered having seen in the lobby. Similarly, appellant testified that persons unknown to him had been in the bar at the same time he was there. Such witnesses could have been helpful if they could have corroborated appellant's claim that he and Crump had been drinking together, or, perhaps, if they had overheard conversation, or seen Crump and appellant leave. Counsel at least could have questioned employees of the bar to see if they had useful information or could supply the names of customers who were at the bar at the time.

In sum, we hold that counsel's failure to interview Taylor, Crump, Officer Box, or the desk clerk; his delay in interviewing Eley; and his failure to seek out witnesses from the hotel or the bar were not supported by tactical considerations, informed or otherwise, and violated the duty to conduct a factual investigation.[28] Of course, counsel was "under no duty to assist in the fabrication of a defense," as the district court wisely noted. But counsel *was* under a duty to investigate whether there was a non-fabricated defense that could be presented. The dissent may well be correct that there were no such defenses available in this case, although it may be significant that the two codefendants pled guilty only to robbery and not armed robbery. But309*309 even if the dissent is correct, investigation is still necessary not only so that defendants receive informed advice from their counsel and make informed decisions as to whether to go to trial, but also so that lawyers do not unwittingly present perjured testimony, *as apparently occurred in this case.* Thus, while counsel may have been fully justified in not *calling* the codefendants or any other witnesses, his failure to *interview* them violated the duty to investigate.

C.

We come then to the question of whether the violation here was "substantial." In *DeCoster I* we had no occasion to define the "substantiality" requirement. Recently, however, in *United States v. Pinkney,* 177 U.S.App.D.C. 423, 543 F.2d 908 (1976), we made clear that for a violation to be substantial it must be "consequential," that is, it in some way must have impaired the defense.[29] *Pinkney* also makes clear that the burden is on the defendant to prove such adverse consequences, since such consequences do not inhere in every violation of the*DeCoster* precepts.[30]

In certain circumstances, however, the acts or omissions of counsel are so likely to have impaired the defense, and yet this consequence would be so difficult to prove, that, in accordance with well-established evidentiary principles,[31] such an impairment can be presumed.[32] For example, there is persuasive authority for indulging such a presumption when counsel is not appointed until the eve of trial,[33] or when counsel has a clear conflict of interest.[34] Only recently, a unanimous Supreme Court held that a petitioner whose right to effective assistance of counsel was infringed by an order issued during trial barring him from consulting with his attorney overnight between his direct and cross-examination need not demonstrate, *or even claim,* prejudice.[35] To use the language of the dissent in the present case, these are all instances in which there is "inherent prejudice" in the nature of the violations. Dissent at ___ of 199 U.S.App.D.C., at 335 of 624 F.2d.

310*310 This case falls squarely within the same category. The violation here — a total failure to conduct factual investigations — makes this case analogous to ones in which counsel is not appointed until immediately before trial. Investigation is so central to the defense function that, except in the most extraordinary circumstances, a gross violation of the duty to investigate will adversely affect a defendant's rights. Furthermore, the violation in this case was *not* simply that counsel failed to interview certain named witnesses.[36] Counsel here also failed to promptly determine whether there were additional witnesses to the alleged robbery or to appellant's alleged flight who could have aided the defense. Appellant cannot be expected to show that such an effort would have been fruitful since the very reason such an effort was necessary was that appellant did not know the identity of any such witnesses.[37]

Finally, we note that even if an investigation would not have produced a scintilla of evidence favorable to the defense — a somewhat unlikely hypothesis — appellant still would have benefited from a full investigation. Had appellant been told by his lawyer that there was no evidence available to support the defense theory, appellant would have been able to make a better informed decision whether to go to trial, or whether to seek a plea agreement comparable to his two codefendants'. Thus, given both the

magnitude of counsel's violation and its probable effect,[38] we conclude that appellant's constitutional right to effective assistance of counsel was violated.

D.

The remaining question is whether a new trial is required. *DeCoster I* teaches that once appellant discharges his burden of showing a substantial violation of one of counsel's duties, the burden shifts to the Government to establish that the constitutional violation was harmless.159 U.S.App. D.C. at 333, 487 F.2d at 1204.[39] *DeCoster I* 311*311 does not address the question of the weight of the burden the Government must bear. But in imposing a burden on the Government, we did cite, *id.* at 333 n.34, 487 F.2d at 1204 n.34, *Chapman v. California,*386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Chapman* holds that if a defendant's constitutional rights were violated, his conviction must be reversed unless the Government "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. at 828. This court has previously followed *Chapman* in determining harmlessness *vel non* in the ineffectiveness context.[40] If anything, *Chapman*should apply with greater force in ineffectiveness cases, since a finding that a defendant's sixth amendment right to effective assistance was infringed necessarily casts doubt on the entire adjudicative process. Indeed there is even authority for holding that such violations can never be harmless, on the theory that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[41] Although we have rejected that per se approach, we hold that harmlessness must be established beyond a reasonable doubt.

When a defendant, as part of his proof of a constitutional violation, demonstrates the consequences that resulted from counsel's acts or omissions, the Government's burden will be to prove that the injury complained of did not affect the outcome of the proceedings in the trial court. Ordinarily, this will not be an onerous burden: by comparing what the defendant shows should have been produced with the evidence that was adduced at trial, it should be readily apparent whether a reasonable doubt exists as to the effect of the constitutional violation on the outcome.[42] The burden is placed on the Government simply to emphasize that when such a reasonable doubt exists, a new trial is required.

When, however, the defendant is excused from showing adverse consequences, *see* pp. ___-___ of 199 U.S.App.D.C., pp. 309-310 of 624 F.2d *supra,* allocation of the burden with respect to harmlessness often will be dispositive. In such cases, by hypothesis, it is impossible to know precisely how the defendant was affected by counsel's failures; consequently, it will be most difficult for a defendant to prove prejudice or for the Government to negate it. To avoid effectively penalizing a defendant for his counsel's failures, *DeCoster I* requires that in such cases the burden be placed on the Government.

In the instant case, the application of these principles is clear. The Government made no effort to discharge its burden, either by refuting the presumption that adverse consequences resulted from the gross violation of the duty to investigate, or by showing that whatever the consequences they could not have affected the result.[43] 312*312 Accordingly, appellant's conviction must be reversed and the case remanded.[44]

III

More than six years have elapsed since the alleged offense was committed, and more than four years since defendant was convicted. Of this time, at most only ten months — the time from the date appellant absconded until his retrial — are wholly attributable to the appellant, and during some of that time the complainant was also unavailable. The remainder of the time was consumed by the deliberate workings of the system in the trial court and in this court.

We have recently observed that "delays on appeal are not insulated from the due process clause of the Fifth Amendment."[45] Of course, due process does not require that "careful study" be sacrificed; "the essential ingredient is orderly expedition and not mere speed."[46]Some delay must be anticipated in precedent-setting cases of this sort, especially since the effective assistance question was not even briefed on the first appeal. Moreover, the price of our insistence on proof concerning counsel's preparation is additional delay while evidence *de hors*the record is presented.[47]

But as we also recently noted, "it would be disingenuous to suggest that the entire time during which a case is under advisement" — or, we might add, on remand — "is consumed in unraveling complex issues. This court, like the District Court, is not free from the problem of calendar backlog."[48] We daresay that "careful study" in this case did not require 18 months between sentencing and our first opinion, another 18 months until the district court's opinion on remand was filed, or more than a year for this opinion to issue.

Because appellant has already served most, if not all, of his sentence, the Government may elect not to retry appellant. For this reason, we do not decide whether due 313*313 process would bar a second trial.[49] That question must await the district court's determination in the first instance, should such a trial be sought.

Reversed.

MacKINNON, Circuit Judge (dissenting):

In my view this dissent is required because the foregoing opinion relentlessly disregards the facts and the law applicable to this case in an unjustified switching of the burden of proof to reverse a conviction of *an admittedly guilty defendant* without any showing even

of a mere possibility that *truthful* evidence might have helped the defense, or might have affected the outcome of the trial.[1] The factual findings of the trial court are obviated without suitable explanation, and, additionally, my two colleagues attempt to change the law by an unjustified appellate experiment so as to greatly increase the *discretionary* powers of appellate judges to reverse criminal convictions. They accomplish this by creating a new and extremely difficult, if not impossible, burden of proof upon the government to again sustain a conviction *after* a prior final judgment of conviction.

With regard to the law, the majority here and in *DeCoster I* are attempting without *en banc*consideration to overrule the unambiguous and settled law of this circuit on the burden of proof to show prejudice; but absent an *en banc* decision changing our decisional law, both opinions which switch the burden of proof are nullities. Even worse, the two opinions in this respect also ignore governing Supreme Court rulings and common law principles and create drastic and unnecessary constitutional conflicts, finishing by refusing to apply the law they seek to create. In saying that a "new trial is required" in this case my colleagues are compelling a useless ceremony, for they well know that the "allocation of burden", which they here manufacture, will, by their standards, be "dispositive" of any subsequent trial, as it is of this trial in their opinion. (Majority opinion, p. ___ of 199 U.S.App.D.C., p. 311 of 624 F.2d). The Government can never satisfy their application of the standard they here create because they require a showing that evidence that cannot be pointed to, from completely speculative witnesses, was not prejudicial to the defendant. The result, beyond belief, is reversal for a failure to investigate a *fabricated*defense by an admittedly guilty defendant.

I do not dissent from the recognition that defense counsel must conform to reasonable standards of representation. My objection is to my colleague's attempt to *shift* the established burden of proof to the Government on an issue that directly intrudes, without justification, into the confidential and privileged relationship between defense counsel and his accused client. The burden of proof more properly should be retained by the defendant.

THE PROCEDURAL BACKGROUND AND THE FACTS

What the introductory paragraph of the majority opinion fails to disclose is that this is the *third*attempt by my two colleagues in their search for error to find some ground, not raised by appellate counsel, for reversing this judgment of conviction. The appellate odyssey indulged in by the majority finally results in their claiming error on *factual* grounds — never raised by appellant or his counsel — and in holding that the trial judge

committed error when he held that defense counsel had presented the *only* defense available to him. But, the majority never point to any other non-fabricated 314*314 *truthful* defense that could have been presented.[2]

This case was first appealed on a brief that suggested three issues: (1) denial of speedy trial, (2) insufficiency of the evidence and (3) the alleged error in submitting the aiding and abetting issue to the jury (Appellant's br. iii).

Then, just prior to oral argument on appeal, the division of the court *sua sponte* launched the case into its *Second* Phase with a telephone request to counsel asking them to be prepared to address (1) whether the trial judge improperly denied appellant Youth Corrections Act treatment and (2) whether any question as to the effectiveness of counsel was raised by the discussion of an alibi defense (Tr. Nov. 15, pp. 7-9) and the alleged alibi testimony offered thereafter at trial (Tr. Nov. 16, pp. 29-43).

After oral argument, by the following order, counsel for appellant was ordered:

> *. . . sua sponte to submit a supplemental memorandum, within ten days from the date of this order, addressed to the question whether the District Court's [sentencing] statement is adequate to support a denial of Youth Corrections treatment to appellant. See United States v. Coefield, [155 U.S.App.D.C. 205, 476 F.2d 1152] (1973). Counsel is specifically requested to discuss the consideration, if any, given to the overcrowded conditions then existing at the Lorton Youth Center.*

Order of March 21, 1973. The order did not further press the effectiveness of counsel as to the alibi defense.

Appellant's response to this order concerning the Youth Corrections Act was filed on April 2, 1973. Thereafter, without any further mention of the aforesaid response, the majority of the panel embarked on an expanded *sua sponte* venture on October 4, 1973 when it filed its*DeCoster I* opinion, *United States v. DeCoster,* 159 U.S.App. D.C. 326, 487 F.2d 1197 (1973),ordering a shotgun type *remand* of the case to the trial court for a hearing on the effectiveness of the representation of appellant by his counsel on five specific matters and a general inquiry into defense counsel's preparation and investigation.[3] 159 U.S.App.D.C. at 328, 487 F.2d at 1199. The remand hearing was held as ordered, and the trial judge, applying the test stated in*DeCoster I,* has found that appellant had *not* been denied proper representation by his counsel at the trial. This appeal is from that finding and, despite the absence of any finding that the decision of the trial court is clearly erroneous, the majority reverse its judgment.

We are thus in the *Third* Phase of this court's handling of the case and in the second attempt by my colleagues to raise points on appeal that were not raised by appellate counsel. Indeed, my colleagues have already taken care to sow the seeds of the *Fourth* Phase: because of the delay caused by their fruitless search for other grounds of reversal, the majority intimate that delay itself (if their present tack fails) would now be cause for appellant to claim reversal on speedy trial grounds! Majority opinion, nn.44, 49 and accompanying text at p. ___ of 199 U.S.App.D.C., p. 312 of 624 F.2d.

I. SPECIFIC ITEMS OF INQUIRY SUGGESTED BY THE OCTOBER 4, 1973 OPINION OF THIS COURT

A. The bond review.

(1) The majority first claimed that defense counsel did not file a timely bond review motion. This suggestion demonstrates 315*315 a lack of understanding of the standards that judges ordinarily apply in considering such requests. When appellant was arrested on this charge he was already being sought as a *fugitive on a bench warrant* issued in another case. He had previously been arrested in South Carolina for carrying a dangerous weapon and had*absconded* by leaving the jurisdiction while he was under a $600 bond. Also, as a juvenile he had been involved in a robbery in the District of Columbia and was sent to the Receiving Home from which he *escaped* in 1969 (Tr. March 3, 1972, pp. 2-3). For an appellate court to suggest that defendant's trial counsel was deficient in not immediately moving for release under such circumstances is to suggest that defense counsel should clutter the courts with frivolous motions. In any event when the bond review motion was made on November 9, 1970 it was denied, as it should have been.

Thereafter, however, when the trial was delayed from January 12, 1971 to February 9, 1971, because of an injury to the complaining witness in an accident, appellant was released. As might have been expected from his prior history of two escapes, he promptly became a fugitive from justice for the third time — thus further delaying the trial.

Finally, the so-called delay in moving for bond review had absolutely no relevance whatever to the conviction of appellant. It was a complete waste of judicial time for an appellate court,*knowing all this,* to remand the case for hearing on such frivolous grounds.

B. The alibi and readiness for trial.

(2) The second point of inquiry is a slight enlargement of the original inquiry into alibi procedures. It was a suggestion by the majority that when defense trial counsel announced himself ready for trial he may not have been prepared to go to trial. This conclusion, however, does not clearly follow. The colloquy relied upon in the court's opinion as the basis for further inquiry by the trial court can be explained just as well by a justifiable and not improper reluctance of defense counsel to furnish the Government with the details of his alibi defense, including the names of alibi witnesses, in advance of the time the applicable district court rule required him to do so. When we consider that there were no *truthful* alibi witnesses, counsels' refusal to name any witness is completely understandable. In any event this refusal had no adverse effect upon defendant's case because during the trial he was permitted, without objection from the Government, to introduce his subsequently discovered alleged alibi witness whose name had not been previously given. This witness, however, did not testify to an alibi. (Tr. Nov. 16, pp. 39-40). Such testimony cannot be characterized as an alibi. The only person who testified to an alibi was the defendant himself, and Rule 84(c) of the U.S. District Court Rules for the District of Columbia then provided, the same as Fed.R.Crim.P. 12.1(d), now provides: "This rule shall not limit the right of the defendant to testify in his own behalf." Thus, as it turned out, there was no violation of the Alibi Rule. Had Eley testified to an alibi, as appellant thought he would, the circumstance would have benefited the defendant, rather than prejudicing him and it would have been the Government that might have claimed prejudice. Such facts are a far cry from proving inadequate representation by counsel.

C. The waiver of a jury trial.

(3) For their third point my colleagues claimed that defense counsel lacked knowledge of the disposition of the cases against appellant's accomplices and that the offer by defense counsel to try the case to the same court that had heard part of the evidence against the two other accomplices further indicated a laxity in representing Decoster. I would take judicial notice that the trial judge here involved would fairly try the case on the basis of the testimony to be introduced against Decoster notwithstanding the court's prior connection with the case against Decoster's accomplices. I would also have to agree with defense counsel's contention that had the Government 316*316 been willing to waive a jury the appellant would have obtained a trial from the judge that was

every bit as fair as from any jury. In fact, many lawyers with substantial experience in trying criminal cases believe that trial judges in most cases hold the Government to a stricter standard for proving guilt than do juries. From all that appears in the records of this court the trial judge here involved is no exception to that rule. It is also not without significance in this case that the judge's reputation was such that Decoster was personally anxious to have his case tried by him *without a jury.* So it is by no means clear that counsel's conduct in this respect was in any way adverse to his client's interest.

In any event, since appellant was tried by a jury and not by the court, the record indicated he was not prejudiced in any way. The point is thus irrelevant to the conduct of appellant's lawyer in his trial, and my colleagues in the present draft of their opinion have now recognized this. Moreover, I fail to see that there is any substantial difference in resulting prejudice whether a seasoned trial judge learns the facts of the crime from a jury trial with a mid-trial guilty plea followed by a presentence investigation and sentencing of defendant's accomplices, or the judge learns the details of the crime solely from the exhaustive presentence report following guilty pleas by the accomplices without the prior submission of any evidence. The majority were once again chasing an insubstantial point.

D. Miscellaneous.

(4)-(5) The remaining points were even more slight and frivolous and the present greatly modified draft of the majority opinion has abandoned any defense of them. However, since the majority continue to arrive at the same result as it did in its prior drafts it is only fair to say that they have finally given up on their prior contention that defense counsel should be found to have inadequately represented a defendant merely because the truth somehow came out from a defense witness and contributed to a proper guilty verdict.

II. PREPARATION AND INVESTIGATION BY DEFENSE COUNSEL

In addition to remanding the case for inquiry into the five points just discussed, my colleagues also directed that the trial court inquire into defense counsel's preparation and investigation. The remand hearing was held on three separate days from February

6 to February 13, 1974, and the court filed complete findings of fact and conclusions of law. (Hereafter Findings and Conclusions.) These concluded that "defense counsel was under no duty to assist the defendant in the fabrication of a defense," that defense counsel raised "the only defense available" to Decoster (putting the Government to its proof, Findings and Conclusions, p. 19), and that appellant was not denied "the reasonably competent assistance of an attorney." Appellant's motion for a new trial was therefore denied.

While my colleagues originally set forth five items of suggested deficiency in defense counsel's representation of Decoster, in their present opinion in effect they have now abandoned most of them and finally settled more or less on one item which they now characterize as the failure of defense counsel to promptly interview four groups of witnesses and *alleged* witnesses — which is asserted to be an alleged failure in necessary preparation and investigation.

A. The Risk of a Fabricated Defense

The holding of the majority on this problem of interviewing witnesses, when applied to the facts here, indicates that they would require defense counsel to make a full investigation in support of a *fabricated defense* which is fanciful and contradicted by overwhelming evidence *and not presently claimed by the defendant.*

Of course, the majority come out against assisting in the fabrication of a defense, but they point to no "non-fabricated defense" (Majority opinion, pp. ___, ___ of 199 U.S.App.D.C., pp. 308, 310, 624 F.2d), and they find that Decoster was prejudiced by the failure of his counsel to investigate in a vacuum in support of a 317*317 defense that is never defined. Result: the conviction is reversed on such grounds by the wholly conclusory assertion of my colleagues that the Government had not sustained the *shifted* burden of proof of establishing beyond a reasonable doubt that counsel did raise the only defense available to him, *i.e.,* putting the government to its proof. What *truthful* defense was even speculatively available, they completely fail to point out or even suggest.

My colleague's opinion does lip service to requiring a factual showing that the alleged error was harmful to the defense, but no impairment is shown. Instead my colleagues attempt to rely on newly established rules of presumption. (Majority opinion, pp. ___-___ of 199 U.S.App. D.C., pp. 309-310 of 624 F.2d). The gist of their real holding is that they would reverse *"even if an investigation would not have produced a scintilla of evidence favorable to the defense"* (Majority opinion, p. ___ of 199 U.S.App.D.C., p. 310 of 624 F.2d) — and that is exactly the rule they have applied here. They accomplish this bit of legerdemain by toying with the words "substantial," "consequential," "harmful" and "prejudicial"[4] in a manner that is strongly reminiscent of the many unsuccessful

attempts to define "productivity" that emanated from*Durham v. United States,* 94 U.S.App.D.C. 228, 214 F.2d 862 (1954) (en banc).[5]

The real issue here, and in many other cases, which the majority completely ignore, is how extensive an investigation a defense lawyer must make when he has sound reason to believe his client is guilty and when his client urges him to present only a fabricated defense. The extent of any investigation by counsel necessarily must be affected by the guilt or innocence of a defendant. I hold with Judge Waddy's conclusion, which points to the nub of the controversy here, when he stated in his conclusions on the facts of this case:

> *Certainly defense counsel was under no duty to assist the defendant in the fabrication of a defense.*

Findings and Conclusions, p. 20. The effect of the majority opinion here is to hold that counsel must investigate to support a fabricated defense. It is on this aspect of this case and the means the majority take to accomplish such result in this and other criminal convictions that I part company from my colleagues.

The majority opinion of course disclaims imposing any obligation on defense counsel 318*318 to suborn perjury, but the effect of holding that counsel here failed in his constitutional duty to defendant because he did not interview witnesses to support a fabricated defense, in the face of Decoster's obvious guilt and his lawyer's knowledge of his untruthfulness and his guilt, is to force objecting defense counsel in the future to indulge in an investigation for no reason other than to somehow aid an obviously untruthful defense. In this connection it must be recognized at all times that appellant's accomplices, Taylor and Eley, had both pleaded guilty and the case against Decoster was substantially the same as the case against them.

I thus take issue with the effect of my colleagues' holding on the facts of this case, that defense counsel owes the same duty to investigate in support of a fabricated defense — which is this case — as when his client makes what appears to him as a truthful claim of innocence. Once defense counsel has reasonable ground for believing his client guilty, the extent of the investigation required is substantially diminished.

To illustrate the unsoundness of the position of the majority in this case, let us look further at the investigations my colleagues assert should have been conducted in this case by defense counsel. In so doing, while defense counsel made no particular point of the fact at the remand hearing, it is perfectly apparent from the record that he was at a disadvantage in answering many questions (Tr. 40, 44) because of the three years and eight months that elapsed from the preliminary hearing (6/8/70) to the remand hearing (2/11/74) and because many of the questions related to decisions he had been required to make quickly and the reasons therefore had not been recorded. Nor could it have been expected that they would be recorded. Defense counsel in most criminal cases cannot be expected to keep books and records like corporate counsel — the representation is different and the trial pace is much swifter. Defense counsel was also not aware of the great lengths to which a majority of this panel would go to reverse a criminal conviction. *See* n.7, *infra.*

B. The alleged failure to investigate

The majority assert that

> *[Defense counsel] did not interview codefendant Taylor, and delayed interviewing Eley until the second day of trial. He did not interview the complainant or the arresting officers, and he failed to search for witnesses at the hotel or the bar. From all that appears in the record, counsel advised his client on whether to go to trial, and then conducted the trial without making any real effort to determine what could be elicited by way of defense.*

Majority Op. p. ___ of 199 U.S.App.D.C., p. 306 of 624 F.2d.

This bald assertion that there was a complete failure to investigate is repeated elsewhere in the majority opinion. It constitutes the *entire basis* for its decision. However, because defense counsel represented Decoster and one of his co-defendants at the preliminary hearing and conducted that hearing for all of them, and represented Decoster continuously thereafter for the 17 months until trial, the record is not clear that the failure to investigate was not just a failure to interrogate some witnesses *shortly before trial. Cf.* Majority Op., n.23. The alleged failure to investigate thus did not cause defense counsel to be ignorant of the facts of the case — which is really the vice that the investigation requirement seeks to avoid. Therefore, the entire base for the majority opinion is not as firm as would be indicated by the frequent repetition of the unqualified assertions that there was a failure to investigate. The frequency with which the majority repeat this claim does not add to its authenticity.

C. Co-defendants Taylor and Eley

Because, Decoster's defense counsel *represented both Taylor and Decoster at the preliminary hearing on June 8, 1970,* ten days after the offense, in the absence of any showing to the contrary, it can be assumed that he was aware of Taylor's testimony from the very start of the case. I am unwilling to *presume* that counsel did not learn the facts of the case at that time.319*319 The overly strong reliance of the majority on counsel's testimony that he "never interviewed Mr. Taylor prior to the trial" (Tr. 37, *cf.* Majority opinion, note 23) fails to recognize that the principal thrust of the context of his examination at this point in the record was directed to his actions *immediately* "prior to trial" (Tr. 36-37). Counsel obviously never interviewed Taylor*immediately* prior to trial because Taylor was not available then, and prior to that time he had ruled Taylor and

Eley out as witnesses because he believed they would both contradict Decoster's story (Tr. 29) (which Eley did). It was not until the day of the trial that Decoster changed his story and demanded that his counsel call Taylor and Eley as witnesses to support his altered defense. Counsel also relied, as he had a right to, on the "letter [he] ... received from Mr. Decoster" (Tr. 38). (Tr. 21, 25, 29). It thus seems apparent that counsel did not interpret the question as inquiring into the knowledge of the offense and the parties thereto that he had gained beginning some 17 months earlier when he began by representing both Taylor and Decoster at the preliminary hearing. My colleagues are thus *overly* literal in reading the record and their reply to this charge (Majority opinion pp. ___-___ of 199 U.S.App.D.C., pp. 306-307 of 624 F.2d and n.23) is deficient because it completely fails to reflect on the possible limited scope of the question. The majority, thus, erroneously assume, from their unreasonably broad interpretation of the scope of the two questions (*Id.,* pp. ___-___ of 199 U.S. App.D.C., pp. 306-307 of 624 F.2d), that counsel was not familiar with the true facts of the case from the outset. This assumes more from the answer than was clearly asked by the question. The majority faults this conclusion as being based on logic instead of evidence. (*Id.*) Actually it is based on evidence *and* logic, and common sense, as it should be.

The third appellant, Eley, was also a defendant in the *same* preliminary hearing, and while Eley had separate counsel (Mr. Kehoe), it was Decoster's counsel in the preliminary hearing (who was also trial counsel for Decoster) who *pulled the entire laboring oar for all three defendants at that hearing* (Tr. 34 and transcript of preliminary hearing, June 8, 1970). The evidence of guilt against all three men was substantially the same, and following the introduction of the Government's case the decision was obviously made by all not to contest the finding of probable cause by the magistrate. This decision was not attacked then and is not attacked now. To reach the decision not to contest the finding of probable cause necessarily involved knowledge by defense counsel for Decoster and Taylor (the counsel whose conduct is here in question) that could only have been obtained by prior discussion of the offense with these men and by consultation with Eley or his counsel. Moreover, the trial court made a finding that counsel did interview Eley before he acceded to Decoster's demand and placed Eley on the stand. Also, *before Decoster was tried, both Taylor and Eley entered guilty pleas to robbery and were sentenced.*

Then, suddenly, *on the day Decoster's trial began,* Decoster apparently switched his story and told his counsel that he had a self-defense claim and demanded that his counsel call Eley and Taylor as witnesses (Tr. 29). *It is for the failure to have foreseen and investigated this admittedly specious defense, conjured up by the accused on the opening day of the trial, that the majority now bases its reversal of this conviction.* The majority cast their decision in slightly different form by indicating counsel should have realized that Taylor and Eley were at least*potential* witnesses who should have been previously interviewed; but the defendant himself never even claimed the defense involving his confederates as witnesses until the day before trial, so how could counsel be expected to realize that the accused was going to change his story? To require such clairvoyance demands too much of counsel. Moreover, as above pointed out counsel was aware of Taylor's and Eley's participation, and the government's evidence thereof, from the time of the preliminary hearing.

320*320 Defense counsel must rely to a great extent on the defendant for the facts of his involvement and that of his accomplices and it is unreasonable to require counsel to anticipate that his defendant on the day trial begins will radically change his story as to his own participation in the crime. It is clear in this record, however, that defense counsel had already been through the preliminary hearing with all three men and it is submitted that this was a sufficient basis for him to conclude, as he did (Tr. 34), that there was no need for the further investigation the majority suggest.

It is also apparent that as a reasonably competent lawyer defense counsel realized from his*early prior knowledge of their acts, and their subsequent guilty pleas and the letter he received from his client,* that Taylor and Eley were not potential witnesses who could benefit his client. He *correctly* concluded that they would contradict his client's story (Tr. 29, 38), and Eley's testimony at trial proved his judgment to be correct. What the majority attempts to do is to rescue Decoster from his perjury and his bull-headed demand on his counsel to call Eley. Decoster forced his counsel to carry out his unreasonable demands and thus there is no reason that he should now be saved from his own folly, particularly so because in his allocution he in effect admitted his guilt.

D. The Government Witnesses

The majority admits that there was no need for a further interview of Officer Ehler, since defense counsel had cross-examined him at the preliminary hearing, but insist that Officer Box should have been interviewed. However, prior to trial defense counsel was given full access to the Government file, including the grand jury testimony and the transcript of the preliminary hearing containing Ehler's testimony, and since defense counsel knew of Decoster's untruthfulness, it was not necessary to interview either Box, or the victim Crump. Likewise *there is no showing that these Government witnesses would have willingly submitted to such interview by the lawyer for the accused. They were not required to* so *do.* Moreover, the testimony of all three Government witnesses was substantially the same and was consistent. The record thus supports a conclusion that there was a lack of prejudice on this score.

The majority, however, attempt to make a point out of the fact that at the preliminary hearing Officer Ehler testified as follows:

> *Mr. Decoster and Mr. Ely [sic] had a hold of the subject, the complainant. One of them was yoking him, I don't know which one it was at the time, but — and they were removing something from his pockets.*

Tr. Preliminary Hearing 5-6 (emphasis added).

While at Decoster's trial Officer Ehler testified:

[Willie Decoster, Jr.] was the one who was going through the complainant's pockets.

Tr. Nov. 15, 1971, p. 12. This latter statement was corroborated by Officer Box's testimony (Tr. 42, 47). So there is an apparent conflict in that Ehler testified at the preliminary hearing that he did not know whether Decoster or Eley was yoking Crump and at the trial 17 months later he testified that it was Decoster who was going through Crump's pockets, *i. e.,* that left Eley as the one who was yoking Crump. The record does not disclose any specifically obvious explanation for this. The most likely explanation probably lies in the fact that in the interim between the two statements by Officer Ehler the other two participants in the crime, Taylor and Eley, had entered guilty pleas and been sentenced. This necessarily involved the acquisition of considerable additional reliable knowledge by the Government as to what the participation of each accused had been in the crime.

Actually, the point is a minor one, and from a substantive point of view *it is relatively immaterial whether Decoster was going through his victim's pockets or yoking him because both acts aided the same crime and the perpetrators of both acts are properly* 321*321 *chargeable as principals.* 18 U.S.C. § 2(a). The important fact is that both officers identified Decoster as an actual participant in the robbery. After originally taking a contrary position, the majority now admit that this was harmless beyond a reasonable doubt (Majority op. n.42). The point was so immaterial it should never have been raised. Also, there is no reasonable doubt about Decoster's identification as a participant in the crime with Taylor and Eley, since he was arrested almost immediately thereafter only a short distance from the scene of the robbery. Even Eley placed Decoster as a participant in the crime.

E. The Desk Clerk at the D.C. Annex Hotel

My colleagues also assert that it was clearly erroneous for the trial judge to find no prejudice in not interviewing the desk clerk at the D.C. Annex Hotel where Decoster was arrested. They suggest the *possibility* that the desk clerk or guests or residents in the lobby at the time *might*have corroborated or denied that Decoster "walked from the bar to the hotel and into the lobby, while Officer Box testified that he had chased appellant" (Majority opinion, p. ___ of 199 U.S.App.D.C., p. 308 of 624 F.2d). However, an examination of the transcript indicates that this suggestion is purely speculative, not based on any foundation whatsoever, and so there is no indication that any material testimony could be thus obtained. In the absence of a proper foundation the court cannot just dig up potentially helpful witnesses out of its imagination — that is pure speculation — and that is what the majority opinion here relies upon. There was no showing or proffer of any sort by appellant that there were any guests or residents in the "lobby", or even that this so-called "hotel" had anything that might pass as a lobby, nor any showing as to what the desk clerk would testify to, or that at his location *inside*

the hotel he was in a position so that he was *able to see* whether Decoster had walked from the bar to the hotel, or that he "remembered" having seen anybody in the lobby (Majority op., p. ___ of 199 U.S.App.D.C., p. 308 of 624 F.2d). Thus no adequate foundation exists in the record for the majority's completely speculative suggestions.

Further, examination of Exhibit 2, which is a sketch of the area, clearly shows that it was*impossible* for the desk clerk to see the path which Decoster testified he took "from the bar to the hotel." This is so because the desk clerk was situated at point (E) on the sketch (Exhibit 2) which was at a considerable distance *inside* the Annex and the entire area that Decoster testified he covered in walking from the bar to the Annex was *around a corner* of the building from the line of vision that the desk clerk had from where he was stationed inside the Annex.*See* point (E), Exhibit 2. It would also have been impossible for the desk clerk to see how Decoster approached the Annex if Decoster had taken the path from the club to the Annex as testified to by the Government witness and Eley or by his own testimony. Exhibit 2 clearly shows that the desk clerk would have had to be able to *see around a corner,* which was a considerable distance away from where he was situated at point (E), before he could have seen how Decoster covered *any* of the distance from the bar to the front door of the Annex. This is difficult to do — even in an appellate opinion of this court. Exhibit 2 and the record prove that it was *not possible* for the desk clerk to be a competent witness on the issue suggested by the majority, *i. e.,* whether Decoster walked from the bar to the Annex. Thus the record discloses that there was no prejudice in not interviewing him.

The assertion by the majority that "the hotel lobby . . . [was a] potentially fruitful [place] for investigation[s]" (Majority op. p. ___ of 199 U.S.App.D.C., p. 308 of 624 F.2d), and the finding that defense counsel was constitutionally deficient in his representation of his client, for not doing so is a good example of the farfetched speculation the majority indulge in to support their extreme conclusions and of what defense lawyers and the public can expect from the majority in the future if they are placed at the mercy of an unreasonable 322*322 change in the burden of proof in *all* ineffectiveness of counsel cases. Competent lawyers should think twice before accepting defense assignments that would subject their professional reputation to second-guessing appellate criticism on such highly speculative grounds for claimed failure to seek out non-existent and immaterial evidence.

The uncontradicted evidence is that when Decoster was in the lobby he was walking.[6] So the only testimony is that when Decoster was *inside* the hotel he was walking, and, if the desk clerk observed this, his testimony would be merely cumulative. Anything beyond this is pure speculation.

F. Other Witnesses

The majority make the further speculative suggestion that the desk clerk should have been asked for names of persons in the lobby, and that

> *Similarly, appellant testified that persons unknown to him had been in the bar at the same time he was there. Such witnesses could have been helpful if theycould have corroborated appellant's claim that he and Crump had been drinking together, or, perhaps, if they had overheard conversation, or seen Crump and appellant leave. Counsel at least could have questioned employees of the bar to see if they had useful information or could supply the names of customers who were at the bar at the time.*

Majority opinion, p. ___ of 199 U.S.App. D.C., p. 308 of 624 F.2d (emphasis added). The italicized words indicate the degree of speculation indulged in by the majority.

As for any possible witnesses at the Annex, as stated above, there is no conflict in the testimony as to what happened *in* the hotel, so further witnesses were unnecessary. As for witnesses from the bar, Decoster testified that Roger Crump was the only person with him at the Golden Gate Club (Tr. 34). Decoster testified that he had been together with Crump in the bar some time before the robbery (Tr. 30-31), and this was not denied by Crump who, because of his intervening head injuries, testified, "I couldn't say for sure" (Tr. 35, 36). So there was no dispute about what happened in the bar either. In any event, such prior meeting in the bar, as testified to by Decoster, was not helpful to him, since he testified that Crump paid for drinks with cash (Tr. 34), and this testimony afforded the Government a basis for suggesting that this may have given Decoster an opportunity to see that Crump "had quite a big roll of money on him that night" (Tr. 34), thus leading to the robbery. The indictment charged that $110 in cash was taken from Crump in the subsequent robbery.

Decoster also testified that no person in "the little restaurant on 9th St.," where he once claimed to have been before he walked to the D.C. Annex, ". . . could testify that [he was] there" (Tr. 36). So, even if witnesses had been found in the Annex or the bar, *there was no dispute as to the events there,* some of the facts as testified to by Decoster were not helpful to him (Tr. 35, 36), and they were not particularly relevant to the commission of the offense, *i.e.,*the robbery of Crump on the street some 323*323 distance away and out of the view of the phantom and useless witnesses the majority demand be located and interviewed. At this point, the majority's asserted denial of speculation ("Unwilling to speculate . . we remanded . . .," Majority opinion, p. ___, of 199 U.S.App.D.C., p. 301 of 624 F.2d) becomes ludicrous. It is thus clear that the majority opinion is based completely on speculative possibilities from unidentified witnesses for which there is no foundation or support in the record.

G. Admission of Guilt

A matter of great significance, which my colleagues refuse to recognize, is that prior to his sentencing Decoster in effect admitted his guilt in a letter to the trial judge. Thereafter, the following occurred at his sentencing:

> *THE COURT: . . . the Court has received a long letter from the Defendant, himself, stating that he has learned the error of his ways and that he has found out that he was fooling with the wrong crowd, and that he had been using drugs and he now knows that the use of drugs could lead only to death or jail, neither one of which is acceptable to him.*
>
> *Mr. DeCoster [sic], do you have something you want to say on your own behalf?*
>
> *DEFENDANT: I just wanted the Court to know that I was sincere in writing this letter. I feel like I can — well, I know I can be rehabilitated which I have did on my part in having to come to face the facts. It just seems like, you know — well, really, I left home when I was at an early age and I didn't have that much confidence and I just hooked up in the wrong places and in the wrong ways. But now I believe that I can — I know that given an opportunity that I can help my family as well as myself. So I ask this Court upon sentencing me to consider this.*

Tr. Sentencing Proceedings, March 3, 1972, p. 4. Thus, Decoster at sentencing did not claim to be innocent and in effect admitted his guilt. From such admission it is apparent that his testimony at trial was false.[7] Thereafter, the height of sophistry is reached when the majority contend that the defendant might have benefited from additional investigation since he could have "been told by his lawyer that there was no evidence available to support the defense theory" (Majority opinion, p. ___ of 199 U.S.App.D.C., p. 310 of 624 F.2d). But appellant knew better than anyone that there was no *truthful* evidence to support *any* defense theory. He did not need his lawyer to investigate to tell him what he already knew.

H. The Suggestion of the Majority as to the Duty of Defense Counsel

The presently stated position of the majority opinion is that from a "full investigation 324*324 . . . appellant [might have] been told by his lawyer that there was no evidence

available to support the defense theory [a false alibi] [and] appellant would have been able to make a better informed decision whether to go to trial, or [plead guilty]" (Majority op. p. ___ of 199 U.S. App.D.C., p. 310 of 624 F.2d). When the majority opinion refers to "the defense theory," *supra,* in the context of his case it is contending that if, as a result of the investigation, Decoster had realized his alibi defense was weak and so had changed his story to admit the fighting, which was an easily provable obvious fact, and denied the incriminating facts, *i.e.,* the actual taking, the larceny, he might thus have obtained an acquittal by testifying falsely. From the very beginning I have vigorously opposed this latter alternative as not being a legitimate consideration.[8] The reluctance of the majority to discuss this prejudice, argumentatively resulting from the inability to possibly secure an acquittal from the use of testimony the majority now knows is perjured, is part and parcel of the complete failure of the majority even to discuss the effect of Decoster's admission of guilt as showing lack of prejudice. In other words, there is lurking in the silence of the refusal by the majority to even discuss the lack of prejudice from the refusal to investigate the *fabricated* defense, that *that* reason is implicit in "the defense theory" the majority refer to and asserts reliance upon, but does not explain. And while the majority opinion states that "counsel was `under no duty to assist in the fabrication of a defense'" (Maj.Op. p. ___ of 199 U.S.App. D.C., p. 308 of 624 F.2d), it places all counsel under that precise duty by holding in *this* case that this counsel violated the accused's "constitutional right to effective assistance of counsel" (*Id.,* p. ___ of 199 U.S.App.D.C., p. 310 of 624 F.2d) in allegedly not stretching his investigation to provide more fuel for a fabricated defense which *the majority now knows* (p. ___ of 199 U.S.App.D.C., p. 310 of 624 F.2d *supra*) would be based on perjury. *What the majority position adds up to is that it reverses the conviction because they contend the defendant was prejudiced by lack of an investigation that might have been used as the basis for talking Decoster out of one perjured defense so he might have relied upon a second perjured defense that had a better chance of succeeding.*[9] 325*325

326*326 Basically I part company from my colleagues in their holding that what it considers to be ineffective assistance of counsel may be grounded in a failure to *assist the accused in fabricating a defense.*

The risk foreseen by Judge Waddy has been realized.

I deny that any lawyer has an obligation to investigate in order to create or assist such a fabrication and no appellate court with its eyes open to such a result should reverse a conviction on such grounds. Ethics alone should prevent it. That by declining to do so the lawyer might also prevent his client from committing perjury would of course be a beneficial but necessarily secondary result. In this case further investigation was not necessary because defense counsel already had adequate information. He had been in the case from the very beginning. Judge Waddy, after trying the case initially, and conducting the extensive remand hearing, also clearly perceived on the remand what was involved *in this case* and likewise stated that defense counsel owed no duty to assist the defendant to fabricate a defense. I agree completely with his statement of the law and with his analysis as to what the suggestions of the majority here actually add up to.

The majority say they cannot agree with the trial court's finding that defense counsel raised the only defense — but they point to no valid defense. All that is present here is an admittedly*fabricated defense.* I submit this is an insufficient showing upon which to base a conclusion that the trial court's finding was clearly erroneous, and the majority does not make this finding which is required to support its reversal.[9a]

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*327 THE BURDEN TO DEMONSTRATE PREJUDICE

The facts of this case prove, and the majority opinion does not disprove, that a *truthful* defense would not have resulted from any further investigation. This conclusion is compelled by appellant's subsequent admission of guilt. In addition to the lack of any substantial factual basis for the majority opinion concluding that lack of prejudice was not shown, the majority also contorted and changed the law. The linchpin of the majority reasoning is:

> *DeCoster I teaches that once appellant discharges his burden of showing a substantial violation of one of counsel's duties, the burden shifts to the Government to establish that the constitutional violation was harmless. (Emphasis added)*

Majority opinion, p. ___ of 199 U.S.App. D.C., p. 310 of 624 F.2d. From this quotation one can see how quickly the "guidelines" are converted into "duties" and result in almost instantaneous "constitutional violation[s]." What the majority does is to make a failure to comply with some feature of the guidelines into a *prima facie* constitutional violation. The "substantial violation" which triggered this quick metamorphosis, according to the majority was the ". . . total failure to conduct (*Id.* p. ___ of 199 U.S.App.D.C., p. 310 of 624 F.2d) . . . a full investigation . . . to support the defense theory [the alibi defense presented at trial] . . . (*Id.* p. ___ of 199 U.S.App.D.C., p. 310 of 624 F.2d)."[10]

The purported reasoning for placing the burden of proof on the Government, which *DeCoster I*asserts, and which the majority attempt to apply here for the first time, lends neither justification nor support to the rule. In attempting to support a new rule shifting the burden of proof the majority opinion in stages: (1) utterly ignores the settled case law in this circuit, ignoring particularly the wisdom of Judges Prettyman and Leventhal

and of Judge (now Chief Justice) Burger, (2) overlooks controlling principles on burden of proof which have been set by the Supreme Court and which are anchored in the common law, (3) cites two erroneous perceptions of judicial process as support for the rule, and (4) creates unnecessary constitutional conflicts involving the sixth amendment right to an adversary trial, the independence of counsel under the sixth amendment, the separation of powers, and waiver of the fifth amendment protection against self-incrimination.[11] 328*328 These points are discussed in turn. *They are very important in this case because the majority opinion has not been able to answer any of them.*

I. THE INCORRECT RULE AND THE CORRECT RESTATEMENT

In *DeCoster I* the majority attempted to relieve future criminal defendants in most situations of all responsibility whatsoever to show prejudice in an ineffectiveness of counsel claim. 487 F.2d at 1204. To accomplish this end, some guidelines for conduct of counsel were proposed, and the opinion states:

> *If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government, "on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby." Coles v. Peyton, 389 F.2d 224, 226 (4th Cir.1968) [cert. denied, 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968)].*

Id., footnote omitted.

Thus by *DeCoster I,* proof on the entire issue of prejudice in future cases, where any one of the asserted standards is violated, is placed upon the Government, to prove the negative — "lack of prejudice." Why should *the Government* be required to prove this when its conduct has not been improper, when the evidence, if it exists, to support the charge, is peculiarly available to the accused, and particularly when the alleged inadequate representation was partially caused by the defendant? The majority contends that this should be done in *all* cases in order to avoid penalizing a defendant for his counsel's failures. However, it is not penalizing the defendant where he is required to prove that he was substantially prejudiced by his counsel's improper representation.

In my dissent in *DeCoster I* I concurred generally in the standards of performance for defense counsel outlined in the majority opinion only on the assumption that they would act as general guidelines, and took issue with the stated attempt to shift the burden of proof of prejudice in future cases. The rule as attempted to be applied here is pernicious and should not be accorded a foothold.

My view is that under the law of this circuit the burden of proving prejudice is clearly upon the criminal defendant in most cases, and as stated by Judge Craven in his dissent in *Coles, supra*,

> *the burden of showing [proceeding to show] lack of prejudice falls on the state when, but only when, the petitioner has shown a set of facts that demonstrate prejudice to his defense, inherently or otherwise.*

389 F.2d at 230 (emphasis in original). The assertion in the majority opinion that, "This case falls squarely within the [inherent prejudice cases] . . . " ignores the facts here present. This is not a case where counsel had insufficient time to consult with the defendant,[12] where there was an obvious conflict of interest,[13] or where the court denied the defendant his right to confer with his counsel.[14] Here, every alleged failing relates to a subjective decision made with sufficient time, without conflict of interest 329*329 and with ample opportunity to consult. Prejudice is not inherent or obvious and must be proved. It is too much to say that any given omission or act universally entails prejudice. Each defendant *on the facts of his own case, except in exceptional circumstances must show actual prejudice to his cause.* Such evidence, if it exists, is normally more available to him than to the Government and he should carry through and prove his case rather than having the burden shifted to the Government on a mere showing of some slight effect on his defense, as the majority holds.

II. THE SETTLED CASE LAW IN THIS CIRCUIT

A. The Cases of this Circuit and the Reasoning of DeCoster I

The crux of *DeCoster I* is its threshold attempt to justify reopening the question of *whether or not a defendant must show prejudice in making an ineffectiveness of counsel claim.* The opinion does this by deliberately interweaving a wholly separate issue. The separate issue is the desirability of some standards by which to gauge performance of counsel. This all takes place at 177 U.S.App.D.C. 330-331, 487 F.2d 1201-02:

> *The first major ineffectiveness case in this Circuit was Jones v. Huff, 80 U.S. App.D.C. 254, 152 F.2d 14 (1945). Applying a due process-fundamental fairness approach, we held the*

standard to be whether counsel's incompetence rendered the trial a "farce and a mockery." In Bruce v. United States, 126 U.S.App.D.C. 336, 379 F.2d 113 (1967), we reconsidered Jones and held that the "farce and mockery" language was "not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing requisite unfairness." The rule announced in Bruce required a defendant to prove:

both that there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense . . . [126 U.S. App.D.C. at 339-340], 379 F.2d at 116-117.

In Bruce, the claim of ineffective assistance arose on collateral attack. In several cases since then, when the ineffectiveness issue was raised on direct appeal, the court has silently ignored the Bruce requirement that the defendant has a "heavy burden" to show prejudice, implying that a different test was applicable on direct appeal. United States v. Hammonds, 138 U.S.App.D.C. 166, 425 F.2d 597 (1970); Matthews v. United States, 145 U.S.App.D.C. 323, 449 F.2d 985 (1971). Indeed, in Bruce itself the court pointed out that "a more powerful showing of inadequacy is necessary to sustain a collateral attack than to warrant an order for a new trial either by the District Court or by this court on direct appeal." [126 U.S.App.D.C. at 340], 379 F.2d at 117; accord Scott v. United States, 138 U.S.App.D.C. 339, 427 F.2d 609 (1970). Since these decisions leave uncertain the correct standard to be applied when the question of ineffectiveness is raised on direct appeal, we now address that issue.

(Emphasis added, footnotes omitted.)

This circuit has *not* departed from the rule that the *defendant* must show prejudice. The law on that point is *not* "uncertain." It was only the question of standards for the performance of defense counsel that was open. *Bruce* was written by Judge Leventhal. Although a collateral attack case, it expressly held that defendants must show prejudice:

But that services were rendered and that there is not the flavor of gross inattention to a client's interest does not necessarily dispose of the case. A claim of ineffective assistance of counsel might be made out if the wishes of the appellant were in fact diverted by clearly erroneous legal advice and he was substantially prejudiced thereby. Turning to the question of prejudice, we find the record barren of any substantial showing on this crucial point. Appellant made a bare assertion of innocence, but he has not come forward with any evidence that his admissions to Judge Sirica are not accurate.

330*330 126 U.S.App.D.C. at 344, 379 F.2d at 121 (emphasis added). Later, in *Matthews v. United States,* 145 U.S.App.D.C. 323, 449 F.2d 985 (1971), a *direct appeal* case, Judge Leventhal, concurring, wrote:

I have taken the trouble of outlining the prejudice I think occurred, because I am by no means of the view, as suggested in the Petition for Rehearing, that in these cases no possibility of prejudice need be shown. Where defendant has not been provided with counsel, that fact in and of itself establishes the need for reversal without regard to any other possibility of prejudice. Glasser v. United States, 315 U.S. 60, 76, 62 S.Ct. 457, 86

> *L.Ed. 680 (1942),* but when the claim is posed in terms of ineffective assistance of counsel, then I think the ineffectiveness has to be measured in terms of whether the attorney has in effect blotted out the substance of a defense, *Bruce v. United States, 126 U.S.App.D.C. 336, 340, 379 F.2d 113, 117 (1967).*

145 U.S.App.D.C. at 332, 449 F.2d at 994 (emphasis added.) More importantly, the disposition in *Matthews* rested explicitly and squarely on *United States v. Hammonds,* 138 U.S.App.D.C. 166, 425 F.2d 597 (1970), a *direct appeal* case. In *Matthews,* Judge Fahy, writing for himself and Judge Wright, stated:

> *The petition of appellant Matthews for rehearing has led us to reconsider our affirmance of his convictions. In United States v. Hammonds, 138 U.S.App.D.C. 166, 425 F.2d 597 (1970), involving a similar problem of ineffective assistance of counsel, the court reversed Hammonds' convictions because of constitutional error there found. In that case as in this the conduct of the same counsel was involved, and the same kind of casual summation to the jury occurred. Moreover, the evidence of guilt in Hammonds was no less strong than the evidence of guilt in Matthews' case.*

145 U.S.App.D.C. at 330, 449 F.2d at 992. *Hammonds,* a *direct appeal* case, expressly follows the earlier case law in this circuit, which holds that the *defendant* must show prejudice:

> *At the outset we recognize that cases involving ineffective assistance of counsel "raise questions of extreme difficulty in the administration of justice." Jones v. Huff, 80 U.S.App.D.C. 254 [255], 152 F.2d 14, 15 (1945). "The burden on the Appellant to establish his claim of ineffective assistance of counsel is heavy. * * * The question * * * is whether his representation was so ineffective that Appellant was denied a fair trial." Harried v. United States, 128 U.S.App.D.C. 330 [333-334], 389 F.2d 281, 284-285 (1967). However, it requires a less "powerful showing of inadequacy" to sustain appellant's burden on direct appeal than is required on collateral attack. Bruce v. United States, 126 U.S.App.D.C. 336, 340, 379 F.2d 113, 117 (1967).*

United States v. Hammonds, 138 U.S.App. D.C. at 169, 425 F.2d at 600 (emphasis added, footnote omitted). *Hammonds* concludes:

> *Appellant has sustained his burden of establishing his claim that he was deprived of his constitutional right to effective assistance of counsel.*

Id. at 173, 425 F.2d at 604.

Although defendant's burden in these direct appeal cases is less than the burden in collateral attacks, the defendant must *nevertheless show prejudice.* That has never been in question. The test reproduced *supra* from *Hammonds* relies on *Harried,* and of course *Hammonds* in turn governed *Matthews. Harried* was a *direct appeal* case. In *Harried,* then-Judge Burger wrote:

> *The burden on the Appellant to establish his claim of ineffective assistance of counsel is heavy. See Bruce v. United States [126 U.S.App.D.C. 336], 379 F.2d 113 (1967); Mitchell v.*

United States, 104 U.S.App.D.C. 57, 259 F.2d 787, cert. denied, 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86 (1958).

128 U.S.App.D.C. at 333-334, 389 F.2d at 284-85 (emphasis added). In setting this test, the*Harried* excerpt relied on *Mitchell,* in which Judge Prettyman, writing for himself and then-Judge Burger, wrote:

> *331*331 A convicted person cannot bring about a judicial hearing upon and determination of the trial competence of defense counsel by making allegations which, either on their face or after initial testing for verity, fail to indicate a lack of skill so great that the accused in realistic fact had not a fair trial. An accused cannot bring about a judicial evaluation of the quality of a defense; he is entitled only to allege and show that the proceeding was not a fair trial.*

104 U.S.App.D.C. at 63-64, 259 F.2d at 793-94 (emphasis added). Although *Mitchell* is a collateral attack case, it is obvious from *Hammonds, Matthews,* and *Harried* and the foregoing language in *Mitchell* and *Bruce* both indicate that the burden is on the defendant to show prejudice in direct appeals as well. Such burden extends to all effectiveness of counsel claims. We made this clear in our approval of the action of the District of Columbia Court of Appeals in*Scott v. United States,* 138 U.S.App.D.C. 339, 427 F.2d 609 (1970):

> *The appropriate standard for ineffective assistance of counsel, set forth in Bruce, supra, is whether gross incompetence blotted out the essence of a substantial defense.*
>
> *Moreover, in case of direct appeal the reviewing court takes action appropriate in the interest of justice, even though the problem would not rise to the constitutional dimensions necessary to undo a final judgment on collateral attack. Dyer v. United States, 126 U.S.App.D.C. 312, 379 F.2d 89 (1967); seeBruce, 126 U.S. App.D.C. at 340, 379 F.2d at 117.*
>
> *However, the opinion of the District of Columbia Court of Appeals reveals both that it was aware of the standard in Bruce and that it sought to apply that standard to the facts of this case.*

138 U.S.App.D.C. at 340, 427 F.2d at 610.

Hammonds, Matthews, Harried, Bruce, and *Mitchell* are the law in this circuit. They have not been overruled. They continue to be cited with favor, as for example, by Judge Robinson in*United States v. Holiday,* 157 U.S.App.D.C. 140, 142 n. 5, 482 F.2d 729, 731 n. 5 (1973). Other examples of recent favorable citation are by Judge Wright in *United States v. DeLoach,* 164 U.S.App.D.C. 116, 120, 504 F.2d 185, 189 (1974), and Judge Bazelon in *United States v. Butler,* 164 U.S.App.D.C. 151, 155, 504 F.2d 220, 224 (1974).

The majority's insinuation that there is uncertainty in the law of this circuit as to whether or not a *defendant* must show prejudice in effectiveness of counsel cases thus amounts to a gross misstatement. It accordingly becomes clear that the majority opinion is attempting to change the settled case law in this circuit with no reference

whatever to the precedents that must properly be overruled before that can be effectively accomplished. Two judges alone cannot do that. An *en banc* court is the only vehicle to accomplish that end.[15] Thus the majority opinion in its attempt for the first time to create a new burden of proof rule in this circuit, contrary to our settled case law, is acting in excess of its authority and its opinion on that point is a nullity. Its attempt to change the rule need not be followed. The majority opinion in no way denies this point.

The majority "incorrectly [interprets] the constitutional requirement of due process" as our panel did when *Agurs* was before it. 332*332 Thereafter the Supreme Court in *Agurs* held that the failure of counsel to obtain the criminal record of the murder victim does not demonstrate ineffectiveness because such evidence *would not create a reasonable doubt of guilt.* 427 U.S. at 102 n. 5, 96 S.Ct. 2392. The same is true here. *There is no showing or claim that any truthful evidence exists that would create a reasonable doubt of guilt.* Certainly the fabricated alibi does not meet the due process standard. The reversal here is thus contrary to *Agurs, supra.*

It is true that some statement of standards for a lawyer's professional work are helpful here, and the foregoing cases support that proposition. But the same cases are the direct case law in this circuit for the proposition that the burden is on the defendant to show prejudice. The cases cited *supra* leave no uncertainty on that point.

There is incontrovertible reasoning in our case law that *DeCoster I* blindly attempts to ignore. The majority in *DeCoster I* predicated its statement on burden of proof with illogic that callously disregards the trust of the reader and the principles of *stare decisis.* And the assertions in the majority opinion that this is a dissenting opinion and so was Judge Craven's opinion in *Coles, supra,* are not an adequate refutation of the reasoning which those opinions embody.

B. United States v. Pinkney

An eloquent rejection of the factual reasoning of the majority here and of the proposition that the burden is on the Government, and not the movant, to show prejudice is found in *United States v. Pinkney,* 177 U.S.App.D.C. 423, 543 F.2d 908 (1976). In *Pinkney,* Judge Robinson, with Judges Wright and C. Stanley Blair concurring, examines a set of alleged errors and omissions of counsel, which are of the same nature as those alleged in this case, namely, failure to discuss a material matter with his client, or to inquire whether certain asserted "grave allegations of the Governments allocution memorandum were true" (at 428, 429, 543 F.2d at 913, 914). The opinion by Judge Robinson nevertheless *rejects* Pinkney's claim of ineffective assistance of counsel, *flatly holding that a DeCoster I motion is a motion for a new trial, in which the defendant bears the same obligation to show prejudice to his cause as in any other new trial motion.*

1. The Facts and Reasoning of Pinkney

In *Pinkney,* appellant, convicted of distributing heroin, claimed ineffective assistance of counsel at sentencing:

> *The Government's allocution memorandum was served on appellant's counsel a week ahead of sentencing, but appellant asserts that counsel never discussed the contents of the memorandum with him. He also complains of counsel's failure to dispute the allegation, made in the memorandum, that appellant was a party to the District's drug traffic.*

At 428, 543 F.2d at 913 (footnotes omitted).

Judge Robinson introduces his *ratio decidendi* by surveying certain preliminary factors:

> *As previously stated, a motion for resentencing charging ineffective assistance of counsel when appellant was sentenced was rejected by the District Court, but we perceive no basis upon which that ruling could now be upset. In the first place, since appellant did not prosecute an appeal from the ruling on the motion, our jurisdiction to entertain the point is, to say the least, not clear. And, in view of the sentencing judge's specification of his reasons for denying the motion, it is equally unclear whether the allocution memorandum played a significant part in the sentencing decision. We need not pass on these aspects of the case, however, because for even additional reasons the District Court must be affirmed.*

Id. at 430, 543 F.2d at 915 (emphasis added) (footnotes omitted).

It should be noted that, although uncertain as to the extent of the trial court's reliance on the allocution, the *Pinkney* court itself relied significantly on the allocution:

> *The evidence adduced at appellant's trial strongly indicated that he was engaged333*333 in wholesaling narcotics. And, the information conveyed by the Government's allocution memorandum cast appellant in that role positively.*

Id. at 427, 543 F.2d at 912 (emphasis added) (footnote omitted).

> *We refer not only to profitable drug-selling reflected by the trial transcript and the Government's allocution memorandum but also to a statement by appellant, communicated to the court in the presentence report, indicating that he was receiving $80 per week in unemployment compensation when the alleged offenses transpired.*

Id. at 428 n. 30, 543 F.2d at 913 n. 30 (emphasis added).

Judge Robinson then goes on to present his *ratio decidendi:*

> *Our DeCoster decision plainly envisioned a motion bolstered by affidavit at its key points, an expectation emanating from the procedural vehicle which DeCosterpressed into service as a record-implementing device. The vehicle, we said, was a motion for a new trial, obviously one presenting new evidence in the sense of evidence outside the record — in other words, a new-trial motion based on newly discovered evidence. An essential characteristic of such a motion is a disclosure of evidence portraying the movant's claim materially and resolutely, and evincing a capability of mounting a serious challenge. By the same token, a motion charging ineffective assistance of counsel must set forth evidence upon which the elements of a constitutionally deficient performance might properly be found.*
>
> *Appellant's motion did not meet these wholesome requirements. There was no affidavit supporting the motion, nor was the motion otherwise verified. There was only the bare statement that sentencing counsel did not confer with appellant on the charge in the Government's allocution memorandum that appellant was a cog in the local drug-distributing machinery. The absence of substantiation therefor is the better assessed in conjunction with appellant's failure to raise the claim in his postsentence letter to the sentencing judge, and in his present counsel's unexplained omission to advance it earlier than he did. Moreover, while insisting upon a further opportunity to dispute the drug-involvement allegations of the Government's memorandum, appellant's motion gave no indication as to the evidence, if any, by which he would undertake an effort at refutation.*

Id. at 431-432, 543 F.2d at 916-917 (emphasis added) (footnotes omitted).

2. Counsel's Performance in Pinkney

The glaring fact in the foregoing extract from *Pinkney* is that both appellant and counsel failed to timely advance the claim of ineffective assistance, and that, in filing the motion, counsel failed to supply the court with particulars. The *Pinkney* majority declines to conform to the temper of *DeCoster I* and find that the untimely and insufficient filing is *itself* ineffective assistance of counsel.

But under the highly suppositive reasoning of the majority in this case, the potential revelations on remand and the untimely motion of counsel *a fortiori* require the simple remedy of inquiry on remand. Reversal was not in issue in *Pinkney* — simply a remand to find out the substance of a pleaded claim. In *DeCoster I,* of course, *there was no claim at all.* This court raised the issue of effective assistance *sua sponte. Supra,* pp. ___-___ of 199 U.S.App. D.C., pp. 300-301 of 624 F.2d. If this court can allow the appellate speculation indulged in this case to require*reversal,* then certainly possible revelations as to Pinkney's participation in District of Columbia drug traffic could be sought on a *remand.*

Given the indistinguishable factual posture of *Pinkney* and of this case, the obvious recourse for the *Pinkney* court was to invoke the hearing remedy of *DeCoster I,* thereby compelling the government to prove that Pinkney was not prejudiced by the alleged omissions of counsel.

But Judge Robinson forthrightly abjures the type of speculation that the majority here calls for:

> *334*334 As an appellate court, our adjudicatory authority extends only to questions amply grounded in the record.*

Id. at 430, 543 F.2d at 915 (emphasis added) (footnote omitted). The *coup de grace* to the mode of fanciful factual analysis which Judge Bazelon's opinion would hereby seek to impose is that the refusal of the court in *Pinkney* to set aside the conviction turned on the conclusion —

> *"that counsel's alleged derelictions [had not] frustrated appellant's opportunity to present his side of the controversy," id. at 429, 543 F.2d at 914.*

3. The Burden of Defendant to Show Prejudice

The crux of Judge Robinson's *Pinkney* analysis is his holding that *an ineffective assistance of counsel claim is a motion for a new trial and is subject to the settled legal standards for such motions:*

> *The vehicle [for relief in ineffective assistance of counsel cases], we said, was a motion for a new trial . . . . An essential characteristic of such a motion is a disclosure of evidence portraying the movant's claim materially . . . evincing a capability of mounting a serious challenge.*

Id. at 431, 543 F.2d at 916.

Each of the cases cited for this proposition unambiguously requires that defendant show prejudice in his motion. Judge Robinson cites:

> *Newsome v. Smyth, 261 F.2d 452, 454 (4th Cir.1958), cert. denied, 359 U.S. 969, 79 S.Ct. 883, 3 L.Ed.2d 837 (1959); United States v. Frame, 454 F.2d 1136, 1138 (9th Cir.), cert. denied, 406 U.S. 925, 92 S.Ct. 1794, 32 L.Ed.2d 126 (1972);United States v. Norman, 402 F.2d 73, 78 (9th Cir.1968), cert. denied, 397 U.S. 938, 90 S.Ct. 949, 25 L.Ed.2d 119 (1970); Dansby v. United States, 291 F.Supp. 790, 794 (S.D.N.Y.1968).*

Id. at n. 58.

In *Dansby* we find:

> *Motions for a new trial are not favored and should be granted only with great caution. The burden of proving the necessity for a new trial is on the petitioner. He must satisfy the court that the jury might have reached a different result without the challenged testimony, or that had the subsequent testimony been presented at the trial it would have "probably" produced a different result.*

291 F.Supp. at 794 (emphasis added) (footnote omitted). My colleagues completely gloss over these requirements.

Norman states that a factual basis there alleged for a new trial is insufficient because ". . . that fact would not have undermined the Government's case in the least." 402 F.2d at 78. Neither would the *fabricated* defense which the majority contends Decoster's counsel was required to investigate.

Frame flatly states:

> *Turning to the merits, we hold that the motion for new trial was properly denied.No showing was made of possible prejudice from the alleged conflict. SeeDavidson v. Cupp, 446 F.2d 642 (9th Cir. 1971), and cases cited.*

454 F.2d at 1138 (emphasis added). Nor does the majority point to any prejudice to Decoster here.

Newsome tells us:

> *Having had a full trial, the defendant clearly is not entitled to a retrial upon the basis of an unsupported statement that he would like additional time to produce unidentified witnesses whose possible testimony was not disclosed.*

261 F.2d at 454.

In his footnote 59, Judge Robinson notes:

> *Our conclusion in this regard in no way impinges upon the rule, which we readily reaffirm, that once a substantial violation of counsel's duties is shown, the Government's burden is to demonstrate lack of prejudice therefrom.*

(Emphasis added). But he omits mention of absolving defendant of the initial duty to show*prejudice* — because no such absolution is possible. To show a "substantial violation of counsel's duties," prejudice must be shown — otherwise the violation would not be substantial. By its own presentation 335*335 of the cases *Pinkney* reiterates that defendant *must* show*prejudice* before *any* obligation of going forward can fall upon the Government. That is the issue in the present case. The remand proceeding is not in issue, and the value of the ABA standards for conduct of counsel is not in issue, nor is the issue the standard announced in*DeCoster I* as to the duty of counsel to furnish

reasonably adequate assistance to the accused. The issue is simply whether this court honors the settled case law that the movants for a new trial must show prejudice.

The validity of Judge Robinson's analysis is unassailable. In *DeCoster* cases, defendant lacks a "substantial" claim and one that is "consequential," unless the defendant first show substantial prejudice. Whether one calls it harm or prejudice, the result is the same and the burden rests initially upon the defendant to prove prejudice. That is the clear holding of all the cases in this court and this does not amount to an acceptance of *DeCoster I* or *II* (Majority op. p. ___ of 199 U.S.App.D.C., p. 310 of 624 F.2d). As in all cases, if the proponent proves his case, prejudice here, the burden of proceeding then shifts to the other party to disprove that fact — but not before prejudice has been proved. To the extent that the majority in *DeCoster* would absolve the defendant from the initial obligation to prove prejudice it does not conform to the law as stated heretofore and hereafter.

III. PRINCIPLES CONTROLLING THE ALLOCATION OF BURDEN OF PROOF ON PREJUDICE

The settled law in this circuit on the responsibility of defendant to show prejudice in effectiveness of counsel cases reflects controlling principles enunciated by the Supreme Court and anchored in the common law.

A. Principles Set by the Supreme Court

The majority in *DeCoster I* adopts the legally unsupported assertion in *Coles v. Peyton* that once certain acts or omissions by counsel are shown, the case for ineffective assistance of counsel must prevail unless the Government, "*on which is cast the burden of proof once a violation of these precepts is shown,* can establish lack of prejudice thereby." 389 F.2d at 226, 159 U.S.App.D.C. at 333, 487 F.2d at 1204 (emphasis added).[16]

This assertion conflicts with the rule evident in holdings by the Supreme Court. 336*336 For example, defendant must show prejudice in claims based on the sixth amendment right to an impartial jury and the fifth amendment right to due process. Exceptions to

the rule of showing actual prejudice are made in those instances in which *defendant* shows that he is the victim of acts that are inherently prejudicial, as opposed to acts that are *actually* prejudicial. A factor to be considered also is whether the Government in any way participated in causing the counsel to be ineffective. But regardless of whether it is actual or inherent prejudice that is alleged, it is*defendant* who must show prejudice. In *Murphy v. Florida,* 421 U.S. 794, 803, 95 S.Ct. 2031, 2038, 44 L.Ed.2d 589 (1975), the Court held:

> *Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury selection process of which he complains permits an inference of actual prejudice.*

(Emphasis added). The allocation of the burden of proof in *Murphy* poses the same questions that are raised by the *DeCoster I* majority. It is true that the burden in *Murphy* requires a defendant to bear a fact-producing responsibility in his own cause. 159 U.S.App.D.C. at 333, 487 F.2d at 1204. Also, it is true that circumstances can be described in which the alleged infringement of the right obscures the evidence of the infringement itself. *Id.* But the general rule stands. The courts can provide *counsel to defendant* to uncover prejudice, no matter how obscured, but it is *defendant* who must show prejudice. With regard to the sixth amendment issue of effectiveness of counsel, there is no possible reason for holding that the rule that defendant show prejudice mysteriously discontinues.

Thus, the majority in *DeCoster I* and here must be assuming that prejudice to the defendant is inherent in the acts or omissions proposed as guidelines in assessing counsel's performance. Neither in *DeCoster I* nor here has there been a showing of inherent prejudice, much less actual prejudice. The position of the majority must be that violation of their precepts constitutes inherent prejudice in any case whatsoever, as occurred in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), where there was no representation at all.

The analysis thus devolves into the question of whether "substantial" deviation from the majority's precepts, 159 U.S.App. D.C. at 333, 487 F.2d at 1204, ipso facto rises to the level of the fundamental constitutional deprivation inherent in, say, complete denial of the assistance of counsel. In a phrase, is deviation from the precepts equivalent to inherent prejudice? If it is not, then prejudice, actual or inherent, must be shown *by each defendant on the facts of the defendant's own case.*

The precepts listed in *DeCoster I* are:

> *In General — Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.*
>
> *Specifically — (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client. (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt legal action.*

> *The Supreme Court has, for example, recognized the attorney's role in protecting the client's privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (1966), and rights at a line-up, United States v. Wade, 388 U.S. 218, 227 [87 S.Ct. 1926, 18 L.Ed.2d 1149] (1967). Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to 337*337 make motions for a pre-trial psychiatric examination or for the suppression of evidence.*
>
> *(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.*

159 U.S.App.D.C. at 332-33, 487 F.2d at 1203-04 (footnotes omitted).

The very generality of these standards prevents their use as conclusive indicators of constitutional prejudice for each and every effectiveness of counsel case. Their relation to prejudice to a defendant's cause turns on the facts of the case in question. The majority in*DeCoster I* reminds us, with regard to the ABA standards incorporated into the foregoing precepts:

> *While the Standards claim that they are not intended "as criteria for judicial evaluation of effectiveness," [citation omitted], they certainly are relevant guideposts in this largely uncharted area.*

159 U.S.App.D.C. at 332 n. 25, 487 F.2d at 1203 n. 25 (emphasis added). This is one of the mistakes the majority makes. They now place more weight on the standards than their authors intended them to bear. As here, they attempt to have them serve as much more than "relevant guideposts."[17]

The key to ineffectiveness of counsel, per the majority in *DeCoster I* is "substantial" violation of the precepts. Now we are told here in *DeCoster II* that "substantial" means "consequential" (Majority opinion, p. ___ of 199 U.S.App.D.C., p. 309 of 624 F.2d). What an exercise in elementary semantics. What my colleagues are trying to do is to skate around the "prejudicial" requirement and make it appear as though they have invented a new standard. But their discovery in reality merely adds up to a failure to recognize that when they are talking about "substantial" and "consequential" they are doing nothing more than describing essential ingredients of "prejudice." To have prejudice the causative factor must be "substantial" and sufficiently related to the result in a causal relationship so that the result may correctly be considered 338*338 a consequence of that factor, i.e., "consequential." Actually, "substantial" and "consequential" in the abstract, and divorced from "prejudice," as my colleagues apparently try to isolate them, are meaningless. They are merely adjectives standing alone. Error that is just "substantial" and not "prejudicial" is of no moment. And error that is "consequential"

(and what error is not a consequence of some causative factor?), without being prejudicial, is immaterial. Thus, to be relevant at all, the neglect must be of sufficient substance so that it may be found to be both a consequence of the alleged failure and prejudicial.

The facts here, as well as in *Coles,* show that a great deal turns on the actual facts of each case. The factors discussed *supra* at pp. ___-___ of 199 U.S.App.D.C., pp. 314-321 of 624 F.2d and in Judge Craven's review of the facts in *Coles,* 389 F.2d at 228-30, demonstrate that the facts of neither case admit of a summary finding of prejudice. Substance requires prejudice that is consequential, and the majority here cannot beg the question by legislating a new task for the prosecution. The terms "substantial" and "consequential" are an admission by the*DeCoster I* majority that the effectiveness question and the meaning of the majority's own precepts *must* be settled on a case-by-case basis, on the facts of each case. Since that is so, it is true that the precepts are not universally dispositive factors, such as providing counsel in the first place, that foreclose any need to show prejudice. Therefore, the case here falls into that category identified by the Supreme Court as *requiring defendant* to show either actual or inherent prejudice. It follows immediately that Judge Craven's rule in *Coles* is correct:

> *the burden of showing lack of prejudice falls on the state when, but only when,the petitioner has shown a set of facts that demonstrate prejudice to his defense,inherently or otherwise.*

389 F.2d at 230 (latter emphasis added).

B. The Application of Chapman v. California

This sets in stark relief the majority's manipulation of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The majority write:

> *Chapman holds that if a defendant's constitutional rights were violated, his conviction must be reversed unless the Government "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." . . . we hold that harmlessness be established beyond a reasonable doubt.*

Majority opinion, p. ___ of 199 U.S.App. D.C., p. 311 of 624 F.2d (emphasis added). But*Chapman* was dealing with a claim of harmless error *after a substantial constitutional violation had been found.* Here, the existence of constitutional error *is* the issue, and the majority has presented neither facts nor law to establish that *any* constitutional right of defendant has been violated at all, particularly his sixth amendment counsel right.

What the majority does here is skip the requirement that the defendant first prove a substantial constitutional violation and, upon the appellate court's *sua sponte* assertion

that the ABA standards were not conformed to, imposes upon the Government the unprecedented burden to prove beyond a reasonable doubt that the assumed error was harmless. The defendant should first be required to prove a constitutional violation that substantially prejudiced him. In fact*Chapman* specifically refused to hold "that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed [to be] harmful." 386 U.S. at 21-22, 87 S.Ct. at 827. The majority opinion relies upon the statement in *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828 (1967)

> *that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.*

But in holding that this rule is applicable here the majority opinion does not fairly consider the hesitating and qualifying steps that Justice Black took before he made that remark, and which may fairly be considered 339*339 as qualifying that statement. The *Chapman* opinion concludes:

> *There is little, if any, difference between our statement in Fahy v. Connecticut,375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.*

386 U.S. at 24, 87 S.Ct. at 828. So, while the earlier statement is clearly appropriate where a constitutional violation is clear, the *Fahy* qualification is more appropriate to situations, such as exists here, where the existence, extent and effect of the alleged constitutional violation have not been proved. Applying the *Fahy* refinement to the facts here would require proof by the defendant that "there is a reasonable possibility that the [alleged inadequate representation] . . . might have contributed to the conviction . . . ." The defendant made no such claim and in view of the jury's guilty verdict, his admission of facts in his letter to his lawyer (n. 7, *supra*), and the clear implications from his in-court statement when he was sentenced (p. 24, 87 S.Ct. p. 828*supra*), his guilt is certain beyond all doubt — not just a reasonable doubt. Thus, there is no "*reasonable* possibility that the [alleged inadequate assistance of counsel] . . . might have contributed to the conviction" — unless of course one would advocate the sporting theory of justice in which perjury might prevail and an acquittal be thereby obtained. But, as Justice Douglas remarked in *Brady v. Maryland,* 373 U.S. 83, 90, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), this is not a permissible consideration. Thus, even if it be assumed, or presumed, that "federal constitutional error" existed, the harmless error standard of *Chapman* has been satisfied.

C. Principles of the Common Law

This circuit has recently succinctly stated the common law on burden of proof in civil cases:

> *Although a plaintiff generally carries the burden of persuasion on each element of his cause of action, special circumstances may lead a court to shift the burden of persuasion to the defendant on some part of the claim. One special circumstance commonly accepted is that the burden will be shifted where the material necessary to prove or disprove an element "lies particularly within the knowledge" of the defendant.*

Nader v. Allegheny Airlines, Inc., 167 U.S. App.D.C. 350, 361, 512 F.2d 527, 538 (1975), *rev'd on other grounds,* 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976) (citations omitted).*Decoster* is a criminal case, but, as we have held, it is not a denial of due process to place on a defendant the burden of proving a claim that is separate from the elements of a crime charged. *United States v. Greene,* 160 U.S.App.D.C. 21, 31-32, 489 F.2d 1145, 1155-56 (1973), *cert. denied,* 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 190 (1974). Thus, the common law fact-finding principles in *Nader* govern this case.

The comparison with *Nader* is illuminating. In *Decoster* the person *asserting the claim is also the person with the access to practically all the important facts that are relevant to proving prejudice.* In *Decoster* the twin policies of placing the burden of proof on the person pressing the claim and of placing the burden of proof on the person with particular access to the facts are *both* satisfied by holding that Decoster is required first to show prejudice.

There is no conflict in the common law principles here. Those principles direct that defendant make a showing of prejudice. Moreover, the Supreme Court has set constitutional standards that require defendant here to show prejudice. The relevance of these principles to this case was stated in the dissenting opinions in *DeCoster I* and in *Coles.* In *DeCoster I* my dissent stated:

> *In addition, I do not concur in the conclusion that the burden in such cases to prove non-prejudice shifts to the Government. Such proof is usually more within the ability of the accused, if such evidence exists at all, and it would place an unfair burden on the Government to impose that task upon it. For instance 340*340the accused could frustrate the Government's effort in many instances merely by claiming his privilege against disclosing some facts on the ground that they might incriminate him.*

159 U.S.App.D.C. at 334, 487 F.2d at 1205. And in *Coles* Judge Craven wrote:

> *Switching the burden of proof does not make these startling defenses true but it does put upon the state the exceedingly awkward, if not unbearable, burden of proving the*

> *negative. And it is not suggested that the state can prove the negative of such matters more easily than petitioner can prove the positive — the usual reason for switching the burden. Nor do these matters, in my opinion, fall within the category of constitutional defects that must be deemed inherently prejudicial because (1) we intuitively sense prejudice, and (2) the extent of it is simply not practicably susceptible to proof, such as (a) failure to have counsel assigned, (b) appointment of counsel followed immediately by trial, (c) division of responsibility among an entire bar (what's everyone's responsibility is no one's responsibility). Except in such situations, and others of like kind, it is still true that "in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused." Estes v. State of Texas, 381 U.S. 532, 542, 85 S.Ct. 1628, 1632, 1633, 14 L.Ed.2d 543 (1965).*

389 F.2d at 230 (footnotes omitted).

Where the Supreme Court has set constitutional standards that require defendant here to show prejudice, and where the common law fact-finding rules direct the same result, it is obviously incorrect to relieve defendant of the responsibility to show prejudice, particularly when the proof of that fact, if it exists, is peculiarly available to him.

IV. THE PURPORTED JUSTIFICATION IN DeCOSTER I FOR SHIFTING THE BURDEN OF PROOF

In attempting to justify placing the burden of proof on the Government in certain cases*DeCoster I* states:

> *Two factors justify this requirement. First, in our constitutionally prescribed adversary system the burden is on the government to prove guilt. A requirement that the defendant show prejudice, on the other hand, shifts the burden to him and makes him establish the likelihood of his innocence. It is no answer to say that the appellant has already had a trial in which the government was put to its proof because the heart of his complaint is that the absence of the effective assistance of counsel has deprived him of a full adversary trial. (Emphasis added). [Thus, the majority, in the proceeding which is supposed to determine whether counsel has been effective, switches the traditional burden of proof, in advance of a determination of that issue, on the ground that what the "complaint" only alleges has already been proved. This perversion of logic by an appellate court is unbelievable.]*
>
> *Second, proof of prejudice may well be absent from the record precisely because counsel has been ineffective. For example, when counsel fails to conduct an investigation, the*

record may not indicate which witnesses he could have called, or defenses he could have raised.

159 U.S.App.D.C. at 333, 487 F.2d at 1204 (footnote omitted).

With respect to both these points the obvious truth is that a defendant is entitled to engage counsel, or obtain court-appointed counsel in *direct appeal* cases (the very cases on which my colleagues bottom their analysis) to develop whatever facts may lie in his favor. The fact of earlier constitutional ineffectiveness of counsel can only follow from the fact of prejudice to defendant's cause. If the consequences of the performance of his counsel do not indicate substantial injury to defendant, he is not to obtain redress. The constitutional requirement of reasonably adequate counsel is not to be used as a shield for criminal behavior.

V. THE CONSTITUTIONAL CONFLICTS

The rule in *DeCoster I* causes constitutional conflicts which are unnecessary and which should therefore be avoided.

341*341 A. The Conflicts

DeCoster I states that it is based explicitly on concern for the adversary process:

Consistent with this recognition the Court has continued to repeat that the purpose of counsel is to "preserve the adversary process" and that counsel must act "in the role of an active advocate in behalf of his client."

159 U.S.App.D.C. at 331, 487 F.2d at 1202 (footnotes omitted).

Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof.

Id. at 333, 487 F.2d at 1204 (footnote omitted).

Two factors justify this requirement. First, in our constitutionally prescribed adversary system the burden is on the government to prove guilt. . . . It is no answer to say that the

> *appellant has already had a trial in which the government was put to its proof because the heart of his complaint is that the absence of the effective assistance of counsel has deprived him of a full adversary trial.*

Id.

It is necessary to be explicit and realistic about what would happen to the adversary process if the burden of proof were shifted to the Government as *DeCoster I* suggests and as the majority here attempts. As the government loses cases through an inability to meet the generally unfair burden of being required to prove a negative "lack of prejudice," prosecutors will increasingly, and justifiably, attempt to protect guilty verdicts by seeking to monitor the decisions and activities of defense counsel in order to build a record showing why certain decisions were proper. The majority opinion encourages, if it does not require, that prosecutors look over the shoulder of defense counsel in all his activities. They will also be required to tailor their prosecutions so that they will not eventually be forced to bear an extremely difficult burden of proving a negative with respect to the conduct of an opposing counsel. In certain trial situations it is highly likely that the prosecutor might, at times, move the court to alter a defense lawyer's decisions. This would inevitably interfere with the right of both parties, the Government and the defendant, to a truly adversary trial.

As Judge Prettyman wrote in *Mitchell,* with respect to the burden the *DeCoster I* type of rule would place on a judge:

> *Moreover the constitutional right of an accused to the assistance of counsel might well be destroyed if counsel's selections upon tactical problems were supervised by a judge. The accused is entitled to the trial judgment of his counsel, not the tactical opinions of the judge. Surely a judge should not share the confidences shared by client and counsel. An accused bound to tactical decisions approved by a judge would not get the due process of law we have heretofore known. And how absurd it would be for a trial judge to opine that such-and-such a course was ineffective or incompetent because it persuaded him (the judge) to decide thus-and-so adversely to the accused.*

259 F.2d at 793. Since this is true with respect to judicial supervision of defense counsel, it is *a fortiori* true of prosecutorial supervision or surveillance of defense counsel. The majority assert that they will not "second guess" defense counsel (Majority opinion, p. ___ of 199 U.S.App.D.C., p. 307 of 624 F.2d), but then they do exactly that when they reject a reasonable interpretation of his actions (*id.,* nn. 5, 23) and resolve all speculative doubts against him with extravagant adverse conclusions (*id.,* n. 23, pp. ___-___ of 199 U.S.App.D.C., pp. 307-309 of 624 F.2d).

Placing the burden on the Government to prove that the defendant's counsel was *not* ineffective or inadequate wars with the sixth amendment right to an adversary trial, and for that reason the attempt to shift the burden cannot be sustained. Moreover, *DeCoster I* is also inconsistent facially: in seeking to assure the effectiveness of counsel, it undermines the very freedom of action 342*342 on which such counsel relies. To the extent that the majority opinion in this case holds that defense counsel must investigate to support a fabricated, *untruthful* defense against counsel's conscience and better

judgment, it strikes at the lawyer's independence and integrity. These qualities must be preserved if we are to have a truly adversary system and a practicing bar with a high standard of ethics.

No lawyer should ever be required to investigate to support a fabricated defense. In his 1975 Sonnett Lecture at Fordham University, Justice Widgery encapsulated what is properly required of an advocate:

> *[T]he trial lawyer must be . . . independent in mind and in fact — he must be able to do what his conscience tells him is right without fear of antagonizing the court or being overborne by his client. Finally, he must have integrity in the pursuit of justice, recognizing his responsibility to the court and his opponent, and rejecting alike the desire to win at all costs and the temptation to take an unfair advantage of such pieces of forensic luck which come his way.*[18]

There are many inherent difficulties that would arise if the burden of proof were placed on the Government to prove that defense counsel did not inadequately represent a defendant. First of all, preparation to assume that burden would require the prosecutor to order an investigation into what for the prosecution has heretofore in most instances been a completely prohibited area — the confidential relationship between a criminal defendant and his counsel — and it would be the Government's investigative arm, the FBI or the police,[19] that would be ordered to make the necessary investigation. While there may be cases where an FBI or police investigation into a lawyer's representation of a defendant in a criminal case would be appropriate, as where defense counsel allegedly committed some criminal offense in his representation of his client, if the burden of disproving prejudice were shifted to the prosecution, as my colleagues would compel, the majority of such investigations would be required to probe in depth into confidential communications and relations between the defendant and his lawyer. A particular target of such investigations would be admissions and statements as to guilt that the defendant may have made to his lawyer. Can defense disclose these privileged communications? In such an inquiry the interests of former defense counsel would then become adverse to those of his former client. Any evidence the lawyer may have been furnished by his client, or otherwise obtained while he was representing the accused, which bore on the question of guilt, would be fairly producible if the defendant was attacking his counsel.

But what of a situation, such as we have here, where two appellate judges raised the issue without informing the defendant or advising him of the privileged disclosures that might be compelled? If the defendant made the motion he would open the door to such inquiry by the prosecutor, the defendant himself would always be a prime target for interrogation, and his exercise of his fifth amendment rights might conflict with an adequate investigation — as possibly in this case — where it appears that appellant apparently committed perjury in the trial of the case.[20] Defense counsel himself might face the same hazard. If the entire relationship between the defendant and his counsel were not thus opened up for searching investigation and interrogation, then the effect of the rule here sought to be applied by the majority would be to shift the burden of proof away from the side that is normally in the best position to produce the most

relevant evidence (the defendant) and to deny or seriously restrict the Government in its access to what in 343*343 most cases would be the best evidence to meet the burden that is being placed upon it. Such result would be grossly unfair, as it would in a great many cases place practically an impossible burden on the Government. It would impose a penalty on the Government for the alleged deficiencies of counsel for the accused.

Thus both the accused and his counsel, if they do not exercise the fifth amendment guarantee against self-incrimination, would be thoroughly interrogated by the Government investigators and, upon a proper showing, the papers and records of accused and counsel could be subpoenaed,[21] search warrants could obviously be issued for relevant evidence, and wiretaps possibly authorized by court order. Evidence thus obtained would be used in an attempt to sustain the unfair burden of proof to disprove prejudice that my colleagues would place on the Government, and might be used as the basis for additional prosecutions of either the defendant or his lawyer, or both, or to add strength to the Government's case if a retrial eventuated.

It seems apparent that the majority has not fully thought through some of the consequences of their attempt to shift the burden of proof to the prosecutor in these cases. Instead, they leave those problems to the future. This is the same siren song that we have heard before with disastrous results. It is my belief that a judge who presents a program to radically change the law in an important particular should demonstrate that his proposal would work fairly and reasonably in actual practice. My colleagues dissent from this principle.

To require the Government in a *post hoc* (second guessing) proceeding to justify the legal activities of defense counsel would require Government investigators to go to extreme and unreasonable ends. The original and subsequent investigative suggestions made by the majority here prove this point (*supra,* n. 1).

The situation here would become typical and appellate defense counsel would be found "ineffective", in this Court, if they did not pursue the largely unreasonable second-guessing speculative patterns which my colleagues have conjured up in this case. And what we have seen here is only the *beginning* of this defense, the effect of which is to try the defense *lawyer*in a second trial.

Once the accused is convicted, the practice would be for a friendly appellate court to exercise its imagination as to speculative witnesses and defenses. If the lawyer is "convicted" in the second trial, then there would ordinarily be a third trial to retry the accused if the case against him were not dismissed. If the pattern the majority here would establish became the applicable rule of law, practically every guilty defendant would have a second defense — post trial — based on speculative evidence, imaginary witnesses, and other excursions into fantasy. Long-established rules imposing the burden of proof on the contending party would be violated. A proposed rule fraught with such dire consequences should not be imposed. If such were the law, defending accused criminals in the jurisdiction of this appellate court would be a hazardous occupation insofar as one's professional reputation were concerned. In the district

court we already have had one libel case for $2 million arising out of an accusation by subsequent appellate counsel that prior defense counsel had ineffectively represented his client at trial.

This is not to say that a defendant in an appropriate case has no relief. He does. The trial judge can appoint *new counsel* for defendant. The judge, in supervising the trial, can and should provide defendant with competent counsel. But when this court attempts to transfer to the prosecution the responsibility for, and burden of, proving that the performance of defense 344*344counsel did not prejudice defendant, as the majority here attempts to do,[22] an even greater constitutional violation is established, for the rule would shift a constitutional obligation which cannot be shifted:

> *Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. . . . The trial court should protect the right of an accused to have the assistance of counsel.*

Glasser v. United States, 315 U.S. 60, 71, 62 S.Ct. 457, 465, 86 L.Ed. 680 (1942) (emphasis added).

The executive branch is the prosecutor. While it must be solicitous of the rights of defendants, it is not defense counsel, and *this court* cannot shift to the executive branch that which is fundamentally the constitutional duty of the judiciary. The judiciary *can* appoint counsel to represent defendants, and the legislature can provide for the appointment and payment of counsel for indigents in order to provide *defense* lawyers. But, unless the Government is somehow involved in the inadequate performance of defense counsel, it is the *defense lawyers*selected by the defendants or appointed by the court who must develop and carry the proof of showing the inadequacy of predecessor counsel. The adversary system by its very nature does not permit the placement of that obligation upon the prosecutor. The United States attorney cannot be both prosecutor and defense counsel, and the complexity of the oversight problem makes it undesirable that he be so charged in every case, upon pain of reversing convictions of admittedly guilty defendants.

Finally, if the majority here persist in burdening the prosecution with the complete inquiry on prejudice, then, given the legitimate investigative steps the prosecution must then undertake, defendant's act of invoking a claim of ineffective assistance of counsel may constitute a *waiver of defendant's fifth amendment guarantee against self-incrimination and of the confidentiality of his attorney-client relationship.* The Supreme Court has recently reminded us that such privileges can be waived, and in so doing reminded us of the importance of the very independence of adversary counsel that the majority here so fervently undermines. In *Maness v. Meyers,* 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1974), the Court, in holding that an attorney could not be held in contempt for advising his client to exercise his guarantee against self-incrimination wrote:

> *A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. If performance of a lawyer's duty to advise a*

> *client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice it is hardly debatable that some advocates may lose their zeal for forthrightness and independence.*

419 U.S. at 466, 95 S.Ct. at 595 (footnotes omitted). The Court goes on 419 U.S. at 467-68, 95 S.Ct. at 596, to quote Mr. Chief Justice Fuller, speaking for the Court in *In re Watts,* 190 U.S. 1, 29, 23 S.Ct. 718, 47 L.Ed. 933 (1903):

> *In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the 345*345 due administration of justice to allow of the application of any other general rule.*

(Emphasis added.)

B. The Conflicts Are Unnecessary

There are cases in which certain constitutional guarantees conflict with others. In this case the majority seeks to create and apply a burden of proof rule that sets the right to adequate assistance of counsel against the adversary guarantees of the sixth amendment, the independence of counsel, the sanctity of the attorney-client relationship as protected by the sixth amendment, the separation of powers, and the defendant's fifth amendment guarantees against self-incrimination.

Adjudication among these conflicting constitutional provisions should not be undertaken where it is unnecessary to do so. *Ashwander v. Valley Authority,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The conflicts in *DeCoster* are needless. They should, and easily can, be avoided by keeping the burden to show prejudice on defendant and using successor counsel to assist defendant in carrying the burden in normal cases.

CONCLUSION

The rule switching the burden of proof that the majority attempted to fashion in *DeCoster I,* and to apply here, must be repudiated. The law in this circuit clearly places the burden of proving prejudice upon the defendant. *Bruce v. United States, Mitchell v.*

United States, Harried v. United States, United States v. Hammond, Matthews v. United States, supra. It is also highly unreasonable to force this circuit to embark on a regular practice of requiring defense counsel to function as investigators and search for non-existent witnesses to support fabricated defenses that are conjured up by defendants on the day of trial. Judge Craven's dissent in*Coles,* which is in accord with the case law in this circuit, sets forth the proper rule, and it is supported by cited judicial authority, which is not true of the majority opinion in that case.

DeCoster I represents a bold attempt to change the law on the burden of proof under the guise of exploring the subject of standards for counsel. The ABA standards speak for themselves. Their strength does not depend on being reprinted in the F.2d reporters, and it is specious to attempt to justify the change in the law by referring to the poverty of most criminal defendants (Majority opinion, p. ___ of 199 U.S.App. D.C., p. 305 of 624 F.2d). There is nothing here to indicate that Decoster's financial condition in any way caused him not to receive a fair trial and so the poverty argument is an injudicial appeal to passion and prejudice. Today, under the Criminal Justice Act, most defendants are as well, if not better, represented than the Government. Moreover, the interests of the poor lie on both the defense *and* the people's — the government's — sides in criminal cases.[23] The burden of proof dictum in *DeCoster I should therefore be rejected entirely, and the* underlying conviction affirmed. To 346*346 switch the burden of proof scorns both the law and logic. To do so in the manner the majority suggests in effect collapses the standard into the remedy.

For the foregoing reasons, from this attempt, without any showing of prejudice, *and without producing a single witness that would testify to a single fact that would be beneficial to Decoster,* to set aside the jury's finding of guilty, which was concurred in twice by the trial judge, and admitted by the accused appellant, I respectfully dissent. It is unthinkable for this court to require counsel at the outset of a criminal trial to investigate every possible defense that might be fabricated.

[*] See 598 F.2d 311.

[*] Panel opinion of Judge Bazelon and panel dissent of Judge MacKinnon in Decoster II appear as an appendix,*see* page 300.

[1] *United States v. DeCoster,* 159 U.S.App.D.C. 326, 487 F.2d 1197 (1973) [hereafter referred to as *DeCoster I*].

[2] American Bar Association, Project on Standards for Criminal Justice, Standards Relating to the Defense Function (App.Draft 1971) [hereafter referred to as ABA Standards].

[3] *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938).

[4] *Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

[5] *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942).

[6] *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

[7] *Id.*

[8] *Scott v. Illinois,* 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

[9] *Payne v. Arkansas,* 356 U.S. 560, 567-68, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958).

[10] *Tumey v. Ohio,* 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

[11] *Chapman v. California,* 386 U.S. 18, 43, 87 S.Ct. 824, 837, 17 L.Ed.2d 705 (1967) (Stewart, J., concurring).

[12] *Id.* at 22-24, 87 S.Ct. 824; *Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963).

[13] The term originated in *Powell v. Alabama, supra,* where the Court held that the trial judge's failure to make an "effective appointment of counsel," 287 U.S. at 71, 53 S.Ct. 55, had resulted in the "denial of effective and substantial aid" of counsel, *id.* at 53, 53 S.Ct. at 58, thereby depriving defendant of due process of law.

[14] *Ferguson v. Georgia,* 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961).

[15] *Brooks v. Tennessee,* 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972).

[16] *Herring v. New York,* 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

[17] *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

[18] *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Glasser v. United States,* 315 U.S. 60, 69-76, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

[19] *Holloway v. Arkansas, supra,* 435 U.S. at 482, 98 S.Ct. 1173. Indeed, joint representation may afford economies and even enhance the presentation of a defense. *See Glasser v. United States, supra,* 315 U.S. at 92, 62 S.Ct. at 475 (Frankfurter, J., dissenting) ("Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack."), *quoted in Holloway v. Arkansas, supra,* 435 U.S. at 482-83, 98 S.Ct. 1173. After all, many cases of multiple defendants (even where each has his own counsel) may involve situations where each would rather be tried alone. But severance is a matter of judicial discretion under Fed.R.Crim.P. 14.

[20] *Holloway v. Arkansas, supra,* 435 U.S. at 484-87, 98 S.Ct. 1173.

[21] *See Powell v. Alabama, supra,* 287 U.S. at 71, 53 S.Ct. 55.

[22] *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

[23] *Id.* at 54, 90 S.Ct. at 1982-1983.

[24] *Holloway v. Arkansas, supra,* 435 U.S. at 482, 98 S.Ct. 1173, *quoting Glasser v. United States, supra,* 315 U.S. at 70, 62 S.Ct. 457.

[25] *Tollett v. Henderson,* 411 U.S. 258, 264, 93 S.Ct. 1602, 1606, 36 L.Ed.2d 235 (1973); *McMann v. Richardson,*397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).

[26] *McMann v. Richardson, supra,* 397 U.S. at 774, 90 S.Ct. at 1450.

[27] *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

[28] *Id.* at 102 n.5, 96 S.Ct. 2392.

[29] *McQueen v. Swenson,* 498 F.2d 207, 218 (8th Cir. 1974), *on remand,* 560 F.2d 959 (8th Cir. 1977).

[30] 586 F.2d 1325 (9th Cir. 1978).

[31] *Id.* at 1330, *quoting McMann v. Richardson, supra,* 397 U.S. at 774, 90 S.Ct. 1441.

[32] *Id.* at 1340 (Hufstedler, J., concurring and dissenting).

[33] *Id.* at 1336-37.

[34] *Diggs v. Welch,* 80 U.S.App.D.C. 5, 7, 148 F.2d 667, 669 (1945).

[35] *See Jones v. Huff,* 80 U.S.App.D.C. 254, 152 F.2d 14 (1945).

[36] *Mitchell v. United States,* 104 U.S.App.D.C. 57, 259 F.2d 787, *cert. denied,* 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86 (1958).

[37] *Id.* 104 U.S.App.D.C. at 65-66, 259 F.2d at 795-96 (Fahy, J., dissenting).

[38] *Bruce v. United States,* 126 U.S.App.D.C. 336, 379 F.2d 113 (1967).

[39] 126 U.S.App.D.C. at 339-40, 379 F.2d at 116-17.

[40] *Scott v. United States,* 138 U.S.App.D.C. 339, 427 F.2d 609 (1970); *United States v. Hammonds,* 138 U.S.App.D.C. 166, 425 F.2d 597 (1970).

[41] *E. g., Beasley v. United States,* 491 F.2d 687, 694 (6th Cir. 1974).

[42] As it happens, the author of *Bruce* had previously, as appointed counsel in *Mitchell,* sought to persuade the court to move from Fifth Amendment to Sixth Amendment analysis. *See* 104 U.S.App.D.C. at 66, 259 F.2d at 796 (Fahy, J., dissenting).

[43] *Maryland v. Marzullo,* 435 U.S. 1011, 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) (White, J., dissenting).

[44] *Moore v. United States,* 432 F.2d 730, 736 (3d Cir. 1970). *See also Marzullo v. Maryland,* 561 F.2d 540, 543-44 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) ("range of competence demanded of attorneys in criminal cases").

[45] Restatement (Second) of Torts § 299A & comment e (1965), *cited in Moore v. United States, supra,* 432 F.2d at 736 n.24.

[46] *See, e. g., Cooper v. Fitzharris,* 586 F.2d 1325, 1330 (9th Cir. 1978) ("reasonably competent attorney acting as a diligent conscientious advocate"); *United States v. Easter,* 539 F.2d 663, 666 (8th Cir. 1976) ("customary skills and diligence that a reasonably competent attorney would perform under similar circumstances"); *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir. 1960) ("counsel reasonably likely to render *and rendering* reasonably effective assistance"). The *MacKenna* test has been adopted by the Sixth Circuit. *Beasley v. United States, supra,* 491 F.2d at 696.

Three circuits continue to adhere to the "farce and mockery" standard. *See, e. g., Gillihan v. Rodriguez,* 551 F.2d 1182, 1187 (10th Cir.), *cert. denied,* 434 U.S. 845, 98 S.Ct. 148, 54 L.Ed.2d 111 (1977); *Rickenbacker v. Warden,*550 F.2d 62 (2d Cir. 1976), *cert. denied,* 434 U.S. 826, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977); *United States v. Madrid Ramirez,* 535 F.2d 125, 129 (1st Cir. 1976). The First and Second Circuits, while formally adhering to the "farce and mockery" standard, have in many recent cases concluded that a reevaluation of that test is not necessary because counsel's alleged deficiencies did not amount to ineffectiveness even under the standard of "reasonable competency." *See, e. g., Rickenbacker v. Warden, supra,* 550 F.2d at 66; *United States v. Madrid Ramirez, supra,* 535 F.2d at 129-30.

[47] *United States ex rel. Williams v. Twomey,* 510 F.2d 634, 640 (7th Cir.) (Wyzanski, J.), *cert. denied,* 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

[48] *Cooper v. Fitzharris, supra,* 586 F.2d at 1330, *quoting McMann v. Richardson, supra,* 397 U.S. at 774, 90 S.Ct. 1441.

[49] 159 U.S.App.D.C. at 332-33, 487 F.2d at 1203-04.

[50] 199 U.S.App.D.C. at ___, 624 F.2d at 203.

[51] *DeCoster I,* 159 U.S.App.D.C. at 333, 487 F.2d at 1204; *Decoster II,* 199 U.S.App.D.C. at ___, 624 F.2d at 203.

[52] ABA Standards, *supra* note 2, at 11. That the ABA Standards were not conceived as "minimum" standards is highlighted by the fact that both the Special Committee on Standards for the Administration of Justice and the Project on Standards for Criminal Justice originally included the term "Minimum Standards" in their titles. These designations were dropped by vote of the ABA House of Delegates in August 1969. *Id.* at v.

[53] *Id.* at ___ of 199 U.S.App.D.C., at 203 of 624 F.2d.

[54] 389 F.2d 224 (4th Cir. 1968).

[55] 435 F.2d 1089 (4th Cir. 1970).

[56] *United States ex rel. Green v. Rundle,* 452 F.2d 232 (3d Cir. 1971).

[57] *United States ex rel. Green v. Rundle,* 303 F.Supp. 972 (E.D.Pa.1969), *reversed,* 452 F.2d 232 (3d Cir. 1971).

[58] 452 F.2d at 235.

[59] *People v. Pope,* 23 Cal.3d 412, 152 Cal.Rptr. 732, 590 P.2d 859 (Feb. 22, 1979).

[60] *See* text accompanying notes 30-33 *supra.*

[61] 23 Cal.3d at 424-25 & n.14, 152 Cal.Rptr. at 738-39 & n.14, 590 P.2d at 865-66 & n.14.

[62] *Cooper v. Fitzharris,* 551 F.2d 1162, 1166 (9th Cir. 1977) (Duniway, J., concurring), *vacated, see* 586 F.2d 1325 (1978) (en banc).

[63] *Commonwealth v. Saferian,* 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974).

[64] In our decision to modify *Bruce,* we have taken into account that the District of Columbia Court of Appeals uses the *Bruce* standard and language. *See, e. g., Fernandez v. United States,* 375 A.2d 484, 486-87 (D.C.App.1977); *Cooper v. United States,* 248 A.2d 826, 827 (D.C.App.1969). However, the change is only from a requirement that defendant show actual effect, required by *Bruce,* to the "likelihood" test of *Saferian,* that is in turn subject to prosecution rebuttal to negative prejudice in fact.

As to the content of the effect that defendant must show is likely, whether it be characterized as "blott[ing] out the essence of a substantial defense" or "deprivation of an otherwise available, substantial defense" is a matter of form more than substance.

[65] *Mitchell v. United States, supra,* 104 U.S. App.D.C. at 65, 259 F.2d at 795 (Fahy, J., dissenting).

[66] 28 U.S.C. § 2106 (1976); *see Scott v. United States, supra,* 138 U.S.App.D.C. at 340, 427 F.2d at 610.

[67] *Dyer v. United States,* 126 U.S.App.D.C. 312, 379 F.2d 89 (1967).

[68] 126 U.S.App.D.C. at 340, 379 F.2d at 117.

[69] *See, e. g., McNabb v. United States,* 318 U.S. 332, 340-41, 63 S.Ct. 608, 87 L.Ed. 819 (1947).

[70] *See Boyd v. Henderson,* 555 F.2d 56, 62 n.8 (2d Cir. 1977).

[71] *United States v. Timmreck,* 441 U.S. 780, 99 S.Ct. 2085, 2087, 60 L.Ed.2d 634 (1979) (formal violation of Fed.R.Crim.P. 11 provides no basis for collateral attack of conviction based on guilty plea); *Davis v. United States,*417 U.S. 333, 345-46 & n.15, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974) (intervening change in law of circuit at as what constitutes a lawful draft induction order is cognizable under 28 U.S.C. § 2255; conviction for an act the law does not make criminal presents one of the "exceptional circumstances" that "inherently results in a complete miscarriage of justice"); *Hill v. United States,* 368 U.S.

424, 428, 82 S.Ct. 468, 471, 7 L.Ed.2d 417 (1962) (failure to permit allocution at sentencing not a "fundamental defect"); *see Stone v. Powell,* 428 U.S. 465, 477 n.10, 96 S.Ct. 3037, 3044, 49 L.Ed.2d 1067 (1976) (reiterating the "established rule" that "non-constitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings"); *Sunal v. Large,* 332 U.S. 174, 178, 67 S.Ct. 1588, 91 L.Ed. 1982 (1947) (collateral attack may not "do service for an appeal").

[72] 428 U.S. 465, 491 n.31, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); *see also United States v. Timmreck,* 441 U.S. 780, 99 S.Ct. 2085, 2087, 60 L.Ed.2d 634 (1979); *Henderson v. Kibbe,* 431 U.S. 145, 154 n.13, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977); *Schneckloth v. Bustamonte,* 412 U.S. 218, 259-63, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (Powell, J., concurring). In *Stone v. Powell,* those concerns were heightened by the special problem of federalism raised by federal challenges to state court judgments. The combination led to denial of collateral relief even for a constitutional claim.

[73] *Scott v. United States, supra,* 138 U.S.App. D.C. at 340, 427 F.2d at 610; *United States v. Hammonds, supra,*138 U.S.App.D.C. at 169, 425 F.2d at 600.

[74] *See McQueen v. Swenson, supra,* 498 F.2d at 220. As to the nature of the government's burden there may be a distinction depending on the court's appraisal of the showing by accused. If the court concludes that a constitutional violation has been established, then there is doctrine indicating that the government must show beyond a reasonable doubt that there has been no prejudice in fact. *Chapman v. California, supra, Fahy v. Connecticut, supra. See* text accompanying notes 11-12 *supra.* If the showing by the accused causes the court serious misgivings notwithstanding the absence of a constitutional violation, *see* discussion at text accompanying notes 65-70, *supra,* the court may be satisfied with a response by the government, that there has not in fact been any injustice, even though this response falls short of a "beyond a reasonable doubt" standard.

[75] *E. g., Mitchell v. United States, supra,* 104 U.S.App.D.C. at 65-66, 259 F.2d at 795-96 (Fahy, J., dissenting)(ultimate question is whether the conviction "rests in substantial degree" upon lack of professional skill); *Cooper v. Fitzharris, supra,* 586 F.2d at 1136-40 (Hufstedler, J., concurring and dissenting); *People v. Pope, supra,* 23 Cal.3d at 425, 152 Cal.Rptr. at 739, 590 P.2d at 866.

[76] *See Mitchell v. United States, supra,* 104 U.S.App.D.C. at 63, 259 F.2d at 793; discussed at text accompanying note 36 *supra.*

[77] *See* Bines, *Remedying Ineffective Assistance in Criminal Cases: Departures from Habeas Corpus,* 59 Va.L.Rev. 927, 961 (1973).

[78] 177 U.S.App.D.C. 423, 543 F.2d 908 (1976). In *Pinkney,* appellant claimed denial of effective assistance of counsel at a sentencing hearing because counsel failed, first, to discuss with him the content of the government's allocution memorandum and, second, to object to the government's allegation in the memorandum that appellant participated in drug traffic in the District of Columbia. We emphasized that appellant had failed to present an affidavit disclosing "evidence portraying the movant's claim

materially and resolutely, and *evincing a capability of mounting a serious challenge.*" 177 U.S.App.D.C. at 431, 543 F.2d at 916 (emphasis supplied). It was acknowledged that "once a substantial violation of counsel's duties is shown, the Government's burden is to demonstrate lack of prejudice therefrom." *Id.* 177 U.S.App.D.C. at 431-32 n.59, 543 F.2d at 916-917 n.59. But the court said:

Only if the evidentiary elements of [appellant's claim that counsel's failure to inform him deprived him of the opportunity to contest the allegations of the government's memorandum] had appeared in appellant's motion would he have been entitled to a hearing, and only if evidence offered at a hearing tended to establish the elements would the Government have been summoned to disestablish prejudice.

Id. In short, the defendant must show that counsel's alleged deficiencies would probably have affected the outcome before the government has the burden of demonstrating that, in fact, the result would not have been affected.

[79] 498 F.2d 207 (8th Cir. 1974), *on remand,* 560 F.2d 959 (8th Cir. 1977).

[80] *Id.* at 216.

[81] *United States v. Clayborne,* 166 U.S.App. D.C. 140, 509 F.2d 473 (1974).

[82] *Id.* 166 U.S.App.D.C. at 144, 509 F.2d at 477.

[83] *United States ex rel. Green v. Rundle,* 452 F.2d 232, 235 (3d Cir. 1971); discussed at text accompanying notes 56-58 *supra.*

[84] 518 F.2d 1245 (7th Cir. 1975).

[85] *Id.* at 1246.

[86] 18 U.S.C. § 3006A(e) (1976) (contemplating ex parte proceeding); *United States v. Harris,* 542 F.2d 1283, 1314-16 (7th Cir. 1976), *cert. denied,* 430 U.S. 934, 97 S.Ct. 1558, 51 L.Ed.2d 779 (1977); *Mason v. Arizona,* 504 F.2d 1345 (9th Cir. 1974), *cert. denied,* 420 U.S. 936, 95 S.Ct. 1145, 43 L.Ed.2d 412 (1975); Report of the Committee to Implement the Criminal Justice Act, 36 F.R.D. 285, 290 (1965).

[87] *United States v. Katz,* 425 F.2d 928, 930 (2d Cir. 1970). Judge Friendly's comment, although directed to the choice of tactics at trial, has more general application. He said:

Determination of the effectiveness of counsel cannot be divorced from the factual situation with which he is confronted. When, as here, the prosecution has an overwhelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do. If he simply puts the prosecution to its proof and argues its burden to convince the jury beyond a reasonable doubt, the defendant may think him lacking in aggressiveness, and surely will if conviction occurs. If he decides to flail around and raise a considerable amount of dust, with the inevitable risk that some may settle on his client, the defendant will blame him

if the tactic fails, although in the rare event of success the client will rank him with leaders of the bar who have used such methods in some celebrated trials of the past.

[88] Listed in order of the proceedings in appellant's case, they are:

(1) Counsel was dilatory in seeking a bond review while appellant was incarcerated for almost five months following his arrest on May 29, 1970;

(2) Counsel failed to obtain a transcript of appellant's preliminary hearing and failed to employ that transcript to impeach prosecution witnesses at trial;

(3) Counsel failed to interview any potential witnesses prior to trial;

(4) Counsel announced "ready" for trial at a time when he did not know whether or not he would present alibi witnesses and before he had fully developed his defense;

(5) Counsel offered to waive jury trial and to permit appellant to be tried before the court when the court had heard a part of the evidence in connection with the guilty pleas of the two co-defendants;

(6) Counsel failed to make an opening statement; and

(7) Counsel failed to see that appellant's sentence was properly executed, in that he failed to see that appellant was given credit for time served.

Appellant also alleges that he was denied the effective assistance of counsel because of counsel's failure to object to appellant's appearing before the jury in prison clothing. This objection was not asserted below, and therefore is not properly before this court.

[89] *See Lutwak v. United States,* 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953); *United States v. Liddy,* 166 U.S.App.D.C. 95, 109, 509 F.2d 428, 442 (1974).

[90] While incarcerated after his arrest, appellant did allege, in a letter to Judge Waddy protesting his continued confinement and the failure of counsel to file a bond review motion, that he had been defending himself from an assault by Crump. This claim is consistent with that he made in a letter to his attorney shortly before trial. There is no indication that the attorney was ever aware of the contents of this letter, or that appellant made similar representations to him prior to the letter to counsel mentioned above. At the remand hearing, appellant admitted this latter self-defense claim was a fabrication.

[91] Taylor could not be located.

[92] Appellant attacks counsel's filing of the bond review motion in an incorrect court, the District Court, rather than the correct court, General Sessions. While we do not commend this error, some confusion was "understandable," as the government's lawyer commented at the remand hearing.

[93] *See Dillane v. United States,* 121 U.S.App. D.C. 354, 350 F.2d 732 (1965) (ineffectiveness in filing notice of appeal warrants only remedy of opportunity to file appeal).

[94] *See* note 93 and accompanying text *supra.*

[95] Deutsch, *Law as Metaphor: A Structural Analysis of Legal Process,* 66 Geo.L.J. 1339, 1342 (1978).

[96] *See* note 2 *supra.*

[97] Dissenting opinion of Bazelon, J., at ___ of 199 U.S.App.D.C., at 276 of 624 F.2d.

[98] ABA Standards, *supra* note 2, at 11; *see* text accompanying notes 52-53 *supra.*

[99] Although Judge Hufstedler dissented from the imposition of a strict prejudice requirement in *Cooper v. Fitzharris,* 586 F.2d 1325 (9th Cir. 1978), she recognized that considerations of effect on outcome where pertinent to determining whether a defendant had been denied the effective assistance of counsel. *Id.* at 1340;*see* text accompanying notes 32-33 *supra.* And the Supreme Court of California, while adopting a standard similar to that of *DeCoster I,* still imposed on defendant the burden of showing that counsel's failures had resulted "in the withdrawal of a potentially meritorious defense." *People v. Pope,* 23 Cal.3d 412, 425, 152 Cal.Rptr. 732, 739, 590 P.2d 859, 866 (1979); *see* text accompanying notes 59-61 *supra.*

[100] *See* dissenting opinion of Bazelon, J., at ___-___ of 199 U.S.App.D.C., at 288-289 of 624 F.2d.

[101] *United States v. Pinkney,* 177 U.S.App.D.C. 423, 543 F.2d 908 (1976).

[102] *Decoster II,* 199 U.S.App.D.C. at ___-___, 624 F.2d at 308-309. He observed, 199 U.S.App.D.C. at ___-___, 624 F.2d at 309-310, that impairment could be presumed where "acts or omissions of [defense] counsel are . . . likely to have impaired the defense" and yet consequence would be difficult to prove. These words could be viewed as suggesting an approach not unlike our own opinion, except that the likely effect is based not on an inquiry in context, but is established by the nature of the violation (described as a "total failure to conduct factual investigations," 199 U.S.App.D.C. at ___, 624 F.2d at 310).

[103] Dissenting opinion of Bazelon, J., at ___ of 199 U.S.App.D.C., at 282 of 624 F.2d.

[104] *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[105] 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *see* text accompanying notes 22-23 *supra.*

[106] *See* dissenting opinion of Bazelon, J., at ___-___ of 199 U.S.App.D.C., at 289-290 of 624 F.2d, *citing**Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

[107] *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); *see* text accompanying notes 27-28 *supra.*

[108] W. Hurst, Law and Social Process in United States History 165 (1972) (1959 Cooley Lectures, U. Michigan).

[109] *Bruce v. United States,* 126 U.S.App.D.C. 336, 379 F.2d 113 (1967).

[110] *United States v. DeCoster,* 159 U.S.App. D.C. 326, 487 F.2d 1197 (1973).

[111] This flexibility in remedies on direct appeal found its roots in *Bruce's* recognition, building on the case of *Dyer v. United States,* 126 U.S. App.D.C. 312, 379 F.2d 89 (1967), that relief may be justified by a lesser showing on direct appeal than on collateral attack. *See* text accompanying notes 65-73 *supra.*

[112] Opinion of Robinson, J., at ___ n.44, of 199 U.S.App.D.C., at 250 n.44 of 624 F.2d.

[1] *See, e. g., Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); *Betts v. Brady,* 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595 (1942); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Faretta v. California,* 422 U.S. 806, 807, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The importance of counsel's function to the effective operation of our adversary system is unquestioned. The Supreme Court stated in *Geders v. United States,* 425 U.S. 80, 88, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592 (1976):

Our cases recognize that the role of counsel is important precisely because [the ordinary] defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.

Glasser v. United States, 315 U.S. 60, 69-70, 62 S.Ct. 457, 464, 86 L.Ed. 680 (1942), is to the same effect:

The guarantees of the Bill of Rights are the protecting bulwarks against the reach of arbitrary power. Among those guarantees is the right granted by the Sixth Amendment to an accused in a criminal proceeding in a federal court "to have the Assistance of Counsel for his defense." "This is one of the safeguards * * * deemed necessary to insure fundamental human rights of life and liberty," and a federal court cannot constitutionally deprive an accused, whose life or liberty is at stake, of the assistance of counsel. *Johnson v. Zerbst,* 304 U.S. 458, 462, 463, 58 S.Ct. 1019, 82 L.Ed. 1461 [(1938)].

[2] This rule applies in almost every case. Exceptions may perhaps be in order in the few cases in which the prosecutor somehow has easier access than the defendant to relevant information. *See* I.C., *infra.*

[3] *See, e. g., Diggs v. Welch,* 80 U.S.App.D.C. 5, 6-7, 148 F.2d 667, 668-69 (1945); *Jones v. Huff,* 80 U.S.App.D.C. 254, 255, 152 F.2d 14, 15 (1945).

[4] The panel was composed of Chief Judge Bazelon and Judge Leventhal and issued *per curiam.*

[5] *See* cases cited at note 3 *supra.*

[6] In addition to this circuit, seven other circuits — the Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth — have rejected the farce and mockery test as a standard that must be met in determining inadequate assistance of counsel. In *Moore v. United States,* 432 F.2d 730, 736 (3d Cir. 1970), the Third Circuit stated:

[T]he standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place.

This standard was reaffirmed in *United States v. Johnson,* 531 F.2d 169, 174 (3d Cir. 1976), where the court added:

[I]t is clear from our decisions that it is the particular facts of each case which determine whether the attorney in question has provided the constitutionally required effective assistance of counsel.

In *Marzullo v. Maryland,* 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) the Fourth Circuit expressly rejected the farce and mockery test and adopted a normal competence standard: "Was the defense counsel's representation within the range of competence demanded of attorneys in criminal cases?" The Fifth Circuit has adopted the following standard: whether the attorney was "reasonably likely to render and [rendering] reasonably effective [assistance.]" *United States v. Gray,* 565 F.2d 881, 887 (5th Cir. 1978); *Mason v. Balcom,* 531 F.2d 717, 724 (5th Cir. 1976); *Burston v. Caldwell,* 506 F.2d 24 (5th Cir.), *cert. denied,* 421 U.S. 990, 95 S.Ct. 1995, 44 L.Ed.2d 480 (1975). The Sixth Circuit has adopted the same standard as the Fifth Circuit. *United States v. Toney,* 527 F.2d 716, 720 (6th Cir. 1975), *cert. denied,* 429 U.S. 838, 97 S.Ct. 107, 50 L.Ed.2d 104 (1976); *Maglaya v. Buchkoe,* 515 F.2d 265, 269 (6th Cir. 1975); *Beasley v. United States,* 491 F.2d 687, 696 (6th Cir. 1974). In *United States v. Sielaff,* 542 F.2d 377, 379 (7th Cir. 1976), *cert. denied sub nom.Sielaff v. Williams,* 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109, the Seventh Circuit stated:

In this Circuit a petitioner asserting a lack of effective assistance of counsel in a criminal case must prove that his counsel's performance did not meet "a minimum standard of professional representation." [citations omitted].

This standard was reaffirmed in *United States v. Brugger,* 549 F.2d 2, 4 (7th Cir.), *cert. denied,* 431 U.S. 919, 97 S.Ct. 919, 53 L.Ed.2d 231 (1977), and in *United States v. Krohn,* 560 F.2d 293, 297 (7th Cir.), *cert. denied,* 434 U.S. 895, 98 S.Ct. 275, 54 L.Ed.2d 185 (1977). The Eight Circuit in *United States v. Malone,* 558 F.2d 435, 438 (8th Cir. 1977), articulated its standard this way:

It is established in this Circuit that a defendant is denied effective assistance of counsel if his trial counsel "does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *United*

States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976); *Pinnell v. Cauthron,* 540 F.2d 938, 939 (8th Cir. 1976).

The Ninth Circuit has adopted a "reasonably competent and effective representation" standard similar to that approved in the Fifth and Sixth Circuits. *Cooper v. Fitzharris,* 586 F.2d 1325, 1328 (9th Cir. 1978) (en banc).

Thus, a majority of the circuits have rejected the farce and mockery test as a minimal standard.

Three circuits — the First, Second, and Tenth — have retained the farce and mockery test. In *United States v. Ramirez,* 535 F.2d 125, 129-30 (1st Cir. 1976), the First Circuit stated:

Ineffective counsel in this circuit means representation such as to make a mockery, a sham or a farce of the trial. . . . While we have considered adopting a more lenient standard requiring "reasonably competent assistance of counsel", [citations omitted], . . . appellant's contentions do not approach a violation of either standard.

Thus, the First Circuit leaves open the possibility of adopting a different standard. *See also Dunker v. Vinzant,*505 F.2d 503 (1st Cir. 1974). The Second Circuit has been more certain in its support of the farce and mockery test. In *United States v. Yanishefsky,* 500 F.2d 1327, 1333 (2d Cir. 1974), the court stated:

The current standard of ineffective assistance of counsel in this circuit is that in order to be of constitutional dimensions the representation [must] be so "woefully inadequate `as to shock the conscience of the Court and make the proceedings a farce and mockery of justice.'" [citations omitted].

The court explicitly declined to adopt any other standard. 500 F.2d at 1333 n. 2. Similarly, the Second Circuit declined to reconsider its position in *Rickenbacker v. Warden, Auburn Correctional Facility,* 550 F.2d 62, 66 (2d Cir. 1976), *cert. denied,* 434 U.S. 826, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977), and it reaffirmed directly the farce and mockery test in *LiPuma v. Commissioner, Department of Corrections,* 560 F.2d 84, 90-91 (2d Cir.), *cert. denied,*434 U.S. 861, 98 S.Ct. 189, 54 L.Ed.2d 135 (1977). The Tenth Circuit also continues to apply the farce and mockery test. *United States v. Larsen,* 525 F.2d 444, 449 (10th Cir. 1975), *cert. denied,* 423 U.S. 1075, 96 S.Ct. 859, 47 L.Ed.2d 85 (1976).

[7] Judge Leventhal stated:

[A] more powerful showing of inadequacy is necessary to sustain a collateral attack than to warrant an order for new trial either by the District Court or by this court on direct appeal.

126 U.S.App.D.C. at 340, 379 F.2d at 117.

[8] The context in which the challenge is raised may affect the *factual showing* that is required to satisfy the standard.

[9] The quality of the defense in *Hammonds* presents an interesting contrast to the representation involved here. In *Hammonds,* the efforts of defense counsel were grossly inadequate. The court delineated an array of failures:

appellant specifies trial counsel's failure to (1) appear at the arraignment, (2) conduct any voir dire examination of the jury, (3) make any opening statement to the jury, (4) cross-examine two of the four Government witnesses, with only slight cross-examination of the other two witnesses (a total of five questions) and (5) request any jury instructions, including in particular an instruction on lesser-included offenses. In addition to counsel's alleged deficiencies in the trial itself, appellant refers to counsel's failure to make any pretrial motions, including a motion for pretrial release, and his declining at the court's invitation to speak to the question of bond after conviction or to speak on appellant's behalf at the sentencing.

Counsel for appellant in this court suggests that trial counsel in his closing argument should at least have mentioned the presumption of innocence and the requirement that all essential elements of the offenses be proved beyond a reasonable doubt; that he should have pointed out to the jury the evidence which could lead to a conclusion that appellant lacked the requisite intent and also the absence of evidence establishing that a person was present in the house at the time of appellant's entry. Appellant's counsel suggests further that while admitting that appellant could not provide the jury with a complete explanation of his presence in the house, trial counsel could have offered one or more hypotheses of what might have happened . . .. 138 U.S.App.D.C. at 172, 425 F.2d at 603. Here, on the other hand, counsel's major shortcoming was supposedly his failure to investigate alibis and defenses that he had good reason to believe were untrue.

[10] The dissent relies heavily on *DeCoster I,* which it acknowledges "shifted the focus of judicial inquiry away from the prejudice to the defendant . . . and toward the task of articulating basic duties counsel owes his client." Dissent ___ of 199 U.S.App.D.C., 267 of 624 F.2d. While conceding that the precedential value of *DeCoster I* is "in question" (dissent n. 62), the dissent contends that it is more relevant than the pre-*DeCoster I* case because those cases are grounded in the Fifth rather than the Sixth Amendment. Dissent n. 121. The dissent's distinction is erroneous. *Scott, supra* at ___ of 199 U.S.App.D.C., at 222 of 624 F.2d, was explicitly decided under the Sixth rather than the Fifth Amendment. The court stated:

What is involved here is the Sixth Amendment. The Sixth Amendment has overlapping but more stringent standards than the Fifth Amendment as is clear from other contexts. Compare, for example, *United States v. Wade,* 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) with *Stovall v. Denno,* 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). The appropriate standard for ineffective assistance of counsel, set forth in *Bruce, supra,* is whether gross incompetence blotted out the essence of a substantial defense.

138 U.S.App.D.C. at 340, 427 F.2d at 610.

[11] The *DeCoster I* guidelines were as follows:

In General — Counsel should be guided by the American Bar Association Standards for the Defense Function. They represent the legal profession's own articulation of guidelines for the defense of criminal cases.

Specifically — (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client. (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt legal action. The Supreme Court has, for example, recognized the attorney's role in protecting the client's privilege against self-incrimination.*Miranda v. Arizona,* 384 U.S. 436, [86 S.Ct. 1602, 16 L.Ed.2d 694] (1966), and rights at a line-up, *United States v. Wade,* 388 U.S. 218, 227, [87 S.Ct. 1926, 18 L.Ed.2d 1149] (1967). Counsel should also be concerned with the accused's right to be released from custody pending trial, and be prepared, where appropriate, to make motions for a pre-trial psychiatric examination or for the suppression of evidence. (3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that "all available defenses are raised" so that the government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

159 U.S.App.D.C. at 332-33, 487 F.2d at 1203-04.

[12] In *Marzullo v. Maryland,* 561 F.2d 540 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978), the Fourth Circuit recently came to the same conclusion. *Coles v. Peyton,* 389 F.2d 224 (4th Cir. 1968), had imposed specific requirements for counsel's preparation of his client's defense. In adopting a "normal competency" approach, *see* note 6 *supra,* the court stated:

While the normal competency standard does not purport to list the things counsel should or should not do, it does not preclude resorting to specifics for ascertaining the "range of competence demanded of attorneys in criminal cases." . . . We adhere to [the list of duties in *Coles*] for it is a definitive, objective description of the competency normally demanded of counsel in certain aspects of their service.

The normal competency standard is necessarily broad and flexible because it is designed to encompass many different factual situations and circumstances. Consequently, its fair and effective administration rests primarily on the district judges. . . .

In exercising its discretion, a trial court may refer to other sources to determine the normal competency of the bar. Among these are precedent from state and federal courts, state bar canons, the American Bar Association Standards Relating to the Defense Function [App. Draft 1971], and in some instances, expert testimony on the

particular conduct at issue. These, of course, do not supplant the test that we have prescribed, but they can aid in objectively ascertaining the range of competency normally expected of attorneys practicing criminal law.

561 F.2d at 544-45.

[13] For example, *DeCoster I* stated, *inter alia,* that "[c]ounsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed." 159 U.S.App.D.C. at 333, 487 F.2d at 1204. Obviously, what is an "appropriate investigation" varies with each particular case. The range of this responsibility to determine what investigation was necessary varies greatly from case to case; but whatever that duty might be, it must be a reflection of the general duty — to render reasonably competent assistance when acting as a diligent, conscientious advocate — as applied to the particular case.

[14] Thus, when the accused admits his guilt to his attorney, or when the lawyer knows from other evidence that the evidence of guilt is overwhelming, or that his client is telling an untruthful story, a more limited investigation may be sufficient, whereas in another case it would not.

[15] standards are intended as guides for conduct of lawyers and as the basis for disciplinary action, *not as criteria for judicial evaluation of the effectiveness of counsel to determine the validity of a conviction*; they may or may not be relevant in such judicial evaluation of the effectiveness of counsel, *depending upon all the circumstances.*

American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Prosecution Function and the Defense Function* 11 (Approved Draft, 1971), § 1.1(f).

As to the danger of using the guidelines as mandatory standards to be applied in determining the validity of criminal convictions, note the chambers opinion of Justice Blackmun in *Nebraska Press Assn. v. Stuart,* 432 U.S. 1327, 96 S.Ct. 251, 46 L.Ed.2d 237 (1975), where the Justice commented on the Nebraska trial court's adoption of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation:

Without rehearsing the description of those Guidelines set forth in my prior opinion, it is evident that they constitute a "voluntary code" which was not intended to be mandatory. Indeed, the word "guidelines" itself so indicates. They are merely suggestive and, accordingly, are necessarily vague.

432 U.S. at 1330, 96 S.Ct. at 254. The ABA Standards contain the same caveat.

Consider also the statement of Judge Harold Medina of the Second Circuit, which was made on November 20, 1976 and concerned the use by some judges of the American Bar Association's guidelines on fair trial and free press: "Judge after judge and court after court took these voluntary guidelines and turned them into a piece of concrete." New York Times, Nov. 21, 1976, p. 62, c. 3. Courts and lawyers should not make that error with respect to the American Bar Association Standards for the Defense Function

referred to in *DeCoster I.* Mere failure to adhere to such guidelines does not amount to a constitutional violation.

Justice Kaplan of the Supreme Judicial Court of Massachusetts made this point quite well in his oft-quoted opinion in *Commonwealth v. Saferian,* 366 Mass. 89, 95, 315 N.E.2d 878, 882-83 (1974):

The decided cases try to express or approximate in varying forms of words a general standard for determining whether "assistance of counsel" has been provided an accused person within the meaning of the Sixth Amendment. It has been said that the standard is not met where inadequacy of counsel has turned the proceedings into "a farce and a mockery," or has created "an apparency instead of the reality of contest and trial." Some cases call for "counsel reasonably likely to render *and rendering* reasonably effective assistance." Still others speak of situations where "the attorney has in effect blotted out the substance of a defense." But whatever the attempted formulation of a standard in general terms, what is required in the actual process of decision of claims of ineffective assistance of counsel, and what our own decisions have sought to afford, is *a discerning examination and appraisal of the specific circumstances of the given case* to see whether there has been *serious incompetency, inefficiency,* or *inattention* of counsel — behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer — and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence. [emphasis added.]

This well states my view that the failure to comply with the duty must be a "*substantial violation*" as *DeCoster I*noted, or *gross incompetence* with substantial prejudice as set forth in *Bruce* and *Scott.* Thus, in Sixth Amendment cases, the defendant must produce evidence showing a *direct* inference of substantial prejudice to the constitutional right of the accused to the assistance of counsel, or such prejudice to his Sixth Amendment right may be shown *indirectly* by evidence that he was denied the essence of a fair trial, *i. e.,* prejudice actual or inherent. Thus the mere showing of some inadequacy in complying with any list of duties, *i. e.,* as stated by*DeCoster I,* does not necessarily satisfy the requirement to show prejudice and thereby shift the burden of proceeding. The inadequacy of counsel must, by proof of "gross incompetence" (*Bruce* and *Scott*) in his performance or substantial impact on the result, be shown to constitute a "substantial violation." *See DeCoster I.*What is required is a showing that the violation itself, or the violation when added to the consequences, was so prejudicial to defendant's constitutional *right,* as to effectively deny him the assistance of counsel that the constitution requires.

[16] Judge Robinson's footnote 58 in *Pinkney* cited four cases: *Newsome v. Smyth,* 261 F.2d 452 (4th Cir. 1958),*cert. denied,* 359 U.S. 969, 79 S.Ct. 883, 3 L.Ed.2d 837 (1959); *United States v. Frame,* 454 F.2d 1136 (9th Cir.),*cert. denied,* 406 U.S. 925, 92 S.Ct. 1794, 32 L.Ed.2d 126 (1972); *United States v. Norman,* 402 F.2d 73 (9th Cir.),*cert. denied,* 397 U.S. 938, 90 S.Ct. 949, 25 L.Ed.2d 119 (1970); and *Dansby v. United States,* 291 F.Supp. 790 (S.D.N.Y.1968).

While *Newsome* was based in part on an application of the farce and mockery test, which we reject as other than an expression that substantial unfair prejudice must be shown, that decision clearly reflects the view that the defendant is expected to demonstrate some sort of prejudice:

[Petitioner] attacks the sufficiency of his personally selected counsel, who conducted his defense in the original trial, principally because his counsel failed to have the prisoner take the witness stand and did not specify the grounds of his motion to set aside the verdict. He also contends that he should have been granted additional time, after the verdict, in which to produce additional witnesses in his behalf, but he did not identify the prospective witnesses or suggest the nature of the testimony he hoped to obtain. Clearly these contentions are without merit. . . . Obviously, it cannot be said that counsel's determination as a matter of trial tactics, not to put his client upon the witness stand, under these circumstances, converts the trial into a farce or a mockery of justice. Indeed, it may be the wise, or even the only prudent, course to take. Having had a full trial, the defendant clearly is not entitled to a retrial upon the basis of an *unsupported statement that he would like additional time to produce unidentified witnesses whose possible testimony was not disclosed.*

261 F.2d at 454 (emphasis added).

Frame flatly states:

Turning to the merits, we hold that the motion for new trial was properly denied. *No showing was made of possible prejudice from the alleged conflict. See Davidson v. Cupp,* 446 F.2d 642 (9th Cir. 1971), and cases cited.

454 F.2d at 1138 (emphasis added).

Norman states that the facts there alleged for a new trial were insufficient because "that fact would not have undermined the Government's case in the least." 402 F.2d at 78. In other words, the defendant failed to sustain his burden of demonstrating prejudice.

Dansby is perhaps the most explicit of all these cases in its statement:

Motions for a new trial are not favored and should be granted only with great caution. *The burden of proving the necessity for a new trial is on the petitioner. He must satisfy the court that the jury might have reached a different result without the challenged testimony, or that had the subsequent testimony been presented at the trial it would have "probably" produced a different result.*

291 F.Supp. at 794.

[17] 177 U.S.App.D.C. at 431, 543 F.2d at 916; *quoted supra* at 17.

[18] While all the circuits have addressed the question of the standard for the duty owed by counsel to the criminal defendant, *see* note 6 *supra,* fewer circuits have addressed the question of the proper procedure for determining when a violation

occurs, *cf.* note 24 *infra.* Yet the circuits seem to be in accord that the burden to show inadequacy of counsel rests upon the defendant.

For example, the Seventh Circuit, in an opinion by then-Judge Stevens, in *Matthews v. United States,* 518 F.2d 1245, 1246 (7th Cir. 1975) stated:

Whenever we are asked to consider a charge that counsel has failed to discharge his professional responsibilities, we start with a presumption that he was conscious of his duties to his clients and that he sought conscientiously to discharge those duties. *The burden of demonstrating the contrary is on his former clients.*[emphasis added.]

Accord, United States v. Sielaff, 542 F.2d 377, 379 (7th Cir. 1976) ("a petitioner . . . *must prove*" (emphasis added;*see* note 6 *supra*)).

The Third Circuit stated in *United States v. Johnson,* 531 F.2d 169, 174 (3d Cir. 1976):

The burden is on petitioner to demonstrate that the representation provided him by counsel was constitutionally inadequate. *United States v. Hines,* 470 F.2d 225, 231 (3d Cir. 1972); *United States v. Varga,* 449 F.2d 1280, 1281 (3d Cir. 1971).

The Tenth Circuit still follows the farce and mockery test, and that Circuit places the burden on the defendant as well. In *United States v. Baca,* 451 F.2d 1112, 1114 (10th Cir. 1971), the court stated:

The burden on an appellant to establish a claim of ineffective assistance of counsel is a heavy one; *he must show* that due to his lawyer's ineptness the trial was a farce, a sham, or a mockery of justice. [emphasis added.]

The Eighth Circuit stated in *Brown v. Swenson,* 487 F.2d 1236, 1240 (8th Cir. 1973) as follows:

It is well established that in order to show a basis for relief on the ground of ineffective assistance of counsel *the appellant must show* actions of his lawyer which would constitute such conscious conduct as to render pretextual the attorney's legal obligation to fairly represent the appellant and circumstances which demonstrate that which amounts to a lawyer's deliberate abdication of his ethical duty to his client. [emphasis added.]

McQueen v. Swenson, 498 F.2d 207, 216 (8th Cir. 1974) agreed in different terms:

We recognize that there is and should be a presumption that counsel is competent, *which must be overcome by the petitioner* in order for an ineffective assistance of counsel claim to lie. [emphasis added].

The Second Circuit, still follows a farce and mockery standard and clearly places a heavy burden upon the appellant. *United States v. Yanishefsky,* 500 F.2d 1327, 1334 (2d Cir. 1974):

Upon careful examination of the record reflecting the character of the "resultant proceedings," . . . and of appellant's specific allegations, we find that taken individually and collectively, . . . they fail to meet the "stringent standards to be met to show inadequacy of counsel" . ..

The Fifth Circuit stated in *Burston v. Caldwell,* 506 F.2d 24, 28 (5th Cir. 1975), quoting *Tyler v. Beto,* 391 F.2d 993 (5th Cir. 1973), *cert. denied,* 393 U.S. 1030, 89 S.Ct. 642, 21 L.Ed.2d 574, that the petitioner has a "heavy burden" to establish ineffective assistance of counsel. The Ninth Circuit also appears to be in accord with these decisions,*Cooper v. Fitzharris,* 586 F.2d 1325, 1331, 1333 (9th Cir. 1978) (en banc), *see* n. 29, *infra.*

Thus it appears that our approach is consistent with the predominant view in the other circuits.

[19] *See Estes v. State of Texas,* 381 U.S. 532, 542, 85 S.Ct. 1628, 1632-1633, 14 L.Ed.2d 543 (1965) ("in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused.")

[20] *Accord: Stone v. Powell,* 428 U.S. 465, 490, 96 S.Ct. 3037, 3050, 49 L.Ed.2d 1067 (1976) ("the ultimate question of guilt or innocence . . . should be the central concern in a criminal proceeding.").

[21] *Cf.* IX Wigmore on Evidence § 2486, at 274-76 (3d ed. 1940):

It is often said that the burden is upon the *party having in form* the affirmative allegation. But this is not an invariable test. . .

It is sometimes said that it is upon the party *to whose case the fact is essential* . . ..

[In other cases] the burden of proving a fact is said to be put on the *party who presumably has peculiar means of knowledge* enabling him to prove its falsity if it is false. . . .

The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations. . . .

There are merely specific rules for specific classes of cases, resting for their ultimate basis upon broad reasons of experience and fairness.

[22] *Decoster* is a criminal appeal case, but, as we have held, it is not a denial of due process to place on a defendant the burden of proving a claim that is separate from the elements of the crime charged. *United States v. Greene,* 160 U.S.App.D.C. 21, 31-32, 489 F.2d 1145, 1155-56 (1973), *cert. denied,* 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 190 (1977). As Justice Holmes remarked in *Casey v. United States,* 276 U.S. 413, 418, 48 S.Ct. 373, 374, 72 L.Ed. 632 (1928):

It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the Government.

[23] Access to the facts was complicated by delay since Decoster was tried in 1971, yet the hearing on adequacy of assistance of counsel was not held until February 6, 1974.

[24] Our refusal to relieve defendant from the burden of proving prejudice, through the device of presuming it, is supported by *Tollett v. Henderson,* 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973), a case with strong Sixth Amendment overtones. In *Tollett,* the Court announced a standard to determine when a criminal defendant who pleads guilty on the advice of counsel is entitled to federal collateral relief on proof of an independent constitutional defect in the prior proceedings (there, the method of selecting the indicting grand jury):

In order to obtain his release on federal habeas under these circumstances, respondent must not only establish the unconstitutional discrimination in selection of grand jurors, *he must also establish that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the "range of competence demanded of attorneys in criminal cases."*

411 U.S. at 268, 93 S.Ct. at 1608-1609 (emphasis added). The Court also stated:

If a prisoner pleads guilty on the advice of counsel, *he must demonstrate* that the advice was not "within the range of competence demanded of attorneys in criminal cases," *McMann v. Richardson,* [397 U.S. 759], at 771 [,90 S.Ct. 1441 at 1449, 25 L.Ed.2d 763].

411 U.S. at 266, 93 S.Ct. at 1608 (emphasis added). Unlike *Murphy* and *Agurs* which are Fifth Amendment cases,*McMann* is specifically concerned with Sixth Amendment rights. The Court stated that the competence demanded of attorneys devolves from the Sixth Amendment:

Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was *within the range of competence demanded of attorneys in criminal cases.* On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand *defendants facing felony charges are entitled to the effective assistance of competent counsel.* Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the *right to counsel guaranteed by the Constitution* is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

397 U.S. at 770-71, 90 S.Ct. at 1448-1449 (emphasis added). The reference to *McMann* in *Tollett* makes clear that the Supreme Court in some circumstances involving alleged Sixth Amendment violations approves of placing the burden to demonstrate the

incompetence of counsel *on the defendant.* There is no indication in *Tollett* that the defendant should be relieved of this burden by presuming incompetence of counsel in certain situations except those obvious instances where unfair prejudice *to his constitutional right* can be directly inferred from the evidence. Thus, *Tollett* suggests that *presumptions* of prejudice *merely* from the acts of omissions of counsel in the conduct of the defense should not be indulged.

While the procedure advocated here is consistent with the Supreme Court's decisions, it differs in certain respects from that adopted in other circuits. For example, in *McQueen v. Swenson,* 498 F.2d 207 (8th Cir. 1974),*writ dismissed,* 425 F.Supp. 373 (E.D.Mo.1976), *rev'd and remanded,* 560 F.2d 959 (8th Cir. 1977), the court discussed the precepts that govern the procedure for determining violations of the right to the adequate assistance of counsel in the Eighth Circuit. In that case Judge Bright stated that the burden is on the defendant to substantiate a claim of inadequate assistance — a proposition with which we agree:

We recognize that there is and should be a presumption that counsel is competent, which must be overcome by the petitioner in order for an ineffective assistance of counsel claim to lie.

498 F.2d at 216. The opinion further stated that evaluation of a habeas corpus petition alleging inadequate assistance of counsel is a two-step process: first, determining whether there has been the violation of a duty owed by a defense attorney to his client; and second, determining whether that failure prejudiced the defense.498 F.2d at 218. We agree that inadequate assistance analysis has several components: the defendant, unless the violation and the substantial unfair prejudice to his constitutional right are apparent on the face of the record, must demonstrate (1) the existence of a duty owed him by his counsel, and (2) a substantial violation of that duty (3) which results in substantial unfair prejudice to his case and thence to his right. However, Judge Bright appears to be of opinion that a very limited investigation would constitute a constitutional violation, and that determining the existence of prejudice was in effect determining whether the constitutional error was harmless under *Chapman. Id.* It is our view that the constitutional violation is not made out *until* the defendant has carried his complete burden; at that point in inadequate assistance cases, the analysis is over and the harmless error doctrine does not apply. Applying the *Chapman* test to an inadequate assistance case requires that the court deem the denial of adequate assistance "nonsubstantial," since the *Chapman* harmless error doctrine, by its own terms, does not apply to "constitutional errors that `affect substantial rights' of a party." 386 U.S. at 23, 87 S.Ct. at 828.

It is important to recognize, however, the similarities between our approach and that adopted by the Eighth Circuit. Judge Bright's conclusion in *McQueen* summarizes that circuit's procedure as follows:

What we are saying is that, here, the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant either

on cross-examination or in his case-in-chief at the original trial. Once this showing is made, a new trial is warranted unless the court is able to declare a belief that the omission of such evidence was harmless beyond a reasonable doubt.

498 F.2d at 220. What we are saying in this case is that, unless the violation and substantial unfair prejudice is apparent to the court on the record, appellants must shoulder the initial burden and make a *prima facie* showing of all the elements of the burden we have outlined above. Then the burden of proceeding shifts to the Government to rebut this showing. After these showings, a new trial is not warranted unless the court determines that on the whole record it appears that the defendant has met his burden.

[25] 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Gideon was charged with a non-capital felony. His request for court appointed counsel was denied because Florida law only permitted appointment of counsel for indigents in capital cases. The Supreme Court reversed Gideon's conviction, holding that his constitutional right to the assistance of counsel had been denied.

[26] 425 U.S. 80, 91, 96 S.Ct. 1330, 1337, 47 L.Ed.2d 592 (1976) ("an order preventing petitioner from consulting his counsel `about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment").

[27] 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The trial court's refusal to permit final argument in a non-jury case was held to be a violation of the Sixth Amendment.

[28] Chief Justice Burger wrote for the Court in *Holloway v. Arkansas,* 435 U.S. 475, 489, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978):

[T]his Court has concluded that the assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman v. California,* supra, 386 U.S., at 23, [87 S.Ct. 824, at 827]. Accordingly, when a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic. *Gideon v. Wainwright,* 372 U.S. 335 [83 S.Ct. 792, 9 L.Ed.2d 799] (1963); *Hamilton v. Alabama,* 368 U.S. 52 [82 S.Ct. 157, 7 L.Ed.2d 114] (1961); *White v. Maryland,* 373 U.S. 59 [83 S.Ct. 1050, 10 L.Ed.2d 193] (1963).

See Matthews v. United States, 145 U.S.App. D.C. 323, 332, 449 F.2d 985, 994 (1971) (Leventhal, J., concurring).

The dissent asserts that the distinction between "actual" and "constructive" denials of the assistance of counsel is a "verbal formalism [that] simply does not correspond to the reality of ineffective assistance." Dissent, n. 129. It contends that since an accused has a right to the effective, as well as the actual, assistance of counsel, cases involving an allegedly inadequate performance by defense counsel (*e. g.* failure to cross-examine certain witnesses; failure to make an opening statement) must be treated the same as cases in which the defendant did not have a lawyer or the lawyer was prevented from

assisting his client in material ways (*e. g.* prevented from cross-examining witnesses or making an opening statement). *Id.* I disagree.

There is an obvious difference between cases in which counsel is present and able to exercise his judgment to use a certain tactic *vel non,* such as to cross-examine a witness, and cases in which the lawyer is denied the right to exercise that professional judgment which is basic to his representation. The Sixth Amendment right to have the assistance of counsel is primarily the right to have the benefit of a lawyer's judgment at all stages of a criminal trial. Cf. *Mitchell, supra* at ___- ___ of 199 U.S.App. D.C., at 229-230 of 624 F.2d. If that right is denied, then reversal is required without any further independent showing of prejudice. *Holloway, supra.* In addition the Supreme Court has applied a judicial gloss on the Sixth Amendment, holding that one's right to the assistance of counsel may be held to be denied when defense counsel is ineffective. *McMann v. Richardson, supra,* 397 U.S. 771 n. 14, 90 S.Ct. 1441. The dissent contends that because additional prejudice need not be shown in cases where there is an actual denial of counsel, it follows that prejudice is not an element of ineffectiveness cases either. Therefore the dissent argues that the only question is "whether defense counsel acted in the manner of a diligent and competent attorney . . .." Dissent — of 199 U.S.App.D.C., 287 of 624 F.2d.

But determining whether counsel has been *"effective"* raises different questions than an inquiry into whether the assistance of counsel was actually *denied.* While the language of the Sixth Amendment focuses on whether an accused had "the Assistance of Counsel" at all, the judicial gloss is concerned with whether counsel was "effective" or "ineffective." And this may involve questions of degree. It is plain from a glance at any dictionary that when the Court used the term "ineffective" it was concerned with the *impact* that counsel's alleged failure may have on the trial. "Ineffective" means, "not producing the desired effect." *Webster's New World Dictionary of the American Language* (College Edition, 1968). If the Supreme Court had intended the one-dimensional inquiry proposed by the dissent it could have focused solely on competence or performance. Its use of the term "ineffective" is consistent with the view adopted by this and the plurality opinion that prejudice is an element of an accused's constitutional claim of ineffectiveness. Thus, the distinction that is drawn here between cases involving "actual" and "constructive" denials of the assistance of counsel is valid — it rests on the difference between the right explicitly granted in the Constitution and the different formulation of the right created by a judicial gloss on the Constitutional provision.

[29] *See* cases cited *supra* at ___ to ___ of 199 U.S.App.D.C. at 219 to 226 of 624 F.2d. See also the recent decision in *Cooper v. Fitzharris,* 586 F.2d 1325, 1331 (9th Cir. 1978) (en banc), in which the court stated:

When the claim of ineffective assistance of counsel rests upon specific acts and omissions of counsel at trial . . . relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct.

[30] In a great many criminal cases, the best, if not the only defense, is merely putting the government to its proof and attempting to convince the jury that the charge has not been proved beyond a reasonable doubt.

[31] Judge Craven, dissenting in *Coles v. Peyton,* 389 F.2d 224, 230 (1968), hit the nub of the problem squarely:

I think the correct rule is that the burden of showing lack of prejudice falls on the state when, *but only when,* the petitioner has shown a set of facts that demonstrate prejudice to his defense, inherently or otherwise.

(Emphasis in original). Thus, Judge Craven expressed his agreement with the view that the initial burden to show prejudice falls on the defendant, and the Government has nothing to rebut — and certainly no burden to proceed — until the defendant fulfills this burden. It is significant that the Fourth Circuit in *Jackson v. Cox,* 435 F.2d 1089, 1093 (1970) declined to apply the rule in *Coles,* which had presumed the existence of prejudice, to a case with facts very similar to the instant case.

This analysis is consistent with *United States v. Pinkney,* 177 U.S.App.D.C. 423, 431-32 n. 59, 543 F.2d 908, 916-17 n. 59 (1976), where Judge Robinson stated:

Only if the evidentiary elements of that claim [of inadequate assistance of counsel] appeared in appellant's motion would he have been entitled to a hearing, and only if evidence offered at a hearing tended to establish the elements would the Government have been summoned to disestablish prejudice.

[32] Where the conduct of trial counsel is questioned, since his professional standing is directly involved, he should be permitted to participate as a third party in that proceeding on an equal basis with the Government.

[33] *Beasley v. United States,* 491 F.2d 687 (6th Cir. 1974). *See Glasser v. United States,* 315 U.S. 60, 75-76, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

[34] Trial counsel attributed his knowledge to the fact that he had conferences with the prosecutors and that he conducted the preliminary hearing for all three defendants. Tr., Feb. 6, 1974, at 34-35; Tr., Feb. 11, 1974, at 12-14.

[35] Findings and Conclusions, at 6, 10.

[36] Tr., Feb. 11, 1974, at 11-14.

[37] Tr., Feb. 11, 1974, at 11, 12-14.

[38] Tr., Feb. 6, 1974, at 34; Tr., Feb. 11, 1974, at 12-13.

[39] Tr., Feb. 6, 1974, at 24-25. Appellant prepared a handwritten letter to counsel, which counsel testified was received by him either the day of, one day before, or two days before trial, *id.* at 24, which was held on November 15-16, 1971. Decoster testified that he wrote the letter during three weeks of September 1971 when he was confined

at the jail (Tr. Feb. 6, 1974, 59-60). Later he changed his testimony and stated that he wrote the letter between May and November 1970 (*id.* 60-61). Thus, the precise date cannot be fixed and both appellant and counsel in the passage of time since the event have a valid excuse for not remembering the precise date. If the letter was written between May and November, 1970, as Decoster testified, his counsel had this admission of his involvement at a very early date. The view that the letter was sent at this time is corroborated by the fact that Decoster made a similar statement in a letter to Judge Waddy dated November 4, 1970. Decoster's letter to his counsel, Government Exhibit # 2, was as follows: 200. 19th St. S.E. Wash., D.C.

Dear Sir:

As I tried to call you before, but couldn't make contact, I decided to write again. Its important I see you, as you are my lawyer and I don't have ways of fighting my case without you. To get to the point, I want to file assault charges against my accuse *[sic]* victim. I think I have as much right as he has, at least I'm entitle *[sic]* to it. If they can charge me with robbery while fighting, I think I have as much right as him, and can do the same. As for Elley*[sic]* & Taylor my accuse *[sic]* partners they can testify their role. Elley *[sic]* came to my aide *[sic]* when the victim stuck his hand in his pocket & Taylor was just standing on the sidewalk. I hope you can do something about this as soon as you get this letter. Please let me know something. If he can be free so can I.

Willie Decoster Dorm D.C.D.C. 162743

This letter clearly admits Decoster's participation in the robbery with his "accuse[d] partners." The letter is ample justification for counsel not to look for alibi witnesses.

Appellant also sent a handwritten note to Judge Waddy, which was received by him on November 4, 1970 and filed on November 13, 1970. *See* Tr., Feb. 6, 1974, at 62. This letter follows without corrections (emphasis added):

Honorable Judge Waddy,

I am an Inmate of D.C. Jail who has been incarcerated for five month on a charge that has been change from robbery to arm robbery. The motive for this letter is to request from the court another lawyer because I've been misrepresented for five month with my present lawyer . . .. Also I would like to protect myself and family which consist of nine more younger than I am, which are barely being supported because my father is the only capable one. The rest is trying to get something I miss. Education. Being an individual of limited education its only natural for me to protect my innocence and with the transcript from my hearing which I cannot obtain because of illegal counseling. *I can prove that I am only guilty of assault by self defence.* But the court says I must wait until Jan. 12, 1971 at my trial to prove my innocence which I think is unconstitutional because there is no evidence or witness of robbery. I was accepted by Blackman Development Center on Oct. 12, but my lawyer hadn't file a motion for bond review. So there was another one of his promise of what he would do. So Your Honor it would be a pleasure if I could speak to you in behave of this case and the way its been handled for the last

five month. It could not be explain in writing so I ask this opportunity for a lawyer and justice. I would be to happy if you would consider this letter soon as possible.

Both of these written notes completely contradict the testimony Decoster gave on the stand (Tr., Nov. 16, 1971, at 30-34). The statements in the letter prove his participation in the events constituting the robbery and the falsity of any claim of alibi. His testimony in court is also contradicted by the testimony of all the witnesses, including his accomplice Eley. In the hearing on remand, Decoster reiterated his trial testimony of November 16, 1971 that he was not at the scene (Tr., Feb. 6, 1974, at 65-68). But in so doing, he stated his letter to his counsel was a fabrication (*Id.* at 71). He also testified on remand, in contradiction to his trial testimony, that he had never seen Eley before he was arrested (*Id.* at 65), and he claimed that Eley's testimony at trial was fabricated (*Id.* at 71).

[40] He represented Decoster and Taylor, and Eley's counsel asked no questions.

[41] Tr., Mar. 3, 1972 (sentencing), at 3-4:

THE COURT: . . . the Court has received a long letter from the Defendant, himself, stating that he has learned the error of his ways and that he has found out that he was fooling with the wrong crowd, and that he had been using drugs and he now knows that the use of drugs could lead only to death or jail, neither one of which is acceptable to him.

Mr. DeCoster, do you have something you want to say on your own behalf?

DEFENDANT: I just wanted the Court to know that I was sincere in writing this letter. I feel like I can be — well, I know I can be rehabilitated which I have did on my part in having to come to face the facts. It just seems like, you know — well, really, I left home when I was at an early age and I didn't have that much confidence and I just hooked up in the wrong places and in the wrong ways. But now I believe that I can — I know that given an opportunity that I can help my family as well as myself. So I ask this Court upon sentencing me to consider this.

[42] Judge Robinson also takes this position, but unlike my dissenting colleagues, he concludes that the Government has met its burden of proof.

[43] *See* n. 10, *supra.*

[44] Dissent n. 143.

[45] 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 590 (1976).

[46] 435 U.S. 475, 98 S.Ct. 1891, 32 L.Ed.2d 358 (1978).

[47] 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[48] Dissent ___ of 199 U.S.App.D.C., 289 of 624 F.2d.

[49] *See* page ___ of 199 U.S.App.D.C., page 231 of 624 F.2d, *supra.*

[50] 435 U.S. at 488, 98 S.Ct. at 1181.

[51] An example of this, from my own experience as United States Attorney, is a case that is unreported (except possibly in its disbarment aspect) which involved a lawyer representing several defendants who entered guilty pleas on his advice. It subsequently appeared that the lawyer had drawn a false indictment against a more affluent brother of one of the defendants in an effort to improve his attorney's fee by "taking care" of that charge. Upon this showing of his lack of fidelity as a lawyer, and without more, the court set aside the judgments of conviction on the guilty pleas. Thereafter the defendants were tried and convicted and the lawyer was disbarred. In my view, setting aside the original convictions was fully justified because the defendants in that case were denied the assistance of counsel who possessed the fidelity required of all lawyers. Complete fidelity of a lawyer to his client is an essential element of the existence of the relationship. The defendants were thus denied the assistance of such counsel as the Constitution requires. The harm to the defendants resulted from the demonstrated lack of that fundamental good moral character required of all lawyers. This prejudice went directly to their constitutional right and there was no necessity to prove any prejudice or harm to any particular defense that they might have had.

[52] *See Cooper v. Fitzharris,* 586 F.2d 1325, 1332 (9th Cir. 1978) (en banc).

[53] Dissent ___ of 199 U.S.App.D.C., 289 of 624 F.2d.

[54] *Id.* page 199 of U.S.App.D.C., page 291 of 624 F.2d.

[55] I have already discussed Supreme Court opinions that are inconsistent with the dissent's position. *E. g.United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (*See* page ___ of 199 U.S.App.D.C., page 226-227 of 624 F.2d, *supra*);*Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976) (n. 20, *supra*); and *Tollett v. Henderson,*411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973) and *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (n. 24, *supra*).

[56] In his first trial, the defendant was represented by a lawyer from the Legal Aid Society of Allegheny County, which was appointed as his counsel. In his second trial, he was represented by another lawyer from the Legal Aid Society.

[57] Similarly, it conflicts with the thesis of Judge Robinson's concurring opinion.

The dissent attempts to garner hidden support from *Chambers,* but nothing therein can be construed as "tacit approval of [a] . . . presumption-of-prejudice rule . . . ." Dissent n. 140, cf. 399 U.S. at 53-54, 90 S.Ct. 1975.*Chambers* also specifically rejects arbitrary *per se* and automatic reversal rules to which the dissent leans. Dissent, page ___ of 199 U.S. App.D.C., page 293 of 624 F.2d and n. 149.

[58] Tr. (Feb. 6, 1974) 72.

[59] Officer Ehler testified: "Mr. Decoster and Mr. Ely had a hold of the subject, the complainant. One of them was yoking him, I didn't know which one it was at the time,

but — and *they* were removing something from his pockets." Tr., Preliminary Hearing (June 8, 1970) 5-6 (emphasis added).

[60] Dissent n. 107.

[61] *Id.*

[62] *See* pages ___-___ of 199 U.S.App.D.C., pages 232-234 of 624 F.2d, *supra.*

[63] Dissent page ___ of 199 U.S.App.D.C., page 286 of 624 F.2d.

The dissent overstates the conflict between the police officer's testimony and Decoster's story, Dissent page ___ of 199 U.S.App.D.C., page 283 of 624 F.2d. Given Decoster's letters to his judge and attorney any conflict with police testimony was minimal — whether with his accomplices who pled guilty he assaulted Crump either in self defense or to rob him.

The dissent predicates some of its criticism of defense counsel on the ground that he "disbelieved his client and therefore thought that further inquiry would prove fruitless." Dissent page ___ of 199 U.S.App.D.C., page 284 of 624 F.2d. However, it was *believing* Decoster's statements in his letters that he *was* present and assaulted Crump in self defense that would reduce the need for an extensive investigation. (Decoster's statement in his letter to the judge in November, 1970 that he was present at the robbery casts doubt on the dissent's assertion "that Decoster claimed he was not with them [his co-defendants]," cf. Dissent n. 110). The testimony of the police officer and the guilty pleas of Decoster's co-defendants also led to the same result. Thus, this case cannot be compared to the case referred to by the dissent at n. 105.

[64] *Id.* page ___ of 199 U.S.App.D.C., page 283 of 624 F.2d.

The dissent speculates about the reasons for what it considers an inadequate number of investigations by appointed defense counsel, n. 80, without reflecting on the number of investigations in cases where defendants hire their own counsel. As to the reasons, these most likely lie in the admitted fact (Dissent, page ___ of 199 U.S.App.D.C., page 287 of 624 F.2d) that most defendants are guilty and they are the best witnesses to the relevant events.

[65] *See* page ___ of 199 U.S.App.D.C., page 240 of 624 F.2d, *supra.*

[66] Tr., Sentencing (March 3, 1972) 2-3.

[67] Dissent page ___ of 199 U.S.App.D.C., page 275 of 624 F.2d.

[68] *Id.* n. 58.

[69] *Id.* page ___ of 199 U.S.App.D.C., page 295 of 624 F.2d.

[70] *See United States v. Roberts,* 199 U.S.App. D.C. ___, 600 F.2d 815 (D.C.Cir. 1979) (Statement on Suggestion for Rehearing en banc by MacKinnon, J.), and Tr., Sentencing (March 3, 1972) 3-4.

[71] Dissent ___ of 199 U.S.App.D.C., page 297 of 624 F.2d.

[72] *Id.* page ___ of 199 U.S.App.D.C., page 267 of 624 F.2d.

[73] In my view one error of counsel alleged by the dissent, his decision to waive his opening statement, was good strategy. In light of Decoster's inability to adhere to a single story, counsel could not be sure what story his client would choose to assert at trial. Under these circumstances, making an opening statement could have caused serious harm to defendant's case. For instance, had counsel stated that Eley would testify to an alibi, Eley's testimony that Decoster was present at the scene of the robbery would have caused even greater damage to appellant's case than actually occurred. Therefore, with the accused changing his story, the position taken by counsel (as the district court found) was an exercise of good judgment. Counsel's decision to waive his opening statement certainly did not constitute a breach of duty to Decoster.

[74] The dissent presents a false picture when it implies that indigent defendants in felony cases went unrepresented in most courts until recently. For many years in most courts in the nation, lawyers gave free legal representation to accused felons who could not afford counsel, and the lawyers were completely uncompensated for such time consuming duties. Such service to indigent defendants was considered to be an obligation of all lawyers. Many jurisdictions also provided paid public defenders. The cases that have held that counsel is required in major criminal cases dealt with isolated courts that did not follow the general national practice. *E. g., Powell v. Alabama,* 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1930); *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). *See* Mayer, *The Lawyers* 163 (1966).

[75] *E. g., United States v. Davis,* 183 U.S.App. D.C. 162, 175, 562 F.2d 681, 694 (1977); *United States v. Moore,*164 U.S.App.D.C. 319, 505 F.2d 426 (1974), *rev'd* 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975); *United States v. Lee,* 165 U.S.App.D.C. 50, 64-69, 506 F.2d 111, 125-30 (1974), *cert. denied,* 421 U.S. 1002, 95 S.Ct. 2403, 44 L.Ed.2d 670 (1975); *United States v. Moore,* 158 U.S.App.D.C. 375, 496, 486 F.2d 1139, 1260 (en banc),*cert. denied,* 414 U.S. 980, 94 S.Ct. 298, 38 L.Ed.2d 224 (1973).

[76] Washington Star, August 9, 1978.

[1] Leventhal Opinion (Op.), 199 U.S.App.D.C. at ___, 624 F.2d at 199; MacKinnon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 217.

[2] See Part I *infra.*

[3] See Part II *infra.*

[4] See Part III *infra.*

[5] See Part IV *infra.*

[6] This trend commenced three decades ago in *Diggs v. Welch,* 80 U.S.App.D.C. 5, 6-7, 148 F.2d 667, 668-669,*cert. denied,* 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002 (1945). For other cases of similar bent, see note 8 *infra.*

[7] See *Diggs v. Welch, supra* note 6, 80 U.S.App. D.C. at 7, 148 F.2d at 669; *Jones v. Huff,* 80 U.S.App.D.C. 254, 255, 152 F.2d 14, 15 (1945).

[8] *Diggs v. Welch, supra* note 6, 80 U.S.App. D.C. at 7, 148 F.2d at 669. See *United States v. Hammonds,* 138 U.S.App.D.C. 166, 169-170, 425 F.2d 597, 600-601 (1970); *Harried v. United States,* 128 U.S.App.D.C. 330, 333-334, 389 F.2d 281, 284-285 (1967); *Mitchell v. United States,* 104 U.S.App.D.C. 57, 63, 259 F.2d 787, 793, *cert. denied,* 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86 (1958); *Jones v. Huff, supra* note 7, 80 U.S.App.D.C. at 255, 152 F.2d at 15.

[9] 126 U.S.App.D.C. 336, 379 F.2d 113 (1967).

[10] *Id.* at 339, 379 F.2d at 116.

[11] Leventhal Op., 199 U.S.App.D.C. at ___, 624 F.2d at 204.

[12] *United States v. Bruce, supra* note 9, 126 U.S.App.D.C. at 339-340, 379 F.2d at 116-117 (footnote omitted).

[13] Unlike the case before us, *Bruce* was an appeal from denial of a motion pursuant to 28 U.S.C. § 2255 (1976). The *Bruce* court observed that "a more powerful showing of inadequacy is necessary to sustain a collateral attack than to warrant an order for new trial either by the District Court or by this court on direct appeal," but felt that "[i]t would not be fruitful to attempt further delineation of the applicable standard by reference to generalities . .." *Id.* at 340, 379 F.2d at 117 (footnotes omitted).

[14] See Leventhal Op., 199 U.S.App.D.C. at ___, 624 F.2d at 203-206.

[15] Leventhal Op., 199 U.S.App.D.C. at ___, 624 F.2d at 206-207.

[16] Bazelon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 264; MacKinnon Op., 199 U.S.App. D.C. at ___, 624 F.2d at 217.

[17] Part III *infra.*

[18] *Holloway v. Arkansas,* 435 U.S. 475, 481-484, 490, 98 S.Ct. 1173, 1177-1179, 1182, 55 L.Ed.2d 426, 433-434, 438 (1978) (appointment of single counsel for three defendants, without investigation of counsel's representations that a conflict of interest existed, violates Sixth Amendment right to effective assistance);*McMann v. Richardson,* 397 U.S. 759, 770-771, 90 S.Ct. 1441, 1448-1449, 25 L.Ed.2d 763, 773 (1970)("defendants facing felony charges are entitled to the effective assistance of competent counsel. . . . [I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel," citing *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)); *Glasser v. United States,* 315 U.S. 60, 76, 62 S.Ct. 457, 468, 86 L.Ed. 680, 702 (1942) (defendant has right to "effective assistance of

counsel, guaranteed by the Sixth Amendment"); *United States v. Hurt,* 177 U.S. App.D.C. 15, 18, 543 F.2d 162, 165 (1976); *Scott v. United States,* 138 U.S.App.D.C. 339, 340, 427 F.2d 609, 610 (1970).

[19] *E. g., Powell v. Alabama,* 287 U.S. 45, 68-72, 53 S.Ct. 55, 63-65, 77 L.Ed. 158, 170-172 (1932) (right to effective assistance of counsel in state trials guaranteed by the Due Process Clause of the Fourteenth Amendment).

[20] Leventhal Op., 199 U.S.App.D.C. at ___, 624 F.2d at 206; MacKinnon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 213.

[21] United States Const. amend. VI.

[22] *Supra* note 19.

[23] 287 U.S. at 71, 53 S.Ct. at 65, 77 L.Ed. at 172.

[24] *Holloway v. Arkansas, supra* note 18, 435 U.S. at 490, 98 S.Ct. at 1182, 55 L.Ed.2d at 438 ("[t]he mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters"); *Geders v. United States,* 425 U.S. 80, 88-91, 96 S.Ct. 1330, 1335-1337, 47 L.Ed.2d 592, 599-601 (1976) (Sixth Amendment confers right to assistance and guidance of counsel; defendant cannot constitutionally be prevented from consulting with his attorney during an overnight recess); *McMann v. Richardson, supra* note 18, 397 U.S. at 770-771, 90 S.Ct. at 1448-1449, 25 L.Ed.2d at 773 (defendants have a right to effective assistance of competent counsel); *Glasser v. United States, supra*note 18, 315 U.S. at 75-76, 62 S.Ct. at 467-468, 86 L.Ed. at 702 (under Sixth Amendment, defendant is entitled to "the benefit of the undivided assistance of counsel of his own choice. . . Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness"). See also*Avery v. Alabama,* 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377, 379 (1940) (state cannot "convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guaranty of assistance of counsel cannot be satisfied by mere formal appointment").

[25] See text *supra* at note 12.

[26] *E. g., United States v. DeCoster (DeCoster I),* 159 U.S.App.D.C. 326, 331, 487 F.2d 1197, 1202 (1973).

[27] *Supra* note 18.

[28] 397 U.S. at 771, 90 S.Ct. at 1449, 25 L.Ed.2d at 773.

[29] *Id.*

[30] See cases cited *infra* notes 31-33.

[31] *Brooks v. Tennessee,* 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972); *Ferguson v. Georgia,* 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961).

[32] *Herring v. New York,* 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975).

[33] *Geders v. United States, supra* note 24.

[34] Only three circuits continue to utilize the farce-and-mockery test. *United States v. Wright,* 573 F.2d 681, 683-684 (1st Cir.), *cert. denied,* 436 U.S. 949, 98 S.Ct. 2857, 56 L.Ed.2d 792 (1978) (ineffective assistance of counsel means presentation that makes a mockery, sham or farce of trial); *United States v. Bubar,* 567 F.2d 192, 202 (2d Cir.), *cert. denied,* 434 U.S. 872, 98 S.Ct. 217, 54 L.Ed.2d 171 (1977) (assistance not ineffective unless purported representation by counsel made trial farce and mockery of justice); *United States v. Riebold,* 557 F.2d 697, 703 (10th Cir.), *cert. denied,* 434 U.S. 860, 98 S.Ct. 186, 54 L.Ed.2d 133 (1977) (representation competent unless perfunctory, in bad faith, sham, or pretense). Both the First and the Second Circuits have, however, recently adverted to the higher reasonable-competence standard without expressly overruling earlier farce-and-mockery language. See *United States v. Wright, supra,* 573 F.2d at 684 (even under higher standard of "reasonably effective assistance," defendant's counsel provided effective assistance); *United States v. Williams,* 575 F.2d 388, 393 (2d Cir.), *cert. denied,* 439 U.S. 842, 99 S.Ct. 134, 58 L.Ed.2d 141 (1978) (performance of counsel did not make proceedings farce or mockery, nor did it fall below standard of reasonably competent attorney acting as diligent, conscientious advocate); *United States v. Tolliver,* 569 F.2d 724, 731 (2d Cir. 1978) (defense counsel's conduct easily met even the more liberal standard that defendant is entitled to reasonably effective assistance of attorney acting as diligent, conscientious advocate).

[35] See *Moore v. United States,* 432 F.2d 730, 736 (3d Cir. 1970) (defendant entitled to counsel exercising level of skill and knowledge customary to the time and place of representation); *Marzullo v. Maryland,* 561 F.2d 540, 543-544 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) (representation must be "within the range of competence demanded of attorneys in criminal cases"); *United States v. Carter,* 566 F.2d 1265, 1272 (5th Cir.), *cert. denied,* 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978) (standard for evaluating defense counsel is whether defendant received "reasonably effective assistance"); *United States v. Yelardy,* 567 F.2d 863, 866 (6th Cir.), *cert. denied,* 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978) (assistance of counsel not ineffective when advice is "within the range of competence demanded of attorney in criminal cases");*Monteer v. Benson,* 574 F.2d 447, 450 (8th Cir. 1978) (defendant entitled to the "exercise [of] the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances"); *Cooper v. Fitzharris,* 586 F.2d 1325, 1328 (9th Cir. 1978) (defendant entitled to reasonably competent and effective representation). Although the Seventh Circuit does not employ the farce-and-mockery test, it subscribes to a standard that appears to fall somewhere between farce and mockery and reasonably effective assistance. See*United States ex rel. Rooney v. Housewright,* 568 F.2d 516, 525-526 (7th Cir. 1977) (attorney must "exhibit[] a minimum degree of professional competency").

[36] *DeCoster I, supra* note 26, 159 U.S.App.D.C. at 331, 487 F.2d at 1202.

[37] See, *e. g., National Sav. Bank v. Ward,* 100 U.S. 195, 198, 25 L.Ed. 621, 622 (1880) (attorney is bound to act with "a proper degree of skill, and with reasonable care and to the best of his knowledge"); *Wilcox v. Plummer,* 29 U.S. (4 Pet.) 172, 180, 7 L.Ed. 821, 824 (1830) (attorney is impliedly bound "to act diligently and skillfully" in the conduct of his client's case); *Dorf v. Relles,* 355 F.2d 488, 492 (7th Cir. 1966) (attorney owes to client "good faith and reasonable skill and diligence in the prosecution of the case"); *Palmer v. Nissen,* 256 F.Supp. 497, 501 (D.Me.1966) (attorney is bound to execute business in his profession entrusted to his care with a reasonable degree of care, skill and dispatch); *Transamerica Ins. Co. v. Keown,* 451 F.Supp. 397, 402 (D.N.J. 1978)(attorney's "standard of care is measured by the knowledge and skill ordinarily possessed and exercised by others in the profession"); *Davis v. Associated Indem. Corp.,* 56 F.Supp. 541, 543 (M.D.Pa.1944) (attorney "must give such attention to his duties, and to the interests of his client, as ordinary prudence demands, or members of the profession usually bestow"). See generally W. Prosser, Torts, § 32 at 161-165 (4th ed. 1971).

[38] I cite the civil counterpart of the ineffective assistance claim in criminal litigation simply to make the point stated in text. In a civil action for damages, of course, the burden is upon the plaintiff to prove injury flowing from the lawyer's breach of duty, see generally W. Prosser, Torts, § 328A at 149 (4th ed. 1971), and the analogy is lost at this point. See Part III *infra.*

[39] Bazelon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 297.

[40] *McMann v. Richardson, supra* note 18, 397 U.S. at 771, 90 S.Ct. at 1449, 25 L.Ed.2d at 773.

[41] Leventhal Op., 199 U.S.App.D.C. at ___, 624 F.2d at 208.

[42] *Id.*

[43] "A retrospective examination of a lawyer's representation to determine whether it was free from any error would exact a higher measure of competency than the prevailing standard. Perfection is hardly attainable and certainly is not the general rule, especially in professional work where intuitive judgments and spontaneous decisions are often required in varying circumstances. The artistry of the advocate is difficult to judge retrospectively because the elements influencing judgment usually cannot be captured on the record. The kaleidoscopic range of possibilities often seems limitless, and it is proverbial that the finest ideas emerge on the way back from the courthouse. The advocate's work, therefore, is not readily capable of later audit like a bookkeeper's. Of course, not all the activity of the advocate has this highly subjective quality. It is possible to examine the sufficiency of his preparation and the adequacy of his knowledge of the relevant law. Review may disclose failures at the trial. All these are matters which will inform the judgment on a retrospective inquiry whether counsel adequately performed his duty. But since what is required is normal and not exceptional representation, there is room for the realization that it would be difficult to find a case where even the ablest and most experienced trial lawyer would be

completely satisfied after a searching re-examination of his conduct of a case." *Moore v. United States, supra* note 35, 432 F.2d at 736-737. See also Bazelon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 276.

[44] Judge Bazelon has "attempted to give substantive content to the Sixth Amendment's mandate by setting forth [the] minimum requirements of [a] competent performance" in the form of "duties . . . derived from the American Bar Association's *Standards for the Defense Function.*" Bazelon Op., 199 U.S.App. D.C. at ___, 624 F.2d at 275. While I would look to these standards as indications of contemporary thought on what a competent performance should offer, I share the plurality's difficulties respecting their use for much more. See Leventhal Op., 199 U.S.App.D.C. at ___, 624 F.2d at 223. Reasonable competence, I think, must retain the degree of flexibility characteristic of most constitutional tests. Judges undoubtedly have enough of a feel to say with confidence that particular activities must enter at a reasonable level of quality into any performance to be deemed effective. Beyond that, in my view, the precise content of effective counsel-assistance must steadily evolve through the traditional and ongoing process of constitutional interpretation in given concrete contexts. In any event, I perceive no need to venture beyond the case before us, and for me the outcome on duty to investigate is decisive. See Part IV *infra,* and note 159.

[45] See Part III *infra.*

[46] See Part IV *infra.*

[47] See Leventhal Op., 199 U.S.App.D.C. at ___, 624 F.2d at 212; Bazelon Op., 199 U.S. App.D.C. at ___, 624 F.2d at 279. But see MacKinnon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 232.

[48] See, *e. g., Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752, 766 (1976); *Lehnhausen v. Lake Shore Auto Parts Co.,* 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351, 358 (1973); *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 596, 82 S.Ct. 987, 991, 8 L.Ed.2d 130, 135 (1962);*Flemming v. Nestor,* 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435, 1448 (1960).

[49] *United States v. Canty,* 152 U.S.App.D.C. 103, 110, 469 F.2d 114, 121 (1972).

[50] *United States v. Pinkney,* 177 U.S.App.D.C. 423, 431, 543 F.2d 908, 916 (1976).

[51] Leventhal Op., 199 U.S.App.D.C. at ___, 624 F.2d at 207.

[52] MacKinnon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 232.

[53] *Id.* at ___, 624 F.2d at 233.

[54] 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[55] *Id.* at 23, 87 S.Ct. at 827-828, 17 L.Ed.2d at 710 (footnote omitted). See also *Harrington v. California,* 395 U.S. 250, 251, 89 S.Ct. 1726, 1727, 23 L.Ed.2d 284, 286 (1969).

[56] *Chapman v. California, supra* note 54, 386 U.S. at 21, 87 S.Ct. at 827, 17 L.Ed.2d at 709.

[57] *Id.* at 22, 87 S.Ct. at 827, 17 L.Ed.2d at 709.

[58] *Id.* at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710.

[59] *Id.,* citing 1 J. Wigmore, § 21 (3d ed. 1940).

[60] *Chapman v. California, supra* note 54, 386 U.S. at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710. For this the Court found support in its earlier decision in *Fahy v. Connecticut,* 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171, 173 (1963).

[61] See text *supra* at note 55.

[62] *Chapman v. California, supra* note 54, 386 U.S. at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710-711. See also*Harrington v. California, supra* note 55, 395 U.S. at 251, 89 S.Ct. at 1727, 23 L.Ed.2d at 286.

[63] See *Holloway v. Arkansas, supra* note 18, 435 U.S. at 490, 98 S.Ct. at 1182, 55 L.Ed.2d at 438 (citing*Chapman v. California, supra* note 54).

[64] See *Estelle v. Williams,* 425 U.S. 501, 504, 96 S.Ct. 1691, 1693, 48 L.Ed.2d 126, 130 (1976) (citing overwhelming judicial recognition of accused's right not to be compelled to go to trial in prison clothing); *Estes v. Texas,* 381 U.S. 532, 544, 85 S.Ct. 1628, 1633-1634, 14 L.Ed.2d 543, 551 (1965) (noting that 48 states and the Federal Rules have proscribed the use of television in the courtroom); *Peters v. Kiff,* 407 U.S. 493, 501-503, 92 S.Ct. 2163, 2168, 33 L.Ed.2d 83, 93-94 (1972) (adverting to long history of constitutional protection from actually or potentially biased tribunal); *Johnson v. Zerbst,* 304 U.S. 458, 467-468, 58 S.Ct. 1019, 1024, 82 L.Ed. 1461, 1468 (1938) (citing explicit guaranty of right to counsel in Sixth Amendment).

[65] See *Barker v. Wingo,* 407 U.S. 514, 519-521, 92 S.Ct. 2182, 2186-2187, 33 L.Ed.2d 101, 110-111 (1972);*United States v. Dougherty,* 154 U.S.App.D.C. 76, 91, 473 F.2d 1113, 1128 (1972).

[66] See *Estelle v. Williams, supra* note 64, 425 U.S. at 504, 96 S.Ct. at 1693, 48 L.Ed.2d at 130 (trial of defendant in prison attire inherently prejudicial; actual harm need not be shown); *Barker v. Wingo, supra* note 65, 405 U.S. at 521, 532, 92 S.Ct. at 2187, 2193, 33 L.Ed.2d at 111-112, 118 (violation of right to speedy trial not inherently prejudicial; actual injury must be shown); *Hamilton v. Alabama,* 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed.2d 114, 116-117 (1961) (absence of counsel on entry of guilty plea inherently prejudicial; actual prejudice need not be shown); *Estes v. Texas, supra* note 64, 381 U.S. at 542-550, 85 S.Ct. at 1632-1636, 14 L.Ed.2d at 550-554 (use of television in courtroom inherently prejudicial; actual prejudice need not be shown); *Turner v. Louisiana,* 379 U.S. 466, 473-474, 85 S.Ct. 546, 550, 13 L.Ed.2d 424, 429-430 (1965) (no need to consider actual effects of close contact between jurors and prosecution witnesses because association inherently prejudicial); *Rideau v. Louisiana,* 373 U.S. 723, 726-727, 83 S.Ct. 1417, 1419-1420, 10 L.Ed.2d 663, 665-666 (1963) (televising defendant in act of

confessing crime inherently prejudicial; actual prejudice need not be shown); *Williams v. Kaiser,* 323 U.S. 471, 475-476, 65 S.Ct. 363, 366, 89 L.Ed. 398, 402 (1945) (absence of attorney at entry of guilty plea inherently prejudicial; actual prejudice need not be shown).

[67] See *Peters v. Kiff, supra* note 64, 407 U.S. at 503-504, 92 S.Ct. at 2169, 33 L.Ed.2d at 94-95 (proof of harm from verdict of unconstitutionally selected jury impossible to adduce); *Estes v. Texas, supra* note 64, 381 U.S. at 544-545, 85 S.Ct. at 1633-1634, 14 L.Ed.2d at 551 (harmful effects from televised trial too subtle to prove).

[68] See note 76 *infra* and accompanying text.

[69] *Tumey v. Ohio,* 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749, 759 (1927).

[70] *Id.* at 522-531, 47 S.Ct. at 441-444, 71 L.Ed. at 754-758.

[71] *Peters v. Kiff, supra* note 64, 407 U.S. at 504, 92 S.Ct. at 2169, 33 L.Ed.2d at 94-95. In *Taylor v. Louisiana,*419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975), the Court, holding that the Sixth Amendment guaranty of an impartial jury encompasses the right to a jury drawn from both the male and female populations, reversed a conviction reached by an unconstitutionally drawn jury without even discussing the relevance of prejudice. *Id.* at 526-538, 95 S.Ct. at 695-702, 42 L.Ed.2d at 695-703; see *id.* at 538-543, 95 S.Ct. at 702-704, 42 L.Ed.2d at 703-705 (dissenting opinion).

[72] *Sheppard v. Maxwell,* 384 U.S. 333, 351-353, 363, 86 S.Ct. 1507, 1516-1517, 1522, 16 L.Ed.2d 600, 614, 621 (1966).

[73] *Estes v. Texas, supra* note 64, 381 U.S. at 542-550, 85 S.Ct. at 1632-1636, 14 L.Ed.2d at 550-554.

[74] *Id.* at 544, 85 S.Ct. at 1633, 14 L.Ed.2d at 551.

[75] *Id.*

[76] *Blackburn v. Alabama,* 361 U.S. 199, 206-207, 80 S.Ct. 274, 279-280, 4 L.Ed.2d 242, 248 (1960) ("in cases involving involuntary confessions, [the] Court enforces the strongly felt attitude of our society that important human values are sacrificed when an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. . . [A] complex of values underlies the stricture against use by the state of confessions which, by way of convenient shorthand, [the] Court terms involuntary . . . ."); *Spano v. New York,* 360 U.S. 315, 320-321, 79 S.Ct. 1202, 1205-1206, 3 L.Ed.2d 1265, 1270 (1959) ("[t]he abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves"); *Rochin v. California,* 342 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183, 190-191 (1952) ("[u]se of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. . . . Coerced confessions offend the

community's sense of fair play and decency"). Reversal is automatic despite the presence of other evidence leaving little doubt of the truth of what was confessed. *E. g., Haynes v. Washington,* 373 U.S. 503, 518, 83 S.Ct. 1336, 1345, 10 L.Ed.2d 513, 523 (1963); *Lynumn v. Illinois,* 372 U.S. 528, 537, 83 S.Ct. 917, 922, 9 L.Ed.2d 922, 928 (1963);*Rochin v. California, supra.*

[77] *Turner v. Louisiana, supra* note 66, 379 U.S. at 473, 85 S.Ct. at 550, 13 L.Ed.2d at 429.

[78] *Bollenbach v. United States,* 326 U.S. 607, 615, 66 S.Ct. 402, 406, 90 L.Ed. 350, 356 (1946).

[79] *United States v. Dougherty, supra* note 65, 154 U.S.App.D.C. at 91, 473 F.2d at 1128.

[80] *Id.*

[81] *Chapman v. California, supra* note 54, 386 U.S. at 22, 87 S.Ct. at 827, 17 L.Ed.2d at 709.

[82] *Id.* at 44, 87 S.Ct. at 838, 17 L.Ed.2d at 722.

[83] Prosecutorial comment on the defendants' failures to testify and an instruction authorizing the jury to draw adverse inferences from those failures, practices condemned in *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

[84] *Chapman v. California, supra* note 54, 386 U.S. at 22-26, 87 S.Ct. at 827-829, 17 L.Ed.2d at 707-711.

[85] *Id.* at 24, 87 S.Ct. at 828, 17 L.Ed.2d at 710-711.

[86] See *Brown v. United States,* 411 U.S. 223, 230-232, 93 S.Ct. 1565, 1570, 36 L.Ed.2d 208, 215 (1973)(statement submitted into evidence in contravention of *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); error deemed harmless); *Schneble v. Florida,* 405 U.S. 427, 430-432, 92 S.Ct. 1056, 1059-1060, 31 L.Ed.2d 340, 344-345 (1972) (*Bruton* violation harmless error); *Harrington v. California, supra* note 55, 395 U.S. at 251-254, 89 S.Ct. at 1727, 23 L.Ed.2d at 286 (*Bruton* violation harmless error); *Bumper v. North Carolina,* 391 U.S. 543, 550, 88 S.Ct. 1788, 1792, 20 L.Ed.2d 797, 803 (1968) (admission of evidence seized in transgression of Fourth Amendment evaluated under *Chapman* harmless-error test); *Fontaine v. California,* 390 U.S. 593, 596, 88 S.Ct. 1229, 1231, 20 L.Ed.2d 154, 157 (1968) (comments on defendant's failure to take the witness stand — an infringement of his constitutional privilege against self-incrimination, see note 83 *supra* — viewed under *Chapman* harmless-error test); *United States v. Alston,* 179 U.S.App.D.C. 129, 130, 551 F.2d 315, 316 (1976) (erroneous burden-of-proof instruction dealt with under *Chapman* harmless-error test); *United States v. Pinkney,* 179 U.S.App.D.C. 282, 285-286, 551 F.2d 1241, 1244-1245 (1976) (erroneous burden-of-proof instruction addressed under *Chapman* harmless-error test); *United States v. Liddy,* 177 U.S.App.D.C. 1, 7-8, 542 F.2d 76, 82-83 (1976) (merits of claims of violations under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and deprivation of Sixth Amendment right to compulsory process not reached because error if any was harmless); *United States v. Scott,* 174 U.S.App.D.C. 96, 98-99, 529 F.2d

338, 340-341 (1975)(erroneous burden-of-proof instruction harmless beyond a reasonable doubt); *United States v. Liddy,* 166 U.S.App.D.C. 95, 111-112, 509 F.2d 428, 444-445 (1974), *cert. denied,* 420 U.S. 911, 95 S.Ct. 833, 42 L.Ed.2d 842 (1975) (admission of evidence that accused retained attorney and instruction permitting adverse inference to be drawn therefrom "raises Sixth Amendment problems under *Griffin," supra* note 83; even assuming constitutional violation, error was harmless under *Chapman*); *United States v. Lindsay,* 165 U.S.App.D.C. 105, 113, 506 F.2d 166, 174 (1974) (admission of unconstitutionally seized evidence assessed under *Chapman* harmless-error test).

[87] The harmless error test is most commonly applied in cases in which the asserted constitutional violation takes the form of receipt of inadmissible evidence, erroneous jury instructions or improper comments by the prosecutor. See cases cited *supra* note 86.

[88] Error consisting of a specific trial occurrence differs readily from pervasive error in the form of a biased tribunal, prejudicial publicity or complete lack of counsel. Compare cases cited *supra* note 86 with text *supra* at notes 64-80.

[89] *Holloway v. Arkansas, supra* note 18, 435 U.S. at 490, 98 S.Ct. at 1182, 55 L.Ed.2d at 438.

[90] See notes 103-113 *infra* and accompanying text.

[91] *Harrington v. California, supra* note 55, 395 U.S. at 254, 89 S.Ct. at 1728, 23 L.Ed.2d at 287.

[92] See *Holloway v. Arkansas, supra* note 18, 435 U.S. at 487-491, 98 S.Ct. at 1180-1182, 55 L.Ed.2d at 436-438;*Herring v. New York, supra* note 32, 422 U.S. at 865, 95 S.Ct. at 2556-2557, 45 L.Ed.2d at 602; *Chapman v. California, supra* note 54, 386 U.S. at 43, 87 S.Ct. at 837, 17 L.Ed.2d at 721 (concurring opinion); *Hamilton v. Alabama, supra* note 66, 368 U.S. at 55, 82 S.Ct. at 159, 7 L.Ed.2d at 116-117; *Glasser v. United States, supra*note 18, 315 U.S. at 75-76, 62 S.Ct. at 467, 86 L.Ed. at 706.

[93] See text *supra* at note 21; *Johnson v. Zerbst, supra* note 64, 304 U.S. at 467-468, 58 S.Ct. at 1024, 82 L.Ed. at 1468.

[94] See notes 21-36 *supra* and accompanying text.

[95] *Chapman v. California, supra* note 54, 386 U.S. at 43, 87 S.Ct. at 837, 17 L.Ed.2d at 721 (concurring opinion);*Hamilton v. Alabama, supra* note 66, 368 U.S. at 55, 82 S.Ct. at 159, 7 L.Ed.2d at 116-117 ("[o]nly the presence of counsel could have enabled [the] presence of counsel could have enabled [the] accused to know all the defenses available to him and to plead intelligently"); *Williams v. Kaiser, supra* note 66, 323 U.S. at 475-476, 65 S.Ct. at 366, 89 L.Ed. at 402 ("[a] layman is usually no match for the skilled prosecutor whom he confronts in the courtroom. He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment").

[96] *Hamilton v. Alabama, supra* note 66, 368 U.S. at 55, 82 S.Ct. at 159, 7 L.Ed.2d at 116-117 ("the degree of prejudice [from absence of counsel at arraignment] can never be known"); *Williams v. Kaiser, supra* note 66, 323 U.S. at 475, 65 S.Ct. at 366, 89 L.Ed. at 402 ("we cannot know the degree of prejudice which the denial of counsel caused"); *Glasser v. United States, supra* note 18, 315 U.S. at 75-76, 62 S.Ct. at 467, 86 L.Ed. at 702 ("[t]o determine the precise degree of prejudice sustained by [the defendant] as a result of [appointed counsel's conflict of interest] is at once difficult and unnecessary").

[97] See, *e. g., Chapman v. California, supra* note 54, 386 U.S. at 43, 87 S.Ct. at 837, 17 L.Ed.2d at 721; *Gideon v. Wainwright, supra* note 18, 372 U.S. at 336-338, 345, 83 S.Ct. at 793, 797, 9 L.Ed.2d at 800, 806; *Hamilton v. Alabama, supra* note 66, 368 U.S. at 55, 82 S.Ct. at 159, 7 L.Ed.2d at 116-117; *Williams v. Kaiser, supra* note 66, 323 U.S. at 475-476, 65 S.Ct. at 366, 89 L.Ed. at 402; *White v. Maryland,* 373 U.S. 59, 60, 83 S.Ct. 1050, 1051, 10 L.Ed.2d 193, 194 (1963).

[98] *Powell v. Alabama, supra* note 19, 287 U.S. at 71-72, 53 S.Ct. at 65, 77 L.Ed. at 171-172.

[99] *Holloway v. Arkansas, supra* note 18, 435 U.S. at 481-484, 490, 98 S.Ct. at 1177-1179, 1182, 55 L.Ed.2d at 433-434, 438; *Glasser v. United States, supra* note 18, 315 U.S. at 76, 62 S.Ct. at 468, 86 L.Ed. at 702.

[100] See note 95 *supra.*

[101] See note 96 *supra.*

[102] See *Milton v. Wainwright,* 407 U.S. 371, 377-378, 92 S.Ct. 2174, 2178, 33 L.Ed.2d 1, 6-7 (1972) (alleged Fifth and Sixth Amendment infractions not reached because error, if any, was harmless); *Coleman v. Alabama,*399 U.S. 1, 11, 90 S.Ct. 1999, 2004, 26 L.Ed.2d 387, 397-398 (1970) (case remanded to determine whether denial of right to counsel at preliminary hearing was harmless error); *United States v. Wade,* 388 U.S. 218, 242, 87 S.Ct. 1926, 1940, 18 L.Ed.2d 1149, 1166 (1967) (case remanded to ascertain impact of lack of counsel at lineup). See also *Anderson v. United States,* 122 U.S. App.D.C. 277, 279, 352 F.2d 945, 947 (1965) (absence of counsel at arraignment harmless because record "affirmatively shows that no prejudice resulted"); *In re DiBella,* 518 F.2d 955, 959 (2d Cir. 1975) (exclusion of counsel from reading of grand jury minutes during contempt proceedings harmless where client was allowed to repeat substance to counsel and exact phraseology was not possibly important); *United States v. Crowley,* 529 F.2d 1066, 1070-1071 (3d Cir.), *cert. denied,* 425 U.S. 995, 96 S.Ct. 2209, 48 L.Ed.2d 820 (1976) (denial of counsel at hearing on motion to withdraw guilty plea harmless under the circumstances).

[103] *Gilbert v. California,* 388 U.S. 263, 269-273, 87 S.Ct. 1951, 1954-1957, 18 L.Ed.2d 1178, 1184-1187 (1967). See also *Moore v. Illinois,* 434 U.S. 220, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977).

[104] *United States v. Wade, supra* note 102, 388 U.S. at 223-242, 87 S.Ct. at 1930-1940, 18 L.Ed.2d at 1155-1166.

[105] *Moore v. Illinois, supra* note 103, 434 U.S. at 232, 98 S.Ct. at 466, 54 L.Ed.2d at 263 (case remanded for determination of whether admission of evidence of identification of unrepresented accused at preliminary hearing was harmless error); *Gilbert v. California, supra* note 102, 388 U.S. at 274, 87 S.Ct. at 1957, 18 L.Ed.2d at 1187(case remanded for inquiry into degree of harm from introduction of evidence of pretrial identification of unrepresented suspect at lineup); *United States v. Wade, supra* note 102, 388 U.S. at 242, 87 S.Ct. at 1940, 18 L.Ed.2d at 1166 (case remanded for ascertainment of impact on in-court identification of prior identification of unrepresented suspect at pretrial lineup).

[106] See *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[107] See *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).

[108] *Milton v. Wainwright, supra* note 102, 407 U.S. at 375-378, 92 S.Ct. at 2177-2178, 33 L.Ed.2d at 5-7 (merits of alleged *Massiah* violation not reached because error, if any, harmless); *United States v. Cheung Kin Ping,* 555 F.2d 1069, 1076-1077 (2d Cir. 1977) (use of defendant's incriminating statements inadmissible under *Miranda*harmless error because evidence was merely cumulative).

[109] See *Coleman v. Alabama, supra* note 102, 399 U.S. at 10-11, 90 S.Ct. at 2003-2004, 26 L.Ed.2d at 397-398. But see *White v. Maryland, supra* note 97.

[110] See *Anderson v. United States, supra* note 102. But see *Hamilton v. Alabama, supra* note 66.

[111] See *United States v. Crowley, supra* note 102; *McGill v. United States,* 121 U.S.App.D.C. 179, 180-182, 348 F.2d 791, 792-794 (1965).

[112] See *In re DiBella, supra* note 102; *United States v. Calabro,* 467 F.2d 973, 988-989 (1972), *cert. denied,*410 U.S. 926, 93 S.Ct. 1358, 35 L.Ed.2d 587 (1973) (counsel's absence because of illness during jury deliberations and return of verdict harmless).

[113] In another context, the Supreme Court has observed that "`lack of counsel at a preliminary hearing involves less danger to "the integrity of the truth-determining process at trial" than the omission of counsel at the trial itself or on appeal. Such danger is not ordinarily greater, we consider, at a preliminary hearing at which the accused is unrepresented than at a pretrial line-up or at an interrogation conducted without presence of an attorney.'" *Adams v. Illinois,* 405 U.S. 278, 283, 92 S.Ct. 916, 919, 31 L.Ed.2d 202, 208 (1972), quoting *People v. Adams,* 46 Ill.2d 200, 263 N.E.2d 490, 494 (1970), in turn quoting *Stovall v. Denno,* 388 U.S. 293, 298, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199, 1204 (1967).

[114] See *United States ex rel. Chambers v. Maroney,* 408 F.2d 1186, 1194 (3d Cir. 1969), *aff'd, Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Twiford v. Peyton,* 372 F.2d 670, 673 (4th Cir. 1967);*Martin v. Commonwealth of Virginia,* 365 F.2d 549, 551-552 (4th Cir. 1966).

[115] See *United States v. Pinkney, supra* note 50, 177 U.S.App.D.C. at 430-432, 543 F.2d at 915-917.

[116] *Supra* note 114.

[117] 399 U.S. at 53-54, 90 S.Ct. at 1982-1983, 26 L.Ed.2d at 429-430.

[118] See, *e. g., Dickey v. Florida,* 398 U.S. 30, 54, 90 S.Ct. 1564, 1577, 26 L.Ed.2d 26, 41-42 (1970) ("[w]ithin the context of Sixth Amendment rights, the defendant generally does not have to show that he was prejudiced by the denial of counsel, confrontation, public trial, and impartial jury, knowledge of the charges against him, trial in the district where the crime was committed, or compulsory process"); *Chapman v. California, supra* note 54, 386 U.S. at 42-44, 87 S.Ct. at 836-837, 17 L.Ed.2d at 720-721 (concurring opinion) (citing numerous cases requiring automatic reversal for violations of Fifth and Sixth Amendment rights); *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (defendant claiming violations of Fourth Amendment rights need only show that evidence has been seized without a properly-issued warrant and without the justification of an exception to the warrant requirement); *Snyder v. Massachusetts,* 291 U.S. 97, 116, 54 S.Ct. 330, 336, 78 L.Ed. 674, 683 (1934) (some "constitutional privileges or immunities may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial"). See also text *supra* at notes 54-64.

[119] *Barker v. Wingo, supra* note 65, 407 U.S. at 521, 532, 92 S.Ct. at 2187, 2193, 33 L.Ed.2d at 111-112. Extraordinary treatment is accorded the speedy trial right because it "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Id.* at 519, 92 S.Ct. at 2186, 33 L.Ed.2d at 110. First, "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Id.* at 519, 92 S.Ct. at 2186, 33 L.Ed.2d at 110-111. Second, "deprivation of the right may work to the accused's advantage." *Id.* at 521, 92 S.Ct. at 2187, 33 L.Ed.2d at 111. Third, "the right to speedy trial is a more vague concept than other procedural rights." *Id.* at 521, 92 S.Ct. at 2187, 33 L.Ed.2d at 112. Finally, unlike many other protections that can be safeguarded through exclusion of tainted evidence or reversal for a new trial, the only remedy for a speedy-trial violation is dismissal of the charge. *Id.* at 522, 92 S.Ct. at 2188, 33 L.Ed.2d at 112.

[120] *Estes v. Texas, supra* note 64, 381 U.S. at 542, 85 S.Ct. at 1632-1633, 14 L.Ed.2d at 550. See also *United States v. Agurs,* 427 U.S. 97, 108, 96 S.Ct. 2392, 2400, 49 L.Ed.2d 342, 352 (1976); *Murphy v. Florida,* 421 U.S. 794, 803, 95 S.Ct. 2031, 2038, 44 L.Ed.2d 589, 596-597 (1975).

[121] See *Estelle v. Williams, supra* note 64, 425 U.S. at 503-506, 96 S.Ct. at 1692-1694, 48 L.Ed.2d at 130-131;*Peters v. Kiff, supra* note 64, 407 U.S. at 501-502, 92 S.Ct. at 2168-2169, 33 L.Ed.2d at 93-95; *Estes v. Texas, supra* note 64, 381 U.S. at 542-550, 85 S.Ct. at 1636-1638, 14 L.Ed.2d at 550-554; *Turner v. Louisiana, supra*note 66, 379 U.S. at 473-474, 85 S.Ct. at 550, 13 L.Ed.2d at 429-430; *Rideau v. Louisiana, supra* note 66, 373 U.S. at 726-727, 83 S.Ct. at 1419-1420, 10 L.Ed.2d at 665-666; *In re Murchison,* 349 U.S. 133, 136-139, 75 S.Ct. 623, 625-627, 99 L.Ed. 942, 946-948 (1955); *Tumey v. Ohio, supra* note 69, 273 U.S. at 532, 535, 47 S.Ct. at 444, 445, 71 L.Ed. at 758, 759.

[122] Although for some violations of the Sixth Amendment right to counsel the Government is permitted to show defensively a lack of prejudice, see notes 102-113 *supra* and accompanying text, the defendant nevertheless is not required to make an affirmative showing of prejudice in order to establish his constitutional claim. See *Dickey v. Florida, supra* note 118.

[123] See notes 55, 63-80, 92-102 *supra* and accompanying text.

[124] See text *supra* at note 62.

[125] See text *supra* at note 21.

[126] See notes 18, 21-36 *supra* and accompanying text.

[127] *Powell v. Alabama, supra* note 19, 287 U.S. at 68-72, 53 S.Ct. at 63-65, 77 L.Ed. at 170-172.

[128] See notes 18, 19 *supra.* For a recent instance, see *Holloway v. Arkansas, supra* note 18, 435 U.S. at 481-484, 98 S.Ct. at 1177-1179, 55 L.Ed.2d at 433-434.

[129] See, *e. g., United States v. Hurt,* 177 U.S.App.D.C. 15, 18, 543 F.2d 162, 165 (1976); *Diggs v. Welch, supra*note 6, 80 U.S.App.D.C. at 6-7, 148 F.2d at 668-669; *Leventhal v. Gavin,* 421 F.2d 270, 272-273 (1st Cir.), *cert. denied,* 398 U.S. 941, 90 S.Ct. 1857, 26 L.Ed.2d 277 (1970); *United States v. Bubar, supra* note 34, 567 F.2d at 201-202; *United States v. Wight,* 176 F.2d 376, 379-380 (2d Cir. 1949), *cert. denied,* 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586 (1950); *United States ex rel. Johnson v. Johnson,* 531 F.2d 169, 174 (3d Cir.), *cert. denied,* 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976); *Wood v. Zahradnick,* 578 F.2d 980, 982 (4th Cir. 1978); *Jones v. Cunningham,* 297 F.2d 851, 854-855 (4th Cir. 1962); *United States v. Alvarez,* 580 F.2d 1251, 1254-1255 (5th Cir. 1978); *Collingsworth v. Mayo,* 173 F.2d 695, 697 (5th Cir. 1949); *Wilson v. Cowan,* 578 F.2d 166, 168 (6th Cir. 1978); *United States ex rel. Healey v. Cannon,* 553 F.2d 1052, 1057 (7th Cir.), *cert. denied,* 434 U.S. 874, 98 S.Ct. 221, 54 L.Ed.2d 153 (1977); *United States ex rel. Feeley v. Ragen,* 166 F.2d 976, 980-981 (7th Cir. 1948); *Beran v. United States,* 580 F.2d 324, 326 (8th Cir. 1978), *cert. denied,* 440 U.S. 946, 99 S.Ct. 1422, 59 L.Ed.2d 634 (1979); *Taylor v. United States,* 282 F.2d 16, 20 (8th Cir. 1960); *Farrow v. United States,* 580 F.2d 1339, 1361 (9th Cir. 1978); *Brubaker v. Dickson,* 310 F.2d 30, 37 (9th Cir. 1962), *cert. denied,* 372 U.S. 978, 83 S.Ct. 1110, 10 L.Ed.2d 143 (1963); *United States v. Riebold, supra* note 34, 557 F.2d at 702-703; *Williams v. Cox,* 350 F.2d 847, 849 (10th Cir. 1965).

[130] See text *supra* at notes 6-19.

[131] See notes 6-13 *supra* and accompanying text.

[132] See notes 34-35 *supra* and accompanying text.

[133] See notes 63-80, 93-101 *supra* and accompanying text.

[134] See text *supra* at notes 92-101.

[135] See text *supra* at notes 116-117.

[136] In *Chambers v. Maroney, supra* note 114, the Supreme Court addressed a contention that the assistance furnished by counsel for the accused at his second trial — an attorney different from his representative at the first trial — was ineffective owing to tardiness in the appointment of second-trial counsel. 399 U.S. at 53-54, 90 S.Ct. at 1982-1983, 26 L.Ed.2d at 429-430. The Court of Appeals for the Third Circuit had found that the accused had not been prejudiced, *United States ex rel. Chambers v. Maroney, supra* note 114, and the Supreme Court agreed, stating that "the claim of prejudice from the substitution of counsel was without substantial basis." 399 U.S. at 54, 90 S.Ct. at 1982, 26 L.Ed.2d at 430 (footnote omitted). That statement cannot be taken as support for the proposition that the defendant bears the onus of proving prejudice. The Court of Appeals subscribed to the legal thesis "that the belated appointment of counsel is inherently prejudicial and makes out a prima facie case of denial of effective counsel, with the burden of proving absence of prejudice shifted to the prosecuting authorities," 408 F.2d at 1189-1190, and the court's sole concern was whether that burden had been met. *Id.* at 1188-1196. The Court of Appeals concluded that the record contained "`adequate affirmative proof' to rebut the prima facie presumption of prejudice from the belated appointment of counsel." *Id.* at 1195, quoting *Fields v. Peyton,* 375 F.2d 624, 628 (4th Cir. 1967) (footnote omitted). It was to that holding that the Supreme Court spoke, and which it affirmed. See 399 U.S. at 53-54, 90 S.Ct. at 1982-1983, 26 L.Ed.2d at 429-430.

[137] Nor am I persuaded that this imposition becomes necessary on the ground that evidence bearing vitally on the impact of counsel's inadequate performance usually is solely in the defendant's possession. See Leventhal Op., ___ U.S.App.D.C. at ___, 624 F.2d at 208; MacKinnon Op., ___ U.S.App.D.C. at ___, 624 F.2d at 228. This argument overlooks the distinction between establishing substantially deficient representation, and identifying the effect of the deficiency on the outcome of the case. It is indeed the defendant's lot to delineate his counsel's departure from the constitutional norm. See text *supra* at notes 41-43. In so doing, the defendant may have to show just what his counsel should have done differently on the facts as he derived them from the defendant and other sources known only to him, and to this extent it may well be true that the evidence is exclusively in his hands. But that is the defendant's concern, not the Government's at all; and once counsel's deficiencies have been documented, resolution of an issue of injury to the defendant's interests does not require peculiar reference to evidence controlled by the defendant. That is accomplished instead by viewing the proven shortfalls in the context of events as they unfolded at trial. Sometimes it will necessitate an investigation into leads or witnesses neglected by defense counsel in order to ascertain what a proper investigation might have turned up and what effect any evidence thereby unearthed might have had at trial. There is no reason for assuming that with respect to these activities the accused is any better situated than the Government, and there is ample basis for believing that ofttimes his position will be relatively worse.

[138] See notes 41-43 *supra* and accompanying text.

[139] See notes 118-124 *supra* and accompanying text.

[140] See text *supra* at notes 54-62.

[141] See *Chapman v. California, supra* note 54, 386 U.S. at 22, 87 S.Ct. at 827, 17 L.Ed.2d at 709.

[142] *United States v. Pinkney, supra* note 50.

[143] 177 U.S.App.D.C. at 428-432, 543 F.2d at 913-917.

[144] *Id.* at 429, 543 F.2d at 914.

[145] *Id.*

[146] *Id.* at 431, 543 F.2d at 916 (footnotes omitted).

[147] *Id.* at 432, 543 F.2d at 917.

[148] *Id.* at 429-430, 543 F.2d at 914-915.

[149] The statement in the opinion that the "motion gave no indication as to the evidence, if any, by which [Pinkney] would undertake an effort at refutation" was directed solely at Pinkney's "insist[ence] upon a further opportunity to dispute the drug-involvement allegations of the Government's memorandum . . . ." *Id.* at 432, 543 F.2d at 917.

[150] Contrary to suggestions in other opinions, Leventhal Op., 199 U.S.App.D.C. at ___ n.75, 624 F.2d at 208 n.75; MacKinnon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 225. Pinkney never arrived at the stage at which prejudice might have become a subject of inquiry. Since Pinkney did not surmount the hurdle of suitably alleging a violation, there was no occasion to consider whether it was harmful to the outcome on sentencing.

[151] *United States v. Pinkney, supra* note 50, 177 U.S.App.D.C. at 431-432 n. 59, 543 F.2d at 916-917 n. 59(citation omitted).

[152] Bazelon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 279.

[153] See Judge Bazelon's excellent discussion on this point. Bazelon Op., 199 U.S.App.D.C. at ___, 624 F.2d at 278.

[154] I am mindful that the victim could not identify Decoster at trial, but that was because — after the robbery and before trial — the victim had sustained an accident impairing his vision.

[155] See *Chapman v. California, supra* note 54, 386 U.S. at 23, 87 S.Ct. at 827, 17 L.Ed.2d at 710 ("[t]he California constitutional [harmless error] rule . . . perhaps over emphasi[zes] . . . the court's view of `overwhelming evidence'. . . ."

[156] The victim, Trial Transcript (Tr.) (Nov. 15, 1972) 32, 41, 43, and the arresting officer, Tr. (Nov. 15, 1972) 39-41, as well as the arresting officer's partner, Tr. (Nov. 16, 1972) 12, all identified Decoster as one of the robbers.

[157] Decoster testified that he met the victim at a bar, had a drink with him, then left and returned directly to his hotel. Tr. (Nov. 16, 1972) 29-35.

[158] See Note, *Ineffective Representation as a Basis for Relief from Conviction: Principles for Appellate Review,*13 Colum. J. of L. & Soc. Prob. 1, 83 (1977) ("a failure to interview one of several government witnesses can be shown to have been harmless when the witness' subsequent testimony was not significant"). Judge Bazelon in dissent urges that counsel's inadequate pretrial investigation deprived Decoster of informed guidance on whether to plead guilty, and advances this as an example of prejudice. Bazelon Op., 199 U.S.App.D.C. at ___, ___- ___, 624 F.2d at 292, 294-295. I am unable to agree. While it is possible to speculate that counsel failed to consult or improperly advised his client on pleading guilty, Decoster has never advanced that contention nor is there any foundation in the record for it. Aside from the difficulty that the point is not properly before us, it encounters also a far more formidable barrier. A question of harm to the accused from ineffective assistance of his counsel is not reached unless and until the accused has established both the fact and the substantiality of counsel's asserted violation. This means that the accused must delineate all essential circumstances in support of his claim when it it is readily within his power to do so. *United States v. Pinkney, supra* note 50, 177 U.S.App.D.C. at 430-432, 543 F.2d at 915-917; text *supra* at notes 142-151. Moreover, in the context of omitted or incompetent advice on a guilty plea, the required demonstration on substantiality necessitates at the threshold a showing that the accused was at least amenable to such a plea. It is a known phenomenon that some defendants in criminal cases disdain the very thought of pleading guilty, and in this instance we are left completely in the dark as to whether Decoster would willingly have entertained and seriously considered a plea, or whether instead he would have insisted upon his right to a trial.

[159] I see no need to address Decoster's remaining complaints of ineffective assistance since they also, for identical reasons, would succumb to the doctrine of harmless error.

[1] *Griffin v. Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956).

[2] *Powell v. Alabama,* 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932).

[3] Despite recent expressions of concern over lawyer incompetence, *see* note 169 *infra,* the problem is not simply that there are too few good attorneys, but that competent legal representation in the United States is grossly maldistributed. There is no dearth of competent counsel for the rich in our society. But no one can say that the same is true for the indigent. The inadequate representation received by the poor is universally recognized and is well documented by the numerous studies and commentary cited below. Nor is the problem of ineffective assistance limited to those who are technically "indigent" and are provided counsel by the court. Those who can scrape together a few dollars to hire their own attorney can retain an attorney who, for a modest fee, will generally provide "modest" services — plea negotiations and *pro forma* representation

with little investigation, preparation or concern for their client's cause. Most indigent defendants, of course, must accept whomever the court appoints to represent them. And although the commitment and competence of court-appointed counsel has improved markedly over recent years, particularly with the development of public defender systems, its effectiveness is still handicapped by unmanageable caseloads, insufficient support services, inexperience in criminal trial practice, lack of independence from the judiciary that controls the appointments and fixes compensation, and inadequate levels of funding and fee schedules.

On the subject of indigent representation, *see generally* American Bar Association Project on Minimum Standards for Criminal Justice, Providing Defense Services (App. Draft 1968); American Bar Association Standing Committee on Legal Aid and Indigent Defendants, The Center for Defense Services: A Draft Discussion Proposal for the Establishment of a Nonprofit Corporation to Strengthen Indigent Defense Services (Feb. 1978 Draft) [hereinafter cited as The Center for Defense Services]; Boston University Center for Criminal Justice, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin (S. Krantz ed. 1976); L. Downie, Justice Denied (1971); National Legal Aid & Defender Ass'n, The Other Face of Justice (1973); Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 Yale L.J. 1179 (1975); Bazelon, *The Defective Assistance of Counsel,* 42 U.Cinn.L.Rev. 1 (1973); Bazelon, *The Realities of* Gideon *and* Argersinger, 64 Geo.L.J. 811 (1976); Wice & Suwak, *Current Realities of Public Defender Programs: A National Survey and Analysis,* 10 Crim.L.Bull. 161 (1974); Note,*Providing Counsel for the Indigent Accused: The Criminal Justice Act* 12 Am.Crim.L.Rev. 789 (1975).

With specific reference to the District of Columbia, *see generally* H. Subin, Criminal Justice in a Metropolitan Court (1966); Comm. of the D.C. Bar on Effective Representation of Indigents in Criminal Cases, Report on the Appointed Counsel Program in the District of Columbia Courts (Dec. 1973); Joint Comm. of the Judicial Conf. of the D.C. Cir. and the D.C. Bar (Unified), Report on Criminal Defense Services in the District of Columbia (Austern-Rezneck Report) (April 1975); Report of the Comm. on Complaints of Ineffective Assistance of Counsel (Wolf Committee Report) (June 1977); Washington Pretrial Justice Program, Report on Disposition of Complaints Against Attorneys Appointed Under the Criminal Justice Act in D.C. Superior Court (Feb. 1977).

These studies document time and again that it is primarily the indigent and the poor who suffer at the hands of incompetent counsel. I am unaware of a single decision or opinion that acknowledges this basic reality underlying the problem of ineffective assistance.

[4] 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).

[5] 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

[6] *Id.* at 344, 83 S.Ct. at 796-797.

[7] 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). *See Scott v. Illinois,* 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979).

[8] *See, e. g., Mayer v. Chicago,* 404 U.S. 189, 198, 92 S.Ct. 410, 416, 30 L.Ed.2d 372 (1971) (indigent convicted of offense punishable only by fine "cannot be denied a `record of sufficient completeness' to permit proper consideration of his claims"); *Tate v. Short,* 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) (indigent unable to pay fine cannot be incarcerated to satisfy offense punishable only by fine); *Williams v. Illinois,* 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) (incarceration of indigent unable to pay fine cannot exceed maximum statutory period); *Roberts v. LaVallee,* 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (per curiam) (right to free transcript of preliminary hearing); *Long v. District of Iowa,* 385 U.S. 192, 87 S.Ct. 362, 17 L.Ed.2d 290 (1966) (per curiam)(right to free transcript on collateral appeal); *Draper v. Washington,* 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963) (right to free transcript on direct appeal); *Smith v. Bennet,* 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961)(waiver of filing fees for state post-conviction proceedings); *Burns v. Ohio,* 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209 (1959) (state cannot require indigent to pay filing fee before permitting appeal); *Griffin v. Illinois,* 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (right to free transcript on appeal for indigents).

[9] "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client. . ." *Anders v. California,* 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967).

[10] *Argersinger v. Hamlin, supra,* 407 U.S. at 31, 92 S.Ct. at 2009. *Accord, Lakeside v. Oregon,* 435 U.S. 333, 341, 98 S.Ct. 1091, 1096, 55 L.Ed.2d 319 (1978) ("In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.").

[11] Despite numerous opportunities, the Supreme Court has never directly confronted the fundamental question of the proper standards and procedures for evaluating challenges to the effectiveness of counsel. *See Maryland v. Marzullo,* 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) (White, J., with Rehnquist, J., dissenting from denial of certiorari). The Court has come closest to addressing the issue of ineffective assistance in the context of a prisoner's collateral attack on the voluntariness of his guilty plea. In *McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), for example, the Court stated that a petitioner seeking relief on that ground must demonstrate that the advice of counsel was not "within the range of competence demanded of attorneys in criminal cases." *Id.* at 771, 90 S.Ct. at 1449, *accord, Tollett v. Henderson,* 411 U.S. 258, 266, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). But the Court has yet to determine the minimum standard of attorney competence required by the Sixth Amendment's guarantee of effective assistance of counsel.

[12] *Diggs v. Welch,* 80 U.S.App.D.C. 5, 7, 148 F.2d 667, 669, *cert. denied,* 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002 (1945); *see, e. g., Jones v. Huff,* 80 U.S.App.D.C. 254, 152 F.2d 14 (1945).

[13] 126 U.S.App.D.C. 336, 379 F.2d 113 (1962).

[14] *Id.* at 339-340, 379 F.2d at 116-17. In *Bruce,* the claim of ineffective assistance arose on collateral attack. We noted that "a more powerful showing of inadequacy is

necessary to sustain a collateral attack than to warrant an order for a new trial either by the District Court or by this court on direct appeal." *Id.* at 340, 379 F.2d at 117.

[15] *Scott v. United States,* 138 U.S.App.D.C. 339, 340, 427 F.2d 609, 610 (1970) (per curiam).

[16] 159 U.S.App.D.C. 326, 487 F.2d 1197 (1973). In the subsequent opinions of this court the spelling of appellant's name has been corrected to "Dec oster," rather than "DeC oster." References in this opinion to*DeCoster I,* however, will retain the spelling used in that opinion.

[17] *See Moore v. United States,* 432 F.2d 730, 737 (3rd Cir. 1970) (en banc).

[18] *DeCoster I,* 159 U.S.App.D.C. at 331, 487 F.2d at 1202 (emphasis in original).

[19] Decoster's codefendants also were apprehended near the scene of the crime and were identified subsequently at the police station.

[20] Crump admitted having had a drink with someone in the bar just before the robbery occurred, but could not specifically remember whether he had met Decoster.

[21] Decoster was also convicted of assault with a dangerous weapon and received a sentence concurrent when his armed robbery sentence. Trial counsel failed to challenge the legality of this concurrent sentence. On the original appeal in this case, the assault conviction was vacated as a lesser included offense of armed robbery arising from the same act or transaction. *DeCoster I,* 159 U.S.App.D.C. at 328, 487 F.2d at 1199 n. 2.

[22] The letter, which was filed in the district court on November 13, 1970, reads as follows:

Honorable Judge Waddy,

I am an Inmate of D.C. Jail who has been incarcerated for five month on a charge that has been change from robbery to arm robbery. The motive for this letter is to request from the court another lawyer because I've been misrepresented for five month with my present lawyer . . . . Also I would like to protect myself and family which consist of nine more younger than I am, which are barely being supported because my father is the only capable one. The rest is trying to get something I miss, Education. Being an individual of limited education its only natural for me to protect by innocence and with the transcript from my hearing which I cannot obtain because of illegal counseling. I can prove that I am only guilty of assault by self defence. But the court says I must wait until Jan. 12, 1971 at my trial to prove my Innocence which I think is unconstitutional because there is no evidence or witness of robbery. I was accepted by Blackman Development Center on Oct. 12, but my lawyer hadn't file a motion for bond review. So there was another one of his promise of what he would do. So Your Honor It would be a pleasure if I could speak to you in behave of this case and the way its been handled for the last five month. It could not be explain in writing so I ask this opportunity for a lawyer and justice. I would be to happy if you would consider this letter soon as possible.

Yours truly, Willie Decoster, Jr.

The district court took no action on Decoster's letter and apparently made no inquiry into the substance of the charges against his attorney. *See* note 38 *infra.*

[23] Appellant had been incarcerated because he was unable to meet the $5,000 bond set for him, and not because he was deemed to pose a danger to the community. *Compare* 18 U.S.C. § 3146 *with* 18 U.S.C. § 3148.

[24] Defense counsel never did obtain a copy of the preliminary hearing. *See* pp. ___-___ of 199 U.S.App.D.C., pp. 271-272 of 624 F.2d *infra.*

[25] Apparently out of exasperation with his lawyer's inaction, Decoster, coincidentally, prepared his own *pro se*motion for bond review that same day. Appellant's motion was filed with the district court on November 16, 1970.

[26] Defense counsel filed the motion in U.S. District Court. It should have been filed in the D.C. Court of General Sessions, which had originally set bail.

[27] *See* 18 U.S.C. §§ 3146(d) & 3147; *Grimes v. United States,* 129 U.S.App.D.C. 308, 394 F.2d 933 (1967).

[28] In this bond review motion, counsel did indicate that the Black Man's Development Center was receptive to third-party custody. That statement, however, was the only change from the motion originally filed in the District Court a month earlier. The motion was denied by the Court of General Sessions on December 12, but the District Court granted the motion and released appellant to the Black Man's Development Center on Jan. 14, 1971, two days after a continuance was granted in appellant's trial at the prosecution's request.

[29] Decoster's codefendants had been tried five months earlier. They both pleaded guilty in the middle of their trial to one count of robbery, received suspended sentences of 18 months to 5 years, and were placed on 5-years probation.

[30] Transcript of Nov. 15, 1971 (Tr. I) at 5.

[31] Eley was committed to the D.C. Jail on November 3, 1971, pursuant to a bench warrant for probation violation issued on October 8, 1971.

[32] Taylor's address was found from a personal recognizance release form filed with the court 11 months earlier. This address proved to be out of date, however, and the belated effort to locate him was unsuccessful.

[33] Despite the trial court's directive, counsel initially was willing to wait until "later in the day" to prepare the subpoenas. Only when the trial judge pointed out that the subpoenas could be processed during the trial preliminaries did counsel move to have them prepared. Tr. I at 9-10. Even then, however, the subpoenas were not issued until after the first day of the two-day trial.

[34] The following colloquy occurred:

[U.S. ATTORNEY]: There was a notice filed under Rule 87 of the Local Rules, Your Honor, an alibi notice demand, to which the government has not yet received a response so I take it from that that there is no alibi defense in this case.

[DEFENSE COUNSEL]: If the court please, . . . I feel this motion at this time should be denied because we have not had the time under the statute to comply with the demand as made by the rules.

THE COURT: Well do you intend to rely on alibi?

[DEFENSE COUNSEL]: We may.

* * * * * *

THE COURT: Well you did announce ready for trial, [counsel], and if you are going to rely on an alibi then you must know the witnesses that you are going to use as alibi witnesses. You announced ready.

[DEFENSE COUNSEL]: If the Court please —

THE COURT: Look, I am not forgiving [the U.S. Attorney] for not filing his motion under Rule 87 timely, but nevertheless it seems to me that if you have your witnesses ready for trial there seems to be no reason why you shouldn't be able to give him the names of the people you intend to call as alibi witnesses at this time.

[DEFENSE COUNSEL]: We will proceed without the alibi witnesses. We will consider we don't have alibi witnesses.

Tr. I at 6-8.

[35] Tr. I at 13. Decoster's codefendants pleaded guilty after the prosecution had presented its case. The district judge not only presided over the codefendant's trial, but also read the probation office reports on the codefendants prior to sentencing them in September, 1971. Tr. I at 18.

[36] Tr. I at 15.

[37] Tr. I at 16. In urging the appointment of new counsel, defense counsel explained:

[DEFENSE COUNSEL]: If the court please, counsel has been in this position prior to this time where the defendant has become unhappy with counsel. Over many years in the practice of law before this court I know this situation comes up, but I do think this is perhaps an unusual dissatisfaction with counsel . . . . I feel if Your Honor would permit me to withdraw and appoint another counsel in the case for whom the defendant may have a greater regard or with whom he would have more rapport, it would be to his best interests in the long run in the appellate procedures.

Tr. I at 19.

[38] THE COURT: But I haven't found any grounds for relieving you of your assignment, [counsel]. You tell me you have prepared the case.

[DEFENSE COUNSEL]: Right. I am ready to go forward.

THE COURT: You are ready to go forward.

Id. Although appellant has not challenged his conviction on this basis, it is firmly established that when the defendant makes a pretrial challenge to the adequacy of counsel's representation, the trial court is obligated to inquire into the substance of the defendant's allegations. *See, e.g., United States v. Woods,* 487 F.2d 1218, 1220 n.2 (5th Cir. 1973) (trial court has responsibility to make inquiry of defendant and appointed counsel concerning defendant's claim of lack of preparation); *United States v. Young,* 482 F.2d 993, 995 (5th Cir. 1973) (reversible error for trial judge not to conduct thorough inquiry into source and factual basis of defendant's complaint; error held harmless because defendant's claim later shown to be insubstantial); *Sawicki v. Johnson,* 475 F.2d 183, 184 (6th Cir. 1973) (per curiam) (thorough investigation of defendant's allegations required); *United States v. Morrissey,* 461 F.2d 666, 669-70 & n.6 (2d Cir. 1972) (perfunctory inquiry into truth and scope of defendant's allegations, without more, constitutes reversible error; held harmless because defendant's claims were either invalid or cured by subsequent actions of attorney and judge); *United States v. Seale,* 461 F.2d 345, 359-60 (7th Cir. 1972) (failure to inquire into basis of defendant's dissatisfaction with counsel is abuse of discretion); *Brown v. Craven,* 424 F.2d 1166, 1170 (9th Cir. 1970) (trial court obligated to conduct inquiry necessary to ease defendant's "dissatisfaction, distrust, and concern" for adequacy of court-appointed counsel's representation);*Monroe v. United States,* 389 A.2d 811 (D.C.App.1978) (Sixth Amendment imposes affirmative duty on trial court to conduct inquiry into defendant's pretrial allegations of counsel's lack of ability or preparedness; inquiry must be on record and findings of fact must be sufficient to permit meaningful appellate review). In *Brown v. United States,*105 U.S.App.D.C. 77, 264 F.2d 363 (en banc), *cert. denied,* 360 U.S. 911, 79 S.Ct. 1299, 3 L.Ed.2d 1262 (1959),this court considered the scope of the trial judge's obligation to inquire into the defendant's objection to counsel. In his concurrence, Chief Justice (then Judge) Burger summarized the grounds of common agreement between the majority and dissenting opinions:

[W]hen, for the first time, an accused makes known to the court in some way that he has a complaint about his counsel, the court must rule on the matter. If the reasons are made known to the court, the court may rule without more. If no reasons are stated, the court then has a duty to inquire into the basis for the client's objection to counsel and should withhold a ruling until reasons are made known.

Id., 105 U.S.App.D.C. at 83, 264 F.2d at 369 (Burger, J., concurring). *See also United States ex rel. Martinez v. Thomas,* 526 F.2d 750, 755 (2d Cir. 1975); *United States v. Calabro,* 467 F.2d 973, 986 (2d Cir. 1972), *cert. denied,* 410 U.S. 926, 93 S.Ct. 1358, 35 L.Ed.2d 587 (1973); *Farrell v. United States,* 391 A.2d 755 (D.C.App.1978).

Trial court inquiry into the basis of the defendant's objections is, of course, consistent with the Supreme Court's admonition that "judges should strive to maintain proper

standards of performance by attorneys who are representing defendants in criminal cases . . . ." *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970). Moreover, an investigation into the substance of the defendant's complaint at the time it is first tendered obviates several of the difficulties appellate courts may later encounter when undertaking such inquiry. Only the trial court can conduct a full evidentiary hearing to explore the substantiality of the defendant's allegations. When the defendant charges that counsel is unprepared for trial, counsel's investigative efforts can be ascertained and evaluated without reference to subsequent developments and later-acquired knowledge. Unlike postconviction appellate review, this inquiry is not clouded by the possibility that the defendant's claim may have been motivated simply by his conviction at trial. And pretrial scrutiny of the defendant's charges not only reduces the likelihood of a postconviction ineffective assistance claim. It also creates a record that reviewing courts can rely upon when an ineffectiveness claim is raised on appeal.

More importantly, a thorough inquiry at this stage of the proceedings allows the trial court to take preventive action in those cases where the defendant's objections prove to be wellfounded. Ineffective defense advocacy can be deterred at the outset, thereby preventing Sixth Amendment deprivations and maintaining the integrity of the adversary system. Finally, the pretrial inquiry serves interests of judicial economy by helping to eliminate any deficiencies in the representation of counsel before the resources of the judicial system have been invested in a full-blown trial.

[39] *Decoster I,* 159 U.S.App.D.C. 326, 487 F.2d 1197 (1973).

[40] Hearings on appellant's motion for a new trial were held before Judge Waddy on February 6, 11, and 13, 1974.

[41] Remand Transcript, Feb. 6, 1974 (R.Tr. I) at 42; District Court Findings of Fact and Conclusions of Law on Remand, April 23, 1975 (Findings) at 8-9. The two officers and the complainant were the prosecution's only witnesses at trial. Crump, the victim, testified that three men accosted him on the night of the robbery; one assailant yoked him from behind, another rummaged through his pockets and removed his wallet containing $110, and the third stood a few feet in front of him holding a knife. When shown a knife by the prosecutor, Crump could not identify it, but said that it looked like the one used in the robbery. Because Crump's eyesight and memory had been damaged in an automobile accident shortly after the robbery, he was unable to identify Decoster at trial or provide further details. He did remember, however, that on the night of the robbery he had identified all three of the men who had been arrested.

At trial Officer Box identified Decoster as the man he had seen going through Crump's pockets and testified that he had chased appellant into the D.C. Annex, never losing sight of him. Box also stated that he had not observed a weapon being used during the robbery. The second police officer, Officer Ehler, also identified Decoster as the man rummaging through Crump's pockets. He said that he had chased, arrested and searched Earl Taylor, the lookout, and had found a straight razor in his pocket. Ehler made no mention of having seen a weapon during the crime, however. Ehler also

testified that although all three men were searched at the time of the arrest, the items alleged to have been stolen were never recovered.

[42] R.Tr. I at 44.

[43] R.Tr. I at 37.

[44] Counsel testified, however, that he had no notes of his conference with Eley. R.Tr. I at 39. And the remand hearings produced conflicting testimony on whether Eley had been interviewed. Eley and Decoster, who were together at the time counsel claimed to have interviewed Eley, both remembered counsel having visited the cellblock. But appellant did not recall that Eley had been interviewed, *id.* at 64-65, 72, and Eley denied ever having spoken to counsel before trial, Remand Transcript, Feb. 13, 1974 (R.Tr. III) at 82-84. The district court, without elaborating, found Eley's testimony "incredible" and credited that of trial counsel. Findings at 14.

[45] R.Tr. I at 34. Only one witness, Officer Ehler, testified at the preliminary hearing, held 17 months before trial. Counsel testified that he noticed no discrepancy between Ehler's testimony at trial and at the preliminary hearing, R.Tr. I at 35, 41. At least one significant contradiction did exist, however. *See* note 106 *infra.*

[46] Counsel remembered having conferences with one of the government prosecutors handling Decoster's case, Daniel Toomey, and suggested that Toomey might have shown him a copy of the transcript. R.Tr. I at 40. But the preliminary hearing transcript was not even ordered by the U.S. Attorney's Office until after Toomey had handed the case over to another prosecutor. Remand Transcript, Feb. 11, 1974 (R.Tr. II) at 11, 19.

[47] Counsel similarly assumed that, following his usual practice, he had obtained appellant's arrest record at the police department, although again he could not state definitely that he had done so in appellant's case. Counsel could not find a copy of the arrest record in his files, however. R.Tr. I at 46-47.

The two U.S. Attorneys who had handled Decoster's case were also called as witnesses. Although neither could remember any particular conference with defense counsel about appellant's case, both did testify that they had frequently discussed counsel's cases with him. R.Tr. II at 10, 17-18. One prosecutor stated further that counsel's usual practice on many afternoons was to jump "in and out" of the prosecutors' offices to speak informally to them regarding discovery. *Id.* at 13. This prosecutor also confirmed that his files showed that Decoster's preliminary hearing transcript had been ordered on October 29, 1971, *id.* at 12, and that it was his practice to show the transcript to a defense attorney whenever it was requested. *Id.* at 12, 13.

Since the remand hearings were held over two years after Decoster's trial, it is not surprising that none of the attorneys involved could recall from memory whether any discovery was conducted. What is surprising, if not shocking, is that none of the participants had any notation in their files of any discovery having been made; indeed, none of the participants appear to have maintained any records of the pretrial discussions and exchanges of information in appellant's case. If only as a matter of

good officekeeping, defense counsel should have recorded exactly when and what he saw of the prosecutor's files. And certainly it is not unreasonable to expect the prosecutor to note in his own records that certain information was made available to defense counsel. But because no records were kept by either party, the only evidence of counsel's discovery efforts consists of vague recollections and tentative testimony about the attorneys' "usual practice" in such cases. When the attorneys involved may be handling up to 300 different cases in a year, *see* note 89 *infra,* reliance on such testimony to support a finding that full discovery was conducted in any specific case seems particularly inappropriate.

[48] This was the substance of appellant's testimony at trial, as well.

[49] The exact date on which counsel received Decoster's letter is the subject of considerable dispute. Counsel claimed to have received the letter "either the day, or two, before trial, or on the date of trial [November 15, 1971]." R.Tr. I at 24. Although the letter was not dated, it indicates that it was sent from the D.C. Jail dormitory, in which Decoster had been confined from June to November, 1970, and then again for three weeks in September, 1971. Appellant did not remember writing any letters during his second period in the dormitory, and thought he might have written the letter sometime from May to November, 1970. *Id.* at 58-61. Despite Decoster's testimony and the address on the letter, the district court apparently credited counsel's recollection of when he had received it. *See*Findings at 12.

[50] This "self-defense" version is consistent with appellant's letter to the district judge in November, 1970, *see*note 22 *supra,* and with Eley's testimony at trial. The letter's account, however, differs from appellant's own testimony at trial. When confronted with this contradiction at the remand hearings, Decoster reaffirmed his trial testimony and claimed that the letter was a fabrication. R.Tr. I at 70-71.

[51] R.Tr. I at 29.

[52] Counsel was unaccompanied when he interviewed Eley and counsel obtained no written statement from Eley. In fact, counsel testified that he did not even take notes of the conference. Thus, we have only the conflicting testimony of defense counsel, Eley, and Decoster as to what occurred. *See* note 44 *supra.*

[53] Ironically, counsel noted at the remand hearing that "[i]t's a cardinal rule with defense counsel that they never put on a witness unless they know what a witness is going to say and I would never have put on Eley unless I knew what he was going to say." R.Tr. I at 40.

At trial, counsel made no effort to bring to the court's attention the apparent conflict between Eley's proposed and actual testimony. This failure suggests either that, contrary to counsel's claim in the remand hearing, R.Tr. I at 40, counsel never obtained assurances from Eley as to his testimony, or that counsel negligently failed to impeach Eley's damaging testimony at trial.

[54] At the remand hearings, counsel said that he believed he had advised appellant of the consequences of requesting trial by the same judge who had heard evidence against his codefendants. R.Tr. I at 37.

[55] R.Tr. I at 45-46.

[56] Appellant's brief presses one additional claim: counsel's failure to object to the defendant's appearance before the jury in jail clothes. It is firmly established that an accused cannot, over his objection, be compelled to go to trial in prison clothing. *See, e.g., Estelle v. Williams,* 425 U.S. 501, 512, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976);*Gaito v. Brierley,* 485 F.2d 86 (3rd Cir. 1973); *Bentley v. Crist,* 469 F.2d 854 (9th Cir. 1972); *Hernandez v. Beto,*443 F.2d 634 (5th Cir.), *cert. denied,* 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174 (1971); *Brooks v. Texas,* 381 F.2d 619 (5th Cir. 1967); *cf. United States v. Carter,* 173 U.S.App.D.C. 54, 522 F.2d 666 (1975). *See also*American Bar Association Project on Minimum Standards for Criminal Justice, Trial by Jury § 4.1(b) (Approved Draft 1968). Forcing the accused to appear in jail clothes not only violates his due process right to the presumption of innocence, but also implicates the equal protection guarantee because it generally operates only against those who cannot post bail prior to trial. *See Estelle v. Williams, supra,* 425 U.S. at 503-06, 96 S.Ct. 1691. Because the Supreme Court has held that "the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation," *id.* at 512-13, 96 S.Ct. at 1697 the need for counsel to safeguard his client's rights by voicing objection at trial is imperative. Appellate counsel, however, did not raise this issue before the district court in his motion for a new trial. Consequently, the record is barren of what considerations, if any, underlay trial counsel's "decision" not to object. Although we cannot speculate on why trial counsel failed to object, his inaction on this matter certainly reflects the tenor of his general performance in this case.

[57] The district judge pointed to these seven allegations (as does the majority here) and treated them essentially as if each was asserted to be an independent event constituting ineffective assistance in and of itself. This is not the nature of appellant's claim. By isolating specific examples of counsel's alleged ineffectiveness, and then dismissing each of these breaches as either excusable or inconsequential, the trial judge and my colleagues totally ignore their aggregate effect on the quality of counsel's performance. This case does not present a series of isolated omissions and failures by counsel; it is a picture of pervasive indifference and incompetent representation — only some of which is visible in the record and manifested in the specific allegations brought by appellate counsel.

[58] At the remand hearings, appellant alleged that trial counsel had been deficient in not ensuring that Decoster's sentence was properly executed. (Appellant had not been given credit for the time he spent in custody prior to trial. As a result of a motion filed on June 19, 1972 in the district court by appellate counsel appointed by this court, the Department of Corrections clarified Decoster's sentence and credited him with the time previously served.) On April 23, 1975, in announcing its Findings, the district court rejected this sentencing-failure claim on the ground that counsel's representation of the

defendant had been completed at the time this issue arose. Findings at 17. *See* Local Rule 2-3(a)(2), United States District Court for the District of Columbia.

[59] The district court labeled the waiver of opening argument "an informed tactical judgment on the part of defense counsel." Findings at 17. The court also found that it was the defendant who demanded to be tried by the court despite counsel's "inclinations" to have a jury trial. *Id.* at 15. Curiously, my colleagues find appellant's claim on this ground to be "frivolous" because he was in fact tried by a jury. But the point is that Decoster did not want a jury trial. Had counsel known prior to the morning of trial that the district judge would be forced to disqualify himself, successful arrangements might have been made to have Decoster's case heard by a different judge — and without a jury, as Decoster had requested.

The majority relies upon our great admiration and respect for the late Judge Waddy — which is shared by all the members of this court — to speculate that the appellant wanted Judge Waddy to hear the case with or without a jury, notwithstanding his participation in the earlier trial of appellant's codefendants. But the record shows only that appellant asked to be tried without a jury, and there is no indication whatsoever that he particularly wanted his trial to be before Judge Waddy. In fact, even after counsel requested that Judge Waddy disqualify himself, the defense reasserted its desire to be tried without a jury, thus indicating that a trial without a jury was its primary, if not only, concern. Tr. I at 13-14.

[60] The district court concluded that although counsel was "dilatory" in filing the motion and "erred" in filing it in the wrong court, his actions "did not, in the slightest degree, limit defendant's ability to contact witnesses and inform his counsel of them if there were any; nor did it frustrate his defense, nor affect his guilt or innocence." *Id.*at 6. The district court also found that counsel knew what the transcript contained from his representation of Decoster at the preliminary hearing. Further, the court did not find any substantial variation between Ehler's testimony at the hearing and at trial. *Id.* at 7-8. *But see* note 106 *infra.*

[61] With respect to these allegations, the court concluded:

1. * * *

[T]his Court finds that while the proper and prudent course for [counsel] was to have interviewed the complaining witness, the police officers and the co-defendants prior to announcing "Ready", his failure to do so in this particular case does not add up to ineffective assistance of counsel warranting a new trial.

2. While it may be that defense counsel herein was lax in his duty to conduct as thorough a factual investigation as might have been possible, we find that counsel did raise the only defense available to him, which defense was putting the government to its proof. And in light of Decoster's posture and attitude during the course of these proceedings, this Court cannot say that defense counsel substantially violated any one of the duties owed to his client.

* * * * * *

3. Further, considering the record *in toto,* while it might appear that defense counsel was less than a "diligent conscientious advocate," the weight of the government's case at trial and supported on the hearing on remand convinces this Court that Decoster was not prejudiced thereby and not denied the "reasonably competent assistance of an attorney" under the circumstances.

Id. at 19-20.

[62] 159 U.S.App.D.C. 326, 487 F.2d 1197 (1973). Although the division of this court in today's decision places our previous ruling in *DeCoster I* in question, a majority of the court today explicitly reaffirms the standard adopted in that opinion: a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate. *See* Statement of Wright, C. J.; Opinion of MacKinnon, J. at p. ___ of 199 U.S.App.D.C., at p. 222 of 624 F.2d & n.11. *Cf. People v. Pope,* 23 Cal.3d 412, 152 Cal.Rptr. 732, 590 P.2d 859 (1979) (adopting*DeCoster I* formulation). Where today's decision departs from *DeCoster I* is in the consequences that are held to flow from counsel's violation of a duty to his client. Regardless of the future vitality of *DeCoster I* as precedent within this Circuit, however, I continue to believe that the principles and analysis in that opinion should govern our approach in this and other ineffectiveness claims.

[63] *DeCoster I* articulated the following duties owed by counsel to a client:

In General — Counsel should be guided by the American Bar Association Standards for the Defense Function. . . .

Specifically — (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . .

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . [I]n most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.

159 U.S.App.D.C. at 332-33, 487 F.2d at 1203-04 (footnotes omitted.)

[64] *DeCoster I,* 159 U.S.App.D.C. at 332, 487 F.2d at 1203.

[65] The duties set forth in *DeCoster I* are similar to those promulgated by the Fourth Circuit in *Coles v. Peyton,*389 F.2d 224, 226 (4th Cir.), *cert. denied,* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968):

Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

[66] American Bar Association Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function (App.Draft 1971) [Defense Function Standards hereinafter cited as ABA Standards]. The ABA House of Delegates approved the second edition of the Defense Function standards on February 12, 1979. The new edition reflects the work of the ABA, its consultants, and representatives from approximately fifty nationwide groups interested in the improvement of American criminal justice. *See* Foreword to American Bar Association Standards Relating to the Administration of Criminal Justice, Prosecution and Defense Function (2d ed., approved draft without commentary 1979). By adopting the second edition of the Defense Function standards, with only one deletion from the first edition, both the ABA Standing Committee on Association Standards for Criminal Justice and the ABA House of Delegates have reaffirmed the continued validity of these standards as a "national norm" for measuring the effectiveness of counsel. *See* Hodson, *Revising the Criminal Justice Standards,* 64 A.B.A.J. 986, 987 (1978).

[67] ABA Standards at § 1.1(f) (2d ed. at § 4-1.1(f)) (cited in *DeCoster I,* 159 U.S.App.D.C. at 332, 487 F.2d at 1203 n.25).

[68] *DeCoster I,* 159 U.S.App.D.C. at 332, 487 F.2d at 1203 n.25.

[69] The courtroom performance of an attorney, for example, ordinarily involves many tactical and strategic judgments that are not subject to categorical prescriptions. *See Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Tasks such as juror voir dire, witness selection, evidentiary objections, direct and cross-examination, opening and closing argument, and preparation of jury instructions may often be handled differently; what is reasonable in one case may be questionable in a different factual setting.

[70] Judge MacKinnon correctly notes that the Advisory Committee that authored the ABA Standards did not propose them "as a set of per se rules applicable to post-conviction procedures." ABA Standards at 11. As the Committee explained, "[t]he standards have been drawn with their primary impact on the conduct of prosecutors and defense counsel in mind. The larger considerations involved in a determination of whether the conduct of a prosecutor or defense lawyer was such that a conviction should be overturned are beyond the scope of the Committee's work." *Id.* The Committee did suggest, however, that its recommendations might prove useful "in

providing a yardstick for the evaluation of the effectiveness of a lawyer's conduct when it is called into question by an attack on the validity of a conviction because of his performance." *Id.* at 10.

Moreover, the Committee stressed that its proposals would contribute nothing to the administration of justice if viewed as "mere paper standards." Noting that the Bar and judiciary had long been woefully lax in adequately enforcing appropriate standards of professional and ethical conduct, the Committee warned that "departures from authoritative professional standards" should no longer be tolerated. *Id.* In this regard, it is significant that the ABA characterized its proposals as "standards" rather than "guidelines."

[71] 159 U.S.App.D.C. at 333 n.23, 487 F.2d at 1203 n.23.

[72] In *United States v. Pinkney,* 179 U.S.App.D.C. 282, 290, 551 F.2d 1241, 1249 (1976), this court recognized that "[i]n order to properly fulfill his responsibilities, counsel's energies and resources should be directed as fully to the dispositional phase of the proceedings as to pretrial preparation and courtroom advocacy." Accordingly, we extended *DeCoster I* by setting forth minimum standards for effective representation at sentencing. Specifically, we imposed upon counsel the duty to familiarize himself with all sentencing reports in advance of the sentencing hearing, as well as the duty to confer with his client during the presentence period in order to keep the client fully informed and to ascertain his views of the dispositional alternatives and their implications. *Id.,* 179 U.S.App.D.C. at 290-91, 551 F.2d at 1249-50. *See United States v. Martin,* 154 U.S.App.D.C. 359, 370-72, 475 F.2d 943, 954-56 (1973) (Bazelon, C. J., dissenting); ABA Standards § 8.1 (2d ed. § 4-8.1) (Sentencing). *See also Gadsden v. United States,* 223 F.2d 627, 630 (1955) ("The right to effective assistance of counsel at the sentencing stage of the proceeding is guaranteed by the Constitution."), *cert. denied, Hines v. United States,* 350 U.S. 949, 76 S.Ct. 324, 100 L.Ed. 827 (1956).

[73] *See* Part IIIB, *infra.*

[74] *DeCoster I,* 159 U.S.App.D.C. at 333, 487 F.2d at 1204.

[75] ABA Standards at 225. *See* ABA Standards § 4.1 (2d ed. § 4-4.1) (Duty to Investigate).

[76] *See* ABA Standards at 224 ("In our system of justice a trial is not an inquiry to expose previously unknown facts.").

[77] *See United States v. Ash,* 413 U.S. 300, 316-17, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973), *quoting United States v. Bennett,* 409 F.2d 888 (2d Cir.), *cert. denied, [Haywood v. United States; Jessey v. United States],* 396 U.S. 852, 90 S.Ct. 113, 117, 24 L.Ed.2d 101 (1969).

[78] ABA Standards at 224. *See Moore v. United States,* 432 F.2d 730, 739 (3d Cir. 1970) (en banc) ("[R]epresentation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange for their attendance.").

[79] A. Amsterdam, B. Segal & M. Miller, Trial Manual for the Defense of Criminal Cases § 106 (3d ed. 1976) (emphasis added).

[80] Congress has recognized the critical importance of adequate pretrial investigation through the adoption of the Criminal Justice Act. That Act provides that:

Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

18 U.S.C. § 3006A(e)(1) (1976). The statute has been interpreted to authorize payments in those circumstances "in which a reasonable attorney would engage such services for a client having the independent financial means to pay for them." *United States v. Bass,* 477 F.2d 723, 725 (9th Cir. 1973). *Accord, United States v. Theriault,* 440 F.2d 713, 717 (5th Cir. 1971) (Wisdom, J., concurring), *on appeal after remand,* 474 F.2d 359 (per curiam), *cert. denied,* 411 U.S. 984, 93 S.Ct. 2278, 36 L.Ed.2d 960 (1973). *See also Mason v. State of Arizona,* 504 F.2d 1345, 1354 (9th Cir. 1974), *cert. denied,* 420 U.S. 936, 95 S.Ct. 1145, 43 L.Ed.2d 412 (1975) ("a state court should probably view with considerable liberality a motion for such pre-trial assistance"); *United States v. Tate,* 419 F.2d 131, 132 (6th Cir. 1969) ("Congressional purpose in adopting this statute was to seek to place indigent defendants as nearly as may be on a level of equality with nonindigent defendants in the defense of criminal cases"); Pye,*The Administration of Criminal Justice,* 66 Colum.L.Rev. 286, 291 (1966) (describing the investigative provisions of the CJA as one of the Act's chief purposes).

Despite the availability of CJA funds both for hiring independent investigators and for compensating counsel who perform such services themselves, few court-appointed counsel make use of the Act to support investigations on behalf of their clients. In fiscal year 1975, for example, the D.C. Superior Court issued CJA orders appointing counsel in 12,130 adult cases (felonies and misdemeanors) and 5,167 juvenile cases. Yet payments were made to investigators in only 109 adult and 13 juvenile cases. (The Public Defender Service, which has a fulltime investigative staff, handled an additional 212 investigations for court-appointed counsel.) In 1976, the figures were comparable: of 13, 536 adult and 5,337 juvenile cases, investigative payments were made in 386 and 255 cases, respectively (with the Public Defender Service providing aid in an additional 156 cases).

One explanation for the infrequency with which court-appointed counsel request investigative expenses is their fear, often reinforced by comments from trial judges, that any money spent on such services will eventually be subtracted from the remuneration the attorneys themselves would otherwise receive. *See* Tague, *The Attempt to Improve Criminal Defense Representation,* 15 Am.Crim.L.Rev. 109, 131 (1977); Austern-Rezneck Report, *supra*note 3, at 45. Moreover, the Criminal Justice Act itself, by compensating attorneys at rates of $30 per hour for time expended in court and only $20 per hour for

out-of-court time, provides a disincentive for counsel to perform their own investigatory work. *See* 18 U.S.C. § 3006A(d)(1) (1976).

[81] *See generally* G. Shadoan, Law and Tactics in Federal Criminal Cases 7 (1964); Young Lawyers Section, D.C. Bar Ass'n, 11th Annual Criminal Practice Institute — Trial Manual §§ 2.1, 2.12 (1974).

[82] While the majority properly notes that the Constitution contains no mandate that counsel "leave not the smallest stone unturned," Opinion of Leventhal, J., at ___ of 199 U.S.App.D.C., at 210 of 624 F.2d, Decoster's attorney did not turn over even the largest boulder.

[83] "[A] defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible." *DeCoster I,* 159 U.S.App.D.C. at 333, 487 F.2d at 1204.

[84] *See* A. Amsterdam, B. Segal & M. Miller, *supra* note 79, § 95.

[85] Despite the obvious value of a transcript of appellant's preliminary hearing for use in impeaching the prosecution's witnesses, *see, e. g., id.* §§ 132, 144, counsel ignored his client's requests and did not even take the simple step of obtaining a copy. *See* pp. ___-___ of 199 U.S.App.D.C., pp. 271-272 of 624 F.2d, *supra.* Yet, acquiring the ability to impeach government witnesses is particularly crucial when, as the district court here observed, "the only defense available . . . was putting the government to its proof." *Findings* at 19. *See* note 106*infra.*

[86] Judge MacKinnon notes that there was no assurance that the prosecution witnesses would have consented to interviews by defense counsel. Opinion of MacKinnon, J., at ___ of 199 U.S.App.D.C., at 238 of 624 F.2d. Unfortunately, due to counsel's failure even to attempt to obtain interviews, we will never know whether permission would have been granted. (Of course, witnesses — particularly police officers — are the property of neither the prosecution nor the defense, and as citizens they have a *moral,* if not legal, obligation to talk to defense counsel in order to prevent an unfair trial. *Cf. Gregory v. United States,* 125 U.S.App.D.C. 140, 369 F.2d 185 (1966) (prosecutor's advice to witnesses not to talk to anyone unless he was present was unprofessional and denied defendant a fair trial)). But the issue before us is not whether these witnesses would have spoken to counsel upon request, but whether counsel who makes no effort to interview critical prosecution witnesses should be considered to be providing effective assistance to his client.

[87] Further support for the inference that counsel had not even formulated a coherent defense strategy is found in the events that occurred at the outset of trial: the confusion over whether an alibi defense would be presented, the belated efforts to subpoena appellant's codefendants, the offer to waive jury trial, and the failure to make an opening statement. At best, these episodes reflect the futile attempts of a defense attorney to cope with an unfortunate predicament brought about by his own inadequate preparation. At worst, they represent the visible tip of an iceberg of inexcusable attorney failures and oversights.

[88] *DeCoster I,* 159 U.S.App.D.C. at 332, 487 F.2d at 1203. Counsel's duty to confer with his client also includes the obligation to "discuss fully potential strategies and tactical choices . . . ." *Id. See* ABA Standards § 3.8 (2d ed. § 4-3.8) (Duty to Keep Client Informed).

Although the inquiry on remand focused on counsel's investigative efforts, two particular revelations indicate that communications between counsel and appellant were minimal. First, at the outset of trial, Decoster requested the court to subpoena his codefendants, explaining that he "didn't have a chance" to talk to his lawyer about this crucial matter of the witnesses that the defense expected to call. *See* p. ___ of 199 U.S.App.D.C., p. 269 of 624 F.2d *supra. Cf.* ABA Standards § 5.2(b) (2d ed. § 4-5.2(b)) ("The decisions on what witnesses to call . . . are the exclusive province of the lawyer *after consultation with his client.*") (emphasis added).

Further, the letter that Decoster sent his attorney sometime before trial opened with the following sentences: "As I tried to call you before, but couldn't make contact, I decided to write again. Its important I see you, as you are my lawyer and I don't have ways of fighting my case without you." Supplementary Brief and Appendices for Appellee, at 48. At the remand hearings, counsel indicated that he had no specific recollection of when he last saw appellant before trial, but suggested that he "might have had contact with him within the week before, ten days before." R.Tr. I at 44. Appellant gave no testimony on this issue.

[89] Counsel's failure to investigate and confer with his client more frequently may have resulted from his inability to devote sufficient time to each of his cases. The records of the Administrative Office of the United States Courts reveal that in 1972, the year that Decoster went to trial, his attorney received payments under the Criminal Justice Act totalling $51,098.47 for handling 284 different cases — more than one case for every working day. This total, of course, does not include any criminal and civil cases that Decoster's attorney may have handled on a retained basis. *Compare* ABA Standards § 1.2(d) (2d ed. § 4-1.2(d)) ("A lawyer should not accept more employment than he can discharge within . . . the limits of his capacity to give each client effective representation.").

Unfortunately, many court-appointed counsel maintain unmanageable caseloads, in part because a high-volume business is required to compensate for low fee schedules under the CJA. *See, e. g., United States ex rel. Green v. Rundle,* 434 F.2d 1112, 1115 (3d Cir. 1970) (court-appointed attorneys were carrying from 600 to 800 cases per year, and often handled 40 to 50 cases a day); *Colson v. Smith,* 315 F.Supp. 179 (N.D.Ga.1970), *aff'd,* 438 F.2d 1075 (5th Cir. 1971) (petitioner's court-appointed counsel was handling approximately 5,000 criminal cases a year); Austern-Rezneck Report, *supra* note 3, at 11 (eleven D.C. attorneys frequently mentioned as either incompetent or uninterested and overloaded with cases were appointed to a total of 657 felonies, 576 serious misdemeanors, and 60 less serious misdemeanors in one year; one handled 113 felonies and 86 serious misdemeanors; another had 136 felonies and 50 serious misdemeanors); Report on Appointed Counsel Program in D.C. Courts, *supra* note 3, at 15-17 (in many felonies, less than 10 hours is expended on entire case; some attorneys are handling over 200 felonies per year).

Similar caseload problems often impair the ability of public defender organizations to provide effective assistance.*See generally* The Center for Defense Services, *supra* note 3, at 21-23; 4 National Institute of Law Enforcement and Criminal Justice (LEAA), The National Manpower Survey of the Criminal Justice System: Courts 22-24 (1978); NLADA, The Other Face of Justice 29 (1973). In the District of Columbia, the Public Defender Service has attempted to ensure that the quality of its representation does not suffer because of overloaded calendars by adopting limits on the number of cases that any attorney may carry. *See* Austern-Rezneck Report, *supra* note 3, at 99-100 (setting maximum of 30 open cases per attorney at any time, 20 in an active posture, and expecting that no attorney will close more than 120 criminal cases annually); *id.* at 122-23 (recommending similar maximum caseload standards for all CJA counsel). *Cf. Wallace v. Kern,* 392 F.Supp. 834, 848-49 (E.D.N.Y.) (Legal Aid Society's caseload too high to allow for effective assistance of counsel; Legal Aid enjoined from accepting additional cases until average attorney caseload falls below 40), *vacated on jurisdictional grounds,* 481 F.2d 621 (2d Cir. 1973), *cert. denied,* 414 U.S. 1135, 94 S.Ct. 879, 38 L.Ed.2d 761 (1974); Wagner, *Colorado Defenders Fight Excessive Caseload,* 6 Nat'l Legal Aid & Defender Ass'n Washington Memo 1 (October 1977) (Colorado public defenders refused further appointments because of case overload; judge agreed to assign cases to private counsel until caseload becomes manageable).

[90] *DeCoster I,* 159 U.S.App.D.C. at 332, 487 F.2d at 1203. One of the rights that can be protected only by prompt legal action is "the accused's right to be released from custody pending trial." *Id.*

[91] Counsel's failure to see that Decoster properly received credit for the 310 days he had been incarcerated prior to his trial on the instant offense is also noteworthy — not because it constituted a specific violation of a duty owed to appellant, but because it illustrates the indifference of counsel to his client's rights.

[92] *United States v. Pinkney, supra* note 72, 179 U.S.App.D.C. at 290, 551 F.2d at 1249. *See generally,* American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures (App. Draft 1968).

[93] Sentencing Transcript, March 3, 1972, at 3.

[94] Indeed, our position is that a finding of ineffective assistance need not automatically require the reversal of an appellant's conviction. *See* notes 121 & 131 *infra.*

[95] *DeCoster I,* 159 U.S.App.D.C. at 330, 487 F.2d at 1201. *See, e. g., United States v. Moore,* 174 U.S.App.D.C. 113, 529 F.2d 355 (1976); *United States v. Brown,* 155 U.S.App.D.C. 177, 179, 476 F.2d 933, 935 (1973) (per curiam); *Campbell v. United States,* 126 U.S.App.D.C. 250, 251, 377 F.2d 135, 136 (1966). By the same token, we have also stressed that "when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel." *DeCoster I,* 159 U.S.App.D.C. at 330, 487 F.2d at 1201.

[96] Even absent a showing of substantial violation under the Sixth Amendment, the due process clause of the Fifth Amendment guarantees defendants protection against prejudicial errors by their counsel. *See* note 121 *infra.*

[97] 389 F.2d 224, 226 (4th Cir.), *cert. denied,* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968). *See* note 65*supra.* The duties enumerated in *Coles* have recently been reaffirmed by the Fourth Circuit as "a definitive, objective description of the competency normally demanded of counsel in certain aspects of their service."*Marzullo v. Maryland,* 561 F.2d 540, 544 (4th Cir. 1977), *cert. denied,* 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978).

[98] This does not mean, of course, that a defendant has no recourse for minor attorney errors not amounting to ineffective assistance. But where counsel's error amounts to no more than an isolated misstep in an otherwise reasonably competent performance, there are nonconstitutional doctrines other than ineffective assistance that are better suited to protect the interests of the defendant. For example, a reviewing court's authority to notice "[p]lain errors or defects affecting substantial rights," Fed.R.Crim.P. 52(b), permits this court to address and rectify attorney errors that arise during the course of the trial proceedings, particularly omissions such as the failure to move for the suppression of inadmissible evidence. Under 28 U.S.C. § 2106 (1976), federal appellate courts are empowered to fashion any remedy that is "just under the circumstances." *Cf. Dyer v. United States,* 126 U.S.App.D.C. 312, 379 F.2d 89 (1967) (reversing conviction on basis of "misgivings" about counsel's performance without finding any constitutional violation). And in our supervisory function, we have the responsibility to preserve the orderly functioning of the trial courts and the obligation to protect the rights of the accused. *See**McNabb v. United States,* 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943). Thus, at least on direct appeal, these doctrines provide ample authority to remedy those errors of trial counsel that may not rise to the level of constitutional violations.

[99] *See United States v. Clayborne,* 166 U.S.App.D.C. 140, 509 F.2d 473 (1974) (failure to interview witness justified because client had been in frequent contact with witness).

[100] Findings at 6, 10. Judge MacKinnon refers to these contacts between the defendant and his attorney as "interviews," Opinion of MacKinnon, J., at p. ___ of 199 U.S.App.D.C., at p. 233 of 624 F.2d, but the district court found only that counsel had appeared with appellant in court on six occasions prior to trial. When at trial appellant accused counsel of inadequate representation, counsel asserted that he had conferred regularly with his client. As noted previously, however, the record contains several indications that communications between appellant and counsel were minimal at best. *See* note 88 *supra.*

[101] Judge MacKinnon suggests that counsel acquired further knowledge of the case from the government's file and the grand jury testimony. Opinion of MacKinnon, J., at ___ of 199 U.S.App.D.C., at 233 of 624 F.2d. Although it was not established that counsel ever availed himself of the opportunity to examine these materials, even full access to the government file is no substitute for personal interview and investigation. Surely, one cannot believe that the prosecutor will ask — and record the answers to — all or even

most of the questions that defense counsel would want answered in preparing the defense.

[102] Judge MacKinnon apparently would go one step further and *require* an attorney to refrain from investigation if he believes his client to be guilty. Opinion of MacKinnon, J., at ___-___ of 199 U.S.App.D.C., at 239-240 of 624 F.2d. Judge MacKinnon points to the ethical standards of the legal profession that prohibit an attorney from assisting a client who wishes to present false testimony. He also cites Justice (then Judge) Stevens' statement that when a defendant admits guilt to his attorney, the attorney has no duty to search for a witness who might testify falsely. *Id.* at ___ of 199 U.S.App.D.C., at 239 of 624 F.2d. *See* Opinion of Leventhal, J., at ___-___ of 199 U.S.App.D.C., at 209-210 of 624 F.2d (citing passage in full).

But an attorney's duty not to present perjured testimony is not a mandate to abjure investigation on behalf of his client, as appears to have happened here. In our adversary system it is not the attorney's role to prejudge the guilt or innocence of his client. And, even in those cases where a defendant admits guilt to his attorney, the attorney must conscientiously gather information to protect the defendant's interests at all stages of the criminal process.*See* note 103 and pp. ___-___ of 199 U.S.App.D.C., pp. 286-289 of 624 F.2d *infra.*

[103] Indeed, a lawyer's complete, independent investigation is so vital a component of effective representation that even the defendant's confidential admission of guilt does not affect the obligation and scope of counsel's duty to investigate. The ABA Standards explicitly state that "[t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or his stated desire to plead guilty." ABA Standards § 4.1 (2d ed. § 4-4.1). Whether the client decides to plead guilty or to go to trial, investigation is essential in fulfilling the lawyer's role of raising mitigating factors and obtaining the most favorable disposition for the defendant in the contexts of pretrial release, charging and plea negotiations, argument to the jury, and sentencing. *See* ABA Standards at 227.

[104] Such attitudes can only exacerbate what is already a serious problem of defendant mistrust of court-appointed counsel. *See, e. g.,* J. Casper, American Criminal Justice: The Defendant's Perspective 106-15 (1972); ABA Standards at 197-98; Wice & Suwak, *supra* note 3, at 171.

[105] The dangers that can result from excusing counsel's inadequate representation on the ground that his client's "guilt is obvious" are vividly illustrated by a series of events occurring shortly after appellant's trial involving the same attorney whose performance is challenged in the present case. In December 1971, Decoster's lawyer was appointed to represent another indigent defendant, Samuel A. Saunders, who was accused of purse snatching. (D.D.C., Cr. No. 2004-71). The victim, an elderly woman who owned a restaurant near Saunders' residence, saw Saunders some five and a half weeks after the robbery, called the police, and had him arrested. Although the Bail Agency recommended release with third-party custody, bond was set for Saunders at $5,000. Decoster's lawyer filed no motion for bond reduction or review; as a result, Saunders

remained incarcerated through the trial and appellate stages. Memorandum of Points and Authorities in Support of Defendant's Motion for Release Pending New Trial at 2, *United States v. Saunders* (D.D.C. Cr. No. 2004-71).

Saunders, who spent over 9 years in an institution for the mentally retarded and is half-blind, *id.,* maintained that he was innocent and that he had been working on the day of the robbery. Trial Transcript of March 2, 1972 (Tr.), at 90, 92. Decoster's lawyer evidently did not believe him; as in the present case, the lawyer apparently conducted no investigation whatsoever. At trial, Saunders' entire defense consisted of his own testimony. Counsel offered no opening statement. On direct examination, he elicited a statement from Saunders that he had not stolen the purse. *Id.* at 81. Decoster's lawyer made no attempt to develop the defense beyond this single denial. On cross-examination, counsel sat silently as Saunders became increasingly confused about whether each question of the U.S. Attorney referred to the day of the robbery or the day of his arrest. *Id.* at 84-90. Nor did counsel attempt to clarify matters on redirect, despite the prosecutor's use of this confusion to imply that Saunders was lying. The most critical dereliction, however, was the lawyer's failure to pursue either in redirect examination or through post-trial investigation, Saunders' assertion during cross-examination that he had been working for the D.C. Employment Service on the day of the robbery and that "they will verify that date." *Id.* at 91.

Not surprisingly, Saunders was convicted and sentenced to 2-6 years. Fortunately, this court appointed a conscientious attorney to represent Saunders on appeal. This lawyer, after reading the transcript of the trial, was disturbed by Saunders' protestations of innocence, and she had her secretary call the U.S. Employment Service. The labor office checked their records for the date of the robbery and found indisputable documentary proof that Saunders had been working on a Washington Star delivery truck on that day and was nowhere near the scene of the crime. Defendant's Motion for New Trial with Supporting Affidavits and Memorandum of Points and Authorities in Support Thereof. The district court granted a motion for a new trial based on the newly-discovered evidence and the charges against Saunders were dismissed. In the meantime, Saunders had spent a year in jail for a crime he had not committed.

Saunders, of course, could demonstrate prejudice, even under the majority's proposed analyses. But there are undoubtedly countless other indigent defendants, like Decoster himself, who are represented with the same callous indifference by court-appointed trial counsel, and who are not fortunate enough to have indisputable evidence, preserved in documentary form, attesting to the prejudice they have suffered. Even if many of these defendants are "probably guilty," they deserve the effective services of a lawyer who is a "conscientious advocate in their behalf." And we can achieve this end only by assuring that counsel fulfills the minimum obligations of a competent attorney without regard to his — or our — subjective beliefs about the defendant's guilt.

[106] There can be no similar excuse, however, for counsel's failure to obtain the transcript of Ehler's testimony at the preliminary hearing. Had counsel done so, he might have been able to turn the officer's testimony to appellant's advantage, by noting the discrepancies between Ehler's testimony at trial and at the preliminary hearing.

Although the district court did not find "any substantial variation" in Ehler's testimony, there was one glaring inconsistency. At trial, Ehler identified Decoster as the assailant who went through Crump's pockets. Trial Transcript, Nov. 16, 1971 (Tr. II), at 12. Yet at the preliminary hearing almost a year and a half earlier, Ehler stated that he did not know which of the attackers was holding Crump and which was rummaging through his pockets. Preliminary Hearing Transcript, June 8, 1970 (P.T.), at 8. Although the identity of the assailant responsible for seizing Crump's wallet is legally immaterial, the obvious and unexplainable discrepancy in Ehler's testimony could have been valuable in impeaching the officer's credibility.

Officer Ehler also testified at the preliminary hearing that he had seen Earl Taylor acting as a lookout in the robbery; Ehler did not mention that Taylor had a weapon. Yet at trial, counsel made no attempt to explore the seeming inconsistency between Ehler's version of the events and that of Crump, who, despite having lost his memory in an automobile accident, stated that Taylor had held a knife on him. Tr. I at 30. In this regard, it might also have been significant that appellant's codefendants pleaded guilty to robbery, rather than armed robbery, and received significantly lighter sentences than Decoster.

[107] Also, had counsel investigated the scene of the crime, he might have been able to discover whether it was in fact possible, as Officer Box testified, that the pursuing officer could have followed Decoster from the parking lot and into the hotel lobby without ever losing sight of him.

The majority would excuse counsel's failure to interview other possible witnesses as well. It is said that the "abstract possibility" that the desk clerk or other possible witnesses at the hotel or bar might have provided useful testimony "is not only speculative but remote in the extreme." Opinion of Leventhal, J., at p. ___ of 199 U.S.App.D.C., at p. 211 of 624 F.2d. My colleagues may be correct that no material information could be elicited from such an investigation. On the other hand, it is also possible that the desk clerk was away from his post and had seen appellant enter the lobby. Similarly, he might have confirmed that appellant's demeanor clearly indicated that he had not been running for any length of time before entering the hotel. These differing conjectures simply prove the main point: Counsel should have investigated and interviewed potential witnesses to determine what they had to offer, so that neither he — nor we — would be compelled to speculate, post hoc, as to what the witnesses would have said.

[108] Findings at 19.

[109] Cf. *Stokes v. Peyton,* 437 F.2d 131, 137 (4th Cir. 1970) (failure to interview cannot be justified by attorney's belief that testimony would not help).

[110] The district court and majority opinions emphasize that prior to the letter, appellant had not suggested that his codefendants might be valuable defense witnesses. It is true, of course, that defense counsel often must rely upon his client as a primary source of information, particularly if an alibi defense is alleged and the defendant claims to have been elsewhere. But defense counsel's duty is to conduct an *independent* investigation; he cannot limit himself to interviewing only those whom the

defendant affirmatively requests to be contacted. Defense counsel knew that Decoster's codefendants allegedly participated in the robbery and that Decoster claimed that he was not with them. This certainly should have alerted counsel to the need to contact them. Furthermore, even after appellant told counsel by letter that his codefendants would support his version of the events, counsel made no effort to contact them. It was Decoster himself who insisted at trial that they be subpoenaed and interviewed.

[111] In many cases, courts have found ineffective assistance without even inquiring into the communications between counsel and client. A lawyer's failure to uncover exculpatory evidence that should have been found, or more generally, his failure to make a thorough investigation, has been found to constitute ineffective assistance.*See, e. g., McQueen v. Swenson,* 498 F.2d 207 (8th Cir. 1974); *Garton v. Swenson,* 497 F.2d 1137 (8th Cir. 1974);*Johns v. Perini,* 462 F.2d 1308 (6th Cir.), *cert. denied,* 409 U.S. 1049, 93 S.Ct. 519, 34 L.Ed.2d 501 (1972);*Pennington v. Beto,* 437 F.2d 1281 (5th Cir. 1971); *Andrews v. United States,* 403 F.2d 341 (9th Cir. 1968); *Coles v. Peyton,* 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968); *Brooks v. Texas,* 381 F.2d 619 (5th Cir. 1967); *Brubaker v. Dickson,* 310 F.2d 30 (9th Cir. 1962), *cert. denied,* 372 U.S. 978, 83 S.Ct. 1110, 10 L.Ed.2d 143 (1963); *McLaughlin v. Royster,* 346 F.Supp. 297 (E.D.Va.1972); *Kott v. Green,* 303 F.Supp. 821 (N.D.Ohio 1968); *Goodwin v. Swenson,* 287 F.Supp. 166 (W.D.Mo.1968); *Smotherman v. Beto,* 276 F.Supp. 579 (N.D. Tex.1967).

[112] Contrary to the assertion by other members of this court that imposing a duty to investigate in this case would be equivalent to requiring counsel to assist the accused in fabricating a defense, investigation is critical for the very reason that it will prevent lawyers from unwittingly presenting perjured testimony, as apparently occurred in this case. Counsel is of course under no duty to fabricate defenses, but a lawyer does have an obligation to make reasonable inquiry into whether any valid defenses do exist. *See Jones v. Cunningham,* 313 F.2d 347, 353 (4th Cir.), *cert. denied,* 375 U.S. 832, 84 S.Ct. 42, 11 L.Ed.2d 63 (1963). Moreover, counsel can discover whether the testimony of his client or a witness is truthful only by conducting a complete, independent investigation.

[113] In addition to the evidence in the trial record, Judge MacKinnon suggests there is evidence that prior to his sentencing, Decoster in effect admitted his guilt in a letter to the trial judge. Opinion of MacKinnon, J., at ___ of 199 U.S.App.D.C., at 234 of 624 F.2d. Although we do not know what DeCoster said in that letter, it would be a mistake to place too much significance on appellant's representations at sentencing. Even those defendants who are convinced of their innocence are reluctant to press their contentions before the court at that time out of fear that they will receive a lengthier sentence if they do not accept responsibility and show remorse for their conduct.*See* Tague, *supra* note 80, at 123 n.82. *Cf. United States v. Grayson,* 438 U.S. 41, 50, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978) (defendant's apparent truthfulness while testifying on his own behalf is probative of his attitudes towards society and prospects for rehabilitation and hence relevant to sentencing).

[114] Opinion of Leventhal, J., at ___ of 199 U.S.App.D.C., at 214 of 624 F.2d. *Accord,* Opinion of MacKinnon, J., at ___ & ___ of 199 U.S.App.D.C., at 234 & 242 of 624 F.2d.

[115] In discussing the scope of a proper investigation, for example, Judge Leventhal refers to the requirement that information alleged to have been overlooked must be material to the defense. Opinion of Leventhal, J., at ___, ___ of 199 U.S.App.D.C., at 210, 211, of 624 F.2d. (With this general proposition I can agree, although I suspect that in application, my interpretation of what information is material would differ from the majority's.) Yet in assessing Decoster's claim that counsel failed to conduct an adequate investigation, Judge Leventhal repeatedly requires the appellant to show not that certain information was material, but that it likely would have affected the outcome. *E.g.,* Opinion of Leventhal, J., at ___- ___ of 199 U.S.App.D.C., at 212-213 of 624 F.2d. Thus, if appellant was guilty, his lawyer need have conducted no investigation.

Although an inquiry into the effect on outcome — however broadly that term is defined — may be a relevant factor in the question of reversal, *it should not bear on the effectiveness of the attorney's performance. See* note 131 *infra.*

[116] "Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke v. Gillies,* 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948). *See* ABA Standards § 5.1(a) (2d ed. § 4-5.1(b)) ("After informing himself fully on the facts and the law, the lawyer should advise the accused with complete candor concerning all aspects of the case, including his candid estimate of the probable outcome.").

[117] *See* ABA Standards § 6.1(b) (2d ed. § 4-6.1(b)) (Duty to Explore Disposition Without Trial).

[118] *See Brady v. United States,* 397 U.S. 742, 752 n.10, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1969) (reporting estimates that between 90% and 95% of all criminal convictions are by pleas of guilty).

[119] *Santobello v. New York,* 404 U.S. 257, 260, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) (Burger, C. J.).

[120] The present case highlights the importance of conducting a prompt and thorough investigation. Although no inquiry was made on remand into counsel's role, if any, in advising appellant on seeking a plea bargain, the record does reveal that the possibility of a plea was raised at some time during the proceedings. R.Tr. I, at 15-16, 18. In light of the utter lack of investigation conducted by defense counsel, and the apparent unfamiliarity of counsel with the circumstances of the offense and the background of his client, there must be serious doubt that he could have offered his client competent advice regarding the acceptance of a possible plea bargain. There must be serious doubt, as well, whether counsel could have capably negotiated with the prosecution on his client's behalf.

[121] Separating the inquiry into the adequacy of counsel's performance from that of prejudice to the defendant reflects the distinction between the Sixth Amendment right to the effective assistance of counsel and the Fifth Amendment right to a fair trial. Although demonstrating a likelihood of prejudice may be required to make out a due

process claim under the Fifth Amendment, it should be clear that prejudice is not an element that must be shown in establishing a violation of the Sixth Amendment. *See, e. g., Moore v. United States,* 432 F.2d 730, 737 (3rd Cir. 1970) (en banc) ("[T]he ultimate issue is not whether a defendant was prejudiced by his counsel's act or omission, but whether counsel's performance was at the level of normal competency."). Indeed, this distinction between the Fifth and Sixth Amendment sources of the right to effective assistance was the basis for this circuit's rejection of the due process "farce and mockery" test in favor of the "reasonably competent assistance" standard. *See* pp. ___-___ of 199 U.S.App.D.C., pp. 266-267 of 624 F.2d *supra.*

Judge MacKinnon's reliance on the line of Fifth Amendment cases to support his view that the defendant must prove "unfair prejudice" is thus misplaced. *See* Opinion of MacKinnon, J. at ___-___ of 199 U.S.App.D.C., at 226-227 of 624 F.2d. Similarly inapposite are those pre-*DeCoster I* cases in our circuit — *e. g., Mitchell, Bruce, Hammonds, Matthews, Harried, Scott* — in which, consistent with the Fifth Amendment, the defendant bore the burden of demonstrating that he had been denied a fair trial. The defendant's due process rights under the Fifth Amendment are simply not coextensive with the Sixth Amendment right to the effective assistance of counsel.

[122] *Anders v. California,* 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967).

[123] The majority opinions read *United States v. Pinkney,* 543 F.2d 908 (1976), as requiring the defendant not only to show a substantial breach of counsel's duties but also to demonstrate that the violation affected the proceedings' outcome. The case does not so hold. In fact, Judge Robinson's opinion in *Pinkney* carefully distinguished between the appellant's burden of showing a substantial violation and the government's burden of proving lack of prejudice to the outcome. *Pinkney* simply held that as a procedural prerequisite to an evidentiary hearing on a motion for a new trial, *id.,* 177 U.S.App.D.C. at 431, 543 F.2d at 916 n.59, the appellant "must set forth evidence upon which the elements of a constitutionally deficient performance might properly be found." *Id.,*177 U.S.App.D.C. at 431, 543 F.2d at 916. Further, "only if evidence offered at a hearing tended to establish the elements would the Government have been summoned to disestablish prejudice." *Id.,* 177 U.S.App.D.C. at 431, 543 F.2d at 916 n.59. In the present case, appellant has established the elements of a Constitutional violation by demonstrating an unjustifiable violation of counsel's duty to investigate. In *Pinkney,* where there was no claim of inadequate investigation, counsel's failure to refute the government's sentencing allocution could have amounted to ineffective assistance only if counsel had failed to discuss the allegations with his client or if counsel had known of information contradicting the government's allegations but had failed to bring that information to the court's attention. The petitioner was denied relief because the record contained no evidence to support either hypothesis, not because the petitioner had failed to show prejudice.

Indeed, the only reference in *Pinkney* to prejudice to the outcome is contained in footnote 59, where the court explicitly stated:

Our conclusion in this regard in no way impinges upon the rule, which we readily reaffirm, that once a substantial violation of counsel's duties is shown, the Government's burden is to demonstrate lack of prejudice therefrom. . . . [I]f . . appellant had met these preconditions [i. e., had offered evidence tending to establish that counsel had failed to inform him of the Government's allocution memorandum], the Government would then have encountered the burden of proving that counsel's dereliction did not harm appellant — for example, because the allocution memorandum actually had no effective role in the sentencing process.

Id.

[124] 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

[125] *Id.* at 85-86, 96 S.Ct. 1330.

[126] Judge Leventhal apparently seeks to distinguish *Geders* on the ground that counsel's effectiveness had been impeded by "direct state interference," whereas in the instant case, counsel's performance is "untrammelled and unimpaired" by state action. *See* Opinion of Leventhal, J., at ___ & ___ of 199 U.S.App.D.C., at 201 & 202 of 624 F.2d. The issue, however, is not whether the state is to be blamed for counsel's actions, but whether the defendant's constitutional rights were violated. The Sixth Amendment entitles the accused to the effective assistance of counsel. From the defendant's perspective, it is difficult to see how the cause of counsel's derelictions could bear any relationship to the prejudicial effect on the defendant's interests. Of what possible significance is it to a defendant whether his counsel fails to present closing argument because the court denies him that opportunity, *see Herring v. New York,* 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975), or because he foregoes it in order to avoid a parking ticket? *See United States v. Benn,* 155 U.S.App.D.C. 180, 476 F.2d 1127 (1973).

Moreover, it is difficult to perceive a rational basis for partitioning the continuum of ineffective assistance cases on the basis of governmental "structural or procedural impediments." State action permeates the entire criminal process. It is the state that formulates and prosecutes the charges against the accused. It is the state that provides the forum for the defendant's trial and sets the rules that govern those proceedings. It is the state that punishes the convicted offender for his wrongdoing. And, most critically for the indigent defendant, it is the state that provides the assistance of counsel so indispensable to the fair administration of our adversary system of criminal justice. If counsel's conduct has deprived the defendant of his constitutional rights, then it is the state's responsibility, through the courts, to vindicate those rights.

[127] 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

[128] *Id.* at 484, 98 S.Ct. 1173.

[129] Judge MacKinnon attempts to account for these and other cases in which the defendant is not required to demonstrate prejudice, *see, e. g., Herring v. New York, supra,* by characterizing them as cases in which the accused has "actually" been denied the assistance of counsel. Opinion of MacKinnon, J., at ___ of 199 U.S.App.D.C., at 229 of 624

F.2d. *Geders,* for example, is interpreted as a case in which, *for the period of the overnight recess,* the defendant was denied the "actual" assistance of counsel; *Holloway* is described as a case in which the petitioners were denied "full representation" by counsel. In these situations, Judge MacKinnon explains, the denial of the "actual assistance of counsel" is apparent on the face of the record and further prejudice is not required. In those cases in which counsel has merely provided inadequate assistance, however, the defendant must prove that counsel's assistance was so ineffective as to constitute the equivalent of non-assistance of counsel. The distinction contained in Judge MacKinnon's verbal formalism simply does not correspond to the reality of ineffective assistance. Judge MacKinnon nowhere explains why a defendant whose counsel cannot consult with him overnight has been denied the "actual" assistance of counsel, while Decoster's counsel, who declined to consult with Decoster at all, was providing "actual assistance." Nor does Judge MacKinnon explain when "full representation" has been denied, much less when such denial is apparent.

I submit that anytime the record reveals that counsel has substantially violated the duties owed to his client, the denial of the "active" assistance of counsel is apparent. The Sixth Amendment demands more than placing a warm body with a law degree next to the defendant. "It has long been recognized that the right to counsel is the right to the effective assistance of counsel." *McMann v. Richardson, supra,* 397 U.S. at 771, n.14, 90 S.Ct. at 1449, n.14. "The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee . . . ."*Holloway v. Arkansas,* 435 U.S. at 490, 98 S.Ct. at 1182. A defendant is no less harmed when counsel is present but fails to perform the duties owed to his client than when counsel is absent altogether. I fail to see how a defendant is any more damaged by the failure to have an opportunity to consult with counsel during one overnight recess in a ten-day trial than by the near-total failure of his attorney to investigate and consult with him prior to trial. *See Cooper v. Fitzharris,* 586 F.2d 1325, 1338 (9th Cir. 1978) (en banc) (Hufstedler, J., with Ely & Hug, JJ., concurring and dissenting) ("It makes little sense to distinguish between cases where counsel is denied and cases where counsel is incompetent because representation by incompetent counsel may be little or not better than no representation at all."). In either case, the defendant has been denied the effective assistance of counsel; and in neither case does the Sixth Amendment violation hinge on a showing of prejudice.

[130] A majority of the members of this court today agree that counsel's performance was at least subject to serious question, if not condemnation. *See* Opinion of Robinson, J., at ___ of 199 U.S.App.D.C., at 262 of 624 F.2d; Opinion of Leventhal, J., at ___ of 199 U.S.App.D.C., at 211 of 624 F.2d. And the trial judge on remand also indicated that he had serious misgivings about counsel's performance. Findings at 20.

[131] This approach clearly separates the question of whether the appellant's Sixth Amendment rights were violated from the question of prejudice. *See* note 121 *supra.* This distinction is critical because it recognizes that even in those cases where a new trial is not required because the defendant was not prejudiced, counsel's performance may still have been ineffective. It thus allows courts to identify and brand as ineffective any conduct falling below the minimum standards of competent lawyering, without regard to the client's guilt or innocence. This determination should help deter defense

counsel from violating the duties owed to their clients. *Cf.* Opinion of Robinson, J., at ___ of 199 U.S.App.D.C., at 253 of 624 F.2d.

This Circuit's early "farce and mockery" test and *Bruce's* "gross incompetence blotting out a substantial defense" test failed to recognize this distinction between counsel's ineffectiveness and prejudice to the defendant. Indeed, I now recognize an oversight in *DeCoster I,* which coalesced these questions when it stated that if "a defendant shows a substantial violation . . . he has been denied effective representation *unless the government . . . `can establish lack of prejudice thereby.'*" 159 U.S.App.D.C. at 333, 487 F.2d at 1204 (emphasis added). Instead, the analysis of ineffective assistance should recognize that the question of attorney performance is distinct from the issue of prejudice to the defendant. *Cf. McQueen v. Swenson,* 498 F.2d 207, 218 (8th Cir. 1974) (evaluation of habeas petition alleging ineffective assistance is two-step process: first, determining whether there has been failure to perform some duty owed by defense counsel to his client and, second, determining whether the constitutional error prejudiced the defense); *Moore v. United States, supra* note 17, 432 F.2d at 737 ("This standard [of normal competency] also makes it clear that the ultimate issue is not whether a defendant was prejudiced by his counsel's acts or omission, but whether counsel's performance was at the level of normal competency.").

[132] 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

[133] *Id.* at 22, 87 S.Ct. at 827. Prior to *Chapman,* the Supreme Court had indicated that constitutional violations could never be harmless. *See id.* at 42-45, 87 S.Ct. 824 (Stewart, J., concurring).

[134] *Id.* at 23-24, 87 S.Ct. 824; *Fahy v. Connecticut,* 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed.2d 171 (1963). This principle is consistent with the constitutional mandate that the government must prove guilt of a criminal offense beyond a reasonable doubt. *See Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Just as a trier-of-fact must find guilt beyond a reasonable doubt, an appellate court must be no less certain that a constitutional violation did not affect the proceedings below.

The reasonable doubt rule is animated by the twin concerns of maintaining an accurate balance between prosecutor and defendant by compensating for systematic flaws in a decision-making process acknowledged to be imperfect, and of introducing a deliberate imbalance into the process consistent with "a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." *In re Winship, supra,* 397 U.S. at 372, 90 S.Ct. at 1077 (Harlan, J., concurring). *See* Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases,* 86 Yale L.J. 1299, 1306-07 (1977). When we know that an error has been introduced into the adversary adjudicative process through the ineffectiveness of counsel, the justification for tilting the scales toward the defendant is even stronger than when the likelihood of error is merely speculative. *See United States v. Burton,* 189 U.S.App.D.C. 327, 355, 584 F.2d 485, 513 n.91 (1978) (Robinson, J., dissenting).

[135] *See Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895) (presumption of innocence "axiomatic," "elementary," and "foundation" of administration of criminal law).

[136] Determining harmlessness by focusing on whether the jury's verdict is supported by overwhelming evidence is questionable quite apart from the special problems of its application in the ineffectiveness context. First, such an approach usurps the jury's function to a far greater degree than one that focuses the appellate court's inquiry on an examination of the nature and effect of the error. Second, lower courts' findings of harmlessness under an overwhelming evidence test are less subject to consistent and even-handed appellate review. Finally, the overwhelming evidence test is contrary to the principle that constitutional protection is due all citizens, the guilty as well as the innocent. *See* Field, *Assessing the Harmlessness of Federal Constitutional Error — A Process in Need of a Rationale,* 125 U.Pa.L.Rev. 15, 33 (1976).

[137] *DeCoster I,* 159 U.S.App.D.C. at 333, 487 F.2d at 1204.

[138] In *Holloway v. Arkansas, supra,* the Supreme Court explained in the context of a joint representation case why a determination of the prejudice resulting from counsel's omissions could be founded upon nothing more than impermissible speculation:

In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. . . . But in a case of joint representation of conflicting interests *the evil* — it bears repeating — *is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.* It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

435 U.S. at 490-91, 98 S.Ct. at 1182 (citations omitted) (emphasis added).

[139] One of the dangers of attempting to assess the harmlessness of a constitutional error by looking to the evidence of guilt at trial is that counsel's ineffectiveness may have so distorted the record that the record is an unreliable indicator of the defendant's guilt. And, as noted in *United States ex rel. Green v. Rundle,* 434 F.2d 1112, 1115 (3rd Cir. 1970), changes in circumstances since the time of trial may also make it difficult for the court to determine the presence or absence of prejudice.

[140] *United States v. Hurt,* 177 U.S.App.D.C. 15, 21, 543 F.2d 162, 168 (1976). The likelihood that counsel's omissions will have impaired the defense, combined with the difficulty of proving that fact, have led several other circuits to presume the existence of

prejudice in certain situations. *See, e. g., United States ex rel. Green v. Rundle, supra,* 434 F.2d at 1115; *Coles v. Peyton,* 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968). Such a presumption is often created when counsel is not appointed until the eve of trial.*See, e. g., Garland v. Cox,* 472 F.2d 875 (4th Cir.), *cert. denied, Slayton v. Garland,* 414 U.S. 908, 94 S.Ct. 217, 38 L.Ed.2d 146 (1973); *Fields v. Peyton,* 375 F.2d 624 (4th Cir. 1967).

In *United States ex rel. Mathis v. Rundle,* 394 F.2d 748 (3d Cir. 1968), the Third Circuit established the rule that belated appointment of counsel was inherently prejudicial and makes out a prima facie case of ineffective assistance, shifting the burden of proving the absence of prejudice to the prosecuting authorities. This rule was applied subsequently in *United States ex rel. Chambers v. Maroney,* 408 F.2d 1186 (3d Cir. 1969). There the court rejected a habeas petitioner's claim of ineffective assistance because the record contained adequate affirmative proof that there was no prejudice. On appeal, the Supreme Court affirmed appellant's conviction, noting that it was "not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel . . . ." *Chambers v. Maroney,* 399 U.S. 42, 54, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970). Although the Third Circuit later jettisoned its presumption-of-prejudice rule because it was no longer needed to effectuate prompt appointments within the circuit, *Moore v. United States, supra* note 17, it is significant that the Supreme Court left the rule undisturbed in *Chambers. See Garland v. Cox, supra,* 472 F.2d at 878 (maintaining presumption of prejudice as best way to serve "our notions of justice and fair play").

Judge MacKinnon's opinion draws heavily upon the Supreme Court's language in *Chambers* to support his view that "a mere breach of duty to an accused is not a constitutional violation [requiring reversal] unless *the defendant*proves that he was prejudiced." Opinion of MacKinnon, J., at ___ of ___ U.S.App.D.C., at 238 of 624 F.2d (emphasis added). But *Chambers* merely held that late appointment *vel non* did not require reversal. The Court's opinion is silent on the issue of who bears the burden of demonstrating the existence or absence of prejudice. Indeed, in its tacit approval of the lower court's presumption-of-prejudice rule, *Chambers* is plainly consistent with the approach prescribed in this opinion: once the defendant has shown a substantial violation of counsel's duties, the government must rebut the presumption of prejudice by proving that the error was harmless.

[141] *Holloway v. Arkansas,* 435 U.S. 475, 488, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978), *quoting Glasser v. United States,* 315 U.S. 60, 76, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

[142] Where counsel's inadequate investigation has prevented him from properly advising his client on pretrial matters, the defendant should receive not only a new trial but also an opportunity to engage in plea discussions after discussing the matter fully with informed, competent counsel. In contrast, the appropriate remedy for violations that affect only sentencing is to remand for resentencing rather than a new trial. *See United States v. Pinkney, supra* note 72, 179 U.S.App.D.C. at 289 n.49, 551 F.2d at 1248 n.49.

[143] *See, e. g., Cooper v. Fitzharris, supra* note 129, 586 F.2d 1325, 1334-42 (Hufstedler, J., dissenting);*Beasley v. United States,* 491 F.2d 687, 696 (6th Cir. 1974). Judge Hufstedler's dissenting opinion in *Cooper* does not recognize, as Judge Leventhal implies, that effect on outcome should be pertinent in determining whether a defendant has been denied the effective assistance of counsel. *See* Opinion of Leventhal, J., at ___, ___ of 199 U.S.App.D.C., at 203, 205 of 624 F.2d. Rather, Judge Hufstedler merely acknowledges the obvious: the potential prejudicial impact of an alleged attorney error may be relevant in assessing the adequacy of representation simply because the greater the impact, the more likely it is that counsel deviated from his obligations. But as Judge Hufstedler clearly states: "This does not mean that prejudice must be shown to demonstrate that counsel was constitutionally ineffective." *Cooper v. Fitzharris, supra,* 586 F.2d at 1340. Particularly significant in this regard is her observation: "Some courts have confused the inquiry into whether attorney errors were significant enough to constitute ineffective counsel with the question of whether ineffectiveness of counsel affected the outcome of the case." *Id.* at 1340 n.18.

[144] *Holloway v. Arkansas,* 435 U.S. 475, 489, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978), *quoting Chapman v. California, supra,* 386 U.S. at 23, 87 S.Ct. 824.

[145] Reversing convictions is likely to have a significant prophylactic effect for several reasons. First, to the extent that trial judges and prosecutors can prevent ineffectiveness from tainting a plea or conviction, they will be encouraged to do so. Second, insofar as ineffectiveness results from indifferent or incompetent lawyers, they will be less likely to receive appointments. Third, in those jurisdictions where ineffectiveness results largely from the unmanageable caseloads of appointed counsel and public defenders, judges will be discouraged from overburdening them. Finally, frequent reversals are likely to attract the attention of the public and may enhance the likelihood of legislative reform. *See* Part IV, *infra.*

[146] In the present case, for example, it may be possible to determine the effect of counsel's failure to familiarize himself with the preliminary hearing testimony. If the government could prove that there were no significant discrepancies between Officer Ehler's testimony at trial and at the preliminary hearing, *but see* note 106 *supra,*then it would be in a position to show that counsel's failure to obtain the transcript could not have prejudiced Decoster.

[147] In *Cooper v. Fitzharris, supra* note 129, for example, the defendant's claim of ineffective assistance was based primarily on counsel's failure to move to suppress certain evidence. The defendant in that case was not prejudiced by counsel's omission, since the evidence was in fact legally admissible under the standards in effect at the time of trial. *See id.,* 586 F.2d at 1333-34. Thus, as the court in *Cooper* explained, the impact of counsel's errors "appear[ed] on the face of the trial record. Their prejudicial effect can be evaluated from that record with reasonable certainty. In such a case there is no reason to reverse a conviction if it appears that the defense was not prejudiced by the alleged inadequacies of counsel's performance." *Id.* at 1332.

Because *Cooper* was limited to the situation in which "the claim of ineffective assistance is founded upon specific acts and omissions of defense counsel at trial," *id.* at 1331, the court reasonably inquired into whether any prejudice could have flowed from the alleged errors. But the court seemed to place the burden of demonstrating the absence of prejudice on the defendant, at least where that determination can be made from the record with reasonable certainty. Moreover, the opinion in *Cooper* is ambiguous regarding whether the absence of prejudice means that counsel was not constitutionally ineffective or simply that nonprejudicial ineffectiveness does not require reversal. *See* notes 121 & 131 *supra.*

[148] *Fahy v. Connecticut, supra,* 375 U.S. at 86-87, 84 S.Ct. at 230. In *United States v. Pinkney, supra* note 123, the court indicated that if the appellant had been able to establish a substantial violation of counsel's duties, then the government would have been given the opportunity to demonstrate that the violation could not have affected the outcome by proving that the allocution memorandum actually had no effective role in the sentencing process.177 U.S.App.D.C. at 431-32, 543 F.2d at 916-17 n.59.

[149] If experience should later teach that it is too difficult to assess the impact of counsel's violations or that interests of judicial economy militate against searching for harmlessness that can rarely be found, then a per se rule requiring automatic reversal should be adopted.

[150] *Chapman v. California, supra,* 386 U.S. at 22, 87 S.Ct. 824.

[151] *See* note 120 *supra.* DeCoster's codefendants pleaded guilty to one robbery count and received suspended sentences and 5-years probation. Decoster was convicted of armed robbery and was sentenced to 2-8 years. A serious possibility leaps out of this record that some measure of Decoster's sentence resulted from shoddy legal representation — especially in light of the pervasive indications that counsel for appellant did not seriously attend to the interests of his client.

Judge Robinson, however, would burden the defendant with having to establish the "fact and the substantiality of counsel's asserted violation" before this court could even remand for more evidence on the likelihood of ineffective assistance in defendant's plea decision. Opinion of Robinson, J., at p. ___ of 199 U.S.App.D.C., p. 263 of 624 F.2d n.158. But trial counsel can hardly be expected to establish his own incompetence. Moreover, appellate counsel is ordinarily reluctant to impugn the competence of a colleague at bar. Also according to Judge Robinson, evidence of defendant's amenability to a guilty plea is necessary before an appellate court may consider the inadequacy of counsel's plea advice. *Id.* Yet how can it be reasonable to expect a defendant to estimate the advisability of entering a plea when he has never had the benefit of basic investigation and legal advice by counsel?

Our criminal justice system could not at present function without the plea bargain, yet countless cases of inadequate assistance concerning the plea never reach the attention of appellate courts. Although we do not know at this moment whether Decoster was prejudiced by his counsel's conduct surrounding the plea, the blatant disparity between Decoster's treatment and that of his codefendants, and the overall record of his

attorney's performance, warrant remand on this issue alone. From the point of view of the fair administration of justice, in the circumstances of this case we cannot ignore the likelihood that defendant's decision not to plead was made without proper advice.

[152] *See* note 29 *supra.*

[153] 159 U.S.App.D.C. at 333, 487 F.2d at 1204 (emphasis added).

[154] Throughout this opinion, I have necessarily limited my discussion to the problem of the representation of the indigent defendant in the criminal process. Inadequate legal assistance for the poor, however, is not confined to the criminal process: it pervades the entire legal system. This reality, no less than ineffective assistance for the criminal defendant, challenges our fundamental belief in equal justice under law.

[155] Perhaps some view the goal of equal justice as "utopian" and feel that society's unwillingness to expend the considerable resources required to improve the quality of representation for the poor will doom to failure any efforts in this regard. Perhaps they believe that courts should not promise equality if it cannot be delivered. I cannot agree that the promise of equal justice for all is impossible to attain. And I do not believe that the difficulty of attaining that goal justifies stopping short of the mark. Some of my colleagues would relegate fundamental rights to mere "aspirations." Aspirations provide little comfort to those, like the poor, who are powerless to fulfill them. Not just "earthbound," *see* Opinion of Leventhal, J., at ___ of 199 U.S.App.D.C., at 217 of 624 F.2d, but shackled to an approach that has failed in the past, some of my colleagues find it "salutary" to pursue a course that cannot provide "Equal Justice Under Law."

[156] In this circuit, the practice of appointing new counsel in many *in forma pauperis* criminal appeals has significantly improved our ability to monitor trial counsel's performance. The appellate lawyer can take an objective look at the entire case and can ask the court to examine issues that should have been raised below but were not, including the effectiveness of trial counsel. It is unreasonable to expect that trial counsel will acknowledge the inadequacies of their own performance or that *pro se* petitions filed by illiterate or semi-literate defendants will be sufficient to uncover Sixth Amendment violations.

[157] *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970).

[158] The inquiry conducted in this situation would be similar to that mandated when the defendant, at the beginning of trial, challenges his attorney's capacity to render effective assistance due to his lack of preparation. When such an objection is made, the Sixth Amendment imposes an affirmative obligation on the trial court to inquire into the basis of the defendant's complaint. *See* note 38 *supra.* In *Sawicki v. Johnson, supra* note 38, the court expressly stated that this investigation should focus on whether counsel fulfilled the obligations enumerated in *Coles v. Peyton, supra* note 65, duties similar to those established in *DeCoster I, see* note 63 *supra.*

[159] *See United States v. Simpson,* 154 U.S.App.D.C. 350, 352-58, 475 F.2d 934, 936-42 (1973) (per curiam)(Bazelon, C. J., dissenting), *cert. denied,* 414 U.S. 873, 94 S.Ct. 140, 38 L.Ed.2d 91 (1973).

[160] At present, appointed counsel in the District of Columbia Superior Court must submit a Supplemental Voucher Information form with every request for compensation under the Criminal Justice Act, 18 U.S.C. § 3006A (1976). As I have noted in *United States v. Simpson, supra* note 159, this document could easily be converted into a worksheet to examine counsel's preparation in the case. A similar form used by the U. S. District Court for the District of Maryland is found in Report of the Judicial Conference of the United States: Jan. 13, 1965, 36 F.R.D. 277, 338 (1965). Several commentators have also suggested checklists of functions defense counsel must perform preparatory to trial. *See, e. g.,* Tague, *The Attempt to Improve Criminal Defense Representation,* 15 Am. Crim.L.Rev. 109, 164 n.285 (1977); Bazelon, *The Realities of Gideon and Argersinger, supra* note 3, at 836-38; Finer, *Ineffective Assistance of Counsel,* 58 Cornell L.Rev. 1077, 1119 (1973).

[161] *Lakeside v. Oregon,* 435 U.S. 333, 341, 98 S.Ct. 1091, 1096, 55 L.Ed.2d 319 (1978). The government prosecutor is under no less of a duty to see that the trial conforms to constitutional standards:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935).

[162] Opinion of Leventhal, J., at ___ of 199 U.S.App.D.C., at 208 of 624 F.2d. My colleagues also fear that an inquiry into counsel's performance will undercut the attorney-client relationship. When the inquiry is conducted upon the defendant's post-trial motion for relief and after counsel's representation has concluded, then of course any concerns about the attorney-client privilege evaporate. *See* ABA Standards § 8.6(c) (2d ed. § 4-8.6(c)); ABA Code of Professional Responsibility, DR 4-101(D). But even if conducted at or before trial, the judge's inquiry need not cut so deeply that it invades the attorney-client relationship. When it appears that defense counsel has overlooked a valid defense or has made a major blunder, the trial judge need only ask whether counsel has an informed tactical reason for his actions. If so, then the inquiry need go no further; if not, then any deeper intervention would be welcomed by the defendant. We must remember that the attorney-client privilege is designed to protect the client, not the attorney. It is incongruous to suggest that the sanctity of that privilege should act as a shield to block efforts at safeguarding the defendant's rights.

[163] *DeCoster I,* 159 U.S.App.D.C. at 331, 487 F.2d at 1202.

[164] Opinion of Leventhal, J., at ___ of 199 U.S.App.D.C., at 208 of 624 F.2d.

[165] Some commentators have questioned the propriety of the adversary system as the "engine of truth" in the criminal process. *See,* e. g., Frankel, *The Search for Truth: An Umpireal View,* 123 U.Pa.L.Rev. 1031 (1975). Many of their criticisms are well taken. But many of the failings of the adversary system do not stem from inherent defects in the adversary process. Rather, they result from the imbalance between the opposing parties that is a by-product of the inferior representation available to the poor. A serious commitment to eliminate the gross disparities in representation would go a long way toward bringing the realities of the adversary system into line with the model on which much of Anglo-American jurisprudence is based.

[166] 104 U.S.App.D.C. 57, 63, 259 F.2d 787, 793, *cert. denied,* 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86 (1958). In dissenting to the majority opinion in *Mitchell,* Judge Fahy responded to the court's concern that judicial oversight of counsel's performance might threaten the relationship between the bench and the bar:

The traditional amenities appropriate to the relationship between courts and members of the bar are not a substitute for inquiry in a particular case into the question whether a defendant has received assistance of counsel in terms of requisite skill. The bar is composed of professionals who have special responsibilities by reason of their calling. While the courts have the duty to defend them against unjust appraisal of their skill and judgment, I think the courts cannot bar inquiry into those matters when the substantial constitutional issue is raised.

* * * * * *

Embarrassment caused counsel by an unjust charge of ineffective assistance is a price that unfortunately must be paid at times for careful judicial administration. And where the charge is just the remedy is not to save counsel from embarrassment but to save his client from unjust conviction or sentence.

Id. at 65-66, 259 F.2d at 795-96.

[167] The need for the trial judge to monitor counsel's performance during trial is heightened if reviewing courts are to be limited to considering only those claims that were raised by objection at trial. *See Wainwright v. Sykes,*433 U.S. 72, 117-18, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Brennan, J., dissenting).

[168] *United States v. Powe,* 192 U.S.App.D.C. 224, 237-38, 591 F.2d 833, 846-47 (1978).

In light of Judge Leventhal's repeated charges that our approach will produce a "thorough reordering of the adversary system," I must emphasize that I am not proposing to transform the adversary system into one "more inquisitorial in nature." Indeed, nothing could be farther from the truth. *The purpose of our approach is merely to assure that our "adversary system of justice" really is adversary.*

Judge Leventhal frequently expresses his fears that the approach outlined in this opinion will undercut the adversary system and seriously disrupt the administration of justice. Yet nowhere does he elucidate the exact nature of the predicted dire

consequences. The approach adopted in this opinion does not require that defense counsel reveal — at each stage of the proceedings — the precise information and reasoning that prompted him to pursue a given course; it only requires that he be able to assert that his actions have in fact been based upon informed tactical decisions. And if counsel is eventually called upon to justify his conduct in a post-trial inquiry, it is enough for him to defend his actions by articulating the reasoning behind them; the reviewing court will not substitute its own judgment as long as counsel's decisions are informed and rational. I thus cannot understand how the adversary system will be "tortured out of shape" if defense counsel must contemplate from the beginning that he may be called upon to justify his conduct at some future date. And I fail to see how requiring defense counsel to fulfill the most rudimentary obligations of pretrial investigation and preparation will disrupt the administration of justice.

[169] In recent years the problem of lawyer incompetence has been the subject of increased concern among judges, the legal community and the public at large. *See, e. g.,* Advisory Comm. to the Judicial Council on Qualifications to Practice before the United States Courts in the Second Circuit, Final Report on Proposed Rules for Admission to Practice (1975), *summarized in New Admission Rules Proposed for Federal District Courts,* 61 A.B.A.J. 945 (1975) (the Clare Committee Report); Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?,* 42 Fordham L.Rev. 227 (1973); Kaufman, *Does the Judge Have a Right to Qualified Counsel?,* 61 A.B.A.J. 569 (1975); Kaufman, *The Court Needs a Friend in Court,* 60 A.B.A.J. 175 (1974); Tamm, *Advocacy Can Be Taught — the N.I.T.A. Way,* 59 A.B.A.J. 625 (1973); Wilkey, *A Bar Examination for Federal Courts,* 61 A.B.A.J. 1091 (1975); *Lawyers on Trial,*Newsweek, Dec. 11, 1978 at 98.

Many reforms have been advocated, including increased trial advocacy training in the law schools, on-the-job certification for specialty practices, and raising the standards for admission to practice to include mandatory law school courses and mandatory continuing education requirements. Efforts to raise the overall level of lawyers' skills are commendable, but none of these proposals even begins to address the unique problems of providing adequate representation for the poor. None of these suggested reforms attempts to deal with the most frequent causes of ineffective assistance for the poor defendant — attorney indifference and overwork. None offers any prospect for correcting the gross imbalance in the distribution of legal representation between the poor and the affluent. Most importantly, none of these reforms can provide any assurance that each defendant will receive the effective and conscientious assistance of counsel guaranteed by the Sixth Amendment.

[170] To date, the bar has been notably lax in disciplining those attorneys who shirk their obligations, despite various provisions of the Code of Professional Responsibility that are designed to protect against such violations.*See, e. g.,* ABA Code of Professional Responsibility, Ethical Consideration 2-30 ("Employment should not be accepted by a lawyer when he is unable to render competent service . . ."); *id.* Ethical Consideration 6-1 ("[A] lawyer should act with competence and proper care in representing clients."); *id.* Disciplinary Rule 6-101(A)(2) ("A lawyer shall not: . . . Handle a legal matter without preparation adequate in the circumstances."); Rules of the D.C. Court of Appeals

Governing the Bar of the District of Columbia, Rule XI, § 6(1)(b) ("Bar Counsel shall have the power and *duty*: . . To investigate all matters involving alleged misconduct by an attorney . . . called to his attention whether by complaint or otherwise.") (emphasis added).

In June, 1977, a committee of the D.C. Bar issued a detailed report on the bar's procedures for handling complaints of ineffective assistance of counsel, particularly those from indigents represented by CJA attorneys. The report criticized the D.C. Bar's own Disciplinary Board for failing to investigate such complaints:

We believe that the problem of substandard performance by court appointed attorneys is one which has been created in substantial part by the tolerance of such conduct over more than a decade. Attorneys accepting cases under the Criminal Justice Act frequently depend upon a high volume of cases in order to earn a living. This is especially the case since the vouchers that such attorneys submit for compensation are frequently reduced by the judges. This economic pressure on attorneys has an effect on the quality of representation. Failure to enforce the disciplinary rules under these circumstances, and the continued appointment of the most notoriously neglectful attorneys, has signaled many criminal practitioners that there is no real level of professionalism required. Once the disciplinary rules are enforced, we believe that a different message will be communicated, and that a large part of the problem will resolve itself by increased levels of performance by attorneys not wanting to risk disciplinary action.

Wolf Committee Report, *supra* note 3, at 10-11.

In the *Saunders* case, *see* note 105, *supra,* appellate counsel was so outraged by trial counsel's failure to carry out his obligations as an attorney that she filed a grievance with the D.C. Bar Association. The results of that complaint are not public, but it is significant that Decoster's attorney continued to receive appointments in the D.C. courts. Apparently, this is not an isolated episode. In 1971, when responsibility for administering the Criminal Justice Act in the District of Columbia was transferred to the Superior Court, the Criminal Justice Act Advisory Board was established as part of the required Plan for Furnishing Representation to Indigents. The Board, which was composed of seven attorneys, was given authority and responsibility to remove attorneys from the list of eligible CJA counsel upon a complaint and demonstration of inadequate representation. In the conclusion of one report on the handling of complaints against court-appointed counsel, however, "[d]espite the clear mandate to act, the Board was wholly ineffectual during its three years of existence." Washington Pretrial Justice Program Report, *supra* note 3, at 5. The Board considered only one particularly egregious case, and even then refused to take any action. *Id.* at 6; Austern-Rezneck Report, *supra* note 3, at 15. The Board's failure to make any attempt to reduce the number of appointed counsel who provide ineffective representation by "decertifying" incompetent attorneys and removing them from the appointment lists was criticized by two independent studies commissioned by the D.C. Bar, first in 1973, *see* Report on Appointed Counsel Program, in D.C. Courts, *supra* note 3, at 31-32, and again in 1975, *see* Austern-Rezneck Report, *supra* note 3, at 124 ("One of the most

serious weaknesses in the existing system is the lack of effective machinery for hearing grievances and taking disciplinary action against errant and incompetent attorneys.").

[1] Appellant was also convicted of assault with a dangerous weapon and received a sentence concurrent with his armed robbery sentence. Since assault with a dangerous weapon is a lesser included offense of armed robbery arising from the same act or transaction, *United States v. Johnson,* 155 U.S.App.D.C. 28, 475 F.2d 1297 (1973), we vacated the assault conviction. *United States v. DeCoster,* 159 U.S. App.D.C. 326, 328 n.2, 487 F.2d 1197, 1199 n.2 (1973).

[2] *See* 18 U.S.C. §§ 3146(d), 3147 (1970); *Grimes v. United States,* 129 U.S.App.D.C. 308, 394 F.2d 933 (1967);*Shackleford v. United States,* 127 U.S.App.D.C. 285, 383 F.2d 212 (1967).

[3] On October 8, 1971, a letter from the Chief Probation Officer informing the court that Eley had been arrested in North Carolina on unrelated charges was placed in the clerk's file for Eley's case. A later report, not available to counsel at the time of appellant's trial but included in the record before us, indicates that Eley was brought to D.C. Jail on November 3, 1971 for a determination of whether to revoke his probation.

[4] A partial transcript of this colloquy is reprinted in our first opinion at 159 U.S.App.D.C. at 329, 487 F.2d at 1200.

[5] The dissent discusses at some length possible innocent explanations for the various acts and omissions to which we pointed in our first opinion. (Dissent at ___-___ of 199 U.S. App.D.C., at 314-316 of 624 F.2d). We need not consider the adequacy of these explanations, for our point in *DeCoster I* was *not* that the various acts*established* that the defendant was denied his right to effective assistance of counsel, but only that they *raised questions* as to whether a constitutional violation had occurred. The proceedings on remand fully vindicated our belief that it was desirable to ventilate the issues concerning counsel's performance, since as we explain in text, a great deal of significant information was elicited at the hearing.

[6] The district judge found counsel had not interviewed either officer.

[7] Appellant testified that he had requested his lawyer to interview the manager at the hotel, but made no such request with respect to people at the bar.

[8] Eley denied having been interviewed, but the district court found his testimony incredible.

[9] Two prosecutors were called as witnesses at the hearing on remand, but neither remembered this case. Each testified, however, that during their tenure in the U.S. Attorney's Office, they had frequently discussed appellant's counsel's cases with counsel. Mr. Cohan, who represented the Government at trial, further stated that appellant's counsel's usual practice was to speak to prosecutors informally regarding discovery and to request to see hearing transcripts, and that Cohan's usual practice was to show them.

[10] Appellant wrote to counsel because, as he explained in the letter, "I tried to call you before, but couldn't make contact."

[11] At the hearing on remand, appellant clung to his trial testimony and stated that the statement in his letter to counsel was a "fabrication."

[12] Counsel was also asked to explain the reasons for certain "tactical decisions" he made. He could not recall why he had moved for bond review in the district court rather than in General Sessions, or why he had omitted mention of the acceptance by Black Man's in the original motion. He stated that he had attempted to waive jury trial at his client's direction, despite counsel's own misgivings. He explained that he had waived opening statement because he believed "the testimony I would have would be sufficient to proceed in this case," but could not recall the factors that led him to that conclusion. And he stated that he did not check to determine if sentence was properly executed, because after filing a notice of appeal on the day sentence was imposed, he considered his representation of appellant terminated.

[13] In his supplemental brief filed in this court after the record was returned, appellant generally presses these same points, plus an additional one: counsel's failure to object to appellant's appearing before the jury in prison garb. Since this issue was not raised below the record does not reflect what considerations, if any, underlay counsel's "decision" not to object. Consequently, we cannot consider it at this time.

[14] 1. . . .

. . . [T]his Court finds that while the proper and prudent course for trial counsel was to have interviewed the complaining witness, the police officers and the codefendants prior to announcing "Ready", his failure to do so in this particular case does not add up to ineffective assistance of counsel warranting a new trial.

2. While it may be that defense counsel herein was lax in his duty to conduct as thorough a factual investigation as might have been possible, we find that counsel did raise the only defense available to him, which defense was putting the government to its proof. And in light of DeCoster's posture and attitude during the course of these proceedings, this Court cannot say that defense counsel substantially violated any one of the duties owed to his client.

* * * * * *

3. Further, considering the record *in toto,* while it might appear that defense counsel was less than a "diligent conscientious advocate," the weight of the government's case at trial and supported on the hearing on remand convinces this Court that DeCoster was not prejudiced thereby and not denied the "reasonably competent assistance of an attorney" under the circumstances.

[15] *See Diggs v. Welch,* 80 U.S.App.D.C. 5, 7, 148 F.2d 667, 669, *cert. denied,* 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002 (1945).

[16] *See Bruce v. United States,* 126 U.S.App. D.C. 336, 339-40, 379 F.2d 113, 116-17 (1967).

[17] At the time *DeCoster I* was decided, three circuits already had rejected the "farce and mockery" standard for some version of a "reasonableness" test. *See Moore v. United States,* 432 F.2d 730 (3rd Cir.1970) (en banc);*Coles v. Peyton,* 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968);*MacKenna v. Ellis,* 280 F.2d 592 (5th Cir.1960), *modified,* 289 F.2d 928, *cert. denied,* 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961). *See also McMann v. Richardson,* 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)(counsel's advice must be "within the range of competence demanded of attorneys in criminal cases"). Since then, three more circuits have joined this trend, *United States ex rel. Williams v. Twomey,* 510 F.2d 634 (7th Cir.1975); *Beasley v. United States,* 491 F.2d 687 (6th Cir.1974); *United States v. Easter,* 539 F.2d 663 (8th Cir.1976); *see also Herring v. Estelle,* 491 F.2d 125 (5th Cir.1974). One circuit has been ambiguous in its standard, *compare Lischko v. Galli,* 534 F.2d 333 (9th Cir.1976), *with United States v. Stern,* 519 F.2d 521, 524 (9th Cir.), *cert. denied,* 423 U.S. 1033, 96 S.Ct. 565, 46 L.Ed.2d 407 (1975), and one circuit has indicated it might reconsider its old rule, *Morgan v. Hogan,* 494 F.2d 1220, 1222 n.4 (1st Cir.1974).

A "reasonableness" standard is rapidly becoming the majority rule in the state courts as well. *See* Bazelon, *The Realities of Gideon and* Argersinger, 64 Geo.L.Rev. 811, 820 n.48 (1976).

[18] ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function 224-25 (App.Draft 1971). *See also id.* at 226-28.

[19] *Id.* at 4.1.

[20] Not infrequently, without inquiring as to what counsel was told by his client, courts have found ineffective assistance in a lawyer's failure to uncover exculpatory evidence that should have been found, or, more generally, in his failure to make a thorough investigation. *See, e. g., McQueen v. Swenson,* 498 F.2d 207 (8th Cir.1974);*Garton v. Swenson,* 497 F.2d 1137 (8th Cir.1974); *Johns v. Perini,* 462 F.2d 1308 (6th Cir.), *cert. denied,* 409 U.S. 1049, 93 S.Ct. 519, 34 L.Ed.2d 501 (1972); *Pennington v. Beto,* 437 F.2d 1281 (5th Cir.1971); *Andrews v. United States,* 403 F.2d 341 (9th Cir.1968); *Coles v. Peyton,* 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968); *Brooks v. Texas,* 381 F.2d 619 (5th Cir.1967); *Brubaker v. Dickson,* 310 F.2d 30 (9th Cir.1962), *cert. denied,* 372 U.S. 978, 83 S.Ct. 1110, 10 L.Ed.2d 143 (1963); *McLaughlin v. Royster,* 346 F.Supp. 297 (E.D.Va.1972); *Kott v. Green,* 303 F.Supp. 821 (N.D.Ohio 1968); *Goodwin v. Swenson,* 287 F.Supp. 166 (W.D.Mo.1968); *Smotherman v. Beto,* 276 F.Supp. 579 (N.D.Tex.1967).

[21] *Von Moltke v. Gillies,* 332 U.S. 708, 721, 68 S.Ct. 316, 322, 92 L.Ed. 309 (1948).

[22] In addition to their common sense appeal, these requirements are set forth as cardinal rules in the leading manuals for defense lawyers. *See, e. g.,* A. Amsterdam, B. Segal, & M. Miller, Trial Manual for the Defense of Criminal Cases §§ 107, 108, 113 (3d

ed. 1974); Young Lawyers Section, D.C. Bar Ass'n, 11th Annual Criminal Practice Institute — Trial Manual §§ 2.1, .12 (1974); G. Shadoan, Law and Tactics in Federal Criminal Cases 7 (1964).

[23] The dissent finds us "overly literal," Dissent at ___ of 199 U.S.App.D.C., at 319 of 624 F.2d, in interpreting the following colloquy:

Q Would it then be a correct inference that you never interviewed Mr. Taylor prior to the trial?

A That's true.

Q Did you make any effort to interview Mr. Taylor before the trial?

A I did not.

(Tr. at 37), or the following colloquy:

Q Did you only think that [Taylor and Eley's testimony might be devastating] and not know it because you had not interviewed them before the trial?

A The only reason I thought that was because of the letter that I received from Mr. Decoster.

Q Well how could you have any views on what their testimony would be if you had not interviewed them?

A Because Mr. Decoster had told me that they were with him at the time he was fighting in this letter. . . .

(Tr. at 38), to mean that counsel never interviewed Taylor and did not interview Eley until the second day of trial.

[24] *Cf. United States v. Clayborne,* 166 U.S.App. D.C. 140, 509 F.2d 473 (1974) (failure to interview witness excused because client had been in frequent contact with witness).

[25] *United States v. DeCoster, supra,* at 1201; *see, e. g., United States v. Moore,* 174 U.S.App. D.C. 113, 116 & n.7, 529 F.2d 355, 358 & n.7 (1976); *United States v. Brown,* 155 U.S.App. D.C. 177, 179, 476 F.2d 933, 935 (1973); *Campbell v. United States,* 126 U.S.App.D.C. 250, 251, 377 F.2d 135, 136 (1966); *Jackson v. United States,* 125 U.S.App.D.C. 307, 309, 371 F.2d 960, 962 (1966).

[26] Our dissenting colleague propounds a number of arguments as to why it would have been fruitless to conduct interviews. For example, it is argued that because the two codefendants confessed their *own* guilt by pleading guilty, they could not have anything useful to contribute on the question of the *defendant's* guilt. (Dissent at ___ of 199 U.S.App.D.C., at 319 of 624 F.2d.) Similarly, it is argued, based on a drawing introduced at trial, that the desk clerk could not have seen appellant enter the hotel lobby. Dissent at ___ of 199 U.S.App.D.C., at 319 of 624 F.2d.) On both points the dissent may well be correct. But it is also possible that the dissent is wrong, that, for example,

the codefendants would have said appellant was not present, or the clerk would have said that he was away from his desk and saw appellant's entry. These rationalizations only prove our main point: counsel should interview potential witnesses to determine what they have to offer, so that neither he — nor we — must engage in post hoc speculation as to what the witnesses would have said.

[27] We cannot agree with our dissenting colleague, Dissent at ___ of 199 U.S.App.D.C., at 319 of 624 F.2d, that reading the prosecutor's notes on his conversation with his witnesses is necessarily an adequate substitute for actually interviewing the witnesses. It defies credulity to believe that in the run of the cases the prosecutors will ask — and record the answers to — all or even most of the questions a defense counsel would want answered in preparing the defense.

[28] Two other omissions by counsel further support our finding that he was inadequately prepared. First, counsel did not obtain a transcript of the preliminary hearing, and thus was unable to use Officer Ehler's statement at the hearing that he did not know which of the three codefendants actually took Crump's wallet to impeach Ehler's trial testimony that it was Decoster who took the wallet. Second, counsel admitted at trial that he had not learned that appellant's former codefendants had pled guilty in the middle of their trial.

[29] In *Pinkney* appellant contended that his lawyer had failed to discuss with him the Government's sentencing memorandum filed several days before sentencing. The court held that this allegation did not constitute an allegation of a substantial violation of a *Decoster* duty because "any omission by counsel . . . was inconsequential unless there was evidence upon which counsel could undertake a refutation," 177 U.S.App.D.C. at 432 n.60, 543 F.2d at 917 n.60, and "appellant's motion gave no indication as to the evidence, if any, by which he would undertake an effort at refutation," *id.* at 432, 543 F.2d at 917.

[30] *Id.* at 431 n.59, 543 F.2d at 916 n.59.

[31] *See, e. g.,* C. McCormick, Evidence § 343 (Cleary ed. 1972) ("The most important consideration in the creation of presumption is probability.")

[32] In so holding, we align ourselves with several other circuits. For example, in *United States ex rel. Green v. Rundle,* 434 F.2d 1112, 1115 (1970), the Third Circuit held that a showing of "prejudice" is excused when, *inter alia,* the pervasiveness of the ineffective assistance makes prejudice impossible to determine. Similarly, in *Coles v. Peyton,* 389 F.2d 224, *cert. denied,* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968), the Fourth Circuit presumed prejudice from a near-total failure to investigate. Although language in *Coles* suggests that prejudice is to be presumed from any violation of the duties *Coles* establishes, *see id.* at 226, *Coles* has been limited to more gross violations, *see, e. g., Jackson v. Cox,* 435 F.2d 1089, 1093 (4th Cir.1970). *See also Thomas v. Wyrick,* 535 F.2d 407, 414 (8th Cir.1976).

The primary distinction between our approach and that followed in the cases cited is that we distinguish between the question of whether counsel's violations were

consequential, *i. e.,* impaired the defense, and the question of whether the impairment was harmful, *i. e.,* affected the outcome. *See* pp. ___-___ of 199 U.S.App.D.C., pp. 311-312 of 624 F.2d *infra; United States v. Pinkney, supra,* 177 U.S. App.D.C. at 431, 543 F.2d at 916 n.59. We avoid using the term "prejudice" because it blurs these two inquiries.

[33] *See, e. g., Garland v. Cox,* 472 F.2d 875 (4th Cir.), *cert. denied sub nom., Slayton v. Garland,* 414 U.S. 908, 94 S.Ct. 217, 38 L.Ed.2d 146 (1973); *Martin v. Virginia,* 365 F.2d 549 (4th Cir.1966).

[34] *See, e. g., Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Castillo v. Estelle,* 504 F.2d 1243, 1245 (5th Cir.1975).

[35] *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976).

[36] If this were all that was alleged, appellant would have been required to show that those witnesses' testimony would have helped the defense or else demonstrate a change in circumstances, such as the passage of time, which would have made such a showing impossible.

[37] *Pinkney* is distinguishable on all these points. Whereas a large-scale failure to investigate will almost always adversely affect a defendant's rights, a failure to inform a defendant of the contents of a government allocution at sentencing is not so inherently injurious, especially when, as in *Pinkney,* the allocution largely rehashes previously published material on drug addiction, 177 U.S.App.D.C. at 426, 543 F.2d at 911, and information previously developed at trial, *id.* at 427, 543 F.2d at 912. Moreover, appellant in *Pinkney* was presumably in a position to come forward with "evidence upon which the elements of a constitutionally deficient performance might properly be found," *id.* at 431, 543 F.2d at 916, *i. e.,* "evidence, if any, by which he would undertake an effort at refutation" of the allocation memorandum, *id.* at 432, 543 F.2d at 917; yet he repeatedly failed to offer such evidence, either after trial or in support of his later motion for resentencing, *id.* at 432, 543 F.2d at 917. As we state in the text, appellant in this case is not now in a position to produce such evidence, nor can it be assumed that his failure to do so means that there was no evidence that might have been discoverable with reasonably thorough investigation and that might have helped his defense.

[38] The presumption of adverse consequences which we find appropriate here is, of course, rebuttable. Indeed, with respect to counsel's failure to discover prior to trial that appellant's codefendants had not pled guilty until the middle of their trial, *see* note 28 *supra,* the record indicates that the omission was inconsequential, since the trial judge informed counsel of this fact before trial started, and appellant reversed his initial decision to waive jury trial. But there is no similar basis for concluding that counsel's failure to interview the Government witnesses or potential defense witnesses, to search for other defense witnesses, or to be familiar with the preliminary hearing transcript had no impact on defendant's position.

[39] Although our dissenting colleague devotes a considerable portion of his dissent to attacking this aspect of the holding of *DeCoster I* (Dissent at ___-___ of 199 U.S.App.D.C.,

at 327-340 of 624 F.2d), he ultimately seems to accept it. *See* Dissent at ___ of 199 U.S. App.D.C., at 334 of 624 F.2d, *quoting United States v. Pinkney, supra*note 29, at 431 of 177 U.S.App.D.C. n.59, at 916 of 543 F.2d n.59. The real issue on which we disagree seems to be whether, on the facts of this case, counsel's omissions should be presumed to have had adverse consequences for the defense. *See* pp. ___-___ of 199 U.S.App.D.C., pp. 309-310 of 624 F.2d *supra.*

[40] *Matthews v. United States,* 145 U.S.App. D.C. 323, 326, 449 F.2d 985, 988, *rev'd on rehearing on other grounds,* 449 F.2d 992 (1971). *See also United States v. Hurt,* 177 U.S.App.D.C. 162, 543 F.2d 162 (1976).

[41] *Glasser v. United States,* 315 U.S. 60, 76, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *see Beasley v. United States,*491 F.2d 687 (6th Cir.1974).

[42] For example, with respect to one of counsel's omissions here — his failure to familiarize himself with the preliminary hearing testimony, *see* note 28 *supra* — it is possible to gauge the consequences of the omission, and hence to determine whether the omission was harmless. The consequence of counsel's failure was that appellant lost the opportunity to impeach Officer Ehler's testimony that appellant took the wallet with the Officer's prior testimony that he did not know who took the wallet. We agree with the district court, however, that this consequence was harmless beyond a reasonable doubt: the question of which of three robbers did the actual taking was not material. *See also United States v. Pinkney, supra* note 29, 177 U.S.App.D.C. at 431-432 n.59, 543 F.2d at 916-917 n.59.

[43] In view of the dissent's discussion of the lack of prejudice from counsel's failure to investigate, *see* dissent at ___ of 199 U.S.App. D.C., at 324 of 624 F.2d, we repeat here what we said at p. ___ of 199 U.S.App.D.C., p. 308 of 624 F.2d *supra:*

In sum, we hold that counsel's failure to interview Taylor, Crump, Officer Box, or the desk clerk; his delay in interviewing Eley; and his failure to seek out witnesses from the hotel or the bar were not supported by tactical considerations, informed or otherwise, and violated the duty to conduct a factual investigation. Of course, counsel was "under no duty to assist in the fabrication of a defense," as the district court wisely noted. But counsel *was* under a duty to investigate whether there was a non-fabricated defense that could be presented. The dissent may well be correct that there were no such defenses available in this case, although it may be significant that the two codefendants pled guilty only to robbery and not armed robbery. But even if the dissent is correct, investigation is still necessary not only so that defendants receive informed advice from their counsel and make informed decisions as to whether to go to trial, but also so that lawyers do not unwittingly present perjured testimony, *as apparently occurred in this case.* Thus, while counsel may have been fully justified in not *calling*the codefendants or any other witnesses, his failure to *interview* them violated the duty to investigate.

[44] Should the Government seek a retrial, the district court will have to decide whether the impossibility at this point of determining whether there were unidentified witnesses favorable to the defense should bar a second trial.

[45] *United States v. Sarvis,* 173 U.S.App.D.C. 228, 235, 523 F.2d 1177, 1184 (1975).

[46] *Harrison v. United States,* 128 U.S.App.D.C. 245, 249-50, 387 F.2d 203, 207-08 (1967), *rev'd on other grounds,* 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968).

[47] Several commentators have suggested that this delay could be minimized, and trial judges' ability "to maintain proper standards of performance by attorneys . . . in criminal cases" enhanced, *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 1449, 25 L.Ed.2d 763 (1970), were trial judges to "develop methods whereby they can quickly discern before a trial begins . . . whether they will receive the truth which results from an effective adversary proceeding." Boston University Center for Criminal Justice, Right to Counsel in Criminal Cases: The Mandate of Argersinger v. Hamlin 196 (1976); *see id.* at 193-98; *United States v. Simpson,* 154 U.S.App.D.C. 350, 352-58, 475 F.2d 934, 936-42 (Bazelon, C. J., dissenting), *cert. denied,* 414 U.S. 873, 94 S.Ct. 140, 38 L.Ed.2d 91 (1973); Finer, *Ineffective Assistance of Counsel,* 58 Cornell L.Rev. 1077, 1088 (1973); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process,* 54 Minn. L.Rev. 1175, 1248 (1970).

[48] *United States v. Sarvis, supra* note 38, at 234-35, 523 F.2d at 1183-84.

[49] *See United States v. Perkins,* 162 U.S.App. D.C. 321, 326 n.10, 498 F.2d 1054, 1059 n.10 (1974); *Clemons v. United States,* 133 U.S.App. D.C. 27, 36 n.9, 408 F.2d 1230, 1239 n.9 (1968), *cert. denied,* 394 U.S. 964, 89 S.Ct. 1318, 22 L.Ed.2d 567 (1969).

[1] *United States v. Agurs,* 427 U.S. 97, 108 n.15, 96 S.Ct. 2392, 2400 n.15, 49 L.Ed.2d 342 (1976): "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish `materiality' in the constitutional sense." *Brady v. Maryland,* 373 U.S. 83, 90-91, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

[2] Majority opinion, pp. ___, ___ of 199 U.S. App.D.C., pp. 308, 310 of 624 F.2d.

[3] *United States v. DeCoster,* 159 U.S.App.D.C. 326, 328-30, 487 F.2d 1197, 1199-1201 (1973). The five specific suggestions listed therein for the district court to review on remand were:

1. Delay in filing bond review motion.

2. Alleged premature announcement of "ready" for trial.

3. Alleged failure to inquire into disposition of cases against appellant's accomplices.

4. Alleged lack of communication between counsel and defendant and expressed dissatisfaction of defendant with his counsel.

5. Contradiction of appellant's testimony by accomplice on a fundamental point.

[4] In footnote 32 the majority state:

. . . we distinguish between the question of whether counsel's violations were consequential, *i.e.,* impaired the defense, and the question of whether the impairment

was harmful, *i.e.,* affected the outcome. *See* pp. ___-___ of 199 U.S.App.D.C., pp. 311-312 of 624 F.2d *infra; United States v. Pinkney, supra,* 177 U.S.App.D.C. at 431 n.59, 543 F.2d at 916 n.59. We avoid using the term "prejudice" because it blurs these two inquiries.

Majority Op., p. ___ of 199 U.S.App.D.C., p. 309 of 624 F.2d. This attempt to create some distinction between "prejudice" and something that "impaired the defense [to a] harmful [extent]" is too thin to be substantial — or workable as a practical matter.

[5] For an instructive chronicle of this aspect of the *Durham* imbroglio, *see United States v. Peterson,* 166 U.S.App.D.C. 75, 83, 509 F.2d 408, 416 (1974); *United States v. Robertson,* 165 U.S.App.D.C. 325, 340-41, 507 F.2d 1148, 1163-64 (1974) (Wilkey, J., dissenting); *United States v. Morgan,* 160 U.S.App.D.C. 278, 280 n.2, 491 F.2d 71, 73 n.2 (1974); *United States v. Greene,* 160 U.S.App.D.C. 21, 28, 489 F.2d 1145, 1152 (1973), *cert. denied,* 419 U.S. 977, 95 S.Ct. 239, 42 L.Ed.2d 190 (1974); *United States v. Marshall,* 153 U.S.App.D.C. 83, 86, 471 F.2d 1051, 1054 (1972) (Bazelon, C. J., dissenting); *United States v. Wilson,* 153 U.S.App.D.C. 104, 108, 471 F.2d 1072, 1076 (1972), *cert. denied,* 410 U.S. 957, 93 S.Ct. 1431, 35 L.Ed.2d 691 (1973); *United States v. Brawner,* 153 U.S.App. D.C. 1, 471 F.2d 969 (1972) (en banc); *United States v. Trantham,* 145 U.S.App.D.C. 113, 115, 448 F.2d 1036, 1038 (1971); *United States v. Eichberg,* 142 U.S.App.D.C. 110, 113, 439 F.2d 620, 623 (1971) (Bazelon, C. J., concurring); *United States v. Carter,* 141 U.S.App.D.C. 46, 54, 436 F.2d 200, 208 (1970);*United States v. Collins,* 139 U.S.App.D.C. 392, 396, 433 F.2d 550, 554 (1970); *Washington v. United States,* 129 U.S.App.D.C. 29, 31, 390 F.2d 444, 446 (1967); *King v. United States,* 125 U.S.App. D.C. 318, 323, 372 F.2d 383, 388 (1967); *Keys v. United States,* 120 U.S.App.D.C. 343, 346 F.2d 824 (1965); *Whalem v. United States,* 120 U.S.App.D.C. 331, 346 F.2d 812 (1965) (en banc); *McDonald v. United States,* 114 U.S. App.D.C. 120, 312 F.2d 847 (1962) (en banc).

[6] (1) Decoster: "I just walked into the door when they arrested me. I was getting my key" (Tr. 35).

The point inside the Annex at which Decoster was arrested was at a considerable distance from the entrance door. *See* point (E) on Exhibit 2.

(2) Crump: "[Decoster] ran into a building" (Tr. 31). This does not indicate that he ran *after* he got *into* the building.

(3) Officer Box arrested Decoster inside the D.C. Annex Hotel and he testified:

". . . when I went inside [the D.C. Annex Hotel] he was at the counter of the Annex and that is where I arrested him . . .

* * * * * *

Q Did he have to open the door to get into the D. C. Annex?

A Yes sir, but it was one of those doors where there is a double door but one of them is stationery [*sic*] and you have to open one to go in.

Q Had the door closed before you got to it?

A It was on its way to closing.

Tr. 46.

[7] The record indicates that Decoster testified under oath: (1) that the last time he saw Crump was in the Golden Gate Club (Tr. 31); (2) that after he left the Golden Gate Club, he went straight across from the Club to the D.C. Annex Hotel (Tr. 32); (3) that he was not with Taylor at or about 6:15 P.M. on May 29, 1970 (Tr. 33); (4) or with Eley on that night (Tr. 33); and (5) that he did not observe anybody trying to rob Roger Crump on the night of May 29, 1970. This testimony obviously conflicts with Decoster's own handwritten note to the judge, received by him about Nov. 4, 1970 (Tr. Feb. 6, 1974, 62), "that he was guilty only of assault by self defense." In a letter to his lawyer he also said:

I want to file assault charges against my accuse [*sic*] victim. I think I have as much right as he has, at least I'm entitle [*sic*] to it. If they can charge me with robbery while fighting, I think I have as much right as him and can do the same. As for Elley [*sic*] and Taylor my accused partners they can testify their role. Elley [*sic*] came to my aid when the victim stuck his hand in his pocket and Taylor was just standing on the sidewalk.

Govt. Ex. 2. Both of these written notes completely contradict the testimony Decoster gave on the stand. They prove his participation in the robbery and the falsity of his alibi. His testimony in court is also contradicted by the testimony of practically all the witnesses, including his accomplice Eley, and on February 6, 1974 Decoster in effect reiterated his denial ((3) and (4) above) that he was with Taylor or Eley at the time of the offense (Tr. Feb. 6, 1974, 65-68). At this time he also testified in contradiction to his trial testimony that he had never seen Eley before he was arrested (*Id.,* 65).

[8] The difference between robbery and armed robbery in this case carries no assurance of a substantially shorter sentence. When Decoster was sentenced he was already serving a sentence on another conviction, which the majority does not mention. In any event, in most cases claiming ineffective assistance of counsel, where a guilty defendant is involved the difference will be between a justified conviction and a possible unjustified acquittal.

[9] To appreciate the attitude that my writing colleague by his opinion seeks to engrave upon the law of this circuit, one need only note his current law review article which sets forth his views for the guidance of judges in all ineffective assistance of counsel cases:

In applying this standard [whether the defendant received the effective assistance of counsel], judges should recognize that *all lawyers will be ineffective some of the time;* the task is too difficult and the human animal too fallible to expect otherwise. *It may even be true that given present conditions, appointed counsel and defenders in some areas will be ineffective all of the time.* Perhaps we should replace the phrase "ineffective assistance" with a new term, such as "failure of the criminal process," which *properly implicates the system rather than the attorney.*

Bazelon, *The Realities of Gideon and Argersinger,* 64 Geo.L.J. 811, 823 (1976) (emphasis added) (hereinafter cited as Georgetown Article).

It is of course not true that "all lawyers will be [constitutionally] ineffective some of the time" — and *constitutional*ineffectiveness is what is involved. It is also incorrect to imply that "appointed counsel and defenders in some areas will be *constitutionally* ineffective *all of the time*." What a gross distortion of fact. This demonstrates how easily my colleague finds *constitutional* error. But then comes the light. What he considers to be "`ineffective assistance' . . . [is really more correctly to be termed] `failure of the criminal process,' which properly implicates the system rather than the attorney." *Id.* With such a viewpoint, practically all criminal convictions would be set aside, which seems to be my colleague's objective.

It is, thus, not surprising that my colleague has taken the position that prejudice need not be proven by a convicted defendant complaining of his attorney. In indicting the "system" rather than the facts of each case, and in carrying forward that attitude into this case, my colleague is attempting to create a format in this circuit for the easy reversal of criminal convictions. The *Decoster* opinions are deftly crafted to that end. Such opinions would impose upon the Government, once a jury has found a defendant guilty, the burden of proving beyond a reasonable doubt that every conceivable overly imaginative item of defense, that any two activist judges could possibly conceive, had been thoroughly investigated and researched. Such opportunity for unlimited second guessing, as articulated by the majority opinion, would require the Government to negate the entire universe of imaginative defenses instead of meeting specific complaints of claimed prejudice. If this were a valid requirement it might save time to add it to the government's burden at the original trial. The standard of reasonable doubt was intended to apply to guilt as a positive fact. To require such proof of a negative would be like requiring the defendant to prove beyond a reasonable doubt that he was not guilty.

My colleague's disposition to blame the "system" is somewhat reflected by the fact that in the last ten reported opinions involving criminal convictions where "the issues occasion[ed] [a] need" for an opinion (Rule 13(c)), and my two colleagues have been together on a three-judge panel, they have reversed in 8 of the 10 cases. Of the two affirmances, one involved a conviction for fraudulently obtaining gasoline contrary to the fuel conservation restrictions. *United States v. Rosser,* 174 U.S.App.D.C. 79, 528 F.2d 652 (1976); *United States v. Sarvis,* 173 U.S.App.D.C. 228, 523 F.2d 1177 (1975); *United States v. David,* 167 U.S.App.D.C. 117, 511 F.2d 355 (1975);*United States v. DeLoach,* 164 U.S.App.D.C. 116, 504 F.2d 185 (1974); *United States v. Melton,* 160 U.S.App.D.C. 252, 491 F.2d 45 (1974); *United States v. Brown,* 160 U.S.App.D.C. 190, 490 F.2d 758 (1973); *United States v. Wright,* 160 U.S.App.D.C. 57, 489 F.2d 1181 (1973); *United States v. DeCoster,* 159 U.S.App.D.C. 326, 487 F.2d 1197 (1973) ("DeCoster I"); *United States v. Morgan,* 157 U.S.App.D.C. 197, 482 F.2d 786 (1973); *United States v. Riley,* 157 U.S.App.D.C. 27, 481 F.2d 1127 (1973). This indicates eight were reversed (one in part and affirmed in part) and two were affirmed.

This list excludes cases affirmed by orders where the "issues occasion[ed] no need . . ." for an opinion, but includes all published opinions of three-judge panels in criminal cases in which the votes of my colleagues completely controlled the decision — no *en banc* decisions.

In all cases involving criminal convictions during the same period when the issues occasioned a need for an opinion, including those cases on which my colleagues sat, there were 116 affirmances (32 of these affirmed the convictions on some counts and reversed others) and only 52 were reversals.

Thus, we see that the burden my colleague is shifting to the Government in these cases is really not to prove that defense counsel furnished reasonably competent assistance, but to prove to his satisfaction "beyond a reasonable doubt" that "the criminal process" in the United States courts did not fail by my colleague's personal non-legal standard. As he applies this standard to cases before him, it must be recognized from his article that he will consider that all lawyers are (constitutionally) ineffective some of the time; and that it may be true, given "present conditions," that appointed counsel and defenders (that is, all lawyers) in some areas are ineffective *all*of the time. That seems an almost impossible burden for the Government to overcome. In his opinion it could not be overcome here by proving that the accused had no defense except a fabricated one.

My colleague thus seems to be warring, not with what reasonable courts consider to be adequate defense assistance, but with his personal views as to "present conditions" and "the system rather than the attorney." This statement explains in a large measure the weird result that his majority opinion would bring about in this case — the freeing of an admittedly guilty defendant — for the failure to investigate a *fabricated* defense which was not even suggested by the defendant until the trial started.

Freeing guilty defendants on non-legal grounds is also basically what my writing colleague advocates under the name of "Jury Nullification." Thus, in *United States v. Barker,* 168 U.S.App.D.C. 312, 514 F.2d 208, *cert. denied,*421 U.S. 1013, 95 S.Ct. 2420, 44 L.Ed.2d 682 (1975), he stated in his separate opinion:

[T]he defendants should not be precluded from asserting their *invalid* defense to the jury. . . . In a previous opinion, I have indicated that jury nullification is a permissible escape valve and should be forthrightly recognized as such.

168 U.S.App.D.C. at 340-41, 514 F.2d at 236-37 (emphasis added). What he is attempting is thus to create illegal "escape valves" for guilty defendants. In the case referred to, in a dissent, he argued that "the jury should be told of its power to *nullify the law* . . . ." *United States v. Dougherty,* 154 U.S.App.D.C. 76, 102, 473 F.2d 1113, 1139 (1972) (emphasis added). The majority thought otherwise. Such lawless suggestion was again rejected in *United States v. Gorham,* 173 U.S.App.D.C. 139, 150-152, 523 F.2d 1088, 1097-1099 (1975), with a citation to Justice Harlan's opinion in *Sparf* and *Hansen v. United States,* 156 U.S. 51, 106, 15 S.Ct. 273, 39 L.Ed. 343 (1895). My colleague's proposal for jury nullification is that juries should be instructed by the judge that they need not return verdicts on the law or the evidence — thus denying any semblance of due process or equal protection of the law by a form of jury anarchy. In his opinion, juries may replace Congress and legislate as they go.

Such opinions demonstrate a disturbing reluctance to apply the law when it results in the conviction of guilty defendants. The proper place to advance such theories is in the

legislative branch of Government, or on the political hustings, by advocating that the Constitution be amended to provide for "non-due process" or "unequal protection of the law." What my colleague overlooks is that the public has some right to have the guilty convicted. The true rule is that innocence should not suffer or guilt escape. No country in the world sets up so many protections for those charged with crime as does this nation and we can well do without shifting to the Government an impossible burden which would "presume" every convicted defendant was prejudiced if fanciful and overly speculative grounds could be conjured up, not by the defendant, but by two judges of an *appellate*court who, under the guise of enforcing reasonable assistance of counsel, are actually attacking "the [entire] system" for some unspecified social grievance they have against it.

My colleague's grievance seems to be that "defendants accused of street crimes," Georgetown Article, *supra,* at 812, too often plead guilty because of the "cop-out-bar" and "plea-hungry judges." *Id.* at 813. Thus, lawyers and Judges are denounced because *defendants plead guilty* to Grand Jury indictments. This name-calling is directed indiscriminately at "regulars," "uptown lawyers" and "public defenders," *Id.* at 814, and by specific mention includes the bar of the District of Columbia. *Id.* at 813. He nowhere acknowledges that *more* than reasonable competence of trial counsel is assured in the U.S. District Court for the District of Columbia because all appointed counsel are picked from a carefully selected list of defense counsel who are approved by all the judges of the United States District Court, and the list is monitored continuously.

Shifting the burden of proof from the defendants will relieve them of the necessity of proving prejudice and thus open the door for the reversal of convictions, as here, in order *sub silentio* to permit defendants to assert "their*invalid* defense to the jury." *Supra.* This is not a proper objective under our system of laws.

[9a] My position on interviewing the witnesses referred to in footnote 43 of the majority opinion is that Decoster's counsel in connection with the preliminary hearing and thereafter had already become familiar with the facts surrounding the robbery from most of the people involved. As for the alleged witnesses in the hotel and bar, they were never sufficiently identified, as to who they were or what concrete relevant testimony they might testify to, so as to conclude that their testimony would be of any consequence in the trial. I have already pointed out that the desk clerk in the so-called hotel was unable to view Decoster's activities at any place where they might be material.

I agree that every counsel is under an obligation to investigate non-fabricated defenses and I also agree with Judge Waddy's finding that the only defense for Decoster here was to put the Government to its proof, *i.e.,* that there was no non-fabricated defense and none has been shown. No prejudice results from a failure to investigate a fabricated defense. We know now on the basis of Decoster's admission at sentencing that he was guilty, and from the entire record it appears to me that his counsel came to the same conclusion following the preliminary hearing and the receipt of the letter from Decoster which admitted that he was fighting with the victim at the time of the robbery. To this evidence counsel also was able to rely on the guilty pleas to robbery by *both* of the men that Decoster admitted being with and fighting the victim with them.

As also stated in the text of my opinion, it is my view of the evidence that the testimony on remand by Decoster's counsel that the text of the majority opinion, and footnote 43 therein, relies upon, as indicating a failure to interview certain witnesses, referred to the period of time *immediately before trial* and should not be interpreted as indicating that counsel *never* discussed the case with the necessary witnesses when he first entered the case some three years and nine months (3 3/4 years) before when he conducted the proceedings for *all* the defendants in the preliminary hearing.

[10] There is no showing in this record that Decoster claimed before trial "not to have been there." *Cf.,* majority opinion, p. ___ of 199 U.S.App.D.C., p. 307 of 624 F.2d. In this respect the majority opinion errs. In fact, in Government Exhibit 2, a letter from Decoster to his attorney, he admitted being involved in the yoking affair, and thus his alibi, contrived at the start of his trial, *was obviously known by his lawyer to be a fabrication.* The relevant text of the letter is set out in n.7, *supra.*

[11] *DeCoster I* comes on scene not fully thought out and, in attempting to work a shift in the burden of proof of prejudice, it is simply not workable. This is illustrated at note 65 in the Georgetown Article, *supra* n.9: "The question of prejudice is analytically separate from the question of whether the defendant's sixth amendment rights were violated. The "mockery" and "gross incompetence blotting out a substantial defense" tests failed to recognize this distinction by blurring the issue of ineffectiveness with the question of prejudice. *DeCoster,* I have come to realize, makes the same mistake, by stating that if "a defendant shows a substantial violation . . . he has been denied effective representation *unless the government . . . [`]can establish lack of prejudice thereby.'Coles v. Peyton,* 389 F.2d 224, 226 (4th Cir.1968)." *Id.* (emphasis added). A nonprejudicial denial of effective assistance need not result in reversal, but the analysis should be distinct."

The bench and bar should be spared another continuing attempt to sustain an undeveloped prejudiced attack on "the system." *Id.* at 823.

[12] *Garland v. Cox,* 472 F.2d 875 (4th Cir.), *cert. denied sub nom. Slayton v. Garland,* 414 U.S. 908, 94 S.Ct. 217, 38 L.Ed.2d 146 (1973) (the court described it as a weak presumption in any event); *Martin v. Virginia,* 365 F.2d 549 (4th Cir.1966); both cases cited at p. ___ of 199 U.S.App.D.C., p. 309 of 624 F.2d n.33, *supra.*

[13] *Glasser v. United States,* 315 U.S. 60, 76, 62 S.Ct. 457, 86 L.Ed. 680 (1942). From the contradictory duties to different clients the conflict of interest was apparent. No inquiry into particular judgments was made; *Castillo v. Estelle,* 504 F.2d 1243, 1245 (5th Cir.1975); cases cited at p. ___ of 199 U.S.App.D.C., p. 309 of 624 F.2d, n. 34,*supra.*

[14] *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976); cited at p. ___ of 199 U.S.App.D.C., p. 309 of 624 F.2d, n. 35, *supra.*

[15] *District of Columbia v. Grimes,* 131 U.S. App.D.C. 360, 367, 404 F.2d 1337, 1343 (1968) (Robinson, J., concurring), and cases cited therein: *Insurance Agents' Int'l Union v. NLRB,* 104 U.S.App.D.C. 218, 260 F.2d 736 (1958), *aff'd* 361 U.S. 477, 80 S.Ct. 419, 4 L.Ed.2d 454 (1960); *Polisnik v. United States,* 104 U.S.App.D.C. 136, 137, 259 F.2d 951, 952 (1958); *Mallory v. United States,* 104 U.S.App. D.C. 71, 259 F.2d 801 (1958); *Davis v. Peerless Inc.*

Co., 103 U.S.App.D.C. 125, 127, 255 F.2d 534, 536 (1958); *Thompson v. Thompson,* 100 U.S.App.D.C. 285, 286, 244 F.2d 374, 375 (1957). *See also District of Columbia v. Washington Post Co.,* 98 U.S.App.D.C. 304, 235 F.2d 531, *cert. denied,* 352 U.S. 912, 77 S.Ct. 147, 1 L.Ed.2d 118 (1956) and *District of Columbia v. Grimes, supra* at 370, 404 F.2d at 1347 (McGowan, J., dissenting). This is particularly true since the bulk of the affected cases are less than ten years old, and so are certainly recent. *District of Columbia v. Grimes* and *Insurance Agents' Int'l Union v. NLRB, supra.*

[16] The majority opinion in *Coles v. Peyton,* 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849, 89 S.Ct. 80, 21 L.Ed.2d 120 (1968), is unconvincing in several respects. It fails to reply to, or even deal with, the apparently convincing answers that the dissent in that case sets forth as replies to what the majority opinion claims are defects in counsel's representation of his client, to wit: (1) the date counsel *actually* began to represent the accused, (2) the defendant's admission to the counsel at trial, and the finding by the state court, that defendant*did* have intercourse with the prosecutrix (it was thus unnecessary to explain that penetration was an element of the crime), (3) the lack of any substantial point in not interviewing a witness who only "heard" a disturbance and screams at a distance in the nighttime, (4) that there was no foundation for asserting that counsel was delinquent in not investigating the male companion the accused alleged was with the prosecutrix because the accused never gave his lawyer any leads or suggestions as to where he could be found or who he was, and (5) that an investigation of the reputation of the prosecutrix for chastity was never made at trial or in connection with the federal appeal, because no possible witnesses were ever suggested. A defense lawyer is not clairvoyant, nor can he divine witnesses where none exist.

On the law side, *no judicial authority or reason whatsoever is cited for the switch in the burden of proof.* Nor are any factors pertinent to the access to admissible evidence cited to require or justify the switch in the normal burden of proof. *Coles* is thus contrary to both law and logic. In justice to *Coles* however, and to distinguish it somewhat from *DeCoster,* half of the *alleged* violations in *Coles* did involve action, or alleged inaction, by the state, *i. e.,* the alleged failure promptly to appoint defense counsel and to afford defense counsel a reasonable opportunity to defend his client. Since this new burden of proof theory was launched in 1968, no subsequent Fourth Circuit case has applied it. *Jackson v. Cox,* 435 F.2d 1089, 1093 (4th Cir.1970) refuses to apply it in a case where defense counsel failed to locate and subpoena an unknown witness where there was no showing, even if he could be found, that he might provide a defense. Those facts are substantially what we have in *DeCoster.*Also in *Hall v. United States,* 410 F.2d 653, 662 (4th Cir.1969), the case was decided against the defendant without any reference to the burden of proof being on the Government. *See also, United States v. Peterson* (No. 75-1056, 4th Cir., July 9, 1975). Maybe this is another example of bad law being made by a hard case on the facts, *i. e.,* the 25-year sentence imposed by the Hustings Court.

[17] The majority violates the intent of the drafters in attempting to apply the general guidelines set forth in the*Standards Relating to the Administration of Criminal Justice (American Bar Association)* § 4.1 (1974), as though the standards were a penal statute and an absolute "duty" of counsel. Those who wrote the *Standards* indicated that the

standards of § 4.1, since a violation thereof was not characterized as "unprofessional," were "intended to serve as *guides* to honorable practice." *Id.* at 64 (emphasis added). They were never intended to be applied in the overly strict manner which the majority here attempts.

While these standards may prove useful to courts in this respect, it should be emphasized that *the Committee has not proposed them as a set of per se rules applicable to post-conviction procedures.* The standards have been drawn with their primary impact on the conduct of prosecutors and defense counsel in mind. The larger considerations involved in a determination of whether the conduct of a prosecutor or defense lawyer was such that a conviction should be overturned are beyond the scope of the Committee's work.

Id. at 65 (Emphasis added). The majority are thus guilty of the same error that Justice Blackmun in his chambers opinion found in the Nebraska trial court's adoption of the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation in *Nebraska Press Assn. v. Stuart,* 423 U.S. 1327, 96 S.Ct. 251, 46 L.Ed.2d 237 (1975):

Without rehearsing the description of those guidelines set forth in my prior opinion, it is evident that they constitute a "voluntary code" which was not intended to be mandatory. Indeed, the word "guidelines" itself so indicates. They are merely suggestive and, accordingly, are necessarily vague.

Id. at 1330, 96 S.Ct. at 254. Section 4.1 of the ABA Standards, too, is just a guide and was never intended to operate in conjunction with what is equivalent to a penal presumption.

[18] Rt. Hon. Lord Widgery, Ford Chief Justice of England, *"The Compleat Advocate,"* 43 Fordham L.Rev. 909, 912 (1975), Fifth Annual John F. Sonnett Memorial Lecture, January 7, 1975.

[19] In appropriate cases the FBI or Police would be replaced by the Secret Service, the Intelligence Division of the IRS, the Postal Inspectors or the investigative arm of other agencies upon which Congress has conferred investigative jurisdiction in various cases.

[20] *See* pp. ___, ___ of 199 U.S.App.D.C., pp. 315, 316 of 624 F.2d, *supra.*

[21] *United States v. Nobles,* 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975). The defense investigator's report relating to his interview with a particular witness, previously delivered to defense counsel, must be furnished to the prosecution for inspection at the completion of the investigator's testimony which related to the interview covered in the report. *Contra, United States v. Wright,* 160 U.S.App.D.C. 57, 489 F.2d 1181 (1973).

[22] The reference in the majority opinion to a three step "inquiry," including whether the violation was "prejudicial" (Majority opinion, p. ___ of 199 U.S.App.D.C., p. 305 of 624 F.2d), should not raise any false hopes that the majority places that burden of proving

prejudice on the defendant. Subsequently, on pp. ___-___ of 199 U.S.App.D.C., pp. 309-310 of 624 F.2d, they take the first two steps on the run and adroitly switch the burden to the Government "even if an investigation would not have produced a scintilla of evidence favorable to the defense . . ." (Majority opinion, p. ___ of 199 U.S.App.D.C., p. 310 of 624 F.2d).

[23] The majority attempt to make it appear that they are fighting for "equal justice" for the poor. However, they confine their benefaction to undeserving criminals who are poor and ignore the deserving victims who are also poor — and victimized by the criminal depredations of small groups of vicious criminals who prey largely on the poor sector. To this end they copy the statement from *Griffin v. Illinois,* 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed. 891 (1956) that: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." This is a simplistic attempt to raise a false issue and one not presented by the facts of this case. That a defendant may not be rich does not give him a right to use perjured testimony in his defense. A rich man does not have that right and neither does a poor man. Likewise no defendant, be he rich or poor, has a right to have his conviction set aside because his lawyer did not investigate to obtain facts in support of a fabricated defense. What my writing colleague is attempting to do is to impose his personal social philosophy that the courts are "wreaking vengeance" when they impose sentences on defendants such as Decoster. *Bazelon, To "Establish Justice" and "Insure Domestic Tranquility,"* 61 A.B.A.J. 1060, 1062 (1975). It is just as wrong for a judge to use his individual social philosophy to *acquit* a defendant as it would be to exercise that individual philosophy to *convict* an accused person.

United States v Scheffer

523 U.S. 303 (1998)

UNITED STATES

v.

SCHEFFER

No. 96-1133.

United States Supreme Court.

Argued November 3, 1997.

Decided March 31, 1998.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Justice Thomas delivered the opinion of the Court with respect to Parts I, II—A, and II—D, concluding that Military Rule of Evidence 707 does not unconstitutionally abridge the right of accused members of the military to present a defense. Pp. 308-312, 315-317.

(a) A defendant's right to present relevant evidence is subject to reasonable restrictions to accommodate other legitimate interests in the criminal trial process. See, *e. g., Rock* v. *Arkansas,* 483 U. S. 44, 55. State and federal rulemakers therefore have broad latitude under the Constitution to establish rules excluding evidence. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *E. g., id.,* at 56. This Court has found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. See*, e. g., id.,* at 58. Rule 707 serves the legitimate interest of ensuring that only reliable evidence is introduced. There is simply no consensus that polygraph evidence is reliable: The scientific community and the state and federal courts are extremely polarized on the matter. Pp. 308-312.

305*305 (b) Rule 707 does not implicate a sufficiently weighty interest of the accused to raise a constitutional concern under this Court's precedents. The three cases principally relied upon by the Court of Appeals, *Rock, supra,* at 57, *Washington* v. *Texas,* 388 U. S. 14, 23, and*Chambers* v. *Mississippi,* 410 U. S. 284, 302-303, do not support a right to

introduce polygraph evidence, even in very narrow circumstances. The exclusions of evidence there declared unconstitutional significantly undermined fundamental elements of the accused's defense. Such is not the case here, where the court members heard all the relevant details of the charged offense from respondent's perspective, and Rule 707 did not preclude him from introducing any factual evidence, but merely barred him from introducing expert opinion testimony to bolster his own credibility. Moreover, in contrast to the rule at issue in *Rock, supra,* at 52, Rule 707 did not prohibit respondent from testifying on his own behalf; he freely exercised his choice to convey his version of the facts at trial. Pp. 315-317.

Thomas, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II—A, and II—D, in which Rehnquist, C. J., and O'Connor, Scalia, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined, and an opinion with respect to Parts II—B and II—C, in which Rehnquist, C. J., and Scalia and Souter, JJ., joined. Kennedy, J., filed an opinion concurring in part and concurring in the judgment, in which O'Connor, Ginsburg, and Breyer, JJ., joined, *post,* p. 318. Stevens, J., filed a dissenting opinion, *post,* p. 320.

Deputy Solicitor General Dreeben argued the cause for the United States. With him on the briefs were *Acting Solicitor General Dellinger, Acting Solicitor General Waxman, Acting Assistant Attorney General Keeney, David C. Frederick, Joel M. Gershowitz,* and *Michael J. Breslin.*

Kim L. Sheffield argued the cause for respondent. With her on the brief were *Carol L. Hubbard, Michael L. McIntyre, Robin S. Wink,* and *W. Craig Mullen.*[*]

305*305 Justice Thomas announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II—A, and II—D, and an opinion with respect to Parts II—B and II—C, in which The Chief Justice, Justice Scalia, and Justice Souter join.

This case presents the question whether Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, unconstitutionally abridges the right of accused members of the military to present a defense. We hold that it does not.

I

In March 1992, respondent Edward Scheffer, an airman stationed at March Air Force Base in California, volunteered to work as an informant on drug investigations for the Air Force Office of Special Investigations (OSI). His OSI supervisors advised him that, from time to time during the course of his undercover work, they would ask him to submit to drug testing and polygraph examinations. In early April, 306*306 one of the

OSI agents supervising respondent requested that he submit to a urine test. Shortly after providing the urine sample, but before the results of the test were known, respondent agreed to take a polygraph test administered by an OSI examiner. In the opinion of the examiner, the test "indicated no deception" when respondent denied using drugs since joining the Air Force.[1]

On April 30, respondent unaccountably failed to appear for work and could not be found on the base. He was absent without leave until May 13, when an Iowa state patrolman arrested him following a routine traffic stop and held him for return to the base. OSI agents later learned that respondent's urinalysis revealed the presence of methamphetamine.

Respondent was tried by general court-martial on charges of using methamphetamine, failing to go to his appointed place of duty, wrongfully absenting himself from the base for 13 days, and, with respect to an unrelated matter, uttering 17 insufficient funds checks. He testified at trial on his own behalf, relying upon an "innocent ingestion" theory and denying that he had knowingly used drugs while working for OSI. On cross-examination, the prosecution attempted to impeach respondent with inconsistencies between his trial testimony and earlier statements he had made to OSI.

Respondent sought to introduce the polygraph evidence in support of his testimony that he did not knowingly use drugs. The military judge denied the motion, relying on Military Rule of Evidence 707, which provides, in relevant part:

> *"(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, 307*307 failure to take, or taking of a polygraph examination, shall not be admitted into evidence." The military judge determined that Rule 707 was constitutional because "the President may, through the Rules of Evidence, determine that credibility is not an area in which a fact finder needs help, and the polygraph is not a process that has sufficient scientific acceptability to be relevant."*[2] *App. 28. He further reasoned that the fact finder might give undue weight to the polygraph examiner's testimony, and that collateral arguments about such evidence could consume "an inordinate amount of time and expense."Ibid.*

Respondent was convicted on all counts and was sentenced to a bad-conduct discharge, confinement for 30 months, total forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The Air Force Court of Criminal Appeals affirmed in all material respects, explaining that Rule 707 "does not arbitrarily limit the accused's ability to present reliable evidence." 41 M. J. 683, 691 (1995) (en banc).

By a 3-to-2 vote, the United States Court of Appeals for the Armed Forces reversed. 44 M. J. 442 (1996). Without pointing to any particular language in the Sixth Amendment, the Court of Appeals held that "[a] *per se* exclusion of polygraph evidence offered by an accused to rebut an attack on his credibility . . . violates his Sixth Amendment right to present a defense." *Id.,* at 445.[3] Judge Crawford, dissenting, 308*308 stressed that a defendant's right to present relevant evidence is not absolute, that relevant evidence can be excluded for valid reasons, and that Rule 707 was supported by a number of

valid justifications. *Id.,* at 449-451. We granted certiorari, 520 U. S. 1227 (1997), and we now reverse.

II

A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions.[4] See *Taylor* v. *Illinois,* 484 U. S. 400, 410 (1988); *Rock* v. *Arkansas,*483 U. S. 44, 55 (1987); *Chambers* v. *Mississippi,* 410 U. S. 284, 295 (1973). A defendant's interest in presenting such evidence may thus " `bow to accommodate other legitimate interests in the criminal trial process.' " *Rock, supra,* at 55 (quoting *Chambers, supra,* at 295); accord,*Michigan* v. *Lucas,* 500 U. S. 145, 149 (1991). As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." *Rock, supra,* at 56; accord, *Lucas, supra,* at 151. Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused. See *Rock, supra,* at 58; *Chambers, supra,* at 302; *Washington* v. *Texas,* 388 U. S. 14, 22-23 (1967).

309*309 Rule 707 serves several legitimate interests in the criminal trial process. These interests include ensuring that only reliable evidence is introduced at trial, preserving the court members' role in determining credibility, and avoiding litigation that is collateral to the primary purpose of the trial.[5] The Rule is neither arbitrary nor disproportionate in promoting these ends. Nor does it implicate a sufficiently weighty interest of the defendant to raise a constitutional concern under our precedents.

A

State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Indeed, the exclusion of unreliable evidence is a principal objective of many evidentiary rules. See, *e. g.,* Fed. Rules Evid. 702, 802, 901; see also *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U. S. 579, 589 (1993).

The contentions of respondent and the dissent notwithstanding, there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community

remains extremely polarized about the reliability of polygraph techniques. 1 D. Faigman, D. Kaye, M. Saks, & J. Sanders, Modern Scientific Evidence 565, n. †, § 14-2.0 to § 14-7.0 (1997); see also 1 P. Giannelli & E. Imwinkelried, Scientific 310*310 Evidence § 8-2(C), pp. 225-227 (2d ed. 1993) (hereinafter Giannelli & Imwinkelried); 1 J. Strong, McCormick on Evidence § 206, p. 909 (4th ed. 1992) (hereinafter McCormick). Some studies have concluded that polygraph tests overall are accurate and reliable. See, *e. g.,* S. Abrams, The Complete Polygraph Handbook 190-191 (1989) (reporting the overall accuracy rate from laboratory studies involving the common "control question technique" polygraph to be "in the range of 87 percent"). Others have found that polygraph tests assess truthfulness significantly less accurately—that scientific field studies suggest the accuracy rate of the "control question technique" polygraph is "little better than could be obtained by the toss of a coin," that is, 50 percent. See Iacono & Lykken, The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests, in 1 Modern Scientific Evidence, *supra,* § 14-5.3, at 629 (hereinafter Iacono & Lykken).[6]

This lack of scientific consensus is reflected in the disagreement among state and federal courts concerning both the 311*311 admissibility and the reliability of polygraph evidence.[7] Although some Federal Courts of Appeals have abandoned the *per se* rule excluding polygraph evidence, leaving its admission or exclusion to the discretion of district courts under *Daubert,*see, *e. g., United States* v. *Posado,* 57 F. 3d 428, 434 (CA5 1995); *United States* v. *Cordoba,*104 F. 3d 225, 228 (CA9 1997), at least one Federal Circuit has recently reaffirmed its *per se*ban, see *United States* v. *Sanchez,* 118 F. 3d 192, 197 (CA4 1997), and another recently noted that it has "not decided whether polygraphy has reached a sufficient state of reliability to be admissible." *United States* v. *Messina,* 131 F. 3d 36, 42 (CA2 1997). Most States maintain *per se* rules excluding polygraph evidence. See, *e. g., State* v. *Porter,* 241 Conn. 57, 92-95, 698 A. 2d 739, 758-759 (1997); *People* v. *Gard,* 158 Ill. 2d 191, 202-204, 632 N. E. 2d 1026, 1032 (1994); *In re Odell,* 672 A. 2d 457, 459 (RI 1996) *(per curiam); Perkins* v. *State,* 902 S. W. 2d 88, 94-95 (Ct. App. Tex. 1995). New Mexico is unique in making polygraph evidence generally admissible without the prior stipulation of the parties and without significant restriction. See N. M. 312*312 Rule Evid. § 11-707.[8] Whatever their approach, state and federal courts continue to express doubt about whether such evidence is reliable. See, *e. g., United States* v. *Messina, supra,* at 42; *United States* v. *Posado, supra,* at 434; *State* v. *Porter, supra,* at 126-127, 698 A. 2d, at 774; *Perkins* v. *State, supra,* at 94; *People* v. *Gard, supra,* at 202-204, 632 N. E. 2d, at 1032; *In re Odell, supra,* at 459.

The approach taken by the President in adopting Rule 707—excluding polygraph evidence in all military trials—is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence. Although the degree of reliability of polygraph evidence may depend upon a variety of identifiable factors, there is simply no way to know in a particular case whether a polygraph examiner's conclusion is accurate, because certain doubts and uncertainties plague even the best polygraph exams. Individual jurisdictions therefore may reasonably reach differing conclusions as to whether polygraph evidence should be admitted. We cannot say, then, that presented with such widespread uncertainty, the President acted arbitrarily or disproportionately in promulgating a *per se* rule excluding all polygraph evidence.

B

It is equally clear that Rule 707 serves a second legitimate governmental interest: Preserving the court members' core 313*313 function of making credibility determinations in criminal trials. A fundamental premise of our criminal trial system is that "the *jury* is the lie detector." *United States* v. *Barnard,* 490 F. 2d 907, 912 (CA9 1973) (emphasis added), cert. denied, 416 U. S. 959 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men."*Aetna Life Ins. Co.* v. *Ward,* 140 U. S. 76, 88 (1891).

By its very nature, polygraph evidence may diminish the jury's role in making credibility determinations. The common form of polygraph test measures a variety of physiological responses to a set of questions asked by the examiner, who then interprets these physiological correlates of anxiety and offers an opinion to the jury about whether the witness—often, as in this case, the accused——was deceptive in answering questions about the very matters at issue in the trial. See 1 McCormick § 206.[9] Unlike other expert witnesses who testify about factual matters outside the jurors' knowledge, such as the analysis of fingerprints, ballistics, or DNA found at a crime scene, a polygraph expert can supply the jury only with another opinion, in addition to its own, about whether the witness was telling the truth. Jurisdictions, in promulgating rules of evidence, may legitimately be concerned about the risk that juries will give excessive 314*314 weight to the opinions of a polygrapher, clothed as they are in scientific expertise and at times offering, as in respondent's case, a conclusion about the ultimate issue in the trial. Such jurisdictions may legitimately determine that the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt. Those jurisdictions may also take into account the fact that a judge cannot determine, when ruling on a motion to admit polygraph evidence, whether a particular polygraph expert is likely to influence the jury unduly. For these reasons, the President is within his constitutional prerogative to promulgate a *per se* rule that simply excludes all such evidence.

C

A third legitimate interest served by Rule 707 is avoiding litigation over issues other than the guilt or innocence of the accused. Such collateral litigation prolongs criminal

trials and threatens to distract the jury from its central function of determining guilt or innocence. Allowing proffers of polygraph evidence would inevitably entail assessments of such issues as whether the test and control questions were appropriate, whether a particular polygraph examiner was qualified and had properly interpreted the physiological responses, and whether other factors such as countermeasures employed by the examinee had distorted the exam results. Such assessments would be required in each and every case.[10] It thus offends no constitutional principle for the President to conclude that a *per se* rule excluding all polygraph evidence is appropriate. Because litigation over the admissibility of polygraph evidence is by its very nature collateral, 315*315 a *per se* rule prohibiting its admission is not an arbitrary or disproportionate means of avoiding it.[11]

D

The three of our precedents upon which the Court of Appeals principally relied, *Rock* v.*Arkansas, Washington* v. *Texas,* and *Chambers* v. *Mississippi,* do not support a right to introduce polygraph evidence, even in very narrow circumstances. The exclusions of evidence that we declared unconstitutional in those cases significantly undermined fundamental elements of the defendant's defense. Such is not the case here.

In *Rock,* the defendant, accused of a killing to which she was the only eyewitness, was allegedly able to remember the facts of the killing only after having her memory hypnotically refreshed. See *Rock* v. *Arkansas,* 483 U. S., at 46. Because Arkansas excluded all hypnotically refreshed testimony, the defendant was unable to testify about certain relevant facts, including whether the killing had been accidental. See *id.,* at 47-49. In holding that the exclusion of this evidence violated the defendant's "right to present a defense," we noted that the rule deprived the jury of the testimony of the only witness who was at the scene and had firsthand knowledge of the facts. See *id.,* at 57. Moreover, the rule infringed upon the defendant's interest in testifying in her own defense——an interest that we deemed particularly significant, as it is the defendant who is the target of any criminal 316*316 prosecution. See *id.,* at 52. For this reason, we stated that a defendant ought to be allowed "to present his own version of events in his own words." *Ibid.*

In *Washington,* the statutes involved prevented codefendants or coparticipants in a crime from testifying for one another and thus precluded the defendant from introducing his accomplice's testimony that the accomplice had in fact committed the crime. See *Washington* v. *Texas,* 388 U. S., at 16-17. In reversing Washington's conviction, we held that the Sixth Amendment was violated because "the State arbitrarily denied [the defendant] the right to put on the stand a witness who was physically and mentally capable of testifying to events that he had personally observed." *Id.,* at 23.[12]

In *Chambers,* we found a due process violation in the combined application of Mississippi's common-law "voucher rule," which prevented a party from impeaching his own witness, and its hearsay rule that excluded the testimony of three persons to whom that witness had confessed. See *Chambers* v. *Mississippi,* 410 U. S., at 302. *Chambers* specifically confined its holding to the "facts and circumstances" presented in that case; we thus stressed that the ruling did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." *Id.,* at 302-303. *Chambers* therefore does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state or federal rule excludes favorable evidence.

Rock, Washington, and *Chambers* do not require that Rule 707 be invalidated, because, unlike the evidentiary rules at issue in those cases, Rule 707 does not implicate any significant 317*317interest of the accused. Here, the court members heard all the relevant details of the charged offense from the perspective of the accused, and the Rule did not preclude him from introducing any factual evidence.[13] Rather, respondent was barred merely from introducing expert opinion testimony to bolster his own credibility. Moreover, in contrast to the rule at issue in *Rock,* Rule 707 did not prohibit respondent from testifying on his own behalf; he freely exercised his choice to convey his version of the facts to the court-martial members. We therefore cannot conclude that respondent's defense was significantly impaired by the exclusion of polygraph evidence. Rule 707 is thus constitutional under our precedents.

* * *

For the foregoing reasons, Military Rule of Evidence 707 does not unconstitutionally abridge the right to present a defense. The judgment of the Court of Appeals is reversed.

It is so ordered.

318*318 Justice Kennedy, with whom Justice O'Connor, Justice Ginsburg, and Justice Breyer join, concurring in part and concurring in the judgment.

I join Parts I, II—A, and II—D of the opinion of the Court.

In my view it should have been sufficient to decide this case to observe, as the principal opinion does, that various courts and jurisdictions "may reasonably reach differing conclusions as to whether polygraph evidence should be admitted." *Ante,* at 312. The continuing, good-faith disagreement among experts and courts on the subject of polygraph reliability counsels against our invalidating a *per se* exclusion of polygraph results or of the fact an accused has taken or refused to take a polygraph examination.

If we were to accept respondent's position, of course, our holding would bind state courts, as well as military and federal courts. Given the ongoing debate about polygraphs, I agree the rule of exclusion is not so arbitrary or disproportionate that it is unconstitutional.

I doubt, though, that the rule of *per se* exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does. Though the considerable discretion given to the trial court in admitting or excluding scientific evidence is not a constitutional mandate, see *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U. S. 579, 587 (1993), there is some tension between that rule and our holding today. And, as Justice Stevens points out, there is much inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests.

With all respect, moreover, it seems the principal opinion overreaches when it rests its holding on the additional ground that the jury's role in making credibility determinations is diminished when it hears polygraph evidence. I am in substantial agreement with Justice Stevens' observation that the argument demeans and mistakes the role and 319*319 competence of jurors in deciding the factual question of guilt or innocence. *Post,* at 336-337. In the last analysis the principal opinion says it is unwise to allow the jury to hear "a conclusion about the ultimate issue in the trial." *Ante,* at 314. I had thought this tired argument had long since been given its deserved repose as a categorical rule of exclusion. Rule 704(a) of the Federal Rules of Evidence states: "Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The Advisory Committee's Notes state:

> *"The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from `usurping the province of the jury,' is aptly characterized as `empty rhetoric.' 7 Wigmore § 1920, p. 17." Advisory Committee's Notes on Fed. Rule Evid. 704, 28 U. S. C., p. 888.*

The principal opinion is made less convincing by its contradicting the rationale of Rule 704 and the well considered reasons the Advisory Committee recited in support of its adoption.

The attempt to revive this outmoded theory is especially inapt in the context of the military justice system; for the one narrow exception to the abolition of the ultimate issue rule still surviving in the Federal Rules of Evidence has been omitted from the corresponding rule adopted for the military. The ultimate issue exception in the Federal Rules of Evidence is as follows:

> *"No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may 320*320 state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime*

charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone." Fed. Rule Evid. 704(b).

The drafting committee for the Military Rules of Evidence renounced even this remnant. It said: "The statutory qualifications for military court members reduce the risk that military court members will be unduly influenced by the presentation of ultimate opinion testimony from psychiatric experts." Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence, App. 22, p. A22-48 (1995 ed.). Any supposed need to protect the role of the finder of fact is diminished even further by this specific acknowledgment that members of military courts are not likely to give excessive weight to opinions of experts or otherwise to be misled or confused by their testimony. Neither in the federal system nor in the military courts, then, is it convincing to say that polygraph test results should be excluded because of some lingering concern about usurping the jury's responsibility to decide ultimate issues.

Justice Stevens, dissenting.

The United States Court of Appeals for the Armed Forces held that the President violated the Constitution in June 1991, when he promulgated Rule 707 of the Military Rules of Evidence. Had I been a member of that court, I would not have decided that question without first requiring the parties to brief and argue the antecedent question whether Rule 707 violates Article 36(a) of the Uniform Code of Military Justice, 10 U. S. C. § 836(a). As presently advised, I am persuaded that the Rule does violate the statute and should be held invalid for that reason. I also agree with the Court of Appeals that the Rule is unconstitutional. This Court's contrary holding rests on a serious undervaluation of the importance of the citizen's constitutional right to present a defense 321*321 to a criminal charge and an unrealistic appraisal of the importance of the governmental interests that undergird the Rule. Before discussing the constitutional issue, I shall comment briefly on the statutory question.

I

Rule 707 is a blanket rule of exclusion.[1] No matter how reliable and how probative the results of a polygraph test may be, Rule 707 categorically denies the defendant any opportunity to persuade the court that the evidence should be received for any purpose. Indeed, even if the parties stipulate in advance that the results of a lie detector test may be admitted, the Rule requires exclusion.

The principal charge against the respondent in this case was that he had knowingly used methamphetamine. His principal defense was "innocent ingestion"; even if the urinalysis test conducted on April 7, 1992, correctly indicated that he did ingest the substance, he claims to have been unaware of that fact. The results of the lie detector

test conducted three days later, if accurate, constitute factual evidence that his physical condition at that time was consistent with the theory of his defense and inconsistent with the theory of the prosecution. The results were also relevant because they tended to confirm the credibility of his testimony. Under Rule 707, even if the results of the polygraph test were more reliable than the results of the urinalysis, the weaker evidence is admissible and the stronger evidence is inadmissible.

Under the now discredited reasoning in a case decided 75 years ago, *Frye* v. *United States,* 54 App. D. C. 46, 293 322*322 F. 1013 (1923), that anomalous result would also have been reached in nonmilitary cases tried in the federal courts. In recent years, however, we have not only repudiated *Frye* `s general approach to scientific evidence, but the federal courts have also been engaged in the process of rejecting the oncepopular view that all lie detector evidence should be categorically inadmissible.[2] Well reasoned opinions are concluding, consistently with this Court's decisions in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.,* 509 U. S. 579 (1993), and *General Electric Co.* v. *Joiner,* 522 U. S. 136 (1997), that the federal rules wisely allow district judges to exercise broad discretion when evaluating the admissibility of scientific evidence.[3] Those opinions correctly observe that the rules of evidence generally recognized in the trial of civil and criminal cases in the federal courts do not contain any blanket prohibition against the admissibility of polygraph evidence.

323*323 In accord with the modern trend of decisions on this admissibility issue, in 1987 the Court of Military Appeals held that an accused was "entitled to attempt to lay" the foundation for admission of favorable polygraph evidence. *United States* v. *Gipson,* 24 M. J. 246, 253 (1987). The President responded to *Gipson* by adopting Rule 707. The governing statute authorized him to promulgate evidentiary rules "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U. S. C. § 836(a).[4] Thus, if there are military concerns that warrant a special rule for military tribunals, the statute gives him ample authority to promulgate special rules that take such concerns into account.

Rule 707 has no counterpart in either the Federal Rules of Evidence or the Federal Rules of Criminal Procedure. Moreover, to the extent that the use of the lie detector plays a special role in the military establishment, military practices are more favorable to a rule of admissibility than is the less structured use of lie detectors in the civilian sector of our society. That is so because the military carefully regulates the administration of polygraph tests to ensure reliable results. The military maintains "very stringent standards for polygraph examiners"[5] and has established its own Polygraph 324*324 Institute, which is "generally considered to be the best training facility for polygraph examiners in the United States."[6] The military has administered hundreds of thousands of such tests and routinely uses their results for a wide variety of official decisions.[7]

325*325 The stated reasons for the adoption of Rule 707 do not rely on any special military concern. They merely invoke three interests: (1) the interest in excluding unreliable evidence; (2) the interest in protecting the trier of fact from being misled by an unwarranted assumption that the polygraph evidence has "an aura of near

infallibility"; and (3) the interest in avoiding collateral debates about the admissibility of particular test results.

It seems clear that those interests pose less serious concerns in the military than in the civilian context. Disputes about the qualifications of the examiners, the equipment, and the testing procedures should seldom arise with respect to the tests conducted by the military. Moreover, there surely is no reason to assume that military personnel who perform the factfinding function are less competent than ordinary jurors to assess the reliability of particular results, or their relevance to the issues.[8] Thus, there is no identifiable military concern that justifies the President's promulgation of a special military rule that is more burdensome to the accused in military trials than the evidentiary rules applicable to the trial of civilians.

It, therefore, seems fairly clear that Rule 707 does not comply with the statute. I do not rest on this ground, however, because briefing might persuade me to change my views, and because the Court has decided only the constitutional question.

II

The Court's opinion barely acknowledges that a person accused of a crime has a constitutional right to present a 326*326 defense. It is not necessary to point to "any particular language in the Sixth Amendment," *ante,* at 307, to support the conclusion that the right is firmly established. It is, however, appropriate to comment on the importance of that right before discussing the three interests that the Government relies upon to justify Rule 707.

The Sixth Amendment provides that "the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." Because this right "is an essential attribute of the adversary system itself," we have repeatedly stated that few rights "are more fundamental than that of an accused to present witnesses in his own defense."[9] According to Joseph Story, that provision was included in the Bill of Rights in reaction to a notorious common-law rule categorically excluding defense evidence in treason and felony cases.[10] Our holding in *Washington* v. *Texas,* 388 U. S. 14 (1967), that this right is applicable to the States, rested on the premises that it "is in plain terms the right to present a defense" and that it "is a fundamental element of due process 327*327 of law."[11] Consistent with the history of the provision, the Court in that case held that a state rule of evidence that excluded "whole categories" of testimony on the basis of a presumption of unreliability was unconstitutional.[12]

The blanket rule of inadmissibility held invalid in *Washington* v. *Texas* covered the testimony of alleged accomplices. Both before and after that decision, the Court has recognized the potential injustice produced by rules that exclude entire categories of

relevant evidence that is potentially unreliable. At common law interested parties such as defendants,[13] their spouses,[14] and their co-conspirators[15] were not competent 328*328 witnesses. "Nor were those named the only grounds of exclusion from the witness stand; conviction of crime, want of religious belief, and other matters were held sufficient. Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors." *Benson* v. *United States,* 146 U. S. 325, 336 (1892). And, of course, under the regime established by *Frye* v. *United States,* scientific evidence was inadmissible unless it met a stringent "general acceptance" test. Over the years, with respect to category after category, strict rules of exclusion have been replaced by rules that broaden the discretion of trial judges to admit potentially unreliable evidence and to allow properly instructed juries to evaluate its weight. While that trend has included both rulemaking and nonconstitutional judicial decisions, the direction of the trend has been consistent and it has been manifested in constitutional holdings as well.

Commenting on the trend that had followed the decision in *Benson,* the Court in 1918 observed that in the

> *"years which have elapsed since the decision of the Ben- son Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the 329*329 truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain." Rosen v. United States, 245 U. S. 467, 471.*

See also *Funk* v. *United States,* 290 U. S. 371, 377-378 (1933). It was in a case involving the disqualification of spousal testimony that Justice Stewart stated: "Any rule that impedes the discovery of truth in a court of law impedes as well the doing of justice." *Hawkins* v. *United States,* 358 U. S. 74, 81 (1958) (concurring opinion).

State evidentiary rules may so seriously impede the discovery of truth, "as well as the doing of justice," that they preclude the "meaningful opportunity to present a complete defense" that is guaranteed by the Constitution, *Crane* v. *Kentucky,* 476 U. S. 683, 690 (1986) (internal quotation marks omitted).[16] In *Chambers* v. *Mississippi,* 410 U. S. 284, 302 330*330 (1973), we concluded that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice."[17] As the Court notes today, restrictions on the "defendant's right to present relevant evidence," *ante,* at 308, must comply with the admonition in *Rock* v. *Arkansas,* 483 U. S. 44, 56 (1987), that they "may not be arbitrary or disproportionate to the purposes they are designed to serve." Applying that admonition to Arkansas' blanket rule prohibiting the admission of hypnotically refreshed testimony, we concluded that a "State's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions that may be reliable in an

individual case." *Id.,* at 61. That statement of constitutional law is directly relevant to this case.

331*331 III

The constitutional requirement that a blanket exclusion of potentially unreliable evidence must be proportionate to the purposes served by the rule obviously makes it necessary to evaluate the interests on both sides of the balance. Today the Court all but ignores the strength of the defendant's interest in having polygraph evidence admitted in certain cases. As the facts of this case illustrate, the Court is quite wrong in assuming that the impact of Rule 707 on respondent's defense was not significant because it did not preclude the introduction of any "factual evidence" or prevent him from conveying "his version of the facts to the court-martial members." *Ante,* at 317. Under such reasoning, a rule that excluded the testimony of alibi witnesses would not be significant as long as the defendant is free to testify himself. But given the defendant's strong interest in the outcome— an interest that was sufficient to make his testimony presumptively untrustworthy and therefore inadmissible at common law—his uncorroborated testimony is certain to be less persuasive than that of a third-party witness. A rule that bars him "from introducing expert opinion testimony to bolster his own credibility,"*ibid.,* unquestionably impairs any "meaningful opportunity to present a complete defense"; indeed, it is sure to be outcome determinative in many cases.

Moreover, in this case the results of the polygraph test, taken just three days after the urinalysis, constitute independent factual evidence that is not otherwise available and that strongly supports his defense of "innocent ingestion." Just as flight or other evidence of "consciousness of guilt" may sometimes be relevant, on some occasions evidence of "consciousness of innocence" may also be relevant to the central issue at trial. Both the answers to the questions propounded by the examiner, and the physical manifestations produced by those utterances, were probative of an innocent state of mind shortly after he ingested the drugs. In Dean Wigmore's view, both "conduct" and "utterances" may constitute332*332 factual evidence of a "consciousness of innocence."[18] As the Second Circuit has held, when there is a serious factual dispute over the "basic defense [that defendant] was unaware of any criminal wrongdoing," evidence of his innocent state of mind is "critical to a fair adjudication of criminal charges."[19] The exclusion of the test results in this case cannot be fairly equated with a ruling that merely prevented the defendant from encumbering the record with cumulative evidence. Because the Rule may well have affected the outcome of the trial, it unquestionably "infringed upon a weighty interest of the accused." *Ante,* at 308.

The question, then, is whether the three interests on which the Government relies are powerful enough to support a categorical rule excluding the results of all polygraph tests no matter how unfair such a rule may be in particular cases.

333*333 *Reliability*

There are a host of studies that place the reliability of polygraph tests at 85% to 90%.[20] While critics of the polygraph argue that accuracy is much lower, even the studies cited by the critics place polygraph accuracy at 70%.[21] Moreover, to the extent that the polygraph errs, studies have repeatedly shown that the polygraph is more likely to find innocent people guilty than vice versa.[22] Thus, exculpatory polygraphs—like the one in this case—are likely to be more reliable than inculpatory ones.

Of course, within the broad category of lie detector evidence, there may be a wide variation in both the validity and the relevance[23] of particular test results. Questions about the examiner's integrity, independence, choice of questions, or training in the detection of deliberate attempts to provoke misleading physiological responses may justify exclusion of 334*334 specific evidence. But such questions are properly addressed in adversary proceedings; they fall far short of justifying a blanket exclusion of this type of expert testimony.

There is no legal requirement that expert testimony must satisfy a particular degree of reliability to be admissible. Expert testimony about a defendant's "future dangerousness" to determine his eligibility for the death penalty, even if wrong "most of the time," is routinely admitted.*Barefoot* v. *Estelle,* 463 U. S. 880, 898-901 (1983). Studies indicate that handwriting analysis, and even fingerprint identifications, may be less trustworthy than polygraph evidence in certain cases.[24] And, of course, even highly dubious eyewitness 335*335 testimony is, and should be, admitted and tested in the crucible of cross-examination. The Court's reliance on potential unreliability as a justification for a categorical rule of inadmissibility reveals that it is "overly pessimistic about the capabilities of the jury and of the adversary system generally. Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."*Daubert,* 509 U. S., at 596.[25]

336*336 *The Role of the Jury*

It is the function of the jury to make credibility determinations. In my judgment evidence that tends to establish either a consciousness of guilt or a consciousness of innocence may be of assistance to the jury in making such determinations. That also was the opinion of Dean Wigmore:

> *"Let the accused's whole conduct come in; and whether it tells for consciousness of guilt or for consciousness of innocence, let us take it for what it is worth, remembering that in either case it is open to varying explanations and is not to be emphasized. Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations." 2 J. Wigmore, Evidence § 293, p. 232 (J. Chadbourn rev. ed. 1979).*

There is, of course, some risk that some "juries will give excessive weight to the opinions of a polygrapher, clothed as they are in scientific expertise," *ante,* at 313-314. In my judgment, however, it is much more likely that juries will be guided by the instructions

of the trial judge concerning the credibility of expert as well as lay witnesses. The strong presumption that juries will follow the court's instructions, see, *e. g., Richardson* v. *Marsh,* 481 U. S. 200, 211 (1987),applies to exculpatory as well as inculpatory evidence. Common 337*337 sense suggests that the testimony of disinterested third parties that is relevant to the jury's credibility determination will assist rather than impair the jury's deliberations. As with the reliance on the potential unreliability of this type of evidence, the reliance on a fear that the average jury is not able to assess the weight of this testimony reflects a distressing lack of confidence in the intelligence of the average American.[26]

Collateral Litigation

The potential burden of collateral proceedings to determine the examiner's qualifications is a manifestly insufficient justification for a categorical exclusion of expert testimony. Such proceedings are a routine predicate for the admission of any expert testimony, and may always give rise to searching cross-examination. If testimony that is critical to a fair determination of guilt or innocence could be excluded for that reason, the right to a meaningful opportunity to present a defense would be an illusion.

It is incongruous for the party that selected the examiner, the equipment, the testing procedures, and the questions asked of the defendant to complain about the examinee's burden of proving that the test was properly conducted. While there may well be a need for substantial collateral proceedings when the party objecting to admissibility has a basis for questioning some aspect of the examination, it seems quite obvious that the Government is in no position to challenge 338*338 the competence of the procedures that it has developed and relied upon in hundreds of thousands of cases.

In all events the concern about the burden of collateral debates about the integrity of a particular examination, or the competence of a particular examiner, provides no support for a categorical rule that requires exclusion even when the test is taken pursuant to a stipulation and even when there has been a stipulation resolving all potential collateral issues. Indeed, in this very case there would have been no need for any collateral proceedings because respondent did not question the qualifications of the expert who examined him, and surely the Government is in no position to argue that one who has successfully completed its carefully developed training program[27] is unqualified. The interest in avoiding burdensome collateral proceedings might support a rule prescribing minimum standards that must be met before any test is admissible,[28] but it surely does not support the blunderbuss at issue.[29]

IV

The Government's concerns would unquestionably support the exclusion of polygraph evidence in particular cases, and may well be sufficient to support a narrower rule designed to respond to specific concerns. In my judgment, however, 339*339 those concerns are plainly insufficient to support a categorical rule that prohibits the admission of polygraph evidence in all cases, no matter how reliable or probative the evidence may be. Accordingly, I respectfully dissent.

[*] Briefs of *amici curiae* urging reversal were filed for the State of Connecticut et al. by *John M. Bailey,* Chief State's Attorney of Connecticut, and *Judith Rossi,* Senior Assistant State's Attorney, and by the Attorneys General for their respective jurisdictions as follows: *Bill Pryor* of Alabama, *Bruce M. Botelho* of Alaska, *Winston Bryant* of Arkansas, *Daniel E. Lungren* of California, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia,*Jeffrey A. Modisett* of Indiana, *Carla J. Stovall* of Kansas, *Richard P. Ieyoub* of Louisiana, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Scott Harshbarger* of Massachusetts, *Mike Moore* of Mississippi,*Joseph P. Mazurek* of Montana, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *Philip T. McLaughlin* of New Hampshire, *Dennis C. Vacco* of New York, *Michael F. Easley* of North Carolina, *Betty D. Montgomery* of Ohio, *Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Jeffrey B. Pine* of Rhode Island, *Charles Molony Condon* of South Carolina, *Richard Cullen* of Virginia, *Christine O. Gregoire* of Washington, *Robert A. Butterworth* of Florida, and *William U. Hill* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson.*

Briefs of *amici curiae* urging affirmance were filed for the American Polygraph Association by *Gordon L. Vaughan;* for the United States Army Defense Appellate Division by *John T. Phelps II;* for the Committee of Concerned Social Scientists by *Charles F. Peterson;* for the National Association of Criminal Defense Lawyers by*Charles W. Daniels* and *Barbara E. Bergman;* and for the United States Navy-Marine Corps Appellate Defense Division by *Syed N. Ahmad.*

[1] The OSI examiner asked three relevant questions: (1)"Since you've been in the [Air Force], have you used any illegal drugs?"; (2) "Have you lied about any of the drug information you've given OSI?"; and (3) "Besides your parents, have you told anyone you're assistingOSI?" Respondent answered "no" to each question. App. 12.

[2] Article 36 of the Uniform Code of Military Justice authorizes the President, as Commander in Chief of the Armed Forces, see U. S. Const., Art. II, § 2, to promulgate rules of evidence for military courts: "Pretrial, trial, and post-trial procedures, including modes of proof, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence

generally recognized in the trial of criminal cases in the United States district courts." 10 U. S. C. § 836(a).

[3] In this Court, respondent cites the Sixth Amendment's Compulsory Process Clause as the specific constitutional provision supporting his claim. He also briefly contends that the "combined effect" of the Fifth and Sixth Amendments confers upon him the right to a "`meaningful opportunity to present a complete defense,' "*Crane* v. *Kentucky,* 476 U. S. 683, 690 (1986) (citations omitted), and that this right in turn encompasses a constitutional right to present polygraph evidence to bolster his credibility.

[4] The words "defendant" and "jury" are used throughout in reference to general principles of law and in discussing nonmilitary precedents. In reference to this case or to the military specifically, the terms "court," "court members," or "court-martial" are used throughout, as is the military term "accused," rather than the civilian term "defendant."

[5] These interests, among others, were recognized by the drafters of Rule 707, who justified the Rule on the following grounds: the risk that court members would be misled by polygraph evidence; the risk that the traditional responsibility of court members to ascertain the facts and adjudge guilt or innocence would be usurped; the danger that confusion of the issues "`could result in the court-martial degenerating into a trial of the polygraph machine;' " the likely waste of time on collateral issues; and the fact that the "`reliability of polygraph evidence has not been sufficiently established.' " See 41 M. J. 683, 686 (USAF Ct. Crim. App. 1995) (citing Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence, App. 22, p. A22-46 (1994 ed.)).

[6] The United States notes that in 1983 Congress' Office of Technology Assessment evaluated all available studies on the reliability of polygraphs and concluded that "`[o]verall, the cumulative research evidence suggests that when used in criminal investigations, the polygraph test detects deception better than chance, but with error rates that could be considered significant.' " Brief for United States 21 (quoting U. S. Congress, Office of Technology Assessment, Scientific Validity of Polygraph Testing: A Research Review and Evaluation—A Technical Memorandum 5 (OTA— TM—H-15, Nov. 1983)). Respondent, however, contends current research shows polygraph testing is reliable more than 90 percent of the time. Brief for Respondent 22, and n. 19 (citing J. Matte, Forensic Psychophysiology Using the Polygraph 121-129 (1996)). Even if the basic debate about the reliability of polygraph technology itself were resolved, however, there would still be controversy over the efficacy of countermeasures, or deliberately adopted strategies that a polygraph examinee can employ to provoke physiological responses that will obscure accurate readings and thus "fool" the polygraph machine and the examiner. See, *e. g.,* Iacono & Lykken § 14-3.0.

[7] Until quite recently, federal and state courts were uniform in categorically ruling polygraph evidence inadmissible under the test set forth in *Frye* v. *United States,* 293 F. 1013 (CADC 1923), which held that scientific evidence must gain the general acceptance of the relevant expert community to be admissible. In *Daubert* v.*Merrell Dow Pharmaceuticals, Inc.,* 509 U. S. 579 (1993), we held that *Frye* had been superseded by the

Federal Rules of Evidence and that expert testimony could be admitted if the district court deemed it both relevant and reliable.

Prior to *Daubert,* neither federal nor state courts found any Sixth Amendment obstacle to the categorical rule. See*, e. g., Bashor* v. *Risley,* 730 F. 2d 1228, 1238 (CA9), cert. denied, 469 U. S. 838 (1984); *People* v. *Price,* 1 Cal. 4th 324, 419-420, 821 P. 2d 610, 663 (1991), cert. denied, 506 U. S. 851 (1992). Nothing in *Daubert*foreclosed, as a constitutional matter, *per se* exclusionary rules for certain types of expert or scientific evidence. It would be an odd inversion of our hierarchy of laws if altering or interpreting a rule of evidence worked a corresponding change in the meaning of the Constitution.

[8] Respondent argues that because the Government——and in particular the Department of Defense——routinely uses polygraph testing, the Government must consider polygraphs reliable. Governmental use of polygraph tests, however, is primarily in the field of personnel screening, and to a lesser extent as a tool in criminal and intelligence investigations, but not as evidence at trials. See Brief for United States 34, n. 17; Barland, The Polygraph Test in the USA and Elsewhere, in The Polygraph Test 76 (A. Gale ed. 1988). Such limited, out of court uses of polygraph techniques obviously differ in character from, and carry less severe consequences than, the use of polygraphs as evidence in a criminal trial. They do not establish the reliability of polygraphs as trial evidence, and they do not invalidate reliability as a valid concern supporting Rule 707's categorical ban.

[9] The examiner interprets various physiological responses of the examinee, including blood pressure, perspiration, and respiration, while asking a series of questions, commonly in three categories: direct accusatory questions concerning the matter under investigation, irrelevant or neutral questions, and more general "control" questions concerning wrongdoing by the subject in general. The examiner forms an opinion of the subject's truthfulness by comparing the physiological reactions to each set of questions. See generally Giannelli & Imwinkelried 219-222; Honts & Quick, The Polygraph in 1995: Progress in Science and the Law, 71 N. D. L. Rev. 987, 990-992 (1995).

[10] Although some of this litigation could take place outside the presence of the jury, at the very least a foundation must be laid for the jury to assess the qualifications and skill of the polygrapher and the validity of the exam, and significant cross-examination could occur on these issues.

[11] Although the Court of Appeals stated that it had "merely remove[d] the obstacle of the *per se* rule against admissibility" of polygraph evidence in cases where the accused wishes to proffer an exculpatory polygraph to rebut an attack on his credibility, 44 M. J. 442, 446 (1996), and respondent thus implicitly argues that the Constitution would require collateral litigation only in such cases, we cannot see a principled justification whereby a right derived from the Constitution could be so narrowly contained.

[12] In addition, we noted that the State of Texas could advance no legitimate interests in support of the evidentiary rules at issue, and those rules burdened only the defense and not the prosecution. See 388 U. S., at 22— 23. Rule 707 suffers from neither of these defects.

[13] The dissent suggests*, post,* at 331, that polygraph results constitute "factual evidence." The raw results of a polygraph exam—the subject's pulse, respiration, and perspiration rates—may be factual data, but these are not introduced at trial, and even if they were, they would not be "facts" about the alleged crime at hand. Rather, the evidence introduced is the expert opinion testimony of the polygrapher about whether the subject was truthful or deceptive in answering questions about the alleged crime. A *per se* rule excluding polygraph results therefore does not prevent an accused—just as it did not prevent respondent here—from introducing factual evidence or testimony about the crime itself, such as alibi witness testimony, see *ibid.* For the same reasons, an expert polygrapher's interpretation of polygraph results is not evidence of " `the accused's whole conduct,' " see *post,* at 336, to which Dean Wigmore referred. It is not evidence of the " `accused's . . . conduct' " at all, much less "conduct" concerning the actual crime at issue. It is merely the opinion of a witness with no knowledge about any of the facts surrounding the alleged crime, concerning whether the defendant spoke truthfully or deceptively on another occasion.

[1] Rule 707 states, in relevant part:

"Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." Mil. Rule Evid. 707(a).

[2] "There is no question that in recent years polygraph testing has gained increasingly widespread acceptance as a useful and reliable scientific tool. Because of the advances that have been achieved in the field which have led to the greater use of polygraph examination, coupled with a lack of evidence that juries are unduly swayed by polygraph evidence, we agree with those courts which have found that a per se rule disallowing polygraph evidence is no longer warranted. . . . Thus, we believe the best approach in this area is one which balances the need to admit all relevant and reliable evidence against the danger that the admission of the evidence for a given purpose will be unfairly prejudicial." *United States* v. *Piccinonna,* 885 F. 2d 1529, 1535 (CA11 1989). "[W]e do not now hold that polygraph examinations are scientifically valid or that they will always assist the trier of fact, in this or any other individual case. We merely remove the obstacle of the per se rule against admissibility, which was based on antiquated concepts about the technical ability of the polygraph and legal precepts that have been expressly overruled by the Supreme Court." *United States* v. *Posado,* 57 F. 3d 428, 434 (CA5 1995).

[3] "The per se . . . rule excluding unstipulated polygraph evidence is inconsistent with the `flexible inquiry' assigned to the trial judge by *Daubert.* This is particularly evident because *Frye,* which was overruled by*Daubert,* involved the admissibility of polygraph evidence." *United States* v. *Cordoba,* 104 F. 3d 225, 227 (CA9 1997).

[4] "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by

regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter." 10 U. S. C. § 836(a).

[5] According to the Department of Defense's 1996 Report to Congress: "The Department of Defense maintains very stringent standards for polygraph examiners. The Department of Defense Polygraph Institute's basic polygraph program is the only program known to base its curriculum on forensic psychophysiology, and conceptual, abstract, and applied knowledge that meet the requirements of a master's degree-level of study. Candidates selected for the Department of Defense polygraph positions must meet the following minimum requirements:

"1. Be a United States citizen.

"2. Be at least 25 years of age.

"3. Be a graduate of an accredited four-year college or have equivalent experience that demonstrates the ability to master graduate-level academic courses.

"4. Have two years of experience as an investigator with a Federal or other law enforcement agency. . . .

"5. Be of high moral character and sound emotional temperament, as confirmed by a background investigation.

"6. Complete a Department of Defense-approved course of polygraph instruction.

"7. Be adjudged suitable for the position after being administered a polygraph examination designed to ensure that the candidate realizes, and is sensitive to, the personal impact of such examinations.

"All federal polygraph examiners receive their basic polygraph training at the Department of Defense Polygraph Institute. After completing the basic polygraph training, DoD personnel must serve an internship consisting of a minimum of six months on-the-job-training and conduct at least 25 polygraph examinations under the supervision of a certified polygraph examiner before being certified as a Department of Defense polygraph examiner. In addition, DoD polygraph examiners are required to complete 80 hours of continuing education every two years." Department of Defense Polygraph Program, Annual Polygraph Report to Congress, Fiscal Year 1996, pp. 14-15; see also Yankee, The Current Status of Research in Forensic Psychophysiology and Its Application in the Psychophysiological Detection of Deception, 40 J. Forensic Sciences 63 (1995).

[6] Honts & Perry, Polygraph Admissibility: Changes and Challenges, 16 Law and Human Behavior 357, 359, n. 1 (1992) (hereinafter Honts & Perry).

[7] Between 1981 and 1997, the Department of Defense conducted over 400,000 polygraph examinations to resolve issues arising in counterintelligence, security, and

criminal investigations. Department of Defense Polygraph Program, Annual Polygraph Report to Congress, Fiscal Year 1997, p. 1; *id.,* Fiscal Year 1996, p. 1; *id.,*Fiscal Year 1995, p. 1; *id.,* Fiscal Year 1994, p. 1; *id.,* Fiscal Year 1993, App. A; *id.,* Fiscal Year 1992, App. A; *id.,*Fiscal Year 1991, App. A-1 (reporting information for 1981-1991).

[8] When the members of the court-martial are officers, as was true in this case, they typically have at least a college degree as well as significant military service. See 10 U. S. C. § 825(d)(2); see also, *e. g., United States* v.*Carter,* 22 M. J. 771, 776 (A. C. M. R. 1986).

[9] "Few rights are more fundamental than that of an accused to present witnesses in his own defense, see, *e. g., Chambers* v. *Mississippi,* 410 U. S. 284, 302 (1973). Indeed, this right is an essential attribute of the adversary system itself. . . . Theright to compel a witness' presence in the courtroom could not protect the integrity of the adversary process if it did not embrace the right to have the witness' testimony heard by the trier of fact. The right to offer testimony is thus grounded in the Sixth Amendment . . . ." *Taylor* v. *Illinois,* 484 U. S. 400, 408-409 (1988).

[10] "Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all. Although the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787, the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury." *Washington* v. *Texas,* 388 U. S. 14, 19-20 (1967) (footnotes omitted).

[11] "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Id.,* at 19.

[12] "It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

"The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury." *Id.,* at 22.

[13] "It is familiar knowledge that the old common law carefully excluded from the witness stand parties to the record, and those who were interested in the result; and this rule extended to both civil and criminal cases. Fear of perjury was the reason for the rule." *Benson* v. *United States,* 146 U. S. 325, 335 (1892).

[14] "The common-law rule, accepted at an early date as controlling in this country, was that husband and wife were incompetent as witnesses for or against each other. . . . "The Court recognized that the basic reason underlying th[e] exclusion [of one spouse's testimony on behalf of the other] had been the practice of disqualifying witnesses with a personal interest in the outcome of a case. Widespread disqualifications because of interest, however, had long since been abolished both in this country and in England in accordance with the modern trend which permitted interested witnesses to testify and left it for the jury to assess their credibility. Certainly, since defendants were uniformly allowed to testify in their own behalf, there was no longer a good reason to prevent them from using their spouses as witnesses. With the original reason for barring favorable testimony of spouses gone the Court concluded that this aspect of the old rule should go too." *Hawkins* v. *United States,* 358 U. S. 74, 75-76 (1958).

[15] See *Washington* v. *Texas,* 388 U. S., at 20-21.

[16] "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, *Chambers* v. *Mississippi,*[410 U. S. 284 (1973)], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment,*Washington* v. *Texas,* 388 U. S. 14, 23 (1967); *Davis* v. *Alaska,* 415 U. S. 308 (1974), the Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense.' *California* v. *Trombetta,* 467 U. S. [479, 485 (1984)]; cf. *Strickland* v. *Washington,* 466 U. S. 668, 684-685 (1984) (`The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment'). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. *In re Oliver,* 333 U. S. 257, 273 (1948); *Grannis* v. *Ordean,*234 U. S. 385, 394 (1914). That opportunity would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and `survive the crucible of meaningful adversarial testing.' *United States* v. *Cronic,* 466 U. S. 648, 656 (1984). See also*Washington* v. *Texas, supra,* at 22-23." *Crane* v. *Kentucky,* 476 U. S., at 690-691.

[17] "Few rights are more fundamental than that of an accused to present witnesses in his own defense. *E. g.,Webb* v. *Texas,* 409 U. S. 95 (1972); *Washington* v. *Texas,* 388 U. S. 14, 19 (1967); *In re Oliver,* 333 U. S. 257 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly

affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers* v. *Mississippi,* 410 U. S., at 302.

[18] "Moreover, there are other principles by which a defendant may occasionally avail himself of conduct as evidence in his favor—in particular, of conduct indicating consciousness of innocence, . . . of utterances asserting his innocence . . . , and, in sedition charges, of conduct indicating a loyal state of mind . . . ." 1A J. Wigmore, Evidence § 56.1, p. 1180 (Tillers rev. ed. 1983); see *United States* v. *Reifsteck,* 841 F. 2d 701, 705 (CA6 1988).

[19] "Mariotta's basic defense was that he was unaware of any criminal wrongdoing at Wedtech, that he was an innocent victim of the machinations of the sophisticated businessmen whom he had brought into the company to handle its financial affairs. That defense was seriously in issue as to most of the charges against him, drawing considerable support from the evidence. . . .

"With the credibility of the accusations about Mariotta's knowledge of wrongdoing seriously challenged, evidence of his denial of such knowledge in response to an opportunity to obtain immunity by admitting it and implicating others became highly significant to a fair presentation of his defense. . . .

"Where evidence of a defendant's innocent state of mind, critical to a fair adjudication of criminal charges, is excluded, we have not hesitated to order a new trial." *United States* v. *Biaggi,* 909 F. 2d 662, 691-692 (CA2 1990); see also *United States* v. *Bucur,* 194 F. 2d 297 (CA7 1952); *Herman* v. *United States,* 48 F. 2d 479 (CA5 1931).

[20] Raskin, Honts, & Kircher, The Scientific Status of Research on Polygraph Techniques: The Case for Polygraph Tests, in 1 Modern Scientific Evidence 572 (D. Faigman, D. Kaye, M. Saks, & J. Sanders eds. 1997) (hereinafter Faigman) (compiling eight laboratory studies that place mean accuracy at approximately 90%); *id.,* at 575 (compiling four field studies, scored by independent examiners, that place mean accuracy at 90.5%); Raskin, Honts, & Kircher, A Response to Professors Iacono and Lykken, in Faigman 627 (compiling six field studies, scored by originalexaminers, that place mean accuracy at 97.5%); Abrams, The Complete Polygraph Handbook 190-191 (1989) (compiling 13 laboratory studies that, excluding inconclusive results, place mean accuracy at 87%).

[21] Iacono & Lykken, The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests, in Faigman 608 (compiling three studies that place mean accuracy at 70%).

[22] *E. g.,* Iacono & Lykken, The Case Against Polygraph Tests, in Faigman 608-609; Raskin, Honts, & Kircher, A Response to Professors Iacono and Lykken, in Faigman 621; Honts & Perry 362; Abrams, The Complete Polygraph Handbook, at 187-188, 191.

[23] See, *e. g.,* Judge Gonzalez's careful attention to the relevance inquiry in the proceedings on remand from the Court of Appeals decision in *Piccinonna.* 729 F. Supp. 1336 (SD Fla. 1990).

[24] One study compared the accuracy of fingerprinting, handwriting analysis, polygraph tests, and eyewitness identification. The study consisted of 80 volunteers divided into 20 groups of 4. Fingerprints and handwriting samples were taken from all of the participants.

In each group of four, one person was randomly assigned the role of "perpetrator." The perpetrator was instructed to take an envelope to a building doorkeeper (who knew that he would later need to identify the perpetrator), sign areceipt, and pick up a package. After the "crime," all participants were given a polygraph examination.

The fingerprinting expert (comparing the original fingerprints with those on the envelope), the handwriting expert (comparing the original samples with the signed receipt), and the polygrapher (analyzing the tests) sought to identify the perpetrator of each group. In addition, two days after the "crime," the doorkeeper was asked to pick the picture of the perpetrator out of a set of four pictures.

The results of the study demonstrate that polygraph evidence compares favorably with other types of evidence. Excluding "inconclusive" results from each test, the fingerprinting expert resolved 100% of the cases correctly, the polygrapher resolved 95% of the cases correctly, the handwriting expert resolved 94% of the cases correctly, and the eyewitness resolved only 64% of the cases correctly. Interestingly, when "inconclusive" results were included, the polygraph test was more accurate than any of the other methods: The polygrapher resolved 90% of the cases correctly, compared with 85% for the handwriting expert, 35% for the eyewitness, and 20% for the fingerprinting expert. Widacki & Horvath, An Experimental Investigation of the Relative Validity and Utility of the Polygraph Technique and Three Other Common Methods of Criminal Identification, 23 J. Forensic Sciences 596, 596-600 (1978); see also Honts & Perry 365.

[25] The Government argues that there is a widespread danger that people will learn to "fool" the polygraph, and that this possibility undermines any claim of reliability. For example, the Government points to the availability of a book called Beat the Box: The Insider's Guide to Outwitting the Lie Detector. Tr. of Oral Arg. 53; Brief for United States 25, n. 10. Beat the Box, however, actually cuts against a *per se* ban on polygraph evidence. As the preface to the book states:

"Dr. Kalashnikov [the author] is a polygraph professional. If you go up against him, or someone like him, he'll probably catch you at your game. That's because he knows his work and does it by the book.

"What most people don't realize is that there are a lot of not so professional polygraph examiners out there. It's very possible that you may be tested by someone who is more concerned about the number of tests he will run this week (and his Christmas bonus) than he is about the precision of each individual test.

. . . . .

"Remember, the adage is that you can't beat the polygraph system but you can beat the operator. This book is gleefully dedicated to the idea of a sporting chance." V.

Kalashnikov, Beat the Box: The Insider's Guide to Outwitting the Lie Detector (1983) (preface); *id.,* at 9 ("[W]hile the system is all but unbeatable, you can surely beat the examiner"). Thus, Beat the Box actually supports the notion that polygraphs are reliable when conducted by a highly trained examiner—like the one in this case.

Nonetheless, some research has indicated that people can be trained to use "countermeasures" to fool the polygraph. See, *e. g.,* Honts, Raskin, & Kircher, Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests, 79 J. Applied Psychology 252 (1994). This possibility, however, does not justify a *per se* ban. First, research indicates that individuals must receive specific training before they can fool the polygraph (*i. e.,*information alone is not enough). Honts, Hodes, & Raskin, Effects of Physical Countermeasures on the Physiological Detection of Deception, 70 J. Applied Psychology 177, 185 (1985); see also Honts, Raskin, Kircher, & Hodes, Effects of Spontaneous Countermeasures on the Physiological Detection of Deception, 16 J. Police Science and Administration 91, 93 (1988) (spontaneous countermeasures ineffective). Second, as countermeasures are discovered, it is fair to assume that polygraphers will develop ways to detect these countermeasures. See, *e. g.,* Abrams & Davidson, Counter-Countermeasures in Polygraph Testing, 17 Polygraph 16, 17-19 (1988); Raskin, Honts, & Kircher, The Case for Polygraph Tests, in Faigman 577-578. Of course, in any trial, jurors would be instructed on the possibility of countermeasures and could give this possibility its appropriate weight.

[26] Indeed,research indicates that jurors do not "blindly"accept polygraph evidence,but that they instead weigh polygraph evidence along with other evidence. Cavoukian & Heslegrave, The Admissibility of Polygraph Evidence in Court: Some Empirical Findings, 4 Law and Human Behavior 117,123, 127-128,130 (1980)(hereinafter Cavoukian & Heslegrave);see also Honts & Perry 366-367. One study found that expert testimony about the limits of the polygraph "*completely eliminated* the effect of the polygraph evidence" on the jury. Cavoukian & Heslegrave 128-129 (emphasis added).

[27] See n. 5, *supra.*

[28] See N. M. Rule Evid. § 11-707.

[29] It has been suggested that if exculpatory polygraph evidence may be adduced by the defendant, the prosecutor should also be allowed to introduce inculpatory test results.That conclusion would not be dictated by a holding that vindicates the defendant's Sixth Amendment right to summon witnesses. Moreover, as noted above,studies indicate that exculpatory polygraphs are more reliable than inculpatory ones.See n. 22, *supra.* In any event,a concern about possible future legal developments is surely not implicated by the narrow issue presented by the holding of the Court of Appeals for the Armed Forces in this case.Even if it were, I can see nothing fundamentally unfair about permitting the results of a test taken pursuant to stipulation being admitted into evidence to prove consciousness of guilt as well as consciousness of innocence.

US Constitution, Fifth Amendment

Article [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Walker v Engle

703 F.2d 959 (1983)

Raymond WALKER, Petitioner-Appellee, Cross-Appellant,

v.

Ted ENGLE, Respondent-Appellant, Cross-Appellee.

Nos. 81-3117, 81-3260.

United States Court of Appeals, Sixth Circuit.

Argued December 3, 1981.

Decided March 23, 1983.

Rehearing and Rehearing Denied June 24, 1983.

960*960 961*961 Dale T. Evans, Asst. Prosecuting Atty., Chief Appellate Div., Canton, Ohio, for respondent-appellant, cross-appellee.

Ernest T. Mansour (argued), David B. Cathcart, Mansour, Gavin, Gerlack & Manos, Gerald Messerman, Messerman & Messerman Co., Cleveland, Ohio, Stanley E. Tolliver, East Cleveland, Ohio, for petitioner-appellee, cross-appellant.

Before KEITH and JONES, Circuit Judges, and BROWN,[*] Senior Circuit Judge.

Rehearing and Rehearing En Banc Denied June 24, 1983.

NATHANIEL R. JONES, Circuit Judge.

The State of Ohio appeals the district court's grant of a writ of habeas corpus to Raymond Walker. Walker cross-appeals from the failure of the district court to hold that a retrial on the charge of first-degree murder was precluded by an insufficiency of the evidence. We affirm the order of the district court granting the writ of habeas corpus and the remand for a new trial.

On July 22, 1972, a robbery occurred at an A & P supermarket in Canton, Ohio. Guy Mack, an off-duty detective with the Canton City Police Department, was shot and killed during the robbery.

The robbery was committed by four men, three of whom entered the store while the other remained outside. In 1973, Warren Davidson and Fred Ogletree were convicted as aiders and abettors in the robbery and homicide and sentenced to life imprisonment. Neither man, however, was believed to be the triggerman.

In late 1975, while incarcerated, Davidson and Ogletree contacted Stark County authorities and implicated Walker as the triggerman in the killing. In return for their testimony against Walker, Stark County officials recommended leniency to the Governor of Ohio.

Walker was indicted on March 12, 1976. The first trial ended with a hung jury.[1] At his second trial, Walker contended by way of alibi that he was confined in the Cuyahoga County Jail on July 22, 1972, the day of the robbery and killing. The official records of the Cuyahoga County Sheriff's Department, which were stipulated to by counsel, reflected that Walker was indeed confined in the Cuyahoga County Jail from April 14, 1972 to August 1, 1972. In response the state introduced an abundance of evidence attempting to show that the officers charged with running the Cuyahoga County Jail were so corrupt and/or inefficient 962*962 that Walker could have gotten out of jail before July 22 and then returned to jail before August 1.

After his second trial, Walker was convicted of first-degree murder. His conviction was affirmed by the Ohio Fifth District Court of Appeals in June 1977. Walker appealed to the Ohio Supreme Court which, in a divided vote, affirmed his conviction. *State v. Walker,* 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). In April 1979, the United States Supreme Court denied Walker's petition for a writ of certiorari. *Walker v. Ohio,* 441 U.S. 924, 99 S.Ct. 2033, 60 L.Ed.2d 397 (1979).

In November 1979, Walker filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. The petition listed three grounds for relief: (1) that the Ohio appellate courts erred in failing to apply the standard of review enunciated by *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); (2) that under the *Jackson* standard, no rational trier of fact could have found Walker guilty of the Mack killing beyond a reasonable doubt; and (3) that numerous trial errors resulting in the admission of irrelevant and inflammatory evidence cumulatively operated to deny Walker a fair trial.

The magistrate filed a 108-page recommended report and decision in which he carefully reviewed the testimony of the forty trial witnesses and examined the conduct of the prosecutor in questioning witnesses and delivering his closing argument.[2] The magistrate ultimately agreed with Walker that the state's evidence regarding corruption and inefficiency at the Cuyahoga County Jail went so far beyond meeting the legitimate issues that the focus of the trial was no longer on Walker's guilt or innocence, but rather on the allegedly unlawful conduct of the officials running the jail. He concluded that the cumulative effect of the evidentiary errors was to deny Walker fundamental fairness. Having determined that a writ of habeas corpus should issue, the magistrate then analyzed the sufficiency of the evidence and concluded that a retrial of Walker was precluded by *Jackson* because of evidentiary insufficiency.

The district court then issued an opinion which, for reasons "independently reach[ed]," concluded that Walker was denied a fair trial in violation of the due process clause of the Fourteenth Amendment. However, the district court disagreed with the magistrate's conclusion that *Jackson* precluded a retrial, holding that apart "from the prejudicial evidence, the prosecution produced sufficient other evidence which, viewed in the light most favorable to the prosecution, would permit a reasonable trier of fact to find Walker guilty beyond a reasonable doubt."[3]

These appeals followed.

I

The major questions we are required to decide are (1) whether the district court was correct in concluding that the admission of certain evidence by the state operated to

deny Walker due process of law; and (2) whether the evidence against Walker was so insufficient as to preclude a retrial.

We begin our discussion with the proposition that errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus. *Bell v. Arn,* 536 F.2d 123 (6th Cir.1976); *Reese v. Cardwell,* 410 F.2d 1125 (6th Cir.1969). Yet, errors of state law, including evidentiary rulings, which result in a denial of fundamental fairness will support relief in habeas corpus. *Handley v. Pitts,* 491 F.Supp. 597, 599, *aff'd.,* 623 F.2d 23 (6th Cir.1980); *Maglaya v. Buckhoe,* 515 F.2d 265 (6th Cir.), *cert. denied,* 423 U.S. 931, 96 S.Ct. 282, 46 L.Ed.2d 260 (1975); *Gemel v. Buchkoe,* 358 F.2d 338 (6th Cir.1966).

The magistrate, in concluding that the cumulative effect of the evidentiary errors denied Walker due process, relied on the entire record. A condensation of his lengthy and excellent analysis would not 963*963 now be fruitful, since the district court based its findings on six specific aspects of the trial. It should be noted that even these six alleged errors must be considered for their cumulative effect. Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. *United States v. Jones,* 482 F.2d 747 (D.C.Cir.1973); *Newsom v. United States,* 311 F.2d 74 (5th Cir.1962); *United States v. Maroney,* 373 F.2d 908 (3rd Cir.1967). It will suffice for our consideration to assess the six alleged trial errors and their cumulative effect.

II

A. Evidence of criminal conviction of Major Payne.[4]

Payne had been Warden of the Cuyahoga County Jail before and after, but not during, Walker's recorded period of confinement. The prosecution, over defense counsel's strenuous and continuing objections, was allowed to question two defense witnesses about Payne's criminal conviction (which came well after Walker's recorded period of detention) for theft of property from the jail. When a defense witness stated that "I think it was something about two guns that were missing," the prosecutor asked, "What was it, evidence?" Defense counsel once again objected on grounds of relevancy, but the

trial court ruled, "No, it's very relevant in this case. Overruled." The prosecutor then continued his attack on the integrity of the Sheriff's Office personnel.

The district court held that the testimony regarding Major Payne's conviction:[5]

> *bore no relevance to the state's case or any issue concerning the accuracy of jail records or record keeping procedures, or, more generally, to the reliability of jail security. Contrary to the trial judge's on-the-record conclusion that Paine's [sic] testimony was "very relevant in this case," it had no tendency to make the truth or falsity of Walker's alibi more or less probable than it would be without the evidence .... Its sole purpose and clear effect was to prejudice the jury's consideration of Walker's alibi.*

The state replies that:[6]

> *It is submitted that the relevance of the testimony concerning Major Payne may be said to arise from the quality of the supervisory personnel selected to keep and maintain the Cuyahoga County Jail records upon which the alibi was dependent. To this extent it should make no difference whether the record indicates an act of supervisory capacity at the exact time of Walker's incarceration .... The question with regard to Major Payne relfect [sic] on the security of evidence held at the jail, and jail security was a major issue in the trial of a case in which it appears that a supposed inmate was able to commit a crime in a town sixty miles away.*

We agree with the district court that (1) the record is clear that Major Payne was not employed at the jail during Walker's incarceration, and (2) testimony regarding "the security of *evidence*held at the jail" has no apparent connection to the issue whether a *prisoner* could leave the jail*and return* undetected.

B. Testimony of State Auditor.

Walker introduced jail commissary records to show that he made numerous transactions during his confinement, including one on the day of the crime. The prosecutor endeavored to undermine this circumstantial evidence by testimony of jail deputies that inmates other than Walker could have made purchases using his commissary account.

However, the state added to this impeachment by calling Frank Lancianese, 964*964 an examiner for the Office of the State Auditor. He testified, over repeated objections, that (1) an audit of the commissary account funds between 1969 and 1975 revealed a $66,000 shortage; (2) the State Auditor's Office encountered "obstacles" in gaining access to the commissary records; and (3) an audit of jail vending machine profits revealed $9,000 unaccounted for by the Sheriff's Department. The prosecutor used this testimony in his closing argument as follows:

> *We have brought the records to you concerning the audit of the sheriff's department for one reason alone. To show you that all the thieves and the bad people weren't on the inside of the jail; that if you lie and steal what says you won't let a prisoner out for a weekend or a few days.*

The district court properly concluded that the admission of the auditor's testimony bore no relationship to the issues raised by Walker's alibi defense, was highly prejudicial, and was calculated to sway the jury on the basis of guilt by association.

The state argues that the auditor's testimony regarding theft from the commissary fund "was relevant to rebut the accuracy of commissary records relied on by Walker in support of his alibi defense."[7] This contention must be rejected, since the alleged thefts did not affect the *record of commissary transactions* relied on by Walker, but showed merely that *commissary* funds may have at some time been misappropriated by Sheriff's Department personnel. As for testimony regarding the vending machines, the state is compelled to concede that it "was not relevant by any definition."[8]

C. References to Tom Booth.

Tom Booth, a member of the Cuyahoga County Sheriff's Department, attended and viewed the trial but was not a witness. The prosecution was permitted, without any basis in the record, to insinuate that several defense witnesses from the Sheriff's Department were being monitored and coached by Tom Booth in furtherance of a Sheriff's Department coverup of improprieties. The state replies that the cross-examination of the defense witnesses was a proper inquiry to determine their credibility and whether they had in fact been coached. The state adds that since control of cross-examination is committed to the discretion of the state trial court, the trial court's rulings are not cognizable on habeas corpus. In support of the latter contention, the state cites *U.S. ex rel. Hickey v. Jeffes,* 571 F.2d 762 (3rd Cir.1978). *Hickey,* however, merely held that a state trial court's admission of certain evidence did not, under the facts of that case, constitute an error of constitutional dimensions. 571 F.2d at 766. *Hickey* does not hold that errors in discretionary rulings can never rise to constitutional dimensions; on the contrary, it is clear that they can. *Gemel v. Buckhoe,* 358 F.2d 338, 340 (6th Cir.1966).

D. Testimony of Canton Police Sergeant Newkirk.

Walker was first located in Chicago, Illinois. Newkirk was allowed to speculate, over objection, that Cuyahoga County authorities impeded Walker's extradition from Illinois to Stark County. The state makes a claim of relevancy. We agree with the district court's finding that this testimony was highly irrelevant and prejudicial conjecture.

E. The John Appling Affair.

As part of its case in chief, the state called John Appling to the stand. Appling, a prisoner in 1972, had served as a "range boss" for the cell block to which Walker was assigned. He refused to be sworn, at which point the trial court began to question Appling concerning his reasons for not wanting to be sworn or to testify. After excusing the jury, the judge called counsel for both sides to the bench. At that conference, the following interchange took place:

> *THE COURT: Counsel approach the bench please?*
>
> *965*965 (COUNSEL APPROACH THE BENCH)*
>
> *MR. AKE: Your honor, the testimony we have that we believe he can relate has absolutely nothing to do with any Fifth Amendment right of his. We are willing to put on for your benefit Detective Newkirk who can give you that testimony to make a determination. He basically — we are — we have testimony to the affect [sic] that he was in the jail in 1972 with Raymond Walker; that Raymond Walker — that he himself was allowed to walk free from the county jail; that he knows of certain activities in the county jail and that he in fact saw Raymond Walker on the outside of the county jail building isn't that correct?*
>
> *MR. JAECK: That's correct. During the time that he was supposed to be confined.*
>
> *MR. TOLLIVER: That has to be in conflict because I had the privilege of talking to this gentleman last night myself and that's not what he told me.*
>
> *THE COURT: He refuses to testify.*
>
> *MR. TOLLIVER: I'll take the stand myself and tell what he told me.*

THE COURT: You got a subpoena on for him too.

MR. TOLLIVER: I have.

THE COURT: And I saw that it was served too.

MR. TOLLIVER: What I'm saying it that this business about having people come in to say what he said I don't see how that can be allowed.

MR. AKE: Your honor, basically the Fifth Amendment does not protect any right here, and we're asking the Court after being permitted to show that he is a hostile witness to then impeach our own witness.

After further questioning by the judge, both Appling and the judge retired to chambers. Upon their return, the judge recalled the jury and allowed Appling, without being sworn, to take the stand, identify himself and refuse to testify.

The state then questioned seven other witnesses concerning Appling. The district court, in the proceeding below, concluded that the state's questions "sought to suggest to the jury that Appling's testimony would have been helpful to the prosecution had he testified." Citing *U.S. v. Vandetti,* 623 F.2d 1144 (6th Cir.1980), which discusses the constitutional problems that arise when the state is permitted to put a witness on the stand who will assert the Fifth Amendment, the district court stated:

The entire line of questioning about Appling leads this court to conclude that Walker's right to a fair trial was grossly prejudiced by the suggestion that evidence was not being presented to the jury which would have established Walker's guilt.

The state now contends that since defense counsel did not object to the questions at trial, any claim of error has been waived. In fact, the state court of appeals appears to have applied a procedural bar to raising the issue on appeal.[9] We cannot agree that this error is not cognizable in this habeas proceeding. The record clearly indicates that defense counsel objected to the process whereby Appling would take the stand so that the prosecution could put other witnesses on to suggest that Appling had relevant testimony to bolster its case.

It is true that, absent a showing of cause and prejudice, *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 966*966 594 (1977) precludes a federal court, as a matter of comity, from hearing an issue to which the state appellate courts applied a procedural bar. Yet, it must also be made clear that this rule is a matter of comity between the federal and state courts and should not be applied to preclude federal courts from hearing federal constitutional claims when to do so does no disrespect to the state courts and their procedural rules. *Jackson v. Cupp,*693 F.2d 867 (9th Cir.1982). Thus, in *Ulster County Court v. Allen,* 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), the Supreme Court held that the *Sykes* rule does not apply when it is *not* clear that the state appellate court had applied a procedural bar. Furthermore, it is now well accepted that when the state appellate court ignores the state procedural default, the federal courts may also reach the merits on a habeas review. To do so does not denigrate the state

procedural system. *Ulster County Court v. Allen,* 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); *Hockenberry v. Sowders,* 620 F.2d 111, *reh. denied,* 633 F.2d 443 (6th Cir.), *cert. denied,* 450 U.S. 933, 101 S.Ct. 1395, 67 L.Ed.2d 367, *reh. denied,* 451 U.S. 933, 101 S.Ct. 2011, 68 L.Ed.2d 320 (1980); *Cook v. Bordenkircher,* 602 F.2d 117 (6th Cir.1979);*Bell v. Watkins,* 692 F.2d 999 (5th Cir.1982); *Burns v. Estelle,* 592 F.2d 1297 (5th Cir.1979),*aff'd en banc,* 626 F.2d 396 (1980); *Moran v. Estelle,* 607 F.2d 1140 (5th Cir.1979); *Henson v. Wyrick,* 634 F.2d 1080 (8th Cir.), *cert. denied,* 450 U.S. 958, 101 S.Ct. 1417, 67 L.Ed.2d 383 (1980); *Quigg v. Crist,* 616 F.2d 1107 (9th Cir.1980); *Brinlee v. Crisp,* 608 F.2d 839 (10th Cir.1979); *cert. denied,* 444 U.S. 1047, 100 S.Ct. 737, 62 L.Ed.2d 733. *See also Martinez v. Harris,* 675 F.2d 51 (2d Cir.1982).

We believe that when a state appellate court applies a procedural bar that has no foundation in the record or state law, the federal courts need not honor that bar.[10] We do not by this holding sanction blanket federal court review of state procedural rulings, rather the rule is to ensure that the state courts do not block federal vindication of federal constitutional rights by procedural rulings that have no basis in state law or the facts of the particular case.

In Ohio, the appellate courts will not entertain an objection on appeal that was not raised before the trial court "at a time when such error could have been avoided or corrected by the trial court." *State v. Gordon,* 28 Ohio St.2d 45, 50, 276 N.E.2d 243 (1971). The underlying rationale of this rule is the same as that in the requirement of F.R.C.P. 51; that "the court should be given an opportunity to correct a mistake or defect ... when it can be accomplished during the same trial." *Presley v. Norwood,* 36 Ohio St.2d 29, 33, 303 N.E.2d 81 (1973). In *Presley,* the Supreme Court of Ohio held that the rationale used by the federal courts under F.R.C.P. 51 was equally controlling for the state rule. It explicitly adopted the rule that "once a party makes his position sufficiently clear to the trial court, the rationale for formally objecting to a charge given in disregard of that position is no longer present." *Id.* at 33, 303 N.E.2d 81, *citing, inter alia, Evansville Container Corp. v. McDonald,* 132 F.2d 80 (6th Cir.1942); *Kentucky Trust Co. v.*967*967 *Glenn,* 217 F.2d 462 (6th Cir.1954); *Meitz v. Garrison,* 413 F.2d 895 (8th Cir.1969).

The state appellate court's holding that there is no evidence which shows that the defendant preserved the issue for appeal by objecting at trial has no foundation in the record. We need not engage in a microscopic-type search of the trial record to conclude that the trial judge was aware that there was a serious question raised as to whether Appling should testify. Moreover, it is clear that the trial judge knew that the defense objected to the proposed minuet which would have Appling take the stand, refuse to testify only to then allow the prosecution to admit other witnesses' views of what Appling might have said. The awareness is apparent given that the trial judge raised the first issue, as to whether or not Appling should take the stand at all, himself. He dismissed the jury and proceeded to question the witness. In light of this, there was obviously no additional need to make a formal objection. Further, the defense clearly did object to the entire scheme once it became clear that Appling would not testify. We do not find and therefore cannot say that there is any support for the view that the trial court did not have an opportunity to consider the issue and correct itself. To the

contrary, from the record, the conclusion is inescapable that the court clearly decided the issue against the defendant.

We thus find that we need not honor the state appellate court's claim to procedural default. Its holding is against the clear record and well-recognized state rule. While state application of its own rules of procedure would not be *reviewable* on habeas, the notions of comity that underlie the *Wainwright v. Sykes* rule do not require that we defer to applications of state procedural bars that have no foundation. There is no foundation here. To hold otherwise without such a foundation would allow state courts, through erroneous rulings, to insulate federal constitutional questions from federal review.[11]

968*968 F. The Use of News Clippings.

The state repeatedly used newspaper clippings to "refresh the recollection" of defense witnesses regarding the "horrible conditions" at the jail. The defense witnesses in several instances clearly stated that they remembered nothing about the alleged incidents described in the newspapers, yet the state persisted in its line of questioning. The district court correctly found that the state was successfully putting the substance of the articles in evidence. As the district court stated:[12]

> *The danger of unfair prejudice to Walker is obvious. Newspaper articles about matters of substantial public controversy (i.e., the jail's "horrible conditions," the prisoners' hunger strike "against medical facilities, bail procedures and overcrowding," Tr. 667, the public probe into the use of drugs by inmates, the destruction of commissary fund records and the state audit) when brought before the jury inhibited a dispassioned consideration of an accused's guilt or innocence. What Cuyahoga County did or didn't do in these matters could not be attributed to the defendant. It appealed to anti-Cuyahoga County provincialism at the expense of the defendant. This heavy baggage was added to the total irrelevance of this evidence on the issues to be decided by the trier of fact.*

In justification, the state once again simply relies on the discretion of the state trial court. That is clearly not enough. A state trial judge cannot operate beyond the requirements of the United States Constitution by claiming discretionary authority. We agree with the conclusion of the district court that "parade[ing]" newspaper clippings before the jury in the manner done here constituted transgressions which "invaded the defendant's right to a fair trial." We reject these procedures as abhorrent and repugnant for their inflammatory and prejudicial effect upon the jury.

We need not determine whether each of the alleged errors would, alone, require that we find a deprivation of due process. It is clear that the cumulative effect of the conduct of the state was to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness. The trial was inflamed by marginally relevant and

irrelevant evidence that was highly prejudicial. The contrary contentions of the state are supported by neither controlling authority nor considerations of fairness and justice. By allowing the trial to focus more on the claimed corruption of the Sheriff's Department than on the issue of Walker's guilt or innocence, the trial court denied Walker due process of 969*969 law in violation of the Constitution. We therefore affirm the district court's grant of the writ.

Our close examination of the trial court record compels an additional comment. Such a trial as was conducted here is a reminder of the role the Great Writ must play in our jurisprudence. When a trial court permits the constitutional protections to be overridden by zealous prosecutors without interjecting restraining or curative measures, the federal courts must be alert to act as the district court did here. The methods utilized by the state to obtain this conviction, in the words of Justice Frankfurter, clearly "offend `a sense of justice'." *Rochin v. California,* 342 U.S. 165, 173, 72 S.Ct. 205, 210, 96 L.Ed. 183 (1952) *citing Brown v. Mississippi,* 297 U.S. 278, 285-6, 56 S.Ct. 461, 464-5, 80 L.Ed. 682.

III

The remaining issue to be decided is whether the evidence against Walker is so insufficient as to preclude a new trial. We must hold that under *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) and for the reasons set forth by the district judge, a new trial is not foreclosed.

The state placed Walker at the scene of the crime through testimony of (1) Davidson and Ogletree, accomplices to the crime; (2) Rene Clark, a disinterested eyewitness; and (3) Mabel Mack, wife of the deceased. The state also placed Walker outside of the jail during the relevant period through testimony of (a) Clarence Cash, who allegedly spoke with Walker at an "after hours" bar during June 1972, (b) James Curry, who allegedly spoke with Walker at a garage around mid-June, and (c) Mrs. Willie Mae Hart, who resided near the A & P store and who saw a brown automobile leave the scene of the crime driven by a black man with a bad complexion "similar to" Walker's.

The magistrate rejected the testimony of these individuals as follows: (1) Davidson and Ogletree were promised leniency, and two witnesses testified that Ogletree named Walker because Walker was sleeping with Ogletree's wife; (2) Rene Clark had earlier identified another suspect in a lineup in which Walker participated; (3) Mrs. Mack said only that Walker "looked like" the killer; (4 and 5) Clarence Cash and James Curry had logical inconsistencies within each of their accounts; and (6) Mrs. Hart specifically stated that she was not saying Walker was the man she saw.

The district court held that the magistrate had erred by weighing the testimony and failing to view the evidence in the light most favorable to the prosecution. Since credibility is not a matter of review for a federal habeas corpus court, *Pigford v. United States,* 518 F.2d 831, 836 (4th Cir.1975), and since the testimony of the state's witnesses, if believed, would provide sufficient evidence to support the conviction, the court concluded that *Jackson* did not preclude retrial.

Walker's main objection to this conclusion is as follows:

> *Rather than a selective review of the prosecution's case, Jackson requires that all the evidence be weighed so as to ascertain whether any rational trier of fact could find guilt beyond a reasonable doubt.*
>
> * * * * * *
>
> *No matter how favorably the prosecution's case may be viewed, no rational mind could accept the testimony of Ogletree and Davidson over the unsolicited and independent testimony of [certain witnesses for defendant].*

This argument must fail since it merely urges this Court to weigh the credibility of the witnesses. This we cannot do. We agree that, from the record, the witnesses for Walker appear more credible than those for the state, and if we were jurors, we might be inclined to vote to acquit in this case. But the inquiry as to sufficiency of the evidence does not require or permit a court "to ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson,* 443 U.S. at 319, 99 S.Ct. at 2789. Looking at 970*970 the case in the light most favorable to the prosecution appears to mean resolving credibility conflicts in favor of the prosecution. *Compare Jackson:*

> *a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume — even if it does not affirmatively appear in the record — that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.*

We believe the district court was correct in its conclusion that retrial is not precluded by*Jackson.* Therefore, the grant of the writ and the order granting the state 120 days to retry Walker is AFFIRMED.

BAILEY BROWN, Senior Circuit Judge, concurring in the result.

I concur with the panel opinion that this habeas petitioner, Walker, was denied federal due process by allowing into evidence a great deal of totally irrelevant and highly prejudicial evidence. I recognize that such rulings on evidence must be egregious to amount to constitutional error, but this is such a case. I also agree with the panel opinion that, however, the state introduced enough evidence of guilt to allow the state to try Walker again.

On the other hand, I am concerned that the panel opinion, in dealing with "The John Appling affair" (at 964), assumes that there is a problem in the area of *Wainwright v.*

Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) and uses this as a springboard for the *tour de force*that follows. In the course of this rather extended discussion, the opinion suggests, *inter alia,*that a federal habeas court may, under *Wainwright,* reach the merits of an issue where no cause and prejudice is shown, where there is a "technical state procedural bar" and there is "plain error." (at 966, n. 10.) In fact, however, there simply is no *Wainwright* problem to be dealt with at all.

While it is true that the Ohio Court of Appeals did (App. at 6) rely on the failure of defense counsel to object to the procedure whereby Appling was placed on the stand before the jury and claimed his immunity not to testify, it did not rely on any alleged failure to object to questions put to other witnesses calculated to suggest to the jury that Appling's testimony would have been favorable. The Ohio Supreme Court also did not rely on an alleged failure to object to the testimony of these other witnesses in reaching its decision. Moreover, respondent below, Engle, does not rely in his brief here on any such alleged failure to object to the testimony of these other witnesses. It is this testimony that Walker complained about in district court and in this court. This part of the panel's opinion is dictum and totally unnecessary.

[*] The Honorable Bailey Brown retired from regular active service under the provisions of 28 U.S.C. § 371(b) on June 16, 1982 and became a Senior Circuit Judge.

[1] The magistrate noted that, according to petitioner's brief, when the jury was discharged the panel stood 10 for 2 for acquittal. App. 28.

[2] App. 27-134.

[3] App. 138.

[4] Throughout the state court trial and subsequent proceedings, references are made to a "Major Paine." This Court takes judicial notice of the fact that the correct title and name are Major Edward Payne.

[5] App. 142-43.

[6] State's Brief at 11-12.

[7] State's Brief at 12.

[8] State's Brief at 13.

[9] The court of appeals stated:

The fifth assignment of error complains that the court erred in ordering a witness, John Appling, to testify and in permitting inquiries concerning him throughout the trial.

An examination of the record shows that John Appling was called as a state's witness and refused to take an oath (R. 51). Whereupon the court excused the jury and conducted a lengthy examination of the witness (R. 52-62). Immediately, the jury was returned to the box whereupon the witness responded to questions giving his name

and address and indicating that he refused to testify, whereupon he was excused and the jury recessed for a regular recess. We find no objection to any of these proceedings and none has been pointed out to us in oral argument to the briefs. Therefore the error, if any there was, is not cognizable upon appeal. See *State v. Gordon,* 28 Ohio St.2d 45, 48, 276 N.E.2d 243.

[10] We note the issue as to whether this Court can, consistent with *Wainwright v. Sykes,* reach the merits of an issue on habeas with no showing of cause and prejudice even when there is a technical state procedural bar. There appears to be confusion in this Circuit as to whether constitutional infirmities in state trials that are reviewable under state law fall outside the *Sykes* requirement. There is ample authority that when there is a plain error exception in state law, we can reach the merits absent any *Sykes* analysis, if the alleged infirmities amount to plain error. *Brewer v. Overberg,* 624 F.2d 51 (6th Cir.) *cert. denied,* 449 U.S. 1085, 101 S.Ct. 873, 66 L.Ed.2d 810 (1980); *Berrier v. Egeler,* 583 F.2d 515 (6th Cir.), *cert. denied,* 439 U.S. 955, 99 S.Ct. 354, 58 L.Ed.2d 347 (1978); *Rachel v. Bordenkircher,* 590 F.2d 200 (6th Cir.1978); *Cook v. Bordenkircher,* 602 F.2d 117 (6th Cir.),*cert. denied,* 444 U.S. 936, 100 S.Ct. 286, 62 L.Ed.2d 196 (1979); *Krzeminski v. Perini,* 614 F.2d 121 (6th Cir.1980). Yet, the holding in *Hockenberry v. Sowders,* 620 F.2d 111 (6th Cir.1979) appears to be in tension with that authority. *See Hockenberry v. Sowders,* 633 F.2d 443 (6th Cir.1979) (order denying rehearing) [especially the dissenting opinions of Judges Keith and Jones at 633 F.2d 445, 448]. Since we here find no adequate state procedural bar, we need not reach this issue.

[11] We are well aware of the danger of a holding which would permit state prisoners to attack, in federal habeas actions, state appellate court applications of state procedural rules as a bar to the review of issues not raised at trial. To allow such a blanket rule would undo the cause and prejudice test enunciated in *Wainwright* and reaffirmed just last term in *Isaac v. Engle,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). *Cf. Hockenberry v. Sowders,* 633 F.2d 443 (6th Cir.1980). Yet, the Supreme Court in *Ulster County, supra,* also made clear that the comity concerns underlying the *Wainwright* rule do not weaken the federal court's duty to vindicate federal constitutional rights. When, as here, the state essentially adopts the federal rule for procedural bars and it is clear from the record that the state appellate application of the procedural bar has no foundation, we believe the comity balance weighs most heavily on the side of not deferring to the obviously erroneous state procedural bar.

The Fifth Circuit has recently stated that: the notion of comity which underlies the exhaustion doctrine must be understood not as a capitulation of federal power to state interests; rather, comity involves a delicate balance and compromise of both state and federal concerns. For as much as the unchanneled exercise of habeas corpus by the federal courts would disrupt the integrity of the state criminal process, so too would an unthinking subservience to state sovereignty render the time-honored Writ of Liberty sterile and nugatory. Comity requires sensitive accommodation, and not simply slavish adherence, to the interests of the states.

Carter v. Estelle, 677 F.2d 427, 442-43 (5th Cir.1982). We are of the belief that it would be slavish adherence to state interests to fail to vindicate a state prisoner's constitutional rights under the guise of honoring a state procedural ruling that is without foundation.

Our position gains added support from the Fifth Circuit's view in *Rummel v. Estelle,* 587 F.2d 651 (5th Cir.1978). There, the defendant had failed to raise an objection at trial to the application of the Texas habitual criminal statute. The Fifth Circuit rejected the argument that the petitioner was now barred from raising the issue on habeas with:

Since it is apparent that the Texas Court of Criminal Appeals has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute, we are at a loss to see how any state interest would be served by demanding that Rummel make a futile gesture at his trial.

Id. at 653.

At least one other court has sought the need not to defer to an application of a state procedural bar when it appeared from the record to be without foundation. In *Thergood v. Tedford,* 473 F.Supp. 339 (D.C.Conn.1978), the Court noted that even though the state had evidently applied the procedural bar, there had been an ample opportunity for the state courts to consider the issue and correct the defect. The Court also reported that "while it is true the petitioner did not use the precise term `exception' in response to the court's adverse ruling on the question in issue here, his request to be heard outside the presence of the jury after the court ruled certainly connoted an objection to that ruling ..." Believing that the petitioner had objected, the court decided the merits in the habeas proceeding.

Finally, the position we adopt here is not in conflict with *Hockenberry v. Sowders, supra.* There, this Court concluded that under *Wainwright,* the federal courts cannot make an independent application of the state's contemporaneous objection rule.

Hockenberry is significantly distinguishable. The contemporaneous objection rule there included the discretionary caveat that the state appellate court could ignore the procedural bar if manifest injustice resulted. This Court merely held that federal courts must, to some extent, defer to a state's assessment that the discretion to ignore the bar should not be exercised. Here, there is doubt as to the factual issue concerning whether or not there was an objection at trial. We do not invade upon the state's discretionary determination concerning its own procedural rule. Rather, we are deciding whether an erroneous factual determination by the state court in applying its nondiscretionary rule should bar federal relief.

That *Hockenberry* requires that we make an assessment as to whether the state procedural ruling is without foundation is clear from the Court's statement that "it is clear that the central question in such an instance is whether the state court denied petitioner's claim on *an adequate* and independent state procedural ground." *Id.* at 115. When the state court erroneously reads a clear record to find no objection by the defendant, the state ground cannot be said to be an adequate one. *See also* footnote 10, above.

[12] App. 158.

Washington v Texas

388 U.S. 14 (1967)

WASHINGTON

v.

TEXAS.

No. 649.

Supreme Court of United States.

Argued March 15-16, 1967.

Decided June 12, 1967.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

Charles W. Tessmer argued the cause for petitioner. With him on the brief was *Emmett Colvin, Jr.*

Howard M. Fender, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Crawford C. Martin,* Attorney General, *George Cowden,* First Assistant Attorney General, *Robert Lattimore,* Assistant Attorney General, and *A. J. Carubbi, Jr.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

We granted certiorari in this case to determine whether the right of a defendant in a criminal case under the 15*15 Sixth Amendment[1] to have compulsory process for obtaining witnesses in his favor is applicable to the States through the Fourteenth Amendment,[2] and whether that right was violated by a state procedural statute providing that persons charged as principals, accomplices, or accessories in the same crime cannot be introduced as witnesses for each other.

Petitioner, Jackie Washington, was convicted in Dallas County, Texas, of murder with malice and was sentenced by a jury to 50 years in prison. The prosecution's evidence showed that petitioner, an 18-year-old youth, had dated a girl named Jean Carter until her mother had forbidden her to see him. The girl thereafter began dating another boy, the deceased. Evidently motivated by jealousy, petitioner with several other boys began driving around the City of Dallas on the night of August 29, 1964, looking for a gun. The search eventually led to one Charles Fuller, who joined the group with his shotgun. After obtaining some shells from another source, the group of boys proceeded to Jean Carter's home, where Jean, her family and the deceased were having supper. Some of the boys threw bricks at the house and then ran back to the car, leaving petitioner and Fuller alone in front of the house with the shotgun. At the sound of the bricks the deceased and Jean Carter's mother rushed out on the porch to investigate. The shotgun was fired by either petitioner or Fuller, and the 16*16 deceased was fatally wounded. Shortly afterward petitioner and Fuller came running back to the car where the other boys waited, with Fuller carrying the shotgun.

Petitioner testified in his own behalf. He claimed that Fuller, who was intoxicated, had taken the gun from him, and that he had unsuccessfully tried to persuade Fuller to leave before the shooting. Fuller had insisted that he was going to shoot someone, and petitioner had run back to the automobile. He saw the girl's mother come out of the door as he began running, and he subsequently heard the shot. At the time, he had thought that Fuller had shot the woman. In support of his version of the facts, petitioner offered the testimony of Fuller. The record indicates that Fuller would have testified that petitioner pulled at him and tried to persuade him to leave, and that petitioner ran before Fuller fired the fatal shot.

It is undisputed that Fuller's testimony would have been relevant and material, and that it was vital to the defense. Fuller was the only person other than petitioner who knew exactly who had fired the shotgun and whether petitioner had at the last minute attempted to prevent the shooting. Fuller, however, had been previously convicted of the same murder and sentenced to 50 years in prison,[3] and he was confined in the Dallas County jail. Two Texas statutes provided at the time of the trial in this case that persons charged or convicted as coparticipants in the same crime could not testify for one another,[4] although there was no bar to their testifying 17*17 for the State.[5] On the basis of these statutes the trial judge sustained the State's objection and refused to allow Fuller to testify. Petitioner's conviction followed, and it was upheld on appeal by the Texas Court of Criminal Appeals. 400 S. W. 2d 756. We granted certiorari. 385 U. S. 812. We reverse.

I.

We have not previously been called upon to decide whether the right of an accused to have compulsory process for obtaining witnesses in his favor, guaranteed in federal trials by the Sixth Amendment, is so fundamental and essential to a fair trial that it is incorporated in the18*18 Due Process Clause of the Fourteenth Amendment.[6] At one time, it was thought that the Sixth Amendment had no application to state criminal trials.[7] That view no longer prevails, and in recent years we have increasingly looked to the specific guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law. We have held that due process requires that the accused have the assistance of counsel for his defense,[8] that he be confronted with the witnesses against him,[9] and that he have the right to a speedy[10] and public[11] trial.

The right of an accused to have compulsory process for obtaining witnesses in his favor stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States. This Court had occasion in *In re Oliver,* 333 U. S. 257 (1948), to describe what it regarded as the most basic ingredients of due process of law. It observed that:

> *"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel."333 U. S., at 273 (footnote omitted).*

19*19 The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

II.

Since the right to compulsory process is applicable in this state proceeding, the question remains whether it was violated in the circumstances of this case. The testimony of Charles Fuller was denied to the defense not because the State refused to compel his attendance, but because a state statute made his testimony inadmissible whether he was present in the courtroom or not. We are thus called upon to decide whether the Sixth Amendment guarantees a defendant the right under any circumstances to put his witnesses on the stand, as well as the right to compel their attendance in court. The resolution of this question requires some discussion of the common-law context in which the Sixth Amendment was adopted.

Joseph Story, in his famous Commentaries on the Constitution of the United States, observed that the right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all.[12] Although 20*20 the absolute prohibition of witnesses for the defense had been abolished in England by statute before 1787,[13] the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be evaluated by the jury.

Despite the abolition of the rule generally disqualifying defense witnesses, the common law retained a number of restrictions on witnesses who were physically and mentally capable of testifying. To the extent that they were applicable, they had the same effect of suppressing the truth that the general proscription had had. Defendants and codefendants were among the large class of witnesses disqualified from testifying on the ground of interest.[14] A party to a civil or criminal case was not allowed to testify on his own behalf for fear that he might be tempted to lie. Although originally the disqualification of a codefendant appears to have been based only on his status as a party to the action, and in some jurisdictions co-indictees were allowed to testify for or against each other if granted separate trials,[15] other jurisdictions came to the view that accomplices or co-indictees were incompetent to testify at least in favor of each other even at separate trials, and in spite of statutes making a defendant competent to testify in his own behalf.[16] 21*21 It was thought that if two persons charged with the same crime were allowed to testify on behalf of each other, "each would try to swear the other out of the charge."[17] This rule, as well as the other disqualifications for interest, rested on the unstated premises that the right to present witnesses was subordinate to the court's interest in preventing perjury, and that erroneous decisions were best avoided by preventing the jury from hearing any testimony that might be perjured, even if it were the only testimony available on a crucial issue.[18]

The federal courts followed the common-law restrictions for a time, despite the Sixth Amendment. In *United States* v. *Reid,* 12 How. 361 (1852), the question was whether one of two defendants jointly indicted for murder on the high seas could call the other as a witness. Although this Court expressly recognized that the Sixth Amendment was designed to abolish some of the harsh rules of the common law, particularly including the refusal to allow the defendant in a serious criminal case to present witnesses in his defense,[19] it held that the rules of evidence in the federal courts were those in force in the various States at the time of the passage of the Judiciary Act of 1789, including the disqualification of defendants indicted together. The holding in *United States* v. *Reid* was not satisfactory to later generations, however, and in 1918 this Court expressly overruled it, 22*22 refusing to be bound by "the dead hand of the common-law rule of 1789," and taking note of "the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court . . . ." *Rosen* v.*United States,* 245 U. S. 467, 471.

Although *Rosen* v. *United States* rested on nonconstitutional grounds, we believe that its reasoning was required by the Sixth Amendment. In light of the common-law history, and in view of the recognition in the *Reid* case that the Sixth Amendment was designed in part to make the testimony of a defendant's witnesses admissible on his behalf in court, it could hardly be argued that a State would not violate the clause if it made all defense testimony inadmissible as a matter of procedural law. It is difficult to see how the Constitution is any less violated by arbitrary rules that prevent whole categories of defense witnesses from testifying on the basis of *a priori* categories that presume them unworthy of belief.

The rule disqualifying an alleged accomplice from testifying on behalf of the defendant cannot even be defended on the ground that it rationally sets apart a group of persons who are particularly likely to commit perjury. The absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant.[20] Common sense would suggest that he often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution 23*23 for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large. Moreover, under the Texas statutes the accused accomplice is no longer disqualified if he is acquitted at his own trial. Presumably, he would then be free to testify on behalf of his comrade, secure in the knowledge that he could incriminate himself as freely as he liked in his testimony, since he could not again be prosecuted for the same offense. The Texas law leaves him free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie.

We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to

events that he had personally observed, and whose testimony would have been relevant and material to the defense.[21] The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use. The judgment of conviction must be reversed.

It is so ordered.

MR. JUSTICE HARLAN, concurring in the result.

For reasons that I have stated in my concurring opinion in *Gideon* v. *Wainwright,* 372 U. S. 335, 349, and in my opinion concurring in the result in *Pointer* v. *Texas,* 24*24 380 U. S. 400, 408, and in my dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497, 539-545, I cannot accept the view that the Due Process Clause of the Fourteenth Amendment "incorporates," in its terms, the specific provisions of the Bill of Rights. In my view the Due Process Clause is not reducible to "a series of isolated points," but is rather "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."*Poe* v. *Ullman, supra,* at 543; see *Palko* v. *Connecticut,* 302 U. S. 319; *Klopfer* v. *North Carolina,* 386 U. S. 213, 226 (opinion concurring in the result).

I concur in the result in this case because I believe that the State may not constitutionally forbid the petitioner, a criminal defendant, from introducing on his own behalf the important testimony of one indicted in connection with the same offense, who would not, however, be barred from testifying if called by the prosecution. Texas has put forward no justification for this type of discrimination between the prosecution and the defense in the ability to call the same person as a witness, and I can think of none.

In my opinion this is not, then, really a problem of "compulsory process" at all, although the Court's incorporationist approach leads it to strain this constitutional provision to reach these peculiar statutes. Neither is it a situation in which the State has determined, as a matter of valid state evidentiary law, on the basis of general experience with a particular class of persons, as for example, the mentally incompetent[1] or those previously convicted of perjury,[2] that the pursuit of 25*25 truth is best served by an across-the-board disqualification as witnesses of persons of that class. Compare *Spencer* v. *Texas,* 385 U. S. 554. This is rather a case in which the State has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by the defendant. This, I think, the Due Process Clause forbids.

On this premise I concur in the reversal of the judgment of conviction.

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

[2] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[3] See *Fuller* v. *State,* 397 S. W. 2d 434 (Tex. Crim. App. 1966).

[4] "Persons charged as principals, accomplices or accessories, whether in the same or by different indictments, can not be introduced as witnesses for one another, but they may claim a severance, and if one or more be acquitted they may testify in behalf of the others." Tex. Pen. Code, Art. 82.

"Persons charged as principals, accomplices or accessories, whether in the same or different indictments, cannot be introduced as witnesses for one another, but they may claim a severance; and, if any one or more be acquitted, or the prosecution against them be dismissed, they may testify in behalf of the others." Tex. Code Crim. Proc., Art. 711 (1925).

These statutory provisions were apparently repealed by implication by Art. 36.09 of the Texas Code of Criminal Procedure of 1965, which became effective after petitioner's trial. Article 36.09 provides that "Two or more defendants who are jointly or separately indicted or complained against for the same offense or an offense growing out of the same transaction may be, in the discretion of the court, tried jointly or separately as to one or more defendants; provided that in any event either defendant may testify for the other or on behalf of the State . . . ."

Counsel have cited no statutes from other jurisdictions, and we have found none, that flatly disqualify coparticipants in a crime from testifying for each other regardless of whether they are tried jointly or separately. To be distinguished are statutes providing that one of two or more defendants tried jointly may, if the evidence against him is insufficient, be entitled to an immediate acquittal so he may testify for the others. These statutes seem designed to allow such joint defendants to testify without incriminating themselves. See, *e. g.,* Ala. Code, Tit. 15, § 309 (1958); Alaska Code Crim. Proc. § 12.20.060 (1962); Kan. Gen. Stat. Ann. § 62-1440 (1964).

[5] *Rangel* v. *State,* 22 Tex. Ct. App. 642, 3 S. W. 788 (1887).

[6] "[A] provision of the Bill of Rights which is `fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment." *Gideon* v. *Wainwright,* 372 U. S. 335, 342 (1963).

[7] See *West* v. *Louisiana,* 194 U. S. 258, 264 (1904).

[8] *Gideon* v. *Wainwright,* 372 U. S. 335 (1963).

[9] *Pointer* v. *Texas,* 380 U. S. 400 (1965).

[10] *Klopfer* v. *North Carolina,* 386 U. S. 213 (1967).

[11] *In re Oliver,* 333 U. S. 257 (1948).

[12] 3 Story, Commentaries on the Constitution of the United States §§ 1786-1788 (1st ed. 1833).

[13] By 1701 the accused in both treason and felony cases was allowed to produce witnesses who could testify under oath. See 2 Wigmore, Evidence § 575, at 685-686 (3d ed. 1940).

[14] See generally 2 Wigmore §§ 575-576 (3d ed. 1940). We have discussed elsewhere the gradual demise of the common-law rule prohibiting defendants from testifying in their own behalf. See *Ferguson* v. *Georgia,* 365 U. S. 570 (1961).

[15] See 2 Wigmore § 580, at 709-710 (3d ed. 1940); *Henderson* v. *State,* 70 Ala. 23, 24-25 (Dec. Term 1881);*Allen* v. *State,* 10 Ohio St. 287, 303 (Dec. Term 1859).

[16] See *Foster* v. *State,* 45 Ark. 328 (May Term 1885); *State* v. *Drake,* 11 Ore. 396, 4 Pac. 1204 (1884). Both cases have been overturned by statute. Ark. Stat. Ann. § 43-2017 (1947); Ore. Rev. Stat. § 139.315 (1965).

[17] *Benson* v. *United States,* 146 U. S. 325, 335 (1892).

[18] "Indeed, the theory of the common law was to admit to the witness stand only those presumably honest, appreciating the sanctity of an oath, unaffected as a party by the result, and free from any of the temptations of interest. The courts were afraid to trust the intelligence of jurors." *Benson* v. *United States,* 146 U. S. 325, 336 (1892).

[19] 12 How., at 363-364.

[20] See n. 5, *supra.*

[21] Nothing in this opinion should be construed as disapproving testimonial privileges, such as the privilege against self-incrimination or the lawyer-client or husband-wife privileges, which are based on entirely different considerations from those underlying the common-law disqualifications for interest. Nor do we deal in this case with nonarbitrary state rules that disqualify as witnesses persons who, because of mental infirmity or infancy, are incapable of observing events or testifying about them.

[1] *E. g.,* Cal. Civ. Proc. Code § 1880, subd. 1; Cal. Pen. Code § 1321.

[2] *E. g.,* Vermont Stat. Ann., Tit. 12, § 1608. See generally 2 Wigmore, Evidence § 488 (3d ed. 1940).

Webb v Texas

409 U.S. 95 (1972)

WEBB

v.

TEXAS.

No. 71-6647.

Supreme Court of United States.

Decided December 4, 1972.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

PER CURIAM.

The petitioner was convicted of burglary in the Criminal District Court of Dallas County, Texas, and was sentenced to a term of imprisonment for 12 years. He appealed, raising several claims of error, among them an allegation that the trial court had violated his constitutional rights by "threatening and harassing" the sole witness for his defense, so that the witness refused to testify. The Court of Criminal Appeals of Texas affirmed his conviction, 480 S. W. 2d 398 (1972). We grant the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari and reverse the petitioner's conviction.

The record shows that, after the prosecution had rested its case, the jury was temporarily excused. During this recess, the petitioner called his only witness, Leslie Max Mills, who had a prior criminal record and was then serving a prison sentence. At this point, the trial judge, on his own initiative, undertook to admonish the witness as follows:

> *"Now you have been called down as a witness in this case by the Defendant. It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. 96*96 If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the liklihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have got to make up*

your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble. The court wants you to know that. You don't owe anybody anything to testify and it must be done freely and voluntarily and with the thorough understanding that you know the hazard you are taking."

The petitioner's counsel objected to these comments, on the ground that the judge was exerting on the mind of the witness such duress that the witness could not freely and voluntarily decide whether or not to testify in the petitioner's behalf, and was thereby depriving the petitioner of his defense by coercing the only defense witness into refusing to testify. Counsel pointed out that none of the witnesses for the State had been so admonished. When the petitioner's counsel then indicated that he was nonetheless going to ask the witness to take the stand, the judge interrupted: "Counsel, you can state the facts, nobody is going to dispute it. Let him decline to testify." The witness then refused to testify for any purpose and was excused by the court. The petitioner's subsequent motion for a mistrial was overruled.

97*97 On appeal, the petitioner argued that the judge's conduct indicated a bias against the petitioner and deprived him of due process of law by driving his sole witness off the witness stand. The Court of Criminal Appeals rejected this contention, stating that, while it did not condone the manner of the admonition, the petitioner had made no objection until the admonition was completed, and there was no showing that the witness had been intimidated by the admonition or had refused to testify because of it.

We cannot agree. The suggestion that the petitioner or his counsel should have interrupted the judge in the middle of his remarks to object is, on this record, not a basis to ground a waiver of the petitioner's rights. The fact that Mills was willing to come to court to testify in the petitioner's behalf, refusing to do so only after the judge's lengthy and intimidating warning, strongly suggests that the judge's comments were the cause of Mills' refusal to testify.

The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of perjury. But the judge did not stop at warning the witness of his right to refuse to testify and of the necessity to tell the truth.[*] Instead, the judge implied that he expected Mills to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted for perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole. At least some of these threats may have been beyond the power of this judge to 98*98 carry out. Yet, in light of the great disparity between the posture of the presiding judge and that of a witness in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify.

In *Washington* v. *Texas,* 388 U. S. 14, 19 (1967), we stated:

> *"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."*

In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment. The admonition by the Texas Court of Criminal Appeals might well have given the trial judge guidance for future cases, but it did not serve to repair the infringement of the petitioner's due process rights under the Fourteenth Amendment.

Accordingly, the judgment is

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

The facts before us do not, in my opinion, justify the Court's summary disposition. Petitioner Webb (who, on a prior occasion, had been convicted on still another 99*99 burglary charge) was apprehended by the owner of a lumber business. The owner, armed with his shotgun, had driven to his office at three o'clock in the morning upon the activation of a burglar alarm. When he entered the building, the owner observed a broken window and an assortment of what he regarded as burglary tools on his desk. When men emerged from an adjacent room, a gun fight ensued. Two intruders escaped, but the owner, despite his having been shot twice, succeeded in holding the petitioner at gunpoint until police arrived.

Although the admonition given by the state trial judge to the sole witness proffered by the defense was obviously improper, sufficient facts have not been presented to this Court to demonstrate the depth of prejudice that requires a summary reversal. The admonition might prove far less offensive, and the conduct of the trial judge understandable, if, for example, as is indicated in petitioner's brief, p. 8, prepared by counsel and filed with the Texas Court of Criminal Appeals, the witness were known to have been called for the purpose of presenting an alibi defense. Against the backdrop of being caught on the premises and of apparently overwhelming evidence of guilt, offset only by a bare allegation of prejudice, I would deny the petition for certiorari and, as the Court so often has done, I would remit the petitioner to the relief available to him by way of a post-conviction proceeding with a full evidentiary hearing.[*]

[*] Cf. *United States* v. *Winter,* 348 F. 2d 204, 210 (1965), where Judge Weinfeld, writing for the Second Circuit, stated:

"Once a witness swears to give truthful answers, there is no requirement to `warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it."

[*] Petitioner's counsel assured the Court of Criminal Appeals that the witness would not have been called "unless he had been previously interviewed and found to be helpful to the appellant's cause." Brief for Appellant on First Motion for Rehearing 7, *Webb* v. *Texas,* 480 S. W. 2d 398 (Ct. Crim. App. Tex. 1972). An evidentiary hearing would allow petitioner's trial counsel to outline the testimony that was expected from the witness.

A prior trial is mentioned in the record. An evidentiary hearing might reveal events at the prior trial that justified the trial judge's unusual concern about possible perjury.

Wiggins v Smith

539 U.S. 510 (2003)

WIGGINS

v.

SMITH, WARDEN, et al.

No. 02-311.

Supreme Court of United States.

Argued March 24, 2003.

Decided June 26, 2003.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

511*511 512*512 513*513 O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post,* p. 538.

Donald B. Verrilli, Jr., argued the cause for petitioner. With him on the briefs were *Ian Heath Gershengorn* and *Lara M. Flint.*

Gary E. Bair, Solicitor General of Maryland, argued the cause for respondents. With him on the brief were *J. Joseph Curran, Jr.,* Attorney General, and *Kathryn Grill Graeff* and *Ann N. Bosse,*Assistant Attorneys General.

Dan Himmelfarb argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson, Assistant Attorney General Chertoff, Deputy Solicitor General Dreeben,* and *Robert J. Erickson.*[*]

514*514 JUSTICE O'CONNOR delivered the opinion of the Court.

Petitioner, Kevin Wiggins, argues that his attorneys' failure to investigate his background and present mitigating evidence of his unfortunate life history at his capital sentencing proceedings violated his Sixth Amendment right to counsel. In this case, we consider whether the United States Court of Appeals for the Fourth Circuit erred in upholding the Maryland Court of Appeals' rejection of this claim.

I

A

On September 17, 1988, police discovered 77-year-old Florence Lacs drowned in the bathtub of her ransacked apartment in Woodlawn, Maryland. *Wiggins* v. *State,* 352 Md. 580, 585, 724 A. 2d 1, 5 (1999). The State indicted petitioner for the crime on October 20, 1988, and later filed a notice of intention to seek the death penalty. Two Baltimore County public defenders, Carl Schlaich and Michelle Nethercott, assumed responsibility for Wiggins' case. In July 1989, petitioner elected to be tried before a judge in Baltimore County 515*515 Circuit Court. *Ibid.* On August 4, after a 4-day trial, the court found petitioner guilty of first-degree murder, robbery, and two counts of theft. App. 32.

After his conviction, Wiggins elected to be sentenced by a jury, and the trial court scheduled the proceedings to begin on October 11, 1989. On September 11, counsel filed a motion for bifurcation of sentencing in hopes of presenting Wiggins' case in two phases. *Id.,* at 34. Counsel intended first to prove that Wiggins did not act as a "principal in the first degree,"*ibid.—i. e.,* that he did not kill the victim by his own hand. See Md. Ann. Code, Art. 27, § 413 (1996) (requiring proof of direct responsibility for death eligibility). Counsel then intended, if necessary, to present a mitigation case. In the memorandum in support of their motion, counsel argued that bifurcation would enable them to present each case in its best light; separating the two cases would prevent the introduction of mitigating evidence from diluting their claim that Wiggins was not directly responsible for the murder. App. 36-42, 37.

On October 12, the court denied the bifurcation motion, and sentencing proceedings commenced immediately thereafter. In her opening statement, Nethercott told the jurors they would hear evidence suggesting that someone other than Wiggins actually killed Lacs. *Id.,* at 70-71. Counsel then explained that the judge would instruct them to weigh Wiggins' clean record as a factor against a death sentence. She concluded: "`You're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no convictions for prior crimes of violence and no convictions, period.. . . I think that's an important thing for you to consider.'"*Id.,* at 72. During the proceedings themselves, however, counsel introduced no evidence of Wiggins' life history.

Before closing arguments, Schlaich made a proffer to the court, outside the presence of the jury, to preserve bifurcation 516*516 as an issue for appeal. He detailed the mitigation case counsel would have presented had the court granted their bifurcation motion. He explained that they would have introduced psychological reports and expert testimony demonstrating Wiggins' limited intellectual capacities and childlike emotional state on the one hand, and the absence of aggressive patterns in his behavior, his capacity for empathy, and his desire to function in the world on the other. See *id.,* at 349-351. At no point did Schlaich proffer any evidence of petitioner's life history or family background. On October 18, the court instructed the jury on the sentencing task before it, and later that afternoon, the jury returned with a sentence of death.*Id.,* at 409-410. A divided Maryland Court of Appeals affirmed. *Wiggins* v. *State,* 324 Md. 551, 597 A. 2d 1359 (1991), cert. denied, 503 U. S. 1007 (1992).

B

In 1993, Wiggins sought postconviction relief in Baltimore County Circuit Court. With new counsel, he challenged the adequacy of his representation at sentencing, arguing that his attorneys had rendered constitutionally defective assistance by failing to investigate and present mitigating evidence of his dysfunctional background. App. to

Pet. for Cert. 132a. To support his claim, petitioner presented testimony by Hans Selvog, a licensed social worker certified as an expert by the court. App. 419. Selvog testified concerning an elaborate social history report he had prepared containing evidence of the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents. Relying on state social services, medical, and school records, as well as interviews with petitioner and numerous family members, Selvog chronicled petitioner's bleak life history. App. to Pet. for Cert. 163a.

According to Selvog's report, petitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone 517*517 for days, forcing them to beg for food and to eat paint chips and garbage. *Id.,* at 166a-167a. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. *Id.,* at 167a-171a. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically, *id.,* at 175a-176a, and, as petitioner explained to Selvog, the father in his second foster home repeatedly molested and raped him. *Id.,* at 176a-179a. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. *Id.,* at 190a. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor. *Id.,* at 192a.

During the postconviction proceedings, Schlaich testified that he did not remember retaining a forensic social worker to prepare a social history, even though the State made funds available for that purpose. App. 487-488. He explained that he and Nethercott, well in advance of trial, decided to focus their efforts on "`retry[ing] the factual case'" and disputing Wiggins' direct responsibility for the murder. *Id.,* at 485-486. In April 1994, at the close of the proceedings, the judge observed from the bench that he could not remember a capital case in which counsel had not compiled a social history of the defendant, explaining, "`[n]ot to do a social history, at least to see what you have got, to me is absolute error. I just—I would be flabbergasted if the Court of Appeals said anything else.'" *Id.,* at 605. In October 1997, however, the trial court denied Wiggins' petition for postconviction relief. The court concluded that "when the decision not to investigate . . . is a matter of trial tactics, there is no 518*518 ineffective assistance of counsel." App. to Pet. for Cert. 155a-156a.

The Maryland Court of Appeals affirmed the denial of relief, concluding that trial counsel had made "a deliberate, tactical decision to concentrate their effort at convincing the jury" that appellant was not directly responsible for the murder. *Wiggins* v. *State,* 352 Md., at 608, 724 A. 2d, at 15. The court observed that counsel knew of Wiggins' unfortunate childhood. They had available to them both the presentence investigation (PSI) report prepared by the Division of Parole and Probation, as required by Maryland law, Md. Ann. Code, Art. 41, § 4-609(d) (1988), as well as "more detailed social service records that recorded incidences of physical and sexual abuse, an alcoholic mother, placements in foster care, and borderline retardation." 352 Md., at

608-609, 724 A. 2d, at 15. The court acknowledged that this evidence was neither as detailed nor as graphic as the history elaborated in the Selvog report but emphasized that "counsel *did* investigate and *were* aware of appellant's background." *Id.,* at 610, 724 A. 2d, at 16 (emphasis in original). Counsel knew that at least one uncontested mitigating factor—Wiggins' lack of prior convictions—would be before the jury should their attempt to disprove Wiggins' direct responsibility for the murder fail. As a result, the court concluded, Schlaich and Nethercott "made a reasoned choice to proceed with what they thought was their best defense." *Id.,* at 611-612, 724 A. 2d, at 17.

C

In September 2001, Wiggins filed a petition for writ of habeas corpus in Federal District Court. The trial court granted him relief, holding that the Maryland courts' rejection of his ineffective assistance claim "involved an unreasonable application of clearly established federal law."*Wiggins* v. *Corcoran,* 164 F. Supp. 2d 538, 557 (2001) (citing *Williams* v. *Taylor,* 529 U. S. 362 (2000)). The court rejected the State's defense of counsel's "tactical" decision to "`retry 519*519guilt,'" concluding that for a strategic decision to be reasonable, it must be "based upon information the attorney has made after conducting a reasonable investigation." 164 F. Supp. 2d, at 558. The court found that though counsel were aware of some aspects of Wiggins' background, that knowledge did not excuse them from their duty to make a "fully informed and deliberate decision" about whether to present a mitigation case. In fact, the court concluded, their knowledge triggered an obligation to look further. *Id.,* at 559.

Reviewing the District Court's decision *de novo,* the Fourth Circuit reversed, holding that counsel had made a reasonable strategic decision to focus on petitioner's direct responsibility.*Wiggins* v. *Corcoran,* 288 F. 3d 629, 639-640 (2002). The court contrasted counsel's complete failure to investigate potential mitigating evidence in *Williams,* 288 F. 3d, at 640, with the fact that Schlaich and Nethercott knew at least some details of Wiggins' childhood from the PSI and social services records, *id.,* at 641. The court acknowledged that counsel likely knew further investigation "would have resulted in more sordid details surfacing," but agreed with the Maryland Court of Appeals that counsel's knowledge of the avenues of mitigation available to them "was sufficient to make an informed strategic choice" to challenge petitioner's direct responsibility for the murder. *Id.,* at 641-642. The court emphasized that conflicting medical testimony with respect to the time of death, the absence of direct evidence against Wiggins, and unexplained forensic evidence at the crime scene supported counsel's strategy. *Id.,* at 641.

We granted certiorari, 537 U. S. 1027 (2002), and now reverse.

II

A

Petitioner renews his contention that his attorneys' performance at sentencing violated his Sixth Amendment right 520*520 to effective assistance of counsel. The amendments to 28 U. S. C. § 2254, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), circumscribe our consideration of Wiggins' claim and require us to limit our analysis to the law as it was "clearly established" by our precedents at the time of the state court's decision. Section 2254 provides:

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

We have made clear that the "unreasonable application" prong of § 2254(d)(1) permits a federal habeas court to "grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts" of petitioner's case. *Williams* v. *Taylor, supra,* at 413; see also *Bell* v. *Cone,* 535 U. S. 685, 694 (2002). In other words, a federal court may grant relief when a state court has misapplied a "governing legal principle" to "a set of facts different from those of the case in which the principle was announced." *Lockyer* v. *Andrade,* 538 U. S. 63, 76 (2003) (citing *Williams* v. *Taylor, supra,* at 407). In order for a federal court to find a state court's application of our precedent "unreasonable," the state court's decision must have been more than incorrect or erroneous. See *Lockyer, supra,* at 75. The state court's application 521*521 must have been "objectively unreasonable." See *Williams* v. *Taylor,* 529 U. S., at 409.

We established the legal principles that govern claims of ineffective assistance of counsel in*Strickland* v. *Washington,* 466 U. S. 668 (1984). An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense. *Id.,* at 687. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Id.,* at 688. We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Ibid.*

In this case, as in *Strickland,* petitioner's claim stems from counsel's decision to limit the scope of their investigation into potential mitigating evidence. *Id.,* at 673. Here, as in *Strickland,*counsel attempt to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternative strategy instead. In rejecting the respondent's claim, we defined the deference owed such strategic judgments in terms of the adequacy of the investigations supporting those judgments:

> *"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, 522*522 applying a heavy measure of deference to counsel's judgments." Id., at 690-691.*

Our opinion in *Williams* v. *Taylor* is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied *Strickland* and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background." 529 U. S., at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). While *Williams* had not yet been decided at the time the Maryland Court of Appeals rendered the decision at issue in this case, cf. *post,* at 542 (Scalia, J., dissenting), Williams' case was before us on habeas review. Contrary to the dissent's contention, *post,* at 543, we therefore made no new law in resolving Williams' ineffectiveness claim. See *Williams,* 529 U. S., at 390 (noting that the merits of Williams' claim "are squarely governed by our holding in *Strickland*"); see also *id.,* at 395 (noting that the trial court correctly applied both components of the *Strickland* standard to petitioner's claim and proceeding to discuss counsel's failure to investigate as a violation of *Strickland*'s performance prong). In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of *Strickland* we apply today. Cf. 466 U. S., at 690-691 (establishing that "thorough investigation[s]" are "virtually unchallengeable" and underscoring that "counsel has a duty to make reasonable investigations"); see also *id.,* at 688-689 ("Prevailing norms of

practice as reflected in American Bar Association standards and the like.. . are guides to determining what is reasonable").

In light of these standards, our principal concern in deciding whether Schlaich and Nethercott exercised "reasonable 523*523 professional judgmen[t]," *id.,* at 691, is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable. Ibid.* Cf. *Williams* v. *Taylor, supra,* at 415 (O'Connor, J., concurring) (noting counsel's duty to conduct the "requisite, diligent" investigation into his client's background). In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," *Strickland,* 466 U. S., at 688, which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time," *id.,* at 689 ("[E]very effort [must] be made to eliminate the distorting effects of hindsight").

B

1

The record demonstrates that counsel's investigation drew from three sources. App. 490-491. Counsel arranged for William Stejskal, a psychologist, to conduct a number of tests on petitioner. Stejskal concluded that petitioner had an IQ of 79, had difficulty coping with demanding situations, and exhibited features of a personality disorder. *Id.,* at 44-45, 349-351. These reports revealed nothing, however, of petitioner's life history. Tr. of Oral Arg. 24-25.

With respect to that history, counsel had available to them the written PSI, which included a one-page account of Wiggins' "personal history" noting his "misery as a youth," quoting his description of his own background as "`disgusting,'" and observing that he spent most of his life in foster care. App. 20-21. Counsel also "tracked down" records kept by the Baltimore City Department of Social Services (DSS) documenting petitioner's various placements in the State's foster care system. *Id.,* at 490; Lodging of Petitioner. In describing the scope of counsel's investigation into petitioner's 524*524 life history, both the Fourth Circuit and the Maryland Court of Appeals referred only to

these two sources of information. See 288 F. 3d, at 640-641; *Wiggins* v. *State,* 352 Md., at 608-609, 724 A. 2d, at 15.

Counsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989. As Schlaich acknowledged, standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report. App. 488. Despite the fact that the Public Defender's office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. *Id.,* at 487. Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as "guides to determining what is reasonable."*Strickland, supra,* at 688; *Williams* v. *Taylor, supra,* at 396. The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), p. 93 (1989) (emphasis added). Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources. Cf. *id.,*11.8.6, p. 133 (noting that among the topics counsel should consider presenting are medical history, educational history, employment and training history, *family and social history,* prior adult and juvenile correctional experience, and religious and cultural influences (emphasis added)); 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1982) ("The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and 525*525 to the court at sentencing. . . . Investigation is essential to fulfillment of these functions").

The scope of their investigation was also unreasonable in light of what counsel actually discovered in the DSS records. The records revealed several facts: Petitioner's mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food. See Lodging of Petitioner 54-95, 126, 131-136, 140, 147, 159-176. As the Federal District Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background. 164 F. Supp. 2d, at 559. Indeed, counsel uncovered no evidence in their investigation to suggest that a mitigation case, in its own right, would have been counterproductive, or that further investigation would have been fruitless; this case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable. See, *e. g., Strickland, supra,* at 699 (concluding that counsel could "reasonably surmise . . . that character and psychological evidence would be of little help"); *Burger* v. *Kemp,* 483 U. S. 776, 794 (1987)(concluding counsel's limited investigation was reasonable because he interviewed all witnesses brought to his attention, discovering little that was helpful and much that was harmful); *Darden* v. *Wainwright,* 477 U. S. 168, 186 (1986) (concluding that counsel engaged in extensive preparation and that the decision to present a mitigation

case would have resulted in the jury hearing evidence that petitioner had been convicted of violent crimes and spent much of his life in jail). Had counsel investigated further, they might well have discovered the sexual abuse later revealed during state postconviction proceedings.

526*526 The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment. Counsel sought, until the day before sentencing, to have the proceedings bifurcated into a retrial of guilt and a mitigation stage. See *supra,* at 515. On the eve of sentencing, counsel represented to the court that they were prepared to come forward with mitigating evidence, App. 45, and that they intended to present such evidence in the event the court granted their motion to bifurcate. In other words, prior to sentencing, counsel never actually abandoned the possibility that they would present a mitigation defense. Until the court denied their motion, then, they had every reason to develop the most powerful mitigation case possible.

What is more, during the sentencing proceeding itself, counsel did not focus exclusively on Wiggins' direct responsibility for the murder. After introducing that issue in her opening statement, *id.,* at 70-71, Nethercott entreated the jury to consider not just what Wiggins "is found to have done," but also "who [he] is." *Id.,* at 70. Though she told the jury it would "hear that Kevin Wiggins has had a difficult life," *id.,* at 72, counsel never followed up on that suggestion with details of Wiggins' history. At the same time, counsel called a criminologist to testify that inmates serving life sentences tend to adjust well and refrain from further violence in prison—testimony with no bearing on whether petitioner committed the murder by his own hand. *Id.,* at 311-312. Far from focusing exclusively on petitioner's direct responsibility, then, counsel put on a halfhearted mitigation case, taking precisely the type of "`shotgun'" approach the Maryland Court of Appeals concluded counsel sought to avoid. *Wiggins* v. *State,* 352 Md., at 609, 724 A. 2d, at 15. When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization 527*527 of counsel's conduct than an accurate description of their deliberations prior to sentencing.

In rejecting petitioner's ineffective assistance claim, the Maryland Court of Appeals appears to have assumed that because counsel had *some* information with respect to petitioner's background—the information in the PSI and the DSS records—they were in a position to make a tactical choice not to present a mitigation defense. *Id.,* at 611-612, 724 A. 2d, at 17 (citing federal and state precedents finding ineffective assistance in cases in which counsel failed to conduct an investigation of any kind). In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. Even assuming Schlaich and Nethercott limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy. 466 U. S., at 691.

The Maryland Court of Appeals' application of *Strickland*'s governing legal principles was objectively unreasonable. Though the state court acknowledged petitioner's claim that counsel's failure to prepare a social history "did not meet the minimum standards of the profession," the court did not conduct an assessment of whether the decision to cease all investigation upon obtaining the PSI and the DSS records actually demonstrated reasonable professional judgment. *Wiggins* v. *State,* 352 Md., at 609, 724 A. 2d, at 16. The state court merely assumed that the investigation was adequate. In light of what the PSI and the DSS records actually revealed, however, counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy 528*528 impossible. The Court of Appeals' assumption that the investigation was adequate, *ibid.,* thus reflected an unreasonable application of *Strickland.* 28 U. S. C. § 2254(d)(1). As a result, the court's subsequent deference to counsel's strategic decision not "to present every conceivable mitigation defense," 352 Md., at 610, 724 A. 2d, at 16, despite the fact that counsel based this alleged choice on what we have made clear was an unreasonable investigation, was also objectively unreasonable. As we established in *Strickland,* "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U. S., at 690-691.

Additionally, the court based its conclusion, in part, on a clear factual error—that the "social service records . . . recorded incidences of . . . sexual abuse." 352 Md., at 608-609, 724 A. 2d, at 15. As the State and the United States now concede, the records contain no mention of sexual abuse, much less of the repeated molestations and rapes of petitioner detailed in the Selvog report. Brief for Respondents 22; Brief for United States as *Amicus Curiae* 26; App. to Pet. for Cert. 175a-179a, 190a. The state court's assumption that the records documented instances of this abuse has been shown to be incorrect by "clear and convincing evidence," 28 U. S. C. § 2254(e)(1), and reflects "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). This partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision.

The dissent insists that this Court's hands are tied, under § 2254(d), "by the state court's factual determinations that Wiggins' trial counsel `*did* investigate and *were* aware of [Wiggins'] background,'" *post,* at 550. But as we have made clear, the Maryland Court of Appeals' conclusion that the *scope* of counsel's investigation into petitioner's background met the legal standards set in *Strickland* represented 529*529 an objectively unreasonable application of our precedent. § 2254(d)(1). Moreover, the court's assumption that counsel learned of a major aspect of Wiggins' background, *i. e.,* the sexual abuse, from the DSS records was clearly erroneous. The requirements of § 2254(d) thus pose no bar to granting petitioner habeas relief.

In their briefs to this Court, the State and the United States contend that counsel, in fact, conducted a more thorough investigation than the one we have just described. This conclusion, they explain, follows from Schlaich's post-conviction testimony that he knew of the sexual abuse Wiggins suffered, as well as of the hand-burning incident. According to the State and its*amicus,* the fact that counsel claimed to be aware of this evidence, which was not in the social services records, coupled with Schlaich's statement that he knew what was in "other people's reports," App. 490-491, suggests that counsel's investigation must have extended beyond the social services records. Tr. of Oral Arg. 31-36; Brief for United States as *Amicus Curiae* 26-27, n. 4; Brief for Respondents 35. Schlaich simply "was not asked to and did not reveal the source of his knowledge" of the abuse. Brief for United States as *Amicus Curiae* 27, n. 4.

In considering this reading of the state postconviction record, we note preliminarily that the Maryland Court of Appeals clearly assumed both that counsel's investigation began and ended with the PSI and the DSS records and that this investigation was sufficient in scope to satisfy*Strickland*'s reasonableness requirement. See *Wiggins* v. *State,* 352 Md., at 608, 724 A. 2d, at 15. The court also assumed, erroneously, that the social services records cited incidences of sexual abuse. See *id.,* at 608-609, 724 A. 2d, at 15. Respondents' interpretation of Schlaich's postconviction testimony therefore has no bearing on whether the Maryland Court of 530*530Appeals' decision reflected an objectively unreasonable application of *Strickland.*

In its assessment of the Maryland Court of Appeals' opinion, the dissent apparently does not dispute that if counsel's investigation in this case had consisted exclusively of the PSI and the DSS records, the court's decision would have constituted an unreasonable application of*Strickland.* See *post,* at 543-544. Of necessity, then, the dissent's primary contention is that the Maryland Court of Appeals *did* decide that Wiggins' counsel looked beyond the PSI and the DSS records and that we must therefore defer to that finding under § 2254(e)(1). See *post,* at 544-551. *Had* the court found that counsel's investigation extended beyond the PSI and the DSS records, the dissent, of course, would be correct that § 2254(e) would require that we defer to that finding. But the state court made no such finding.

The dissent bases its conclusion on the Maryland Court of Appeals' statements that "`[c]ounsel were aware that appellant had a most unfortunate childhood,'" and that "`counsel *did* investigate and *were* aware of appellant's background.'" See *post,* at 540, 545 (quoting *Wiggins* v. *State, supra,* at 608, 610, 724 A. 2d, at 15, 16). But the state court's description of how counsel learned of petitioner's childhood speaks for itself. The court explained: "Counsel were aware that appellant had a most unfortunate childhood. Mr. Schlaich had available to him not only the pre-sentence investigation

report . . . but also more detailed social service records." See 352 Md., at 608-609, 724 A. 2d, at 15. This construction reflects the state court's understanding that the investigation consisted of the two sources the court mentions. Indeed, when describing counsel's investigation into petitioner's background, the court never so much as implies that counsel uncovered any source other than the PSI and the DSS records. The court's conclusion that counsel were aware of "incidences of . . . sexual abuse" does not suggest otherwise, cf.*supra,* at 518, because the court assumed that counsel 531*531 learned of such incidents from the social services records. *Wiggins* v. *State,* 352 Md., at 608-609, 724 A. 2d, at 15.

The court's subsequent statement that, "as noted, counsel *did* investigate and *were* aware of appellant's background," underscores our conclusion that the Maryland Court of Appeals assumed counsel's investigation into Wiggins' childhood consisted of the PSI and the DSS records. The court's use of the phrase "as noted," which the dissent ignores, further confirms that counsel's investigation consisted of the sources previously described, *i. e.,* the PSI and the DSS records. It is the dissent, therefore, that "rests upon a fundamental fallacy," *post,* at 544-that the Maryland Court of Appeals determined that Schlaich's investigation extended beyond the PSI and the DSS records.

We therefore must determine, *de novo,* whether counsel reached beyond the PSI and the DSS records in their investigation of petitioner's background. The record as a whole does not support the conclusion that counsel conducted a more thorough investigation than the one we have described. The dissent, like the State and the United States, relies primarily on Schlaich's postconviction testimony to establish that counsel investigated more extensively. But the questions put to Schlaich during his postconviction testimony all referred to what he knew from the social services records; the line of questioning, after all, first directed him to his discovery of those documents. His subsequent reference to "other people's reports," made in direct response to a question concerning petitioner's mental retardation, appears to be an acknowledgment of the psychologist's reports we know counsel commissioned—reports that also revealed nothing of the sexual abuse Wiggins experienced. App. 349. As the state trial judge who heard this testimony concluded at the close of the proceedings, there is "*no reason to believe* that [counsel] did have all of this information." *Id.,* at 606 (emphasis added).

532*532 The State maintained at oral argument that Schlaich's reference to "other people's reports" indicated that counsel learned of the sexual abuse from sources other than the PSI and the DSS records. Tr. of Oral Arg. 31, 33, 35. But when pressed repeatedly to identify the sources counsel might have consulted, the State acknowledged that no written reports documented the sexual abuse and speculated that counsel must have learned of it through "[o]ral reports" from Wiggins himself. *Id.,* at 36. Not only would the phrase "other people's reports" have been an unusual way for counsel to refer to conversations with his client, but the record contains no evidence that counsel ever pursued this line of questioning with Wiggins. See *id.,* at 24-25. For its part, the United States emphasized counsel's retention of the psychologist. *Id.,* at 51; Brief for United States as *Amicus Curiae* 27. But again, counsel's decision to hire a psychologist sheds no light on the extent of their investigation into petitioner's social background. Though Stejskal based his conclusions on clinical interviews with Wiggins,

as well as meetings with Wiggins' family members, Lodging of Petitioner, his final report discussed only petitioner's mental capacities and attributed nothing of what he learned to Wiggins' social history.

To further underscore that counsel did not know, prior to sentencing, of the sexual abuse, as well as of the other incidents not recorded in the DSS records, petitioner directs us to the content of counsel's October 17, 1989, proffer. Before closing statements and outside the presence of the jury, Schlaich proffered to the court the mitigation case counsel would have introduced had the court granted their motion to bifurcate. App. 349-351. In his statement, Schlaich referred only to the results of the psychologist's test and mentioned nothing of Wiggins' troubled background. Given that the purpose of the proffer was to preserve their pursuit of bifurcation as an issue for appeal, they had every incentive to make their mitigation case seem as strong as possible. 533*533 Counsel's failure to include in the proffer the powerful evidence of repeated sexual abuse is therefore explicable only if we assume that counsel had no knowledge of the abuse.

Contrary to the dissent's claim, see *post,* at 547, we are not accusing Schlaich of lying. His statements at the postconviction proceedings that he knew of this abuse, as well as of the hand-burning incident, may simply reflect a mistaken memory shaped by the passage of time. After all, the state postconviction proceedings took place over four years after Wiggins' sentencing. Ultimately, given counsel's likely ignorance of the history of sexual abuse at the time of sentencing, we cannot infer from Schlaich's postconviction testimony that counsel looked further than the PSI and the DSS records in investigating petitioner's background. Indeed, the record contains no mention of sources other than those it is undisputed counsel possessed, see *supra,* at 523-524. We therefore conclude that counsel's investigation of petitioner's background was limited to the PSI and the DSS records.

3

In finding that Schlaich and Nethercott's investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland.* 466 U. S., at 689. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.,* at 690-691. A decision not to

investigate thus "must be directly assessed for reasonableness in all the circumstances."*Id.,* at 691.

534*534 Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further. Counsel's pursuit of bifurcation until the eve of sentencing and their partial presentation of a mitigation case suggest that their incomplete investigation was the result of inattention, not reasoned strategic judgment. In deferring to counsel's decision not to pursue a mitigation case despite their unreasonable investigation, the Maryland Court of Appeals unreasonably applied *Strickland.* Furthermore, the court partially relied on an erroneous factual assumption. The requirements for habeas relief established by 28 U. S. C. § 2254(d) are thus satisfied.

III

In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced his defense. *Strickland,* 466 U. S., at 692. In *Strickland,* we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.,* at 694. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence. In this case, our review is not circumscribed by a state court conclusion with respect to prejudice, as neither of the state courts below reached this prong of the *Strickland* analysis.

The mitigating evidence counsel failed to discover and present in this case is powerful. As Selvog reported based on his conversations with Wiggins and members of his family, 535*535 see Reply Brief for Petitioner 18-19, Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry* v. *Lynaugh,* 492 U. S. 302, 319 (1989)("`[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse'"); see also *Eddings* v. *Oklahoma,* 455 U. S. 104, 112 (1982) (noting that

consideration of the offender's life history is a "`part of the process of inflicting the penalty of death'"); *Lockett*v. *Ohio,* 438 U. S. 586, 604 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant's background).

Given both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form. While it may well have been strategically defensible upon a reasonably thorough investigation to focus on Wiggins' direct responsibility for the murder, the two sentencing strategies are not necessarily mutually exclusive. Moreover, given the strength of the available evidence, a reasonable attorney might well have chosen to prioritize the mitigation case over the direct responsibility challenge, particularly given that Wiggins' history contained little of the double edge we have found to justify limited investigations in other cases. Cf. *Burger* v. *Kemp,* 483 U. S. 776 (1987); *Darden* v. *Wainwright,* 477 U. S. 168 (1986).

536*536 The dissent nevertheless maintains that Wiggins' counsel would not have altered their chosen strategy of focusing exclusively on Wiggins' direct responsibility for the murder. See*post,* at 553-554. But as we have made clear, counsel were not in a position to make a reasonable strategic choice as to whether to focus on Wiggins' direct responsibility, the sordid details of his life history, or both, because the investigation supporting their choice was unreasonable. See *supra,* at 524-527. Moreover, as we have noted, see *supra,* at 526, Wiggins' counsel did *not* focus solely on Wiggins' direct responsibility. Counsel told the sentencing jury "[y]ou're going to hear that Kevin Wiggins has had a difficult life," App. 72, but never followed up on this suggestion.

We further find that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence. In reaching this conclusion, we need not, as the dissent suggests, *post,* at 554-556, make the state-law evidentiary findings that would have been at issue at sentencing. Rather, we evaluate the totality of the evidence—"both that adduced at trial, *and the evidence adduced in the habeas proceeding[s].*" *Williams* v. *Taylor,* 529 U. S., at 397-398 (emphasis added).

In any event, contrary to the dissent's assertion, it appears that Selvog's report may have been admissible under Maryland law. In *Whittlesey* v. *State,* 340 Md. 30, 665 A. 2d 223 (1995), the Maryland Court of Appeals vacated a trial court decision excluding, on hearsay grounds, testimony by Selvog himself. The court instructed the trial judge to exercise its discretion to admit "any relevant and reliable mitigating evidence, including hearsay evidence that might not be admissible in the guilt-or-innocence phase of the trial." *Id.,* at 73, 665 A. 2d, at 244. This "relaxed standard," the court observed, would provide the factfinder with "the opportunity to consider `any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less 537*537 than death.'" *Ibid.* See also *Ball* v. *State,* 347 Md. 156, 172-173, 699 A. 2d 1170, 1177 (1997) (noting that the trial judge had admitted Selvog's social history report on the defendant). While the dissent dismisses the contents of the social history report, calling Wiggins a "liar" and his claims of sexual abuse "uncorroborated gossip," *post,* at 554, 555, Maryland appears to consider this type of evidence relevant at sentencing, see

Whittlesey, supra, at 71, 665 A. 2d, at 243 ("The reasons for relaxing the rules of evidence apply with particular force in the death penalty context"). Not even the State contests that Wiggins suffered from the various types of abuse and neglect detailed in the PSI, the DSS records, and Selvog's social history report.

Wiggins' sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. Cf. *Borchardt* v. *State,* 367 Md. 91, 139-140, 786 A. 2d 631, 660 (2001) (noting that as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed); App. 369 (instructing the jury: "If you unanimously find that the State has proven by a preponderance of the evidence that the aggravating circumstance does outweigh the mitigating circumstances, then consider whether death is the appropriate sentence").

Moreover, in contrast to the petitioner in *Williams* v. *Taylor, supra,* Wiggins does not have a record of violent conduct that could have been introduced by the State to offset this powerful mitigating narrative. Cf. *id.,* at 418 (Rehnquist, C. J., dissenting) (noting that Williams had savagely beaten an elderly woman, stolen two cars, set fire to a home, stabbed a man during a robbery, and confessed to choking two inmates and breaking a fellow prisoner's jaw). As the Federal District Court found, the mitigating evidence in this case is 538*538 stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams,* where we found prejudice as the result of counsel's failure to investigate and present mitigating evidence. *Id.,* at 399. We thus conclude that the available mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of Wiggins' moral culpability. *Id.,* at 398. Accordingly, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, dissenting.

The Court today vacates Kevin Wiggins' death sentence on the ground that his trial counsel's investigation of potential mitigating evidence was "incomplete." *Ante,* at 534. Wiggins' trial counsel testified under oath, however, that he was aware of the basic features of Wiggins' troubled childhood that the Court claims he overlooked. App. 490-491. The Court chooses to disbelieve this testimony for reasons that do not withstand analysis. Moreover, even if this disbelief could plausibly be entertained, that would certainly not establish (as 28 U. S. C. § 2254(d) requires) that the Maryland Court of Appeals was *unreasonable* in believing it, and in therefore concluding that counsel adequately investigated Wiggins' background. The Court also fails to observe § 2254(e)(1)'s requirement that federal habeas courts respect state-court factual determinations not rebutted by "clear and convincing evidence." The decision sets at naught the statutory scheme we once described as a "highly deferential standard for evaluating state-court rulings," *Lindh* v. *Murphy,* 521 U. S. 320, 333, n. 7 (1997). I respectfully dissent.

I

Wiggins claims that his death sentence violates *Strickland* v. *Washington,* 466 U. S. 668 (1984), because his trial attorneys, 539*539 had they further investigated his background, would have learned—and could have presented to the jury—the following evidence: (1) According to family members, Wiggins' mother was an alcoholic who neglected her children and failed to feed them properly, App. to Pet. for Cert. 165a-169a; (2) according to Wiggins and his sister India, Wiggins' mother intentionally burned 5-year-old Wiggins' hands on a kitchen stove as punishment for playing with matches, *id.,* at 169a-171a; (3) Wiggins was placed in foster care at age six because of his mother's neglect, and was moved in and out of various foster families,*id.,* at 173a-192a; (4) according to Wiggins, one of his foster parents sexually abused him "`two or three times a week, sometimes everyday,'" when he was eight years old, *id.,* at 177a-179a; (5) according to Wiggins, at age 16 he was knocked unconscious and raped by two of his foster mother's teenage children, *id.,* at 190a; (6) according to Wiggins, when he joined the Job Corps at age 18 a Job Corps administrator "made sexual advances . . . and they became sexually involved," *id.,* at 192a-193a (later, according to Wiggins, the Job Corps supervisor drugged him and when Wiggins woke up, he "knew he had been anally penetrated," *id.,* at 193a); and (7) Wiggins is "`borderline'" mentally retarded, *id.,* at 193a-194a. All this information is contained in a "social history" report prepared by social worker Hans Selvog for use in the state postconviction proceedings.

In those proceedings, Carl Schlaich (one of Wiggins' two trial attorneys) testified that, although he did not retain a social worker to assemble a "social history" report, he nevertheless had detailed knowledge of Wiggins' background:

> *"`Q But you knew that Mr. Wiggins, Kevin Wiggins, had been removed from his natural mother as a result of a finding of neglect and abuse when he was six years old, is that correct?*
>
> *"`A I believe that we tracked all of that down.*
>
> *540*540 "`Q You got the Social Service records?*
>
> *"`A That is what I recall.*
>
> *"`Q That was in the Social Service records?*
>
> *"`A Yes.*
>
> *"`Q So you knew that?*
>
> *"`A Yes.*

" `Q You also knew that where [sic] were reports of sexual abuse at one of his foster homes?

" `A Yes.

" `Q Okay. You also knew that he had had his hands burned as a child as a result of his mother's abuse of him?

" `A Yes.

" `Q You also knew about homosexual overtures made toward him by his Job Corp supervisor?

" `A Yes.

" `Q And you also knew that he was borderline mentally retarded?

" `A Yes.

" `Q You knew all—

" `A At least I knew that as it was reported in other people's reports, yes.

" `Q But you knew it?

" `A Yes.'" App. 490-491.

In light of this testimony, the Maryland Court of Appeals found that "counsel *did* investigate and*were* aware of [Wiggins'] background," *Wiggins* v. *State,* 352 Md. 580, 610, 724 A. 2d, 1, 16 (1999) (emphasis in original), and, specifically, that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood," *id.,* at 608, 724 A. 2d, at 15. These state-court determinations of factual issues are binding on federal habeas courts, including this Court, unless rebutted by clear 541*541 and convincing evidence.[1] Relying on these factual findings, the Maryland Court of Appeals rejected Wiggins' claim that his trial attorneys failed adequately to investigate potential mitigating evidence. Wiggins' trial counsel, it said, "did not have as detailed or graphic a history as was prepared by Mr. Selvog, but that is not a Constitutional deficiency. *See Gilliam v. State,*331 Md. 651, 680-82, 629 A. 2d 685, 700-02 (1993), *cert. denied,* 510 U. S. 1077 . . . (1994);*Burger v. Kemp,* 483 U. S. 776, 788-96 . . . (1987)." *Id.,* at 610, 724 A. 2d, at 16.

The state court having adjudicated Wiggins' Sixth Amendment claim on the merits, 28 U. S. C. § 2254(d) bars habeas relief unless the state-court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," § 2254(d)(2). The Court concludes without foundation that the Maryland Court of Appeals' decision failed both these tests. I shall discuss each in turn.

A

In concluding that the Maryland Court of Appeals *unreasonably* applied our clearly established precedents, the Court disregards § 2254(d)(1)'s command that only "clearly established Federal law, as determined by the Supreme Court of the United States," be used in assessing the reasonableness of state-court decisions. Further, the Court misdescribes the state court's opinion while ignoring § 2254(e)(1)'s 542*542 requirement that federal habeas courts respect state-court factual determinations.

1

We have defined "clearly established Federal law, as determined by the Supreme Court of the United States," to encompass "the holdings . . . of this Court's decisions *as of the time of the relevant state-court decision.*" *Williams* v. *Taylor,* 529 U. S. 362, 412 (2000) (emphasis added). Yet in discussing what our precedents have "clearly established" with respect to ineffectiveness claims, the Court relies upon a case—*Williams* v. *Taylor, supra*—that *postdates* the Maryland court's decision rejecting Wiggins' Sixth Amendment claim. See *ante,* at 522. The Court concedes that *Williams* was not "clearly established Federal law" at the time of the Maryland Court of Appeals' decision, *ante,* at 522, yet believes that it may ignore § 2254(d)'s strictures on the ground that "Williams' case was before us on habeas review[, and] we therefore made no new law in resolving [his] ineffectiveness claim," *ibid.* The Court is wrong—in both its premise and its conclusion.

Although *Williams* was a habeas case, we reviewed the *first* prong of the habeas petitioner's*Strickland* claim— the inadequate-performance question—*de novo.* Williams had surmounted § 2254(d)'s bar to habeas relief because we held that the Virginia Supreme Court's analysis with respect to *Strickland*'s second prong—the *prejudice* prong—was both "contrary to," and "an unreasonable application of," our clearly established precedents. See *Williams, supra,* at 393-394, 397. That left us free to provide habeas relief— and since the State had not raised a*Teague* defense, see *Teague* v. *Lane,* 489 U. S. 288 (1989), we proceeded to analyze the inadequate-performance contention *de novo,* rather than under "clearly established" law. That is clear from the fact that we cited no cases in our discussion of the inadequate-performance question, see 529 U. S., at 395-396. The Court is mistaken to assert that this discussion "made no new law," 543*543 *ante,* at 522. There was nothing in *Strickland,* or in any of our "clearly established" precedents at the time of the Virginia Supreme Court's decision, to support*Williams*' statement that trial counsel had an "obligation to conduct a thorough

investigation of the defendant's background," 529 U. S., at 396. That is why the citation supporting the statement is not one of our opinions, but rather standards promulgated by the American Bar Association, *ibid.* (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980)). Insofar as this Court's cases were concerned, *Burger* v. *Kemp,* 483 U. S. 776, 794 (1987), had *rejected* an ineffective-assistance claim even though acknowledging that trial counsel "could well have made a more thorough investigation than he did." And *Strickland* had eschewed the imposition of such "rules" on counsel, 466 U. S., at 688-689, specifically stating that the very ABA standards upon which *Williams* later relied "are guides to determining what is reasonable, *but they are only guides.*" 466 U. S., at 688 (emphasis added). *Williams did* make new law—law that was *not* "clearly established" at the time of the Maryland Court of Appeals' decision.

But even if the Court were correct in its characterization of *Williams,* that *still* cannot justify its decision to ignore an Act of Congress. Whether *Williams* "made new law" or not, what *Williams*held was not clearly established Supreme Court precedent *as of the time of the state court's decision,* and cannot be used to find fault in the state-court opinion. Section 2254(d)(1) means what it says, and the Court simply defies the congressionally imposed limits on federal habeas review.

2

The Court concludes that *Strickland* was applied unreasonably (and § 2254(d)(1) thereby satisfied) because the Maryland Court of Appeals' conclusion that trial counsel adequately investigated Wiggins' background, see *Wiggins,* 352 Md., at 610, 724 A. 2d, at 16, was unreasonable. That assessment 544*544 cannot possibly be sustained, particularly in light of the state court's factual determinations that bind this Court under § 2254(e)(1). The Court's analysis of this point rests upon a fundamental fallacy: that the state court "clearly assumed that counsel's investigation began and ended with the PSI and the DSS records," *ante,* at 529. That is demonstrably not so. The state court did observe that Wiggins' trial attorneys "had available" the presentence investigation (PSI) report and the Maryland Department of Social Services (DSS) reports, *Wiggins, supra,* at 608-609, 724 A. 2d, at 15-16, but there is absolutely nothing in the state-court opinion that says (or assumes) that these were the *only* sources on which counsel relied. It is rather *this* Court that makes such an assumption—or rather, such a bald assertion, see *ante,* at 527 (asserting that counsel "cease[d] all investigation" upon receipt of the PSI and DSS reports); *ante,* at 524 (referring to "[c]ounsel's decision not to expand their investigation beyond the PSI and DSS records").

Nor *could* the Maryland Court of Appeals have "assumed" that Wiggins' trial counsel looked no further than the PSI and DSS reports, because the state-court record is clear that Wiggins' trial attorneys had investigated well beyond these sources. Public-defender investigators interviewed Wiggins' family members, see Defendant's

Supplemental Answer to State's Discovery Request filed in No. 88-CR-5464 (Cir. Ct. Baltimore Cty., Md., Sept. 18, 1989), Lodging of Respondents, and Wiggins' trial attorneys hired a psychologist, Dr. William Stejskal (who reviewed the DSS records, conducted clinical interviews, and performed six different psychological tests of Wiggins, *ibid.;* App. 349-351), and a criminologist, Dr. Robert Johnson (who interviewed Wiggins and testified that Wiggins would adjust adequately to life in prison, *id.,* at 319-321). Schlaich also testified in the state postconviction proceedings that he knew information about Wiggins' background that was not contained in the DSS or PSI reports—such as the allegation that Wiggins' mother 545*545 burned his hands as a child, *id.,* at 490—so Schlaich *must* have investigated sources beyond these reports.

As the Court notes, *ante,* at 529-530, the Maryland Court of Appeals did not expressly state that counsel's investigation extended beyond the PSI and DSS records. There was no reason whatever to do so, since it had found that "counsel *did* investigate and *were* aware of appellant's background," *Wiggins, supra,* at 610, 724 A. 2d, at 16, and since that finding was based on a state-court record that clearly demonstrates investigation beyond the PSI and DSS reports. The court's failure to recite what is obvious from the record surely provides no basis for believing that it stupidly "assumed" the opposite of what is obvious from the record.

Once one eliminates the Court's mischaracterization of the state-court opinion—which did not and could not have "assumed" that Wiggins' counsel knew only what was contained in the DSS and PSI reports—there is no basis for finding it "unreasonable" to believe that counsel's investigation was adequate. As noted earlier, Schlaich testified in the state postconviction proceedings that he was aware of the essential items contained in the later-prepared "social history" report. He knew that Wiggins was subjected to neglect and abuse from his mother, App. 490, that there were reports of sexual abuse at one of his foster homes, *ibid.,* that his mother had burned his hands as a child, *ibid.,* that a Job Corps supervisor had made homosexual overtures toward him, *id.,* at 490-491, and that Wiggins was "`borderline'" mentally retarded, *id.,* at 491.[2] Schlaich explained that, although he 546*546 was aware of all this potential mitigating evidence, he chose not to present it to the jury for a strategic reason—namely, that it would conflict with his efforts to persuade the jury that Wiggins was not a "`principal'" in Mrs. Lacs's murder (*i. e.,* that he did not kill Lacs by his own hand). *Id.,* at 504-505.

There are only two possible responses to this testimony that might salvage Wiggins' ineffective-assistance claim. The first would be to declare that Schlaich had an inescapable *duty* to hire a social worker to construct a so-called "social history" report, *regardless* of Schlaich's pre-existing knowledge of Wiggins' background. Petitioner makes this suggestion, see Brief for Petitioner 32, n. 8 (asserting that it was "`a normative standard'" at the time of Wiggins' case for capital defense lawyers in Maryland to obtain a social history); and the Court flirts with accepting it, see *ante,* at 524 ("[P]rofessional standards that prevailed in Maryland . . . at the time of Wiggins' trial" included, for defense of capital cases, "the preparation of a social history report"); *ibid.* (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6, p. 133 (1989) (hereinafter ABA Guidelines), which says that counsel should make efforts "`to discover *all reasonably available* mitigating evidence'"

(emphasis added by the Court)). To think that the requirement of a "social history" was part of "clearly established Federal law" (which is what § 2254(d) requires) when the events here occurred would be absurd. Nothing in our clearly established precedents requires counsel to retain a social worker when he is already largely aware of his client's background. To the contrary,*Strickland* emphasizes that "[t]here are countless ways to provide effective assistance in any given case," 466 U. S., at 689, and further states that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are 547*547 guides to determining what is reasonable, *but they are only guides,*" *id.,* at 688. Cf. *ante,* at 524 (treating the ABA Guidelines as "well-defined norms"). It is inconceivable that Schlaich, assuming he testified truthfully regarding his detailed knowledge of Wiggins' troubled childhood, App. 490-491, would need to hire a social worker to comport with *Strickland*'s competence standards. And it certainly would not have been *unreasonable* for the Maryland Court of Appeals to conclude otherwise.

The second possible response to Schlaich's testimony about his extensive awareness of Wiggins' background is to assert that Schlaich lied. The Court assumes *sub silentio* throughout its opinion that Schlaich was not telling the truth when he testified that he knew of reports of sexual abuse in one of Wiggins' foster homes, see, *e. g., ante,* at 525 ("Had counsel investigated further, they might well have discovered the sexual abuse later revealed during state postconviction proceedings"), and eventually declares straight-out that it disbelieves Schlaich, *ante,* at 531-533. This conclusion rests upon a blatant mischaracterization of the record, and an improper shifting of the burden of proof to the State to demonstrate Schlaich's awareness of Wiggins' background, rather than requiring Wiggins to prove Schlaich's ignorance of it. But, more importantly, it is simply not enough for the Court to conclude, *ante,* at 533, that it "cannot infer from Schlaich's postconviction testimony that counsel looked further than the PSI and DSS reports in investigating petitioner's background." If it is at least *reasonable* to believe Schlaich told the truth, then it could not have been *unreasonable* for the Maryland Court of Appeals to conclude that Wiggins' trial attorneys conducted an adequate investigation into his background. See 28 U. S. C. § 2254(d)(1).

Schlaich's testimony must have been false, the Court insists, because the social services records do not contain any evidence of sexual abuse, and "the questions put to Schlaich during his postconviction testimony all referred to what he 548*548 knew from the social services records." *Ante,* at 531. That is not true. Schlaich was *never* asked "what he knew from the social services records." With regard to the alleged sexual abuse in particular, Schlaich answered "`[y]es'" to the following question: "`You also knew that where *[sic]* were reports of sexual abuse at one of his foster homes?' " This question did not "refe[r] to what [Schlaich] knew from the social services records," as the Court declares; and neither, by the way, did *any*of the other questions put to Schlaich regarding his knowledge of Wiggins' background. See App. 490-491. Wiggins' postconviction counsel simply never asked Schlaich to reveal the source of his knowledge.

Schlaich's most likely source of knowledge of the alleged sexual abuse was Wiggins himself; even Hans Selvog's extensive "social history" report unearthed no documentation or corroborating witnesses with respect to that claim. *Id.,* at 464; see

App. to Pet. for Cert. 177a, 193a. The Court, however, dismisses this possibility for two reasons. First, because "the record contains no evidence that counsel ever pursued this line of questioning with Wiggins." *Ante,* at 532. This statement calls for a timeout to get our bearings: The burden of proof here is on*Wiggins* to show that counsel made their decision without adequate knowledge. See*Strickland,* 466 U. S., at 687. And when counsel has testified, under oath, that he *did* have particular knowledge, the burden is not on counsel to show how he obtained it, but on *Wiggins*(if he wishes to impeach that testimony) to show that counsel could not have obtained it. Thus, the absence of evidence in the record as to whether or not Schlaich pursued this line of questioning with Wiggins dooms, rather than fortifies, Wiggins' ineffective-assistance claim. Wiggins has produced no evidence that *anything* in Hans Selvog's "social history" report was unknown to Schlaich, and no evidence that any source on which Selvog relied was not used by Schlaich.

549*549 The Court's second reason for rejecting the possibility that Schlaich learned of the alleged sexual abuse from Wiggins is even more incomprehensible. The Court claims that "the phrase `other people's reports' [would] have been an unusual way for counsel to refer to conversations with his client." *Ante,* at 532. But Schlaich never used the phrase "other people's reports" in describing how he learned of the alleged sexual abuse in Wiggins' foster homes. Schlaich testified only that he learned of Wiggins' *borderline mental retardation* as it was reported in "`other people's reports'":

> *"`Q And you also knew that he was borderline mentally retarded?*
>
> *"`A Yes.*
>
> *"`Q You knew all—*
>
> *"`A At least I knew that as it was reported in other people's reports, yes.*
>
> *"`Q But you knew it?*
>
> *"`A Yes.'" App. 490-491 (emphasis added).*

It is clear that when Schlaich said, "`At least I knew *that* as it was reported in other people's reports,'" *id.,* at 491 (emphasis added), the "`that'" to which he referred was the fact that Wiggins was borderline mentally retarded—not the other details of Wiggins' background which Schlaich had previously testified he knew.

The Court's final reason for disbelieving Schlaich's sworn testimony is his failure to mention the alleged sexual abuse in the proffer of mitigating evidence he would introduce if the trial court granted his motion to bifurcate. "Counsel's failure to include in the proffer the powerful evidence of repeated sexual abuse is . . . explicable only if we assume that counsel had no knowledge of the abuse." *Ante,* at 533. But because the *only* evidence of sexual abuse consisted of Wiggins' own assertions, see App. 464; App. to Pet. for Cert. 177a, 193a (evidence not exactly worthy of the Court's flattering description as "powerful"), *there was nothing to proffer* 550*550 *unless Schlaich declared an intent to put Wiggins on the stand.* Given counsel's chosen trial strategy to prevent

Wiggins from testifying during the sentencing proceedings, the decision not to mention sexual abuse in the proffer is perfectly consistent with counsel's claimed knowledge of the alleged abuse.

Of course these reasons the Court offers—which range from the incredible up to the feeble—are used only in support of the Court's conclusion that, *in its independent judgment,* Schlaich was lying. The Court does not even attempt to establish (as it must) that it was *objectively unreasonable* for the state court to believe Schlaich's testimony and therefore conclude that he conducted an adequate investigation of Wiggins' background. It could not possibly make this showing. Wiggins has not produced any direct evidence that his attorneys were uninformed with respect to *anything* in his background, and the Court can muster no circumstantial evidence beyond the powerfully unconvincing fact that Schlaich failed to mention the allegations of sexual abuse in his proffer. To make things worse, the Court is *still* bound (though one would not know it from the opinion) by the state court's factual determinations that Wiggins' trial counsel "*did* investigate and *were* aware of [Wiggins'] background," *Wiggins,* 352 Md., at 610, 724 A. 2d, at 16 (emphasis in original), and that "[c]ounsel were aware that [Wiggins] had a most unfortunate childhood," *id.,* at 608, 724 A. 2d, at 15. See 28 U. S. C. § 2254(e)(1).[3] Because it is at least reasonable to believe 551*551 Schlaich's testimony, and because § 2254(e)(1) requires us to respect the state court's factual determination that Wiggins' trial attorneys were aware of Wiggins' background, the Maryland Court of Appeals' legal conclusion—that trial counsel "did not have as detailed or graphic a history as was prepared by Mr. Selvog, *but that is not a Constitutional deficiency,*" *Wiggins, supra,* at 610, 724 A. 2d, at 16 (emphasis added)—is unassailable under § 2254(d)(1).

B

The Court holds in the alternative that Wiggins has satisfied § 2254(d)(2), which allows a habeas petitioner to escape § 2254(d)'s bar to relief when the state court's adjudication of his claim "resulted in a decision that was *based on an unreasonable determination of the facts* in light of the evidence presented in the State court proceeding." (Emphasis added.) This is so, the Court says, because the Maryland Court of Appeals wrongly claimed that Wiggins' social services records "recorded incidences of . . . sexual abuse." 352 Md., at 608-609, 724 A. 2d, at 15.

That it made that claim is true enough. And I will concede that Wiggins has rebutted the presumption of correctness by the "clear and convincing evidence" that § 2254(e)(1) requires. It is both clear and convincing from reading the DSS records that they contain no evidence of sexual abuse. I will also assume, *arguendo,* that the state court's error was "unreasonable" in light of the evidence presented in the state-court proceeding.

Given all that, the Court's conclusion that a § 2254(d)(2) case has been made out still suffers from the irreparable defect 552*552 that the Maryland Court of Appeals' decision was not "based on" this mistaken factual determination. What difference did it make whether the social services records contained evidence of sexual abuse? Even if they did not, the court's decision would have been the same in light of Schlaich's sworn testimony that he was aware of the alleged sexual abuse. The *source* of Schlaich's knowledge—whether he obtained it from the DSS reports or from Wiggins himself — was of no consequence. The only thing that mattered was that Schlaich *knew,* and testified under oath that he knew, enough about Wiggins' background to make it reasonable to proceed without a report by a social worker. The Court's opinion does not even discuss this requirement of § 2254(d)(2), that the unreasonable determination of facts be one on which the state-court decision was *based.*

II

The Court's indefensible holding that Wiggins has avoided § 2254(d)'s bar to relief is not alone enough to entitle Wiggins to habeas relief on his Sixth Amendment claim. Wiggins *still* must establish that he was "prejudiced" by his counsel's alleged "error." *Strickland,* 466 U. S., at 691-696. Specifically, Wiggins must demonstrate that, if his trial attorneys had retained a licensed social worker to assemble a "social history" of their client, there is a "reasonable probability" that (1) his attorneys would have chosen to present the social history evidence to the jury, *and* (2) upon hearing that evidence, the jury would have spared his life. The Court's analysis on these points continues its disregard for the record in a determined procession toward a seemingly preordained result.

There is no "reasonable probability" that a social-history investigation would have altered the chosen strategy of Wiggins' trial counsel. As noted earlier, Schlaich was well aware—without the benefit of a "social history" report—that Wiggins had a troubled childhood and background. And the 553*553 Court remains bound, *even after* concluding that Wiggins has satisfied the standards of §§ 2254(d)(1) and (d)(2), by the state court's factual determination that Wiggins' trial attorneys "*were* aware of [Wiggins'] background," *Wiggins,* 352 Md., at 610, 724 A. 2d, at 16 (emphasis in original), and "were aware that [Wiggins] had a most unfortunate childhood,"*id.,* at 608, 724 A. 2d, at 15. See 28 U. S. C. § 2254(e)(1). Wiggins' trial attorneys chose, however, not to present evidence of Wiggins' background to the jury because of their "deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of Ms. Lacs." *Wiggins, supra,* at 608, 724 A. 2d, at 15.

Wiggins has not shown that the incremental information in Hans Selvog's social-history report would have induced counsel to change this course. Schlaich testified under oath that presenting the type of evidence in Selvog's report would have conflicted with his chosen defense strategy to raise doubts as to Wiggins' role as a principal, and that he

wanted to avoid a "shotgun approach" with the jury. App. 504-505.[4] (This testimony is entirely unrefuted by the Court's statement that *at the time of trial* counsel "were not in a position to make a reasonable strategic choice," because of their alleged inadequate investigation, *ante,* at 536. Schlaich presented this testimony in state postconviction proceedings, when *there was no doubt* he was fully aware of the details of Wiggins' background. See App. 490-491.) It is irrelevant whether a hypothetical "reasonable attorney" might have introduced evidence of alleged sexual abuse,*ante,* at 535-536; *Wiggins'* attorneys would *not* have done so, and therefore 554*554 Wiggins was not prejudiced by their allegedly inadequate investigation. There is simply *nothing* to show (and the Court does not even dare to *assert*) that there is a "reasonable probability" this evidence would have been introduced *in this case. Ante,* at 535-536.

What is more, almost all of Selvog's social-history evidence was *inadmissible* at the time of Wiggins' trial. Maryland law provides that evidence in a capital sentencing proceeding must be "reliable" to be admissible, see *Whittlesey* v. *State,* 340 Md. 30, 70, 665 A. 2d 223, 243 (1995),and many of the anecdotes regarding Wiggins' childhood consist of the baldest hearsay—statements that have been neither taken in court, nor given under oath, nor subjected to cross-examination, nor even submitted in the form of a signed affidavit. Consider, for example, the allegation that Wiggins' foster father sexually abused him "`two or three times a week, sometimes everyday,'" App. to Pet. for Cert. 177a. The *only* source of that information was Wiggins himself, in his unsworn and un-cross-examined interview with Hans Selvog. There is absolutely no documentation or corroboration of the claim, App. 464, and the allegedly abusive foster parent is apparently deceased, *id.,* at 470. Wiggins was, however, examined by a pediatrician during the time that this supposed biweekly or daily sexual abuse occurred, and the pediatrician's report mentioned no signs of sexual abuse. App. to Pet. for Cert. 181a; App. 464.

Much of the other "evidence" in Selvog's report (including Wiggins' claim that he was drugged by his Job Corps supervisor and raped while unconscious, and that he was raped by the teenage sons at his fourth foster home) was also undocumented and based entirely on Wiggins' say-so. The Court treats all this uncorroborated gossip as established fact,[5] 555*555*ante,* at 534-535—indeed, even refers to it as "powerful" evidence, *ante,* at 534—and assumes that Wiggins' lawyers could have simply handed Hans Selvog's report to the jury. Nothing could be further from the truth. As the State Circuit Court explained in rejecting Wiggins' Sixth Amendment claim, "Selvog's report would have had a great deal of difficulty in getting into evidence in Maryland. He was not licensed in Maryland, the report contains multiple instances of hearsay, it contains many opinions in the nature of diagnosis of a medical nature." App. to Pet. for Cert. 156a.

The Court contends that Selvog's report "may have been admissible," *ante,* at 536—relying for that contention upon *Whittlesey* v. *State, supra. Whittlesey,* however, merely *vacated* the trial judge's decision that a social-history report assembled by Selvog was *per se* inadmissible on hearsay grounds and remanded for a determination whether the hearsay evidence was "reliable." *Id.,* at 71-72, 665 A. 2d, at 243. Thus, unless the Court is prepared to make the implausible contention that Wiggins' hearsay statements in

Selvog's report are "reliable" under Maryland law, there is no basis for its conclusion that Maryland "consider[s] this type of evidence relevant at sentencing," *ante,* at 537. The State Circuit Court in the present case, in its decision that post-dated *Whittlesey,* certainly did not think Selvog's report met the standard of reliability, App. to Pet. for Cert. 156a, and that court's assessment was undoubtedly correct. Wiggins' accounts of his background, as reported by Selvog, are the hearsay statements of a convicted murderer and, as the trial testimony in this case demonstrates, a serial liar. Wiggins lied to Geraldine Armstrong when he told her that Mrs. Lacs's car belongs to "`a buddy of min[e],'" App. 179. He lied when he told the police that he had obtained 556*556 Mrs. Lacs's car and credit cards on Friday in the afternoon, rather than Thursday, *id.,* at 180. He lied to Armstrong about how he obtained Mrs. Lacs's ring, *ibid.* And, knowing that the information he provided to Selvog would be used to attack his death sentence, Wiggins had every incentive to lie again about the supposed abuse he suffered. The hearsay statements in Selvog's report pertaining to the alleged sexual abuse were of especially dubious reliability; Maryland courts have consistently refused to allow hearsay evidence regarding alleged sexual abuse, except for statements provided by the victim to a treating physician. See *Bohnert* v. *State,* 312 Md. 266, 276, 539 A. 2d 657, 662 (1988) (refusing to admit into evidence a social worker's opinion, based on a child's "unsubstantiated averments," that the child had been sexually abused); *Nixon* v.*State,* 140 Md. App. 170, 178-188, 780 A. 2d 344, 349-354 (2001) (child protective services agent's testimony that retarded teenager told agent she had been sexually abused was inadmissible hearsay); *Low* v. *State,* 119 Md. App. 413, 424-426, 705 A. 2d 67, 73-74 (1998)(refusing to admit into evidence examining physician's testimony regarding a child's statements of sexual abuse).

Given that the anecdotes in Selvog's report were unreliable, and therefore inadmissible, the only way Wiggins' trial attorneys could have presented these allegations to the jury would have been to place Wiggins on the witness stand. Wiggins has not established (and the Court does not assert) any "reasonable probability" that they would have done this, given the dangers they saw in exposing their client to cross-examination over a wide range of issues. See App. 353 (Wiggins' trial attorneys advising him in open court: "`Kevin, if you do take the witness stand, you must answer any question that's asked of you. If it is a question the judge rules is a permissible question, you would have to answer'"). Their perception of those dangers must surely have been heightened by their observation of Wiggins' volatile and obnoxious behavior throughout the trial. See, *e. g.,* 557*557 *id.,* at 32 (Wiggins interrupting the judge's statement of the verdict to say: "`He can't tell me I did it. I'm going to go out. . . . I didn't do it. He can't tell me I did it'"); *id.,* at 56 (Wiggins interrupting the prosecutor's opening argument to say: "`I'm not going to take that because I didn't kill that lady. I'm not going to sit there and take that'").

But even indulging, for the sake of argument, the Court's belief that Selvog's report "may" have been admissible, *ante,* at 536, the Court's prejudice discussion simply assumes without analysis that the sentencing jury would have believed the report's hearsay accounts of Wiggins' statements. *Ante,* at 536-537. Yet that same jury would have learned during the guilt phase of the trial that Wiggins is a proven liar, see App. 179-180, and Wiggins would not have aided his credibility with the jury by avoiding the witness stand and funneling his story through a social worker. I doubt very much that

Wiggins' jury would have shared the Court's uncritical and wholesale acceptance of these hearsay claims.

* * *

Today's decision is extraordinary—even for our "`death-is-different'" jurisprudence. See*Simmons* v. *South Carolina,* 512 U. S. 154, 185 (1994) (Scalia, J., dissenting). It fails to give effect to § 2254(e)(1)'s requirement that state-court factual determinations be presumed correct, and disbelieves the sworn testimony of a member of the bar while treating hearsay accounts of statements of a convicted murderer as established fact. I dissent.

[*] Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Alfred P. Carlton, Lawrence J. Fox, David J. Kessler,* and *Robin M. Maher;* for the Constitution Project by *Virginia E. Sloan* and*Stephen F. Hanlon;* for the National Association of Criminal Defense Lawyers et al. by *David A. Reiser, Eleanor H. Smith,* and *Lisa B. Kemler;* for the National Association of Social Workers et al. by *Thomas C. Goldstein* and*Amy Howe;* and for Janet F. Reno et al. by *Robert S. Litt, Kathleen A. Behan,* and *John A. Freedman.*

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, *Manuel M. Medeiros,* State Solicitor General, *Robert R. Anderson,* Chief Assistant Attorney General, *Pamela C. Hamanaka,* Senior Assistant Attorney General, and *Kristofer Jorstad, A. Scott Hayward,* and*Donald E. De Nicola,* Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.,* of Alabama, *Terry Goddard* of Arizona, *Ken Salazar* of Colorado, *Thurbert E. Baker* of Georgia, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Richard P. Ieyoub* of Louisiana, *Mike McGrath*of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *D. Michael Fisher* of Pennsylvania, *Larry Long* of South Dakota, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, and *Christine O. Gregoire* of Washington; and for the Criminal Justice Legal Foundation by*Kent S. Scheidegger.*

[1] Title 28 U. S. C. § 2254(e)(1) provides:

"In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

[2] The only incident contained in the "social history" report about which Schlaich did not confirm knowledge was the occurrence of sexual abuse in *more than one* of Wiggins' foster homes. And *that* knowledge remained unconfirmed only because the question

posed asked him whether he knew of reports of abuse at "`one'" of the foster homes. App. 490. The record does not show that Schlaich knew of all these incidents in the degree of detail contained in the "social history" report—but it does not show that he did *not,* either. In short, given Schlaich's testimony, there is *no basis* for finding that he was without knowledge of *anything* in the "social history" report.

[3] The Court defends its refusal to adhere to these state-court factual determinations on the ground that "the Maryland Court of Appeals' conclusion that the *scope* of counsel's investigation . . . met the legal standards set forth in *Strickland* represented an objectively unreasonable application of our precedent." *Ante,* at 528-529. That is an inadequate response, for several reasons. First, because in the very course of determining *what was* the scope of counsel's investigation, the Court was bound to accept (as it did not) the Maryland Court of Appeals' factual findings that counsel knew of Wiggins' background, including his "most unfortunate childhood." And it is an inadequate response, secondly, because even after the Court concludes that the petitioner has avoided § 2254(d)'s bar to relief because of that misapplication of *Strickland* (or because of the alleged mistaken factual assumption "that counsel learned of . .. sexual abuse.. . from the DSS records," *ante,* at 529), it *still* must observe § 2254(e)(1)'s presumption of correctness in deciding the merits of the habeas question. See *Miller-El* v.*Cockrell,* 537 U. S. 322, 341, 348 (2003).

[4] Introducing evidence that Wiggins suffered semiweekly (or perhaps daily) sexual abuse as a child, for example, could have led the jury to conclude that this horrible experience made Wiggins precisely the type of person who could perpetrate this bizarre crime—in which a 77-year-old woman was found drowned in the bathtub of her apartment, clothed but missing her underwear, and sprayed with Black Flag Ant and Roach Killer.

[5] Wiggins' postconviction lawyers could have increased the credibility of these anecdotes, and assisted this Court's prejudice determination, by at least having Wiggins testify under oath in the state postconviction proceedings as to his allegedly abusive childhood. They did not do that— perhaps anticipating, correctly alas, that they could succeed in getting this Court to vacate a jury verdict of death on the basis of rumor and innuendo in a "social history" report that would never be admissible in a court of law.