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INEFFECTIVE ASSISTANCE OF COUNSEL

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INEFFECTIVE ASSISTANCE OF COUNSEL OR "HOW I CAN SATISFY THE SIXTH AMENDMENT AND STILL NOT HELP MY CLIENT"

BY: THOMAS J. MARLOWE

The United States Constitution guarantees a criminal defendant the assistance of counsel in the presentation of his defense.[1] However, the mere fact that a lawyer is present . . . does not, in and of itself, qualify as assistance.[2] The United States Supreme Court has held that "'the right to counsel is the right to effective assistance of counsel.'"[3]

This article will provide a broad overview of the ineffective assistance of counsel (hereinafter "IAC") claims asserted by defendants and the rationales employed by three circuits when reviewing those claims. Specifically, the article will provide a comparison among the Courts of Appeals for the Fourth, Fifth and Eleventh Circuits. Although Virginia is in the Fourth Circuit this article will also review cases from the Fifth and Eleventh Circuits because the majority of capital IAC claims have been decided in those two circuits.[4]

After explaining the general law pertaining to IAC claims, the article will compare the circuits in four general categories. Each category represents one of the typical grounds upon which IAC claims are based or reviewed. The categories are: Failure to Investigate or Present Evidence; Lack of Legal Knowledge/Failure to Research the Law; Failure to Object/Defaults; and Prejudicial Statements Made by Counsel During Trial.

Although the Supreme Court has stated that "the purpose of the effective assistance guarantee . . . is not to improve the quality of legal representation [and] is simply to ensure that criminal defendants receive a fair trial,"[5] our hope is that this material will, if only by negative example, improve the quality of death penalty representation. A better understanding of the unique requirements of capital defense may be gained through a comparison and analysis of the laws dealing with what capital defense counsel allegedly could or should have done to provide effective assistance.

BACKGROUND

Prior to *Strickland v. Washington*,[6] the United States Supreme Court's review of claims of ineffectiveness of counsel focused primarily upon situations where a defendant was actually denied assistance of counsel, or where the state interfered with counsel's ability to conduct an adequate defense.[7] In *Strickland*, for the first time, the Court's inquiry focused exclusively upon defense counsel's *personal* performance of his professional duties.

In *Strickland*, David Washington, a prisoner sentenced to death, sought collateral relief. Washington asserted that his counsel ineffectively presented his defense. Specifically, Washington challenged his counsel's performance on both substantive and procedural grounds alleging, inter alia, that counsel failed to investigate; failed to present favorable character evidence; and utilized an improper trial strategy.[8]

A federal district court in Florida held an evidentiary hearing on Washington's claims. "[T]he District Court concluded that although trial counsel made errors in judgment in failing to investigate nonstatutory mitigating evidence further than he did, no prejudice to respondent's sentence resulted from any such error in judgment."[9] The Supreme Court ultimately granted certiorari.

The Court prefaced its opinion by noting that the policy behind the sixth amendment right to counsel is a concept of "fundamental fairness".[10] Prior to reviewing Washington's claim, the Court established a two-part test to determine whether representation of a convicted defendant was so defective as to constitute a denial of fundamental fairness:

> First, the defendant must show that counsel's performance was deficient. [hereinafter, "performance prong"] 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. [hereinafter, "prejudice prong"] 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 or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.[11]

This test is designed to be utilized by reviewing courts in both direct appeal and collateral proceedings,[12] and by its nature places a substantial burden on the defendant. This burden is especially onerous due to the independent nature of each prong of the test. Thus, even if the defendant proves that his attorney did neglect some aspect of his defense, the defendant has the additional burden of proving, without the aid of hindsight,[13] that he was prejudiced by this failure.

The standard applied to the performance prong of the test is an objective standard of reasonableness.[14] In other words, to prove that an attorney ineffectively represented the defendant, the claimant must prove that the attorney's performance fell below an undefined objective standard reviewed solely upon the circumstances of the particular case.[15] Making the test even more onerous, the Supreme Court has stated that "[j]udicial scrutiny of counsel's performance must be highly deferential . . . [and] [a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . and to evaluate the conduct from counsel's perspective at the time."[16] The notion that the attorney's actions must be viewed from his/her perspective, combined with the strong presumption against a finding of ineffectiveness,[17] results in an almost insurmountable burden for the claimant.

Perhaps an even more insurmountable task is the claimant's burden of overcoming the presumption that he suffered no prejudice from his counsel's actions.[18] A claimant sustains this burden of proof only when he shows 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."[19] Further, the Court noted that all factors relating to sympathy or the particular sentencing practices of a particular judge should not be considered, and that the reviewing court should assume that the trier of fact acted in accordance with the law.[20] The question therefore becomes whether there exists a reasonable probability that, without the errors, the sentencer would have concluded that the defendant did not deserve a sentence of death.[21]

The *Strickland* Court's instruction to avoid the benefits of hindsight, combined with the broad objective standard utilized under the performance prong of the *Strickland* analysis, provide reviewing courts great latitude in their determination of appropriate attorney conduct. An additional factor contributing to the claimant's burden is the fact that a court is not required to address both parts of the test if it finds that the claimant failed to prove *either* prong.[22] "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."[23]

Applying its test to the facts, the Court found that Washington's counsel acted within the reasonable bounds of attorney conduct and

employed one of a myriad of potential trial strategies available. Further, the Court found that Washington had not suffered any prejudice by these omissions or choices.[24]

APPLICATION OF THE *STRICKLAND* STANDARD IN THE FOURTH, FIFTH AND ELEVENTH CIRCUITS

This article will provide examples of what is and is not considered ineffective assistance of counsel. It should be noted that despite the burdens which a claimant must overcome to prevail on an IAC claim, ineffective assistance of counsel does occur and can be successfully challenged.

Although there are a large number and variety of IAC claims, the following categories are the areas in which most claims arise.

I. *FAILURE TO INVESTIGATE OR PRESENT EVIDENCE:*

A) Fourth Circuit:

Briley v. Bass,[25] applied the prejudice prong of the *Strickland* test in the manner suggested as most efficient by the Supreme Court. In *Briley*, the defendant was sentenced to death for the murder of a five year old child during the commission of a robbery.[26] Briley asserted on federal habeas a claim that his attorney failed to present mitigation evidence during the sentencing phase of his trial.[27] The court found that he failed to satisfy the *prejudice prong* of the *Strickland* test.[28]

The only mitigation evidence presented by counsel during the penalty phase was the testimony of Briley's parole officer, who testified that his employment record was good, and that Briley observed the rules of parole. In his habeas appeal, Briley asserted that additional mitigation witnesses were available and should have been called by his counsel.[29] The court noted, however, that with only one exception, Briley had not established how the additional witnesses would testify.[30] The one exception was his mother whom the court found most likely would have been a "sympathy" witness.[31]

After a brief review of the evidence, the Fourth Circuit applied the prejudice prong of the *Strickland* test and held that Briley received effective assistance of counsel. The court stated that the true problem was a lack of suitable mitigation evidence and not counsel's actions.[32] Although the court noted that Briley's mother may have been helpful to the defense, it did not find it necessary to pursue the question of whether the attorney was negligent in failing to call her as a witness because Briley could not satisfy the second prong of the test. The court noted with respect to the absence of the mother's testimony, "it certainly [did] not suggest a `reasonable probability' that the result reached by the jury would have differed had they been exposed to it."[33]

Another case dealing with alleged failure to investigate and adequately present evidence was *Turner v. Bass*.[34] However, in *Turner*, the court's inquiry focused upon the performance prong of the *Strickland* test rather than the prejudice prong.

Turner claimed that his attorneys' ignorance had caused them to "mishandle the psychiatric testimony and mitigating evidence."[35] The court reviewed the attorneys' actions based upon the evidence contained in the record and found Turner's claim to be frivolous.[36] In particular, the court focused upon the fact that Turner's attorneys requested a private psychiatrist and, after initially being denied, persisted and eventually prevailed in their request.[37]

The psychiatrist, along with several other mitigation witnesses, testified during the sentencing phase of Turner's trial. The court found the doctor's testimony helpful to the defense, but noted that the mitigation evidence was simply insufficient to dissuade the jury from imposing the death penalty.[38] The holding exemplifies the strong presumption inherent in the *Strickland* test that an attorney's actions, viewed in the context of the time at which he acted, are presumed to be correct and reasonable.[39]

Another case expressing this proposition is *Roach v. Martin*,[40] in which the defendant asserted that his attorneys were ineffective during the sentencing phase due to, among other things, their lack of investigation of potential defenses. In essence, Roach argued that his attorney failed to investigate or discover the fact that Roach had Huntington's disease;[41] and that his attorney failed to research the side effects of narcotics on a stricken individual, and that as a result, Turner lost a potential opportunity to assert a theory of insanity or involuntary drug induced psychosis.[42]

The court dismissed his claim and held that his counsel's actions, viewed at the time at which they were done, were reasonable and within acceptable standards of performance. The court based its decision upon its impression of counsel's behavior and his assertion that his actions were predicated upon information provided by the defendant. Specifically, the court found that it was reasonable for counsel to have failed to further investigate this defense because the accused had recalled details of the murder so precisely that it was consistent with his prior statement that he had only drunk some alcohol and smoked a little marijuana.[43] The court noted that the defendant had not told his counsel the truth regarding his drug use until the day on which they were to enter their plea. Thus, the court judged the attorney's actions based upon his reasonable reliance on his client's statements[44] and the eventual defense strategy employed, which focused upon Roach's mental abnormalities.[45]

B) Fifth Circuit:

The Fifth Circuit, compared to the Fourth Circuit, has decided a significantly greater number of IAC cases.[46] Thus, that court has had a greater opportunity to develop a body of case law interpreting various aspects of ineffective assistance of counsel claims. It should be noted that, as in the Fourth Circuit, the majority of the claims allege counsel's failure to investigate.

A very recent Fifth Circuit decision, *Smith v. Black*,[47] unfortunately parallels the Fourth Circuit's tendency to accord great deference to the "strategy" employed by trial attorneys. In *Smith*, the petitioner alleged that his attorney had failed to present an adequate case in mitigation.[48] In essence, Smith claimed that his counsel failed to present mental retardation evidence.

During an evidentiary hearing before the district court, Smith produced undisputed evidence that his I.Q. was approximately 70 and that he was incapable of comprehending the nature of his crime or assisting in his own defense.[49] The Fifth Circuit opined that, although failure to present mental retardation evidence was not the result of a comprehensive trial strategy, Smith nevertheless failed to satisfy the deficiency or prejudice prong of the *Strickland* test.[50]

The court based its holding upon the fact that Smith's behavior did not blatantly indicate the need for expert testimony and that the defense focused upon an assertion of innocence.[51] The court reasoned that because Smith testified, the jury was presented with a sufficient opportunity to personally evaluate his capabilities and capacity.[52] The court found that adequate mitigation evidence was also presented through the testimony of five character witnesses.[53] The court concluded that the impact of any professional evidence pertaining to competency would not have been likely to alter the jury's decision.

Another case in which defense counsel failed to submit evidence of the defendant's mental incompetence was *Wilson v. Butler*.[54] In *Wilson*, the petitioner maintained that his trial counsel failed to adequately investigate or prepare a case in mitigation based upon his mental infirmities. Wilson's appointed counsel stated that although he had learned that the accused may have had problems since childhood, he at no time "investigate[d] the history of Wilson's mental problems; determine[d] the existence of relevant psychological, psychiatric, or probation records; or attempt[ed] to consult with, or have Wilson examined by, a competent psychiatrist or psychologist."[55]

In his habeas petition Wilson presented evidence that he was unable to conform or appreciate the significance of his conduct and that such inabilities were a result of his low I.Q. score of 66. Upon presentation of this evidence, the Fifth Circuit elected to apply the prejudice prong of the *Strickland* test and found that it was insufficient to sustain Wilson's assertion that his counsel should have presented an insanity defense.[56] The court did find, however, that Wilson alleged a valid ineffective assistance of counsel claim against his attorney for failure to present this evidence as a mitigating circumstance during the penalty phase of the trial.[57]

Finding that the failure to present this evidence was "both professionally unreasonable and prejudicial,"[58] the court noted, "if the mitigating circumstance of mental impairment had been established, the district court might conclude that the degree of likelihood that a jury would not have recommended a death sentence is sufficient to undermine its confidence in the outcome of this phase of the trial."[59]

In *Nealy v. Cabana*,[60] the Fifth Circuit did not hesitate to find ineffective assistance of counsel. In *Nealy*, the petitioner testified, professed his innocence, and was sentenced to a term of life imprisonment. On collateral appeal he claimed that he was denied effective assistance of counsel because his attorney failed to investigate or obtain the testimony of witnesses whom Nealy claimed could establish an alibi. This testimony was especially significant because the heart of the state's case was the testimony of a confessed murderer who implicated Nealy in exchange for a reduced sentence.

The Court of Appeals reversed the district court, which had found that even if the representation Nealy received was deficient, Nealy failed to establish prejudice under *Strickland*.[61] The Court found that Nealy's counsel made no attempt beyond a phone call to secure the testimony of the witnesses and noted "that, at a minimum, counsel had the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."[62]

A type of IAC claim which has not yet been presented to the Fourth Circuit was reviewed in both *Sawyer v. Butler*[63] and *Romero v. Lynaugh*.[64] In each of these cases, the petitioner alleged that defense counsel committed error by failing to make any closing arguments.[65]

Sawyer alleged on habeas that failure to give a closing argument during the guilt phase of a trial is tantamount to an abandonment of the case.[66] In response, his trial attorney testified that he was familiar with the prosecutor and that the prosecutor routinely saved his best statements for rebuttal. Convinced that a guilty verdict would be returned, the attorney stated that he had hoped to save his arguments for the penalty phase in the hopes of avoiding the death penalty.[67] The Court applied the prejudice prong of the *Strickland* test and found that Sawyer had failed to establish what the attorney might have said to possibly alter the verdict.[63]

A similar denial was the result in *Romero*, in which the petitioner claimed that the closing argument offered by his counsel during the sentencing phase was wholly inadequate:

> Ladies and Gentleman, I appreciate the time you took deliberating and the thought you put into this. I'm going to be extremely brief. I have a reputation for not being brief. [asked petitioner to stand up] You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say.[69]

The district court granted Romero relief and found that this type of argument constituted deficient representation under the first prong of the *Strickland* test by preventing the jury from considering any mitigating factors such as Romero's youth, intoxication and family background.[70] On the state's appeal to the Fifth Circuit, the court reversed this finding and held that Romero's attorney provided constitutionally effective representation.[71] The court noted:

> Romero's youth was obvious . . . the fact is that the evidence of possible mitigating factors was before the jury . . . we are not prepared to fault [the attorney's] effort to highlight the heavy responsibility of the jury by not burdening them with the obvious and avoiding the risk of losing them by arguing the absurd.[72]

It appears clear that although the Fifth Circuit may be more experienced in reviewing ineffective assistance of counsel claims than the Fourth Circuit, it does not appear to have developed a significantly less rigorous application of the *Strickland* standard.

C) Eleventh Circuit:

Illustrative of the principle that defense counsel must perform *reasonable* investigations to discover possible mitigating evidence is *Tyler v. Kemp*.[73] In *Tyler*, the petitioner confessed to poisoning her husband and was subsequently convicted of first degree murder. Her appointed counsel, Bishoff, was an inexperienced attorney who had never tried a capital case. At the sentencing phase of Ms. Tyler's trial, Bishoff failed to present any evidence and the jury imposed the death sentence.[74]

Denied state habeas relief, Tyler petitioned the federal district court and alleged that Bishoff rendered ineffective assistance of counsel during the sentencing phase of her trial.[75] The district court granted relief and found that Bishoff's failure to present *any* evidence constituted ineffective assistance of counsel.[76] The State appealed and the Eleventh Circuit affirmed, finding that Tyler had satisfied both the performance and prejudice prong of the *Strickland* test.[77] "Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted in this case was thus robbed of the reliability essential to assure confidence in that decision."[78]

The court discussed the fact that Bishoff's investigation consisted of nothing more than speaking with several members of Tyler's family for a few hours at the jail.[79] It should be noted that although Bishoff asked Tyler's brother, grandmother and aunt to testify at trial, they refused. The explanation for their reticence was that "they knew nothing of the murder and had nothing to tell."[80] However, the reason for their refusal was Bishoff's error in failing to explain the basis or benefit of their testimony.

During the evidentiary hearing, Tyler's relatives testified that Bishoff did not explain the concept of mitigation, and they simply assumed that he was seeking evidence of guilt or innocence.[81] At the hearing they testified that had they understood the nature of the sentencing proceeding, they would have agreed to present evidence that Ms. Tyler had no prior criminal record, that her husband was an abusive alcoholic, and that she was a devoted wife and mother.[82] The Court also noted that a diligent attorney would have searched for potentially mitigating evidence from sources other than Tyler's immediate family, such as her previous employer.[83]

II. *LACK OF LEGAL KNOWLEDGE/FAILURE TO RESEARCH THE LAW:*

A) Fourth Circuit:

Although a few capital murder cases in the Fourth Circuit mention IAC claims based upon lack of knowledge or research, there is only one, *Hyman v. Aiken*,[84] which explicitly discusses the issue. *Hyman* is also perhaps the most egregious example of lack of representation.

In *Hyman*, the Fourth Circuit held that petitioner had satisfied *both* prongs of the *Strickland* test and that he was entitled to discharge or to a new trial.[85] The issue in *Hyman* involved the trigger-man rule and resolution of the question of who actually committed a murder during the commission of a robbery. Hyman's habeas counsel claimed that the

inadequate representation given during the guilt phase of the trial prejudiced Hyman during the penalty phase. Upon reviewing the facts, the Court found that Hyman satisfied the first prong of the *Strickland* test by showing that his counsel, Demetrious Stratos, failed to provide adequate representation as envisioned by the sixth amendment.

The Court discussed several aspects of Stratos' representation which it found could not be "considered the result of deliberate, informed trial strategy."[86] Specifically, the Court noted the following unjustifiable errors:

1.) Stratos failed to update or purchase new reporters for some period of time.[87]

2.) Stratos did not possess or read a copy of the death penalty statute listing the aggravating and mitigating factors before the penalty trial began.[88]

3.) Stratos and assistant counsel admitted that once Hyman moved to have them dismissed, they resented him and only met with him three more times over a period of three months.[89]

4.) Stratos' lack of knowledge caused him to erroneously interpret the law, and to advise Hyman to plead guilty to murder in exchange for a life sentence to avoid what Stratos *believed* was the possibility of accomplice liability and a sentence of death.[90]

5.) Stratos failed to call vital defense witnesses, such as Hyman's wife, who had already testified at her own trial that another member of their "gang" had committed the murder.[91]

6.) Stratos failed to oppose the State's motion to exclude testimony regarding the fact that one of their chief witnesses received a pardon in exchange for his testimony.[92]

7.) Neither Stratos nor his assistant acquired the statement of the victim's brother, the only eyewitness to the crime, in which he stated that a woman shot the deceased.[93]

8.) Stratos "reviewed" the State's file, but failed to acquire a copy of Hyman's "confession" or mention its existence on direct examination, thereby allowing the State to use it as impeachment evidence.[94]

After acknowledging the lack of preparation and obvious unprofessional behavior, the Court also noted that "but for his counsel's . . . errors, there is a reasonable probability that the outcome of the sentencing phase of Hyman's trial would have been different."[95]

Although this is a relatively clear case of attorney incompetence, there is no case even suggesting a "bright line" between effective and ineffective assistance of counsel. However, a non capital case, *Williams v. Kelly*[96] would seem to indicate that the Fourth Circuit is willing to condone very questionable "tactics". In *Williams*, the Fourth Circuit reversed the finding of the District Court that an attorney had failed to render effective assistance, thereby prejudicing his client's defense.[97] The accused alleged that his counsel's performance was deficient because he had failed to make a motion to strike at the close of the State's case, and because he elected to have the accused testify even though the accused's testimony was the only way in which one of the elements of the crime could be proved.[98]

In a subsequent federal habeas action, the District Court found that the State's case would not have survived a motion to strike and, therefore, counsel erred by failing to make such a motion. The lower court found that by allowing the accused to testify, counsel clearly misunderstood the applicable law:

> It strains logic . . . to conclude that an attorney does his client any service by putting his client on the witness stand to admit all of the elements of the offense with which he is charged, after the Commonwealth has failed to prove its case . . . Moreover, had it not been for counsel's incompetence, petitioner could not have been convicted of the crime for which he is now imprisoned.[99]

Despite this finding, the Fourth Circuit applied the first prong of the *Strickland* test and held that the attorney's "challenged actions emerge as sound trial strategy that fell well within the wide range of reasonable professional assistance.'"[100] The court based its finding upon the fact that a police officer testified as to the circumstances surrounding an oral confession made by the defendant. The court reasoned that since the defendant stated that he "snatched" the stolen property from the victim while his accomplice intended to knock the victim down, it was reasonably possible that counsel would have inferred that his confession and the officer's testimony were sufficient for a finding of guilt if the defendant failed to take the stand.

Thus, although the law in Fourth Circuit is not well developed in this aspect of attorney competence, it is clear that the Court's inclination is to give great weight to the presumption that an attorney's actions were reasonable.

B) Fifth Circuit:

Despite the fact that there are a greater number and variety of IAC decisions in the Fifth Circuit, none involved situations where counsel was as blatantly unprepared as in *Hyman v. Aiken.*

Although not a capital case, a helpful and educational decision is *Burley v. Cabana.*[101] In *Burley*, the petitioner was convicted of murder and received a sentence of life imprisonment. At federal habeas Burley asserted that his counsel was ineffective by failing to inform the trial judge of the sentencing options available under the Youth Court Act.[102] The Court of Appeals adopted the Magistrate's findings:

> "The record indicates that Judge Gordon mistakenly believed that life imprisonment was the only sentence available . . . Judge Gordon stated in his opinion that he thought the sentence was harsh and that he would not have even given the maximum under a manslaughter conviction. He practically cries out for an alternative. Had Henry conducted even a minimal investigation of the law, he could have offered one. *To be considered effective, counsel has a duty to make at least a minimum investigation of the law, especially on such an important issue as sentencing mitigation . . . .*"[103]

Although the Fifth Circuit has held that counsel must investigate the law pertaining to the defendant's case, the court has not required counsel to accurately convey that information to the defendant. In *Czere v. Butler,*[104] the petitioner claimed that his plea of guilty to two counts of second degree murder should be deemed involuntary because he relied upon erroneous information provided by his counsel. Specifically, Czere alleged that counsel advised him that he would be eligible for parole within fifteen years where in fact he was required to serve a minimum of eighty years on the two life terms.[105] Czere alleged that the difference between fifteen and eighty years would have altered his decision to plead guilty.

Denying habeas relief, the Fifth Circuit applied a clearly erroneous standard and adopted the district court's finding that parole was not overly important to Czere at the time his plea was entered and that his primary concern was to avoid the death penalty.[106] The Court noted that Czere's counsel advised him that he would be in jail at least forty years,

and that Czere never testified that the difference between forty and eighty years would have made him risk imposition of the death penalty.[107] The Court stated, "[i]t is not our role to assume the existence of prejudice. Regardless of how plausible a showing . . . might be, *Strickland* requires that the petitioner `affirmatively prove' prejudice."[108] In essence, the Court held that reviewing courts must weigh all of the factors confronting the defendant when determining the effect any inaccurate information had on the defendant's decision to enter a plea.[109]

A novel ineffective assistance of counsel claim was presented in *Felde v. Butler*.[110] In that case, the petitioner, a Vietnam veteran suffering from delayed stress syndrome, originally testified and requested the jury to impose the death penalty. The IAC claim raised on collateral appeal essentially sought to establish a *per se* rule that defense counsel cannot properly fulfill their duty pursuant to the sixth amendment while following their client's wishes and advocating imposition of the death penalty.[111]

The Fifth Circuit recognized that philosophical and legal issues were involved in such a claim, but then refused to address the issues.[112] Rather, the Court utilized the prejudice prong of the *Strickland* test and found that "even if . . . making such an argument renders counsel ineffective, in this case there is no reasonable probability that a different result would have ensued had counsel remained silent."[113]

C) Eleventh Circuit:

An unusual case resulting in the granting of relief was *Magill v. Dugger*.[114] In *Magill*, a part-time assistant public defender, Hale Stancil, was assigned to represent the defendant on a charge of first degree murder. In preparation for trial, Stancil met and discussed the case with the head of the public defender's office, Robert Pierce. On the first day of jury selection, however, Robert Pierce unexpectedly entered the courtroom and announced that he would represent Magill.[115] The court noted that Pierce met Magill only fifteen minutes before the proceedings began, and that he had not participated in any of the pre-trial discovery.[116]

Magill alleged that Pierce committed numerous errors throughout the guilt phase of the trial. Prior to reviewing the claims individually, the Court of Appeals stated that "[t]his case presents a clear example of attorney performance which is outside the wide range of reasonable professional assistance . . . Pierce was woefully unprepared to defend Magill."[117]

Through review of the record, the court discerned that the heart of the proffered defense was Magill's alleged lack of premeditation.[118] The heart of counsel's error was failure to prepare Magill to testify. The court found that the critical errors occurred during the prosecution's cross-examination, when Magill stated that he fired the second and third shots with the intent to kill the victim.[119] Pierce failed to object to the entire line of questioning, including the prosecution's successful attempt to elicit Magill's opinion as to whether he committed first degree murder.[120] "The prosecutor's questions clearly were leading to this end, yet counsel sat silently while his client told the jury he was guilty of capital murder . . . that question was the ultimate question for the jury to decide."[121]

The court found that the prejudice prong of *Strickland* had not been satisfied as to the conviction, but vacated the death sentence on the grounds that it could have been affected by the error. "Although the guilt and penalty phases are considered `separate' proceedings, we cannot ignore the effect of events occurring during the former upon the jury's decision in the latter."[122]

A case in which the court adopted a perhaps unrealistic view of the adversary process is *Davis v. Kemp*.[123] In *Davis*, the defense counsel attempted to bolster his case by calling a witness whom he alleged had coerced Davis into killing the victim.[124] On direct examination, counsel asked the witness to state his name and then indicated that he had no further questions. He alleged that his trial strategy was to simply "display" the witness so that the jury could see his size, and infer that Davis was coerced.[125] The problem was that the defense attorney had erroneously assumed that in Georgia, the prosecution's cross would be limited to the scope of direct.[126]

Davis claimed ineffective assistance of counsel and alleged that because of his counsel's actions, the state was able to obtain damaging testimony. However, the court held that because the state could have called the witness as their own, Davis' argument that his counsel allowed the state to admit otherwise inadmissible evidence was incorrect.[127] The significance of the court's holding is evident in its statement that "there is no indication that the state could not have located [the witness] to call as a rebuttal witness."[128] In holding that Davis failed to show prejudice, the court seems to disregard the reality of the situation that the testimony simply would not have been available absent counsel's error.

III. *FAILURE TO OBJECT/DEFAULTS:*

A) Fourth Circuit:

Recent Fourth Circuit decisions demonstrate that an increasing number of claims will be dismissed based upon procedural principles. The most recent Fourth Circuit opinion, *Justus v. Murray*,[129] applied the principles of procedural default outlined in *Slayton v. Parrigan*[130] and *Wainwright v. Sykes*[131] to bar both the substantive and the IAC claims.[132] The rule in *Slayton*, in essence, states that a failure to raise claims which could have been raised at trial, on direct appeal, or in a prior state habeas proceeding, will bar further review. *Sykes* extends this rule to the federal forum by denying federal review of a claim procedurally barred on state grounds unless the petitioner shows both "cause" excusing the default, and "prejudice" from a lack of federal review.

The Fourth Circuit decision affirmed the judgment of the District Court denying habeas relief, and outlined the progression of Justus' appeals. In *Justus*, the petitioner asserted substantive claims in his petition for state habeas that were not raised on direct appeal. Pursuant to the principles established in *Slayton*, the state habeas court found that his claims were procedurally defaulted. Justus then presented these claims to a federal magistrate who also rejected them because Justus failed to offer a cognizable excuse for the default. Objecting to the findings of the magistrate, Justus for the first time, offered as an excuse for the default of his substantive claims the ineffectiveness of his counsel. However, the district court affirmed the magistrate's findings because, not only was the IAC claim not listed in the petition or alleged as error, but also because it was not presented to and exhausted in the state courts.[133] Thus, in addition to his substantive claims, his IAC claim was also procedurally defaulted.

Another case in which the Fourth Circuit disposed of claims based upon the doctrine of procedural default was *Coleman v. Thompson*.[134] In *Coleman*, the petitioner filed his notice of appeal from an adverse ruling of the state habeas court one day late. The Virginia Supreme Court affirmed the dismissal, and Coleman unsuccessfully petitioned the District Court for federal habeas relief.

Of note in the Fourth Circuit's denial of habeas relief is its comment that Coleman's reliance on *Murray v. Carrier*[135] was misplaced and that Coleman's assertion that his procedural default was excusable due to IAC was untenable. The Fourth Circuit based its holding upon the fact that prisoners seeking state habeas relief have no constitutional right to counsel,[136] therefore, they cannot be denied effective assistance of counsel.[137]

Another aspect of procedural default arises when the defendant fails to object to an alleged error during the trial or fails to raise the issue on direct appeal. The Fourth Circuit generally applies a strict procedural analysis in these cases. Similar to the petitioner in *Coleman*, the petitioner in *Waye v. Townley*[138] alleged that his procedurally defaulted *Sandstrom* claim[139] was still reviewable by the federal courts because the default was caused by the ineffectiveness of his counsel.[140]

Applying an analysis similar to that utilized in *Wainwright v. Sykes*, the Fourth Circuit held that Waye was required to prove prejudice under both *Strickland* and *Sykes* before he would have been entitled to relief from the procedural bar.[141] Each of the tests has a prejudice prong which requires the petitioner to prove that, in general, the outcome of the trial, or fundamental fairness has been undermined. Waye alleged *Strickland* prejudice based upon his counsel's failure to object to the improper jury instruction on *Sandstrom* grounds.[142] However, the court noted that even if he was able to show that his attorney did not provide effective assistance, he would not be able to satisfy the second prong of the *Strickland* test by showing actual prejudice as required by *Sykes*.[143]

Thus, the court again showed its willingness to employ the complicated procedural rules surrounding state procedural requirements to deny relief to death sentenced prisoners.

B) Fifth Circuit:

It appears that one area in which the Fourth Circuit has dealt with issues virtually untouched by the Fifth Circuit is procedural defaults.

The only analogous Fifth Circuit case, *Streetman v. Lynaugh*[144], involved federal review of whether defense counsel had "lost" a claim by failing to develop evidence at one stage in the state habeas process. After being denied state habeas, Streetman sought a federal evidentiary hearing raising, for the first time, the admissibility of his confession. Streetman also alleged that his trial and state habeas counsel was ineffective for failing to create a factual basis for his inadmissibility claim.[145]

Streetman alleged that his confession was coerced because the police physically threatened him and his family and also promised that no information would be used against him.[146] The court determined that because the prosecutor admitted that without the confession the state's case was quite weak, "there exists a reasonable probability that the outcome of his trial would have been different."[147] The court also found that failure to challenge the confession constituted IAC, but that the failure to develop the challenge at state habeas was the result of institutional impediments that affected counsel's performance.[148]

Habeas counsel filed its petition and the state district court ordered the hearing to begin the next morning. Habeas counsel had less than one hour to speak with Streetman prior to the hearing and, therefore, requested a continuance to subpoena witnesses and to pursue an investigation of additional information not within the record.[149] Despite the fact that habeas counsel was woefully unprepared, the state court refused to grant a continuance. As a result, habeas counsel did not learn of the possible involuntary nature of Streetman's confessions until after the hearing.[150]

The court noted that "[w]hat is clear from the foregoing facts is that neither Streetman nor his habeas attorney made a tactical choice to leave evidence regarding the voluntariness of [the] confessions undeveloped. Instead, the failure was due to counsel's lack of opportunity to prepare."[151] Therefore, the court reversed the denial of the writ, and remanded the case for a full federal evidentiary hearing.[152]

C) Eleventh Circuit:

When the state opposes a petitioner's request for habeas relief and establishes grounds of procedural default, the petitioner must satisfy both the cause and prejudice standards elucidated in *Wainwright v. Sykes*.[153] In addition, if the petitioner asserts that his "cause" for the procedural default is IAC, then he must also prove that his representation was ineffective under *Strickland*.[154]

In *Stephens v. Kemp*,[155] the state argued that Stephens' claim was procedurally barred by Georgia's habeas petition statute.[156] The state argued that because Stephens first raised his IAC claim in his second state petition, and because the state held it procedurally barred it should, therefore, be barred from federal review.[157] The court of appeals addressed this contention and found that Stephens' satisfied the cause and prejudice standard of *Sykes* and that the federal courts were entitled to hear his defaulted claim.[158]

The court found "cause" for Stephens' failure to raise the claim "in the fact that [his] trial counsel, whose effectiveness is here challenged, also represented him in the first state habeas proceeding."[159] Prior to finding prejudice under *Sykes*, however, the court analyzed whether Stephens' counsel was, in fact ineffective. First the court noted that his attorney was appointed just two days before his arraignment, and two days after the court had already ordered a psychiatric evaluation of the defendant.[160] In addition, the attorney was informed by Stephens' sister that he had spent time in a mental institution shortly before the time of the offense.

The psychiatrist who examined Stephens' filed a written report which stated that he could find no evidence of mental disease or defect.[161] The report also contained a passing reference to Stephens' brief stint in the mental hospital. Despite this information, Stephens' attorney did not pursue his investigation of petitioner's mental condition any further. The Court found this reliance on the psychiatrist's report reasonable with respect to the guilt phase of the trial, but not with respect to the sentencing phase.

> [W]hen a capital sentencing proceeding is contemplated by counsel aware of the facts of which appellant's trial counsel was aware, professionally reasonable representation requires more of an investigation into the possibility of introducing evidence of the defendant's mental history and mental capacity in the sentencing phase than was conducted by trial counsel in this case.[162]

The court concluded that Stephens had satisfied both the performance and prejudice prong of the *Strickland* test.[163] The court utilized its analysis under *Strickland* as grounds for deciding that the petitioner had satisfied the prejudice standard under Sykes. Consequently, IAC was successfully presented as an excuse for procedural default.

The Eleventh Circuit has also held defense counsel ineffective when it has been found that they failed to object to unreliable scientific evidence. In *Chatom v. White*,[164] Chatom was convicted of murdering two sheriff's deputies. His conviction was based primarily upon an expert's testimony and the test results from an atomic absorption test.[165] The state performed the tests on an alleged accomplice of Chatom's, with the hope of proving by inference that if the accomplice did not fire the weapon, Chatom must have.[166]

The court noted that Chatom's counsel failed to object to the introduction of this evidence despite the fact that the prosecution violated a discovery order by failing to inform Chatom that such test results existed. The court proceeded to analyze Chatom's claim under the performance prong of the *Strickland* test, and held that although the situations are rare where one error will warrant a finding of IAC, the absorption test was one such case due to its critical nature as corroboration of the prosecution's circumstantial evidence.[167]

The court also concluded that counsel's failure fulfilled the prejudice prong of the *Strickland* test.[168] The Court's reasoning was simple: "While a timely objection by Chatom's counsel may not have excluded the evidence of the atomic absorption test, the lack of any objection clearly prejudiced Chatom since the adversarial testing contemplated by the sixth amendment did not occur."[169] The court noted that Chatom had also proven prejudice by the fact that his counsel's error prevented this issue from being addressed in direct or collateral appeals.

IV. *PREJUDICIAL STATEMENTS MADE BY COUNSEL DURING TRIAL:*

A) Fourth Circuit:

The law of the Fourth Circuit is only beginning to develop in the area regarding an attorney's prejudicial statements. The developments, however are anything but favorable to capital defendants. It appears that the Court of Appeals is quite tolerant of attorneys who inadvertently "slander" their clients.

For example, in *Brown v. Dixon*[170] the petitioner, Brown, claimed that his counsel was ineffective during closing argument because he intentionally conceded petitioner's guilt[171] without his approval and also admitted the existence of the statutory aggravating factors warranting death.[172]

The District Court for the Western District of North Carolina granted relief, holding that Brown's trial counsel had potentially affected the outcome of the proceeding.[173] On appeal, the Fourth Circuit reversed and found that the attorney's actions were within the bounds of his authority and that his statements were part of an overall trial strategy. Specifically, the court noted that they would not recommend this as a routine method of defense, but only found that it was a reasonable under the circumstances.[174]

Similarly, the petitioner in *Clozza v. Murray*,[175] asserted that he was denied effective assistance of counsel at both the guilt and sentencing phase of his capital murder trial. Specifically, Clozza maintained that his attorney breached his duty of loyalty by uttering remarks during trial which conceded Clozza's guilt and prejudiced his defense.

For example, Clozza's attorney stated during his closing argument that "he did not want to put petitioner `back on the street' and that if Clozza's attempt at suicide had been successful, `it would not have been the greatest tragedy.'"[176] Upon its review of these comments, the Fourth Circuit held that they did not prejudice Clozza's defense and further noted that a successful defense was an almost impossible task.[177] The Court of Appeals refused to "second-guess counsel's tactical choices"[178] and adopted the reasoning of the state habeas court. The state court had found that Clozza's attorney adopted a defense theory based upon his credibility with the jury:

> The remarks which Clozza contends showed hopelessness and disgust indicated to the jury that defense counsel understood the gravity of the crimes as well as their horrible nature. Had counsel attempted to pass the crimes off as anything other than the atrocities that they were, his credibility with the jury would most certainly become suspect. Thus, we conclude that counsel's remarks were consistent with his trial strategy.[179]

The Fourth Circuit then addressed the effectiveness prong of the *Strickland* test and stated that "almost anything other than an open confession of complete guilt should withstand an ineffectiveness claim."[180] The court also summarily addressed the prejudice prong of the test and found that it was unlikely that, but for counsel's errors, the result would have been different.[181]

Thus, although the law pertaining to IAC claims based upon attorney misconduct is quite new, the Fourth Circuit appears willing to shape its analysis to deny relief in any case "short of an open confession of complete guilt."

B) Fifth Circuit:

An unfortunate similarity exists between the Fourth and Fifth circuits in the manner in which they dispose of IAC claims based upon allegedly improper and prejudicial remarks by counsel.

In two cases, *Mattheson v. King*[182] and *Rushing v. Butler*,[183] the Fifth Circuit addressed IAC claims based upon statements of counsel that allegedly prejudiced their clients. In both cases, the court apparently relied upon the presumption that attorneys are required to make tactical decisions and that those decisions should be accorded great deference.

In *Mattheson*, for example, the petitioner complained that during voir dire his counsel described the crime as "gross and heinous" and admitted that Mattheson was a murderer.[184] However, the Fifth Circuit accorded great weight to his counsel's explanation:

> [Counsel] had decided to be as candid as possible with the jury, presumably to build up his credibility and that of his theory of the case . . . Applying the presumption that the challenged action was taken as a matter of sound trial strategy, we cannot say that counsel's remarks... were outside the wide range of professionally competent assistance.[185]

Similarly, in *Rushing* defense counsel made statements during his closing argument which tended to concede the petitioner's guilt.[186] Again, the Court relied upon the trial strategy presumption and held that Rushing's claims failed both prongs of the *Strickland* test.[187]

C) Eleventh Circuit:

The Eleventh Circuit has also reviewed IAC claims where the petitioner alleges that his counsel's statements have prejudiced his defense. For the purpose of this article only one, *Messer v. Kemp*,[188] merits review.

In *Messer*, the petitioner alleged that counsel was ineffective throughout both the guilt and sentencing phases.
Messer's allegations of ineffectiveness are based upon the fact that his counsel, Sawhill, did not make an opening statement, nor did he present a case-in-chief.[189] Further, Sawhill made statements during his closing arguments which Messer argued conceded guilt and prejudiced his defense:[190]

> I would be no less honest with each and every one of you if I tried to tell you the evidence said something other than what [the prosecutor] indicates occurred.[191]

Further, Sawhill continued to prejudice his client's defense during the sentencing phase by intimating that a careful analysis of the aggravating and mitigating circumstances might warrant imposition of the death penalty:

> I dare say, and it has been suggested to me . . . that I ought to argue to this jury to leave him alive is a more cruel punishment because he's got to live with it, so I don't know what to say to you. I really don't.[192]

During the evidentiary hearing, Sawhill claimed that his actions were part of an informed strategy to "maintain credibility with the jury, and then present the human side of his client during the sentencing phase in hopes that the jury would spare [his] life."[193] Upon review of all the facts and circumstances involved in the case, the Eleventh Circuit held that Sawhill's actions were reasonable and noted that Messer had failed to satisfy the prejudice prong of the *Strickland* test.

Further understanding of defense "strategy" may be gleaned from the dissenting opinion of Judge Johnson. Specifically, the dissent found that Sawhill's questioning of the sole mitigation witness, Messer's mother, resulted in her testifying that her son expected to receive the death penalty.[194] This, coupled with both a closing argument that implied that Sawhill could understand if the jury imposed the death penalty, refuted the earlier assertion of a strategic decision to rely solely on the sentencing phase for favorable results, and led the dissent to believe that Sawhill's conduct fell outside the acceptable range.[195]

CONCLUSION

It appears that the Supreme Court was correct in its prediction that many IAC claims would be quickly and easily disposed of through application of the prejudice prong of the *Strickland* test. The reason becomes apparent when one considers that, in *Strickland*, courts are instructed to review IAC claims based upon all of the circumstances

involved. Under this broad direction, a reviewing court is provided with great latitude in interpreting the effect of counsel's error upon the proceedings. "It is not our role to assume the existence of prejudice. Regardless of how plausible a showing of prejudice might be, *Strickland* requires that the petitioner `affirmatively prove' prejudice."[196]

In addition, even if the claimant manages to overcome the prejudice prong of the test, he must still prove that his attorney's actions were unreasonable and not in accordance with accepted professional norms. This too often proves to be an insurmountable burden considering the great deference which reviewing courts grant to counsel's decisions. If an attorney can in any way justify his actions, and if those actions can be viewed as reasonable the petitioner will be unable to overcome the burden of presumed effective assistance.

It would appear that the performance prong of the test is at odds with other concepts discussed in *Strickland*. The Supreme Court has warned reviewing courts of the danger of applying hindsight in their analysis, and rather, instructs the courts to view and judge the attorney's actions from his/her point of view. The obvious flaw, however, is that almost any attorney who testifies during an evidentiary IAC hearing would be capable of justifying his actions, unless they involved some of the most egregious errors of judgment. This fatal flaw in the *Strickland* analysis allows the judicial system to favor efficiency over the concept of fundamental fairness.

Despite the difficulties involved, IAC claims can succeed provided that habeas counsel completely reinvestigates the case. The governing law, however, is illustrative of the fact that effective and aggressive capital defense is principally a matter of internal standards of professional responsibility and personal integrity.

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1. U.S. Const. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.")

2. *Strickland v. Washington*, 466 *U.S.* 668, 685 *(1984)*("That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.")

3. *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. *759, 771*, n. 14 (1970).

4. Of 2,393 death sentenced prisoners in the country, Florida in the Eleventh Circuit houses 313 and Texas in the Fifth Circuit 324. These two states also lead the nation in executions carried out since 1976: 37 in Texas, 24 in Florida. Virginia stands fifth in executions with 10. NAACP Legal Defense and Education Fund, Death *Row U.S.A. (Sept.* 21, 1990).

5. *Strickland*, 466 U.S. at 689.

6. 466 U.S. 668 (1984).

7. *Id.* at 683.

As far back as Powell v. *Alabama*, 287 U.S. 45 (1932), the basic case establishing right to counsel in capital cases, the Supreme Court has recognized that the right may be undermined by institutional barriers as well as personal incompetence, and that the duty of a state is not discharged "by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Id.* at 71.

8. *Id.* at 675.

9. *Id.* at 678-79.

10. *Id.* at 686.

("The bench-mark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.")

11. *Id.* at 687.

12. *Id.* at 697.

13. *Id.* at 689.

It should be noted, however, that despite this aspect of the *Strickland* test, the Courts frequently seem to utilize "hindsight" to support holdings adverse to the defendant.

For example, in *Smith v. Procunier*, 769 F.2d 170 (4th Cir. 1985), *aff'd*, 477 U.S. 527 (1986), the appellant claimed he was denied effective assistance of counsel due to his counsel's failure to further develop a defense of mental incapacity. *Id.* at 173.

Upon review, however, the Court of Appeals noted that it was a matter of professional judgment for the attorney to determine whether further inquiry would prove fruitful, and then stated "counsel's professional wisdom in deciding not to do so was borne out because both psychiatrists have (at the state *habeas corpus* hearing) indicated that, had they been asked an opinion as to whether Smith suffered from a potentially mitigating mental incapacity, the answer in each case would have been negative." *Id.*

This clearly indicates the Courts' willingness to utilize "hindsight" in its review, when hindsight vindicates the attorney's actions.

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

15. *Id.* (The Court noted that specific guidelines listing criteria of effective attorney performance are not possible).

16. *Id.* at 689.

17. *Id. ("[C]ourt[s]* must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy"') (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

18. *Id.* at 692.

19. *Id.* at 694.

20. *Id.* at 695. For example, the Court noted that specific sentencing practices of the trial judge should not be considered when determining prejudice).

21. *Id.*

22. *Id.* at 697.

23. *Id.*

24. *Id.* at 700.

25. 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985).

26. *Id.* at 1240.

27. *Id.* at 1248.

28. *See also, Whitley v. Bair*, 802 F.2d 1487, 1494-96 (4th. Cir. 1986), *cert. denied*, 480 U.S. 951 (1987)(Petitioner alleged that counsel's failure to present additional mitigating evidence prejudiced his defense. The Fourth Circuit refused to address the performance prong of the *Strickland* test, and found that Whitley did not suffer prejudice sufficiently substantial to warrant relief).

29. *Briley*, 750 F.2d at 1248.

30. As discussed in previous issues of the Capital Defense Digest, defense counsel must be sure to proffer the testimony of any witnesses who were unavailable or were not allowed to testify.

31. *Briley*, 750 F.2d at 1248.

32. Ironically, the Court fails to realize that without a thorough investigation, it would not be possible to know what, if any, mitigation evidence was lacking.

33. *Briley*, 750 F.2d at 1248.

34. 753 F.2d 342 (4th Cir. 1985), *rev'd other grounds sub nom. Turner v. Nurray*, 476 U.S. 28 (1986).

35. *Id.* at 350. (Turner's claim asserted that the attorneys "did nôt know the diagnostic implications or the potential dangers from cross examination of a diagnosis of anti-social personality . . . [and] did not acquire the degree of expertise in psychiatric matters necessary to fully develop the psychiatric defense.")

36. *Id.*

37. *Id.* at 348-49.

38. *Id.* at 350.
39. *Strickland,* 466 U.S. at 689; *See also Evans v. Thompson,* 881 F.2d 117, 124 (4th Cir. 1989)(Court held that petitioner was unable to overcome presumption that his counsel's actions were reasonable).
40. 757 F.2d 1463 (4th Cir. 1985), *cert. denied,* 474 U.S. 865 (1985).
41. Roach alleged that Huntington's disease can cause one to involuntarily abuse intoxicating substances. *Id.* at 1479.
42. *Id.* at 1477.
43. *Id.* at 1478.
44. *See also, Clanton v. Bair,* 826 F.2d 1354, 1358 (4th Cir. 1987), *cert. denied,* 484 U.S. 1036 (1988)("When a seemingly lucid and rational client rejects the suggestion of a psychiatric evaluation and there is no indication of a mental or emotional problem, a trial lawyer may reasonably forego insistence upon an examination.")
45. *Roach,* 757 F.2d at 1478.
46. See, Note 4, supra.
47. 904 F.2d 950 (5th Cir. 1990).
48. *Id.* at 977.
49. *Id.*
50. *Id.* at 978.
51. *Id.* at 977.
52. *Id.*
53. *Id.*
54. 813 F.2d 664 (5th Cir. 1987), *cert. denied,* 484 U.S. 1079 (1987).
55. *Id.* at 669.
56. *Id.* at 670.
57. *Id.* at 673.
58. *Id.* at 672.
59. *Id.* at 673.
60. 764 F.2d 1173 (5th Cir. 1985).
61. *Id.* at 1176-79.
62. *Id.* at 1177.
63. 848 F.2d 582 (5th Cir. 1988).
64. *884 F.2d 871 (5th Cir. 1989), cert. denied,* 110 S. Ct. 1311 (1990).
65. In *Romero,* counsel did not give a closing argument during the sentencing phase; In *Sawyer,* counsel did not give closing argument in guilt phase.
66. *Sawyer,* 848 F.2d at 592.
67. *Id.*
68. *Id.*
69. *Romero,* 884 F.2d at 875.
70. *Id.* at 876.
71. *Id.* at 877.
72. *Id.*
73. 755 F.2d 741 (llth Cir. 1985), *cert. denied,* 474 U.S. 1026 (1985).
74. *Id.* at 743.
75. *Id.* at 744.
76. *Id.*
77. *Id.*
78. *Id.* at 745.
79. *Id.* at 744.
80. *Id.*
81. *Id.* at 745.
82. *Id.*
83. *Id.*
84. 824 F.2d 1405 (4th Cir. 1987), *vacated and remanded,* 478 U.S. 1016 (1986).
85. *Id.* at 1416-17.
86. *Id.* at 1416.
87. *Id.* at 1412.
88. *Id.* at 1415.
89. *Id.* at 1413.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 1415.
94. *Id.* at 1414.
95. *Id.* at 1416.
96. 816 F.2d 939 (4th Cir. 1987).
97. *Id.* at 950.
98. *Id.* at 946.
99. *Id.*
100. *Id.* at 946-47 (quoting *Strickland v. Washington,* 466 U.S. at 689).
101. 818 F.2d 414 (5th Cir. 1987).
102. *Id.* at 415.
103. *Id.* at 417 (emphasis added).

Capital defense counsel in Virginia have further duty to examine sentencing law. Dependent upon a number of factors, those sentenced to life imprisonment for capital murder are eligible for parole consideration after serving 25 years, 30 years, or never. Va. Code Ann. § 53.1-151 (1988).

104. *See, Czere v. Butler,* 833 F.2d 59 (5th Cir. 1987); *But See, Martin v. State of Texas,* 737 F.2d 460 (5th Cir. 1984)(Failure to advise defendant of his rights to appointed counsel and appeal constitutes ineffective assistance of counsel).
105. *Czere,* 833 F.2d at 62.
106. *Id.* at 64.
107. *Id.*
108. *Id.* (quoting *Strickland v. Washington,* 466 U.S. at 693.)
109. See *Micheaux v. Collins,* 911 F.2d 1083 (5th Cir. 1990)(Petitioner failed to show prejudice under *Strickland* when claiming IAC due to misstatement of maximum possible penalty before entering plea).
110. 817 F.2d 281 (5th Cir. 1987), *cert. denied,* 484 U.S. 873 (1987).
111. *Id.* at 283-84.
112. *Id.* at 284.
113. *Id.*
114. 824 F.2d 879 (llth Cir. 1987).
115. *Id.* at 883.
116. *Id.*
117. *Id.* at 885.
118. *Id.*
119. *Id.* at 887.
120. *Id.*
121. *Id.* at 887-88.
122. *Id.* at 888.
123. 829 F.2d 1522 (llth Cir. 1987), *cert. denied,* 485 U.S. 929 (1988).
124. *Id.* at 1538.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. 897 F.2d 709 (4th. Cir. 1990). *See,* case summary of *Justus v. Murray,* Capital Defense Digest, this issue; *See also,* Hobart, *State Habeas in Virginia: A Critical Transition,* Capital Defense Digest, this issue.
130. 215 Va. 27, 205 S.E.2d 680 (1978), *cert. denied,* 419 U.S. 1108 (1975). *See also,* Hobart, *State Habeas in Virginia: A Critical Transition,* Capital Defense Digest, this issue.
131. 433 U.S. 72 (1977).
132. *Justus,* 897 F.2d at 712.
133. *Id.* at 711.
134. 895 F.2d 139 (4th Cir. 1990).
135. 477 U.S. 478 (1986).
136. See, *Murray v. Giarratano,* 109 S. Ct. 2765 (1989).

137. *Coleman*, 895 F.2d at 144; citing *Wainwright v. Torna*, *455* U.S. 586, 587-88 (1982)).

138. 871 F.2d 18 (4th Cir. 1989), *cert. denied*, 109 S. Ct. 3202 (1989).

139. A *Sandstrom* claim asserts that a jury instruction has unlawfully shifted the burden of proof to the defendant, or raised a presumption of guilt. *Sandstrom* v. *Montana*, 442 *U.S.* 510 (1979).

140. Waye, 871 F.2d at 20.

141. *Id.*

142. *See also, Giarratano v. Procunier*, 891 F.2d 483 (4th. Cir. 1989)(Petitioner unsuccessfully sought to defeat procedural bar through claim of IAC).

143. *Waye*, 871 F.2d at 20-21.

144. 812 F.2d 950 (5th Cir. 1987).

145. *Id.* at 956.

146. *Id.*

147. *Id.* at 957.

148. *Id.* at 960; *See*, Endnote 7, supra.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 961.

153. 433 U.S. 72 (1977).

154. *See Stephens v. Kemp*, 846 F.2d 642 (llth Cir. 1988), *cert. denied*, 488 U.S. 872 (1988).

155. 846 F.2d 642 (llth Cir. 1988), *cert. denied*, 488 U.S. 872 (1988).

156. *Id.* at 651.

157. *Id.*

158. *Id.*

159. *Id.* (citing *Alston v. Garrison*, 720 F.2d 812 (4th. Cir. 1983)).

160. *Id.* at 652.

161. *Id.* at 653.

162. *Id.*

163. *Id.*

164. 858 F.2d 1479 (llth Cir. 1988), *cert. denied*, 109 S. Ct. 1315 (1989).

165. *Id.* at 1481.

166. *Id.*

167. *Id.* at 1485.

168. *Id.* at 1487.

169. *Id.*

170. 891 F.2d 490 (4th Cir. 1989).

171. *Example of statements made by defense counsel: "Ne may have committed a horrible crime and he did commit two horrible crimes,* but his is still a human being with a soul despite the blackness of the crime that this man has committed." *Id.* at 499, n. 17.

172. *Id.* at 498.

173. *Brown* v. *Rice*, 693 F. Supp. 381, 395-97 (W.D.N.C. 1988).

174. *Brown*, 891 F.2d at 500.

175. U.S. App. LEXIS 16115 (4th. Cir. 1990); .

176. Lexis at 13.

177. *Id.*

178. *Id.* at 19.

179. *Id.* at 17.

180. *Id.* at 22.

181. *Id.* at 23.

182. 751 F.2d 1432 (5th Cir. 1985).

183. 868 F.2d 800 (5th Cir. 1989).

184. *Mattheson*, 751 F.2d at 1440.

185. *Id.* at 1441.

186. "I'm not saying there's reason to let this man walk out of here. I'm not saying to do that. I wouldn't insult your integrity in any form or fashion in asking you to do that." *Rushing*, 868 F.2d at 805.

187. *Id.*

188. 760 F.2d 1080 (llth Cir. 1985), *cert. denied*, 474 U.S. 1088 (1986).

189. *Id.* at 1089-90.

190. *Id.* at 1088.

191. *Id.* at 1089 n. 5.

192. *Id.* at 1097.

193. *Id.* at 1090.

194. *Id.* at 1091.

195. *Id.* at 1094.

196. *Czere* v. *Butler*, 833 F.2d at 64 (quoting, *Strickland v. Washington*, 466 U.S. at 693.)

A WORD OF THANKS

AND

A CONTINUED APPEAL

Last Spring we noted that the cost of publishing and mailing Capital Defense Digest is quite significant. We noted further that the Digest is intended to serve the Commonwealth, that its purpose is to assist capital defense counsel by increasing the fund of knowledge available to the entire legal community, including judges and prosecutors. We asked that those who believed that the Digest is helpful and should continue in the widest possible distribution consider defraying a portion of the cost.

The response has been gratifying, and we hope it will continue. The amount contributed does not represent a major percentage of the publication cost but it is a clear endorsement of the continuing need for the Digest.

The suggested sum is $10.00. Checks should be made payable to Washington and Lee University and mailed to:

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Washington and Lee University
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