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Iii. Constitutional Law

a Virginia resident and a nonresident defendant.[104] In holding that a mere contract automatically did not confer personal jurisdiction within the constitutional mandates of due process, the Fourth Circuit in *Chung* recognized and protected a forum state's interest in preserving a nonresident defendant's due process right.[105] By recognizing that a plaintiff's right to a convenient forum in which to assert claims against a nonresident defendant must yield to a nonresident defendant's due process rights, however, the Fourth Circuit set forth guidelines that balance a state's conflicting interests.[106]

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III. CONSTITUTIONAL LAW

Hoots v. Allsbrook: *The Fourth Circuit's Application of the Strickland Test for Determining Ineffective Assistance of Counsel Claims*

The sixth amendment to the United States Constitution guarantees criminal defendants the right to counsel.[1] The sixth amendment right to counsel applies to both state and federal prosecutions.[2] If unable to retain

104. *See supra* note 5 and accompanying text (mere contract insufficient to establish jurisdiction over nonresident defendant).

105. *Id.*

106. *See supra* notes 65-68 and accompanying text (discussing circumstances in contract cases establishing personal jurisdiction over nonresident defendants); notes 70-81 and accompanying text (Fourth Circuit's reasoning in *Chung* establishing lack of personal jurisdiction).

1. U.S. Const. amend. VI. The sixth amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defense." *Id.*

2. *See* Powell v. Alabama, 287 U.S. 45, 68-71 (1932). In *Powell* the United States Supreme Court ruled that the due process clause of the fourteenth amendment required that in state capital cases, trial courts must appoint counsel for defendants who are incapable of defending themselves because of ignorance or feeblemindedness. *Id.* at 71. The Supreme Court later recognized that the sixth amendment right to counsel applied through the fourteenth amendment to all state felony trials. *See* Gideon v. Wainwright, 372 U.S. 335, 342 (1963). The Supreme Court has extended the right to counsel to all indigent misdemeanor defendants facing a possible jail sentence. *See* Argersinger v. Hamlin, 407 U.S. 25, 36-37 (1972). The sixth amendment right to counsel attaches when the government formally charges the defendant with a crime. *See* Kirby v. Illinois, 406 U.S. 682, 689-90 (1972) (sixth amendment does not apply until government commences prosecution).

counsel independently, criminal defendants have a right to counsel appointed by the state.[3] The Supreme Court of the United States has recognized as a corollary to the sixth amendment right to counsel the right to the effective assistance of counsel.[4] In *Strickland v. Washington*[5] the Supreme Court addressed the issue of ineffective assistance of counsel during actual trial performance and established a two-prong test for courts to apply in evaluating claims of ineffective assistance of counsel.[6] Under *Strickland*'s two-prong test

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3. *See Argersinger*, 407 U.S. at 36-37 (if faced with possible jail sentence, indigent misdemeanor defendants have right to counsel). The Supreme Court in *Argersinger* stated that the assistance of counsel is requisite to the very existence of a fair trial. *Id.* at 31. Furthermore, the Court in *Argersinger* stated that the right to have counsel appointed by the state applies in both felony and misdemeanor offenses. *Id.* 32-36; *see also supra* note 2 and accompanying text (discussing history of right to counsel).

4. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (sixth amendment entitles criminal defendants facing felony charges to effective assistance of counsel); *see also Gideon*, 372 U.S. at 374 (fourteenth amendment protects right to effective assistance of counsel against state action); White v. Maryland, 373 U.S. 59, 60 (1963) (sixth amendment entitles defendant to assistance of counsel at preliminary hearing because preliminary hearing is one of critical stages of criminal proceeding); Reece v. Georgia, 350 U.S. 85, 90 (1955) (effective assistance of counsel is constitutional requirement of due process that no state may disregard); Glasser v. United States, 315 U.S. 60, 69-70 (1942) (federal court may not deprive accused, whose life or liberty is at stake, of assistance of counsel, because assistance of counsel is one of safeguards necessary to ensure fundamental human rights of life and liberty); Avery v. Alabama, 308 U.S. 444, 446 (1940) (constitutional right to assistance of counsel includes opportunity for counsel to consult and confer with accused to prepare defense); *Powell*, 287 U.S. at 57 (1932) (when defendant is unable to secure counsel or to represent himself adequately in state capital case, due process of law requires court to appoint counsel at proper time so that counsel effectively can help prepare case).

5. 466 U.S. 668 (1984).

6. *See id.* at 686 (discussing various ways in which counsel may deprive defendant of effective assistance of counsel). In *Strickland v. Washington* the State of Florida indicted the defendant for kidnapping and murder. *Id.* at 672. Acting against counsel's advice, the defendant waived his right to a jury trial and his right to have an advisory jury presnet at the capital sentencing hearing. *Id.* The trial judge sentenced the defendant to death on three counts of murder, and the Florida Supreme Court upheld the convictions on direct appeal. *Id.* at 675. Claiming, *inter alia*, that counsel had rendered ineffective assistance at the sentencing proceeding, the defending sought appellate relief from his death sentence. *Id.* The United States Supreme Court granted certiorari because of the differing standards for determining ineffective assistance of counsel claims in the various circuit courts. *Id.* at 683-84. The *Strickland* Court outlined a test for determining ineffective assistance claims. *Id.* at 687; *see infra* text accompanying notes 7-8 (discussing *Strickland* test requirements). The Supreme Court in *Strickland* stated that one of the purposes of the sixth amendment right to counsel is to ensure that criminal defendants receive a fair trial, and not to improve the quality of legal representation. *Strickland*, 466 U.S. at 689. The Supreme Court in *Strickland* stated that another purpose of the sixth amendment right to counsel is to ensure that the public justifiably may rely on the outcome of the trial. *Id.* at 692-93. The *Strickland* Court added, furthermore, that ensuring a fair trial was the guide for determining the effectiveness of counsel in cases involving claims of ineffectiveness of counsel in cases involving claims of ineffectiveness during counsel's actual performance of his duties. *Id.*

After articulating the general standards for judging ineffective assistance of counsel claims, the Supreme Court applied those standards to the facts of the *Strickland* case. *Id.* at 698-701. The Supreme Court in *Strickland* concluded that counsel's conduct was not deficient and that

for determining effectiveness of counsel, a defendant must show first that counsel's trial performance was deficient.[7] Second, a defendant must show

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even if counsel's conduct was deficient, the defendant could not show sufficient prejudice to warrant setting aside his death sentence. *Id.* at 698-99. Accordingly, the Supreme Court in *Strickland* determined that the defendant failed to satisfy the standards for proving ineffectiveness of counsel. *Id.* at 698-701.

Courts have recognized three ways in which a defendant may be deprived of ineffective assistance of counsel. A defendant may be deprived of ineffective assistance of counsel when defense counsel functioned under a conflict of interest. *See* Cuyler v. Sullivan, 446 U.S. 335, 344 (1980) (assistance of counsel is ineffective when actual conflict of interests adversely affects counsel's performance); Holloway v. Arkansas, 435 U.S. 475, 489-90 (1978) (same). A state may deprive a defendant of effective assistance of counsel by interfering with defense counsel's ability to render effective assistance for the accused. *See* Geders v. United States, 425 U.S. 80, 91 (1976) (state interfered with counsel's ability to render effective assistance by preventing attorney and client from consulting during overnight recess); Herring v. New York, 422 U.S. 853, 858-64 (1975) (closing argument for defense is basic element of criminal trial, and state may not restrict counsel who is defending criminal prosecution in accordance with constitutional traditions of sixth and fourteenth amendments); Brooks v. Tennessee, 406 U.S. 605, 612-13 (1972) (state law requiring that defendant be first defense witness unconstitutionally interfered with attorney's freedom to decide how to present his case); Ferguson v. Georgia, 365 U.S. 570, 593-596 (1961) (discussing state statute's bar on direct examination of defendant as unconstitutional interference with attorney's ability to assist accused). A defendant also might be deprived of effective assistance if counsel fails to render adequate legal assistance. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (counsel's advice with respect to guilty plea must be within the range of competence demanded of attorneys in criminal cases). In *Strickland* the Supreme Court elaborated for the first time on the constitutional issue of ineffective assistance of counsel in a case involving a claim of an attorney's ineffectiveness during actual performance of his duties. *Strickland*, 466 U.S. at 686.

7. *See Strickland*, 466 U.S. at 687-91 (discussing what constitutes deficient performance). The proper standard for evaluating attorney performance is whether the attorney provided reasonably effective assistance. Trapnell v. United States, 725 F.2d 149, 151-52 (2d Cir. 1983) (stating that standard of competence for counsel in criminal proceeding is reasonably competent assistance). Reasonableness is an objective standard judged by prevailing professional norms. *See Strickland*, 466 U.S. at 688 (discussing reasonableness of attorney's actions considered in light of all circumstances as guideline for determining effectiveness of attorney's performance in ineffective assistance of counsel claims). The Supreme Court in *Strickland* stated that representing a criminal defendant involves certain basic duties such as the duty of loyalty, the duty to consult with the defendant, and the duty to inform the defendant of matters concerning his trial. *Id.* According to the Supreme Court in *Strickland*, the function of counsel is to assist the defendant, and the attorney has a duty to use such skill and knowledge as will render the trial a reliable adversarial testing process. *Id.* The *Strickland* Court added that because of counsel's constitutionally protected independence concerning trial strategy and the wide latitude counsel must have in making tactical decisions, courts should not second guess counsel's decisions or allow hindsight to affect the court's evaluation of whether counsel's performance was reasonable under all of the circumstances. *Id.* at 689. The Supreme Court in *Strickland* stated that in deciding an actual ineffectiveness claim, therefore, the court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case as of the time of counsel's conduct. *Id.* at 690. Furthermore, the Supreme Court in *Strickland* stated that courts presume that counsel has rendered adequate assistance and has exercised reasonable professional judgment in making significant decisions. *Id.* at 690.

that counsel's deficient trial performance prejudiced the defense.[8] In determining whether counsel's deficient performance prejudiced the defense, some courts have examined the cumulative effect of counsel's errors.[9] Other courts have examined each of counsel's errors individually.[10] In *Hoots v.*

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8. *See Strickland* 466 U.S. at 691-96 (Supreme Court in *Strickland* discussing what constitutes prejudice in ineffective assistance of counsel claim). According to the Supreme Court in *Strickland*, even professionally unreasonable errors do not warrant setting aside the judgment of a criminal proceeding unless the errors have prejudiced the defense unfairly. *Id.* at 691. The Court in *Strickland* stated that in determining whether counsel's errors prejudiced the defendant, a court hearing an ineffective assistance of counsel claim must consider the totality of the evidence. *Id.* at 695. The Supreme Court in *Strickland* also stated that courts presume prejudice in some sixth amendment contexts. *Id.* at 692. Furthermore, the Supreme Court in *Strickland* added that courts presume prejudice when actual or constructive denial of assistance to the defendant exists. *Id.* According to the Supreme Court in *Strickland*, various kinds of state interference with assistance of counsel will result in a presumption of prejudice. *See id.* (discussing situations in which courts presume prejudice); *see also* United States v. Cronic, 466 U.S. 648, 659 n.25 (1984) (courts may presume prejudice when counsel was either totally absent, or was prevented from representing accused during critical stage of criminal proceeding). Courts also will presume prejudice when an actual conflict of interests exists. *See Strickland*, 466 U.S. at 692 (discussing effect of conflict of interest on prejudice determination); *see also* Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980) (considering prejudice when actual conflict of interest burdens counsel). The Supreme Court in *Strickland* stated that to succeed on a claim that counsel rendered ineffective assistance during actual performance at trial, however, a defendant affirmatively must prove prejudice from his attorney's deficient performance. *Strickland*, 466 U.S. at 693.

To prove prejudice in an actual ineffectiveness claim, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the proceeding would have resulted differently. *See id.* at 693-94. The Supreme Court derived the *Strickland* standard for determining prejudice from the foundation of the test for determining the materiality of exculpatory information that the prosecution does not disclose to the defense and also from the test for determining materiality of testimony that the government makes unavailable to the defense by deporting the witness. *See id.* at 693-94 (discussing various standards for determining prejudice); *see also* United States v. Agurs, 427 U.S. 97, 112-13 (1976) (test for materiality of exculpatory information is whether withheld information creates reasonable doubt as to guilt of accused); United States v. Valenzuela-Bernal, 458 U.S. 858, 872-74 (1982) (test for determining materiality of testimony made unavailable to defense because government deported witness is whether errors had some conceivable effect on outcome of proceeding). In arriving at its standard for determining prejudice, the Supreme Court in *Strickland* rejected several other standards. *Strickland*, 466 U.S. at 693-94. The Court in *Strickland* determined that a test based on a standard requiring that the errors conceivably affected the outcome was not sufficient. *Id.* at 693. The Supreme Court in *Strickland* stated further that it is not sufficient for the defendant to show that the errors merely "impaired the presentation of the defense." *Id.* The Court in *Strickland* noted that the defendant need not satisfy the "newly discovered evidence" standard, however, which requires defendants to show that counsel's deficient conduct more likely than not altered the outcome of the case. *Id.*

9. *See, e.g.*, Wilson v. McMacken, 786 F.2d 216, 218-20 (6th Cir. 1986) (applying *Strickland* test individually and cumulatively to counsel's errors in determining ineffective assistance of counsel claims); United States v. Cruz, 785 F.2d 399, 404-07 (2d Cir. 1986) (same); McNeil v. Cuyler, 782 F.2d 443, 447-51 (3d Cir. 1986) (same).

10. *See* United States v. Lewis, 786 F.2d 1278, 1281-84 (5th Cir. 1986) (applying *Strickland* test individually to counsel's errors to determine prejudice in ineffective assistance of counsel claim).

Allsbrook[11] the United State Courts of Appeals for the Fourth Circuit applied the *Strickland* test to each individual error of counsel to determine whether counsel's performance prejudiced the defendant.[12]

In *Hoots* police arrested and the state trial court indicted defendant Hoots for the armed robbery of a restaurant in North Carolina.[13] The district court for the State of North Carolina appointed Wilson O. Weldon, Jr., a North Carolina attorney, to represent Hoots as an indigent.[14] Weldon based his defense of Hoots on the theories of alibi, misidentification, and third-party commission of the crime.[15] At Hoots' first trial Weldon produced six alibi witnesses to testify that Hoots was at home on the night of the robbery.[16] Weldon also attempted to introduce evidence showing that two other men had committed the robbery.[17] At Hoots' trial, however, the trial judge refused to allow testimony that a third party committed the crime.[18] Hoots' first trial ended in a mistrial when the jury failed to reach a verdict.[19]

At Hoots' second trial Weldon cross-examined the state's sole eyewitness to the crime about her description of the gunman.[20] Weldon also called alibi witnesses on behalf of Hoots.[21] Weldon did not attempt, however, to introduce into the second trial evidence indicating that the other men had committed the robbery.[2] The jury found Hoots guilty and sentenced him to 40 years in prison.[23]

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11. 785 F.2d 1214 (4th Cir. 1986).

12. *See id.* at 1219-23 (discussing *Hoots* court's application of *Strickland* test for determining ineffective assistance of counsel).

13. *Id.* at 1215.

14. *Id.*

15. *See id.* In *Hoots* Weldon presented witnesses to testify that Hoots was at home on the night of the robbery. *Id.* at 1216. Weldon also cross-examined the state's sole eyewitness, Karen Roark, about the robbery and about her identification of the gunman. *Id.* Furthermore, in an effort to prove a third-party commission of the crime, Weldon attempted to introduce into evidence testimony from witnesses who claimed that they had heard two men, Hayes and Shaw, discuss and plan the robbery. *Id.*

16. *Id.* at 1216; *see supra* note 15 and accompanying text (discussing Weldon's plan of defense). In *Hoots* Weldon also produced three witnesses, Harper, Ridge, and Meade, who testified at Hoots' first trial and claimed to have witnessed two men, Hayes and Shaw, in various stages of planning the robbery. *Hoots*, 785 F.2d at 1216.

17. *See Hoots*, 785 F.2d at 1216. As part of his planned defense of the defendant in *Hoots*, Weldon attempted to show that third parties, Hayes and Shaw, instead of Hoots, committed the robbery. *Id.* at 1216.

18. *See id.* at 1216. In *Hoots* the prosecution objected to Meade's testimony that he had seen Hayes and Shaw together both before and after the robbery and that he had heard them planning the crime. *Id.* The court sustained the prosecution's objection. *Id.*

19. *Id.* at 1215.

20. *See id.* In *Hoots* Weldon cross-examined Roark, the state's sole eyewitness to the robbery, about discrepancies in her earlier descriptions of the gunman. *Id.*

21. *Id.*

22. *See id.* at 1217 (discussing Weldon's decision not to introduce evidence to prove third party commission of crime).

23. *Id.*

On direct appeal Hoots dismissed Weldon as his attorney and secured private counsel.[24] Arguing that Weldon inadequately had presented to the lower court the misidentification and third-party commission theories of defense, Hoots claimed that Weldon's assistance was ineffective.[25] The North Carolina Court of Appeals rejected, *inter alia*, Hoots' claim of ineffective assistance of counsel and affirmed Hoots' conviction.[26] Hoots appealed to the North Carolina Supreme Court, which rejected his claim for lack of a substantial constitutional question.[27]

After the North Carolina Supreme Court dismissed his claim, Hoots sought post-conviction relief in other North Carolina courts by again claiming that Weldon's assistance was ineffective.[28] The state trial court, however, denied post-conviction relief.[29] The North Carolina Court of Appeals also denied Hoots' petition for review.[30] After the state trial court denied his motion for post-conviction relief, Hoots petitioned the United States District Court for the Western District of North Carolina for a writ of habeas corpus arguing that counsel at the state trial provided ineffective assistance.[31] The district court referred Hoots' petition to a magistrate who recommended that the court deny the writ.[32] The federal district court affirmed the magistrate's findings, and Hoots appealed to the United States Court of Appeals for the Fourth Circuit.[33]

On appeal the Fourth Circuit in *Hoots* affirmed the district court's judgment that Hoots had received effective assistance of counsel.[34] In determining whether Hoots had received effective assistance of counsel, the Fourth Circuit applied the two-pronged standard that the United States Supreme Court had

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* In *Hoots* the Fourth Circuit noted that the state trial court ruled that Weldon effectively had performed his duties by presenting the available evidence to Hoots' advantage. *Id.* The state court further found that the evidence Weldon did not investigate or present was either not probative or did not exclude Hoots as a participant in the robbery. *Id.*
30. *Id.* at 1218. In *Hoots* after the North Carolina Court of Appeals denied his petition for post-conviction relief, defendant Hoots sought post-conviction relief based on newly discovered evidence that he claimed would show that two other men had committed the robbery. *Id.* Hoots claimed that the newly discovered evidence would exculpate him as the gunman. *Id.* The court denied relief because the newly discovered evidence had not precluded the possibility that Hoots robbed the restaurant and therefore, had not justified a new trial under state law. *Id.* On appeal the North Carolina Court of Appeals, concluding that the lower court did not abuse its discretion and that substantial evidence supported the lower court's conclusions, upheld the state trial court's denial of relief. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 1223.

outlined in *Strickland*.[35] The Fourth Circuit considered individually the three bases of Hoots' claim that he was deprived of effective assistance of counsel.[36] Hoots based his claim that Weldon was ineffective on the grounds that Weldon inadequately investigated the defense of misidentification, that Weldon should have researched the personal background of the state's sole eyewitness and should have impeached her, and that Weldon prejudiced Hoots' defense by failing to investigate the third-party commission defense.[37]

In considering Hoots' claim that Weldon inadequately had investigated the defense of misidentification, the Fourth Circuit determined that Weldon's failure to investigate the defense of misidentification had constituted a deficient performance under the first prong of the *Strickland* test.[38] The Fourth Circuit in *Hoots* reviewed the district court's finding that Weldon did not prejudice Hoots' defense by failing to interview and use the witnesses to the robbery who could not identify Hoots.[39] Concluding that Weldon's failure to investigate constituted deficient performance, the Fourth Circuit considered whether Weldon's deficient performance prejudiced the defendant under the second prong of the *Strickland* test.[40] The Fourth Circuit noted that the *Strickland* test for determining prejudice required the defendant to show a reasonable probability that counsel's unprofessional conduct altered the outcome of the defendant's case.[41] The Fourth Circuit noted that the United States Supreme Court in *Strickland* had defined the phrase "reasonable probability" as a probability sufficient to undermine confidence in the outcome of the case.[42] Applying *Strickland*, the *Hoots* court determined that Weldon's failure to investigate the defense of misidentification did not prejudice the defendant unfairly.[43] In examining the discrepancies in the description of the robber, the Fourth Circuit determined that the discrepancies did not create a reasonable probability that the court would have found Hoots innocent had

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35. *Id.* at 1219.

36. *Id.* at 1219-23.

37. *Id.*

38. *Id.* at 1219-20.

39. *See id.* at 1219-21 (discussing testimony of persons who witnessed the robbery). In *Hoots* only one person in the restaurant where the robbery occurred could identify Hoots as the gunman. *Id.* at 1216. Three other people in the restaurant when the robbery occurred could not identify Hoots as the gunman. *Id.* at 1219. Weldon interviewed none of the three people who were in the restaurant but could not identify Hoots. *Id.*

40. *Id.* at 1220.

41. *Id.*; *Strickland v. Washington*, 446 U.S. 668, 694 (1984).

42. *Hoots*, 785 F.2d at 1220; *Strickland*, 466 U.S. at 694.

43. *See Hoots*, 790 F.2d at 1220-21. In *Hoots* the Fourth Circuit stated that the state's sole eyewitness enjoyed unique lighting advantages over the other eyewitnesses since she and the gunman were standing in the brightest part of the restaurant. *Id.* at 1220. The *Hoots* court determined that none of the other eyewitnesses would have testified that Hoots was not the gunman. *Id.* The *Hoots* court determined that, in addition, Roark's unique lighting advantage over the other people in the restaurant provided her the ability to identify Hoots even though the other witnesses in the restaurant could not identify the gunman. *Id.*

the other witnesses testified.[44] The Fourth Circuit concluded, therefore, that Hoots failed to show that his attorney's failure to interview and to use the potential testimony of eyewitnesses to the robbery satisfied the *Strickland* prejudice requirement.[45]

Turning to Hoots' claim that Weldon's failure to discover the eyewitness' prior criminal record had constituted ineffective assistance of cousnel under *Strickland*, the Fourth Circuit in *Hoots* determined that defense counsel ordinarily has a duty to investigate possible methods for impeaching prosecution witnesses.[46] The Fourth Circuit concluded, therefore, that Weldon's failure to uncover easily discoverable information was deficient.[47] The Fourth Circuit decided that Weldon's failure to impeach the state's sole eyewitness, however, did not create a reasonable probability that Weldon's error unfairly prejudiced Hoots' defense.[48]

The Fourth Circuit finally considered Hoots' claim that Weldon inadequately had investigated and presented the third-party commission defense.[49] Hoots contended that Weldon rendered ineffective assistance because Weldon did not attempt to introduce evidence at the second trial that two men other than Hoots had committed the crime.[50] The Fourth Circuit noted that under North Carolina law evidence on the commission of a crime by a third party is admissible only if the evidence points unerringly to the guilt of the third party and to the innocence of the accused.[51] The Fourth Circuit concluded that in deciding not to attempt to introduce the evidence of the third party commission at the second trial, Weldon correctly had interpreted North Carolina law.[52] Accordingly, the Fourth Circuit determined that Weldon's failure in

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44. *Id.*

45. *Id.* at 1221.

46. *Id.*

47. *Id.*

48. *See id.* at 1221. In *Hoots* the state's sole eyewitness had previous convictions on worthless check charges. *Id.* Weldon did not discover the state eyewitnesses' worthless check convictions and, therefore, was unable to impeach the credibility of the state's sole eyewitness. *Id.* The *Hoots* court concluded that, nonetheless, the state eyewitnesses' prior worthless check convictions did not imply that the eyewitness was untrustworthy or unreliable. *Id.* The *Hoots* court noted the difficulty in determining how a jury might react to various methods of impeachment. *Id.* The Fourth Circuit in *Hoots* concluded that Weldon's failure to impeach the state's eyewitness, therefore, did not create a reasonable probability that the jury would not have convicted Hoots had Weldon impeached the witness. *Id.*

49. *Id.*

50. *See id.* at 1221-22. At the first trial in *Hoots* Weldon introduced testimony that two other men had borrowed a pistol and that a witness had seen the two men together before the robbery. *Id.* The trial court, however, did not allow into evidence the assertion that two other men had planned the robbery. *Id.* at 1222. Weldon, therefore, did not attempt to introduce certain testimony at the second trial showing that two other men had planned the robbery. *Id.*

51. *Id.* at 1222; *see* State v. Hamlette, 302 N.C. 490, 501, 276 S.E.2d 338, 346 (1981) (stating North Carolina law that evidence of third-party commission of crime is admissible only if that evidence points unerringly to guilt of third party and innocence of second).

52. *Hoots*, 785 F.2d at 1222.

Hoots' second trial to attempt to introduce evidence that the judge already had ruled inadmissible at Hoots' first trial was not ineffective assistance of counsel.[53]

The dissent in *Hoots* argued that the majority incorrectly applied the prejudice prong of the *Strickland* test.[54] The dissent agreed with the majority's determination that Weldon's failure to solicit testimony from other eyewitnesses and his failure to impeach the state's sole eyewitness with her criminal record satisfied the deficiency prong of the *Strickland* test.[55] The dissent disagreed, however, with the majority's conclusion that Weldon's deficiencies did not prejudice Hoots' defense.[56] The dissent argued that the majority concluded, after evaluating the defense errors separately, that each error individually did not create a reasonable probability that Weldon's conduct prejudiced Hoots.[57] The dissent contended that the *Strickland* test required courts to consider, instead, the cumulative effect of all of counsel's alleged errors in determining whether a reasonable probability existed that a different verdict would have resulted if counsel had not erred.[58] Accordingly, the dissent in *Hoots* would have held that Weldon's errors prejudiced the defense and constituted ineffective assistance of counsel.[59]

The Supreme Court has not addressed the question of whether courts should consider counsel's errors individually or cumulatively when determining prejudice under *Strickland*.[60] The *Hoots* court's examination of each individual claim of ineffective assistance of counsel in determining prejudice under *Strickland* is consistent with how the Fourth Circuit has interpreted and applied the *Strickland* test in other ineffective assistance of counsel claims.[61]

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53. *Id.* at 1222-23.

54. Hoots v. Allsbrook, 785 F.2d 1214, 1223 (4th Cir. 1986) (Ervin, J., dissenting).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* 1225.

60. *See infra* text accompanying notes 61-101 (discussing differing opinions of federal circuit courts concerning application of *Strickland* test).

61. *See Hoots*, 785 F.2d at 1219-23 (applying *Strickland* standard for determining ineffective assistance of counsel claim); *see also* Ballou v. Booker, 777 F.2d 910, 914 (4th Cir. 1985) (applying *Strickland* standard in determining that counsel's performance was not deficient); Roach v. Martin, 757 F.2d 1463, 1476-77 (4th Cir. 1985) (*Roach* court's application of *Strickland* standard for determining ineffective assistance of counsel claim); Williams v. Gupton, 627 F. Supp. 669, 672-74 (W.D.N.C. 1986) (applying *Strickland* standard for determining ineffective assistance of counsel claim). The Fourth Circuit in *Ballou v. Booker* applied the two-prong *Strickland* test individually to each of the defendant's ineffective assistance of counsel claims. *Ballou*, 777 F.2d at 914-15. In *Ballou* the state charged the defendant with rape. *Id* at 910. The defendant claimed that counsel was deficient because he failed to investigate every avenue open to him. *Id.* at 913-14. The Fourth Circuit in *Ballou* separately examined each avenue that the defendant claimed his counsel should have taken, and the court determined that counsel's conduct was not deficient. *Id.* at 914-15. Because the Fourth Circuit in *Ballou* determined that

In *Roach v. Martin*,[62] for example, the Fourth Circuit applied the *Strickland* test individually and arrived at an independent conclusion on each of the defendant's ineffective assistance of counsel claims.[63] The state trial judge in *Roach* sentenced the defendant to death for capital murder, criminal sexual conduct, armed robbery, and kidnapping.[64] The defendant filed a petition for federal habeas corpus relief in the United States District Court for the District of South Carolina.[65] The district court dismissed the defendant's claims and the defendant appealed to the Fourth Circuit.[66] The Fourth Circuit in *Roach* examined the defendant's ineffective assistance of counsel claims individually and determined that counsel's conduct was not deficient.[67] The *Roach* court, therefore, did not reach the prejudice issue.[68] Accordingly, the Fourth Circuit in *Roach* dismissed the defendant's claim that he received ineffective assistance of counsel.[69]

The *Hoots* court applied the two-prong *Strickland* test for determining ineffective assistance of counsel claims consistently with how the United States Court of Appeals for the Fifth Circuit has applied the *Strickland* standard.[70] In *United States v. Lewis*[71] a jury convicted the defendant in the United States District Court for the Western District of Louisiana for operating a fraudulent investment scheme.[72] On appeal to the Fifth Circuit,

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counsel was not deficient in any of the individual ineffective assistance claims, the court did not address the prejudice issue. *Id.* at 914 n.7.

Similar to the Fourth Circuit's application of the *Strickland* test in *Ballou*, district courts within the Fourth Circuit have applied the two-prong *Strickland* test to each individual claim of ineffective assistance of counsel. Thus, in *Williams v. Gupton*, the District Court for the Western District of North Carolina applied the two-prong *Strickland* test individually to each claim of ineffective assistance of cousel. *Gupton*, 627 F. Supp. 669, 672-74 (W.D.N.C. 1986). The *Gupton* court determined that petitioner's first claim failed both prongs of the *Strickland* test and that the second claim did not show professional incompetence. *Id.*; *see infra* test accompanying notes 63-69 (discussing Fourth Circuit's application of *Strickland* standard in *Roach v. Martin*).

62. 757 F.2d 1463 (4th Cir. 1985).

63. *Id.* at 1476-77.

64. *Id.* at 1467-69. In *Roach v. Martin* the South Carolina Supreme Court affirmed the defendant's conviction on direct appeal, and after exhausting his state court remedies, the defendant filed a petition for federal habeas corpus relief in the United States District Court for the District of South Carolina. *Id.* at 1469. The district court referred the petition to a United States Magistrate who recommended that the district court dismiss the petition and grant summary judgment in favor of the State. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 1476-80.

68. *Id.*

69. *Id.*

70. *See infra* notes 74-76 and accompanying text, (discussing Fifth Circuit's application of *Strickland* test in *United States v. Lewis* and *Wicker v. McCotter*); note 76 (discussing Fifth Circuit's application of *Strickland* test in *Wicker v. McCotter*).

71. 786 F.2d 1278 (5th Cir. 1986).

72. *Id.* at 1279.

the defendant challenged his conviction on the grounds that he received ineffective assistance of counsel and that the court allowed inadmissible evidence into the trial.[73] The Fifth Circuit in *Lewis* applied the *Strickland* test to determine whether the defendant suffered prejudice because of counsel's alleged errors.[74] Considering separately the defendant's four claims of ineffective assistance, the Fifth Circuit in *Lewis* concluded that none of the individual claims established prejudice.[75] Accordingly, the Fifth Circuit in *Lewis* dismissed the defendant's petition.[76]

In contrast to the Fifth Circuit's application of the *Strickland* test in *Lewis*, in *McNeil v. Cuyler*[77] the United States Court of Appeals for the Third Circuit applied the *Strickland* test both individually and cumulatively to decide the defendant's ineffective assistance of counsel claim.[78] The state trial court in *Cuyler* convicted the defendant of first degree murder.[79] After the state courts denied his post trial motions, the defendant filed a habeas corpus petition in which he claimed that he had received ineffective assistance of counsel.[80] The United States District Court for the Eastern District of Pennsylvania denied the petition, and the defendant appealed to the Third Circuit.[81] The Third Circuit in *Cuyler* examined petitioner's ineffective assistance claim by determining whether petitioner had satisfied the prejudice requirement of *Strickland*.[82] The defendant argued that absent the cumulative effect of counsel's errors, the outcome of the trial would have been different.[83] After examining the cumulative effect of counsel's alleged acts and omissions, the *Cuyler* court concluded that counsel's conduct did not

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73. *Id.* at 1283-86.

74. *Id.* at 1281.

75. *Id.*

76. *Id.* at 1281-83. In *Wicker v. McCotter* the Fifth Circuit considered the defendant's ineffective assistance of counsel claims separately. *Wicker*, 783 F.2d 487, 494-97 (5th Cir. 1986). Although the defense requested the Fifth Circuit in *Wicker* to consider the alleged errors as a whole, the *Wicker* court reviewed each claim separately and ruled on each individual claim specifically. *Id.* at 494-97.

77. 782 F.2d 443 (3d Cir. 1986).

78. *See id.* at 449-51 (applying *Strickland* standard for determining ineffective assistance of counsel claims); *infra* text accompanying notes 83-101 (discussing courts that apply *Strickland* standard for determining ineffective assistance of counsel claims both individually and cumulatively).

79. *Cuyler*, 782 F.2d at 445-46.

80. *Id.* at 444-46.

81. *Id.*

82. *See id.* In *McNeil v. Cuyler* the United States Court of Appeals for the Third Circuit examined whether the defendant met the *Strickland* prejudice requirement without first determining that counsel's conduct was deficient. *Id.* 450-51. In *Strickland* the United States Supreme Court stated that a court hearing an ineffective assistance of counsel case need not determine first whether counsel's performance was deficient. *Strickland*, 466 U.S. at 697. The *Strickland* Court instructed courts, instead, to decide ineffective assistance of counsel questions on the prejudice issue when possible. *Id.*

83. *McNeil*, 782 F.2d at 450.

create a reasonble probability that the outcome of the trial would have differed.[84] Accordingly, the Third Circuit in *Cuyler* dismissed the defendant's ineffective assistance of counsel claim.[85]

Consistent with the Third Circuit's application of the *Strickland* test in *Cuyler*, the United States Court of Appeals for the Sixth Circuit in *Wilson v. McMacken*[86] applied the two-prong *Strickland* test both individually and cumulatively in considering the defendant's claim of ineffective assistance of counsel.[87] In *Wilson* a jury in the state trial court of Ohio convicted the defendant of murder.[88] The defendant filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Ohio on the grounds that, *inter alia*, counsel rendered ineffective assistance of counsel.[89] The district court dismissed the petition, and the defendant appealed to the Sixth Circuit.[90] The Sixth Circuit in *Wilson* held tht none of counsel's alleged individual acts or omissions established ineffective assistance of counsel under *Strickland*.[91] The *Wilson* court added that even when the court examined the alleged acts and omissions in combination, the defendant failed to establish ineffective assistance of counsel under *Strickland*.[92] Accordingly, the Sixth Circuit in *Wilson* applied the *Strickland* test both individually and cumulatively to decide an ineffective assistance of counsel claim.[93]

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84. *Id.* at 451.

85. *Id.*

86. 786 F.2d 216 (6th Cir. 1986).

87. *Id.* at 219-20.

88. *Id.* at 217. In *Wilson v. McMacken* the defendant appealed to the Ohio Court of Appeals for the Eighth Judicial District which affirmed the conviction. *Id.* The Ohio Supreme Court in *Wilson* dismissed *sua sponte* any further appeal as lacking a sufficient constitutional question. *Id.* The defendant in *Wilson* filed an application for a writ of habeas corpus in the United States District Court for the Northern District of Ohio. *Id.* The defendant stated four grounds in support of his petition for a writ of habeas corpus, including the claim of ineffective assistance of counsel. *Id.* The district court in *Wilson* referred the petition to a magistrate who recommended that the court dismiss the petition. *Id.* The defendant in *Wilson* objected to portions of the report, and the district court reviewed the report and dismissed the petition. *Id.* Subsequently, the defendant appealed to the United States Court of Appeals for the Sixth Circuit. *Id.* at 220.

89. *Id.* at 217.

90. *Id.* at 220.

91. *Id.* at 219-20.

92. *See id.* at 220. In *Wilson* the defendant based his ineffective assistance of counsel claim on three separate grounds. *Id.* at 218-19. The *Wilson* court determined that the cumulative effect of petitioner's complaints concerning counsel's performance was no greater than the individual grievances against counsel's performance. *Id.* at 219-20. Accordingly, the *Wilson* court concluded that whether the court considered the petitioner's complaints separately or cumulatively, the defendant failed to meet the prejudice prong of the *Strickland* test for determining ineffective assistance of counsel claims. *Id.*

93. *Id.* at 218-20. Similar to the Sixth Circuit's application of *Strickland* in *Wilson*, the United STates Court of Appeals for the Eleventh Circuit in *Jones v. Smith* approved the cumulative application of the *Strickland* test. *See* Jones v. Smith, 772 F.2d 668, 669 (11th Cir. 1985). In *Jones* the Eleventh Circuit affirmed the holding of the United States District Court for the Southern District of Alabama. *Id.* at 674. In that decision, the district court held that

Similarly, in *United States v. Cruz*,[94] the United States Court of Appeals for the Second Circuit considered the defendant's three claims of ineffective assistance of counsel both individually and cumulatively.[95] In *Cruz* the United States District Court for the Southern District of New York convicted the defendant on six counts of narcotics and firearms charges.[96] On appeal to the United States Court of Appeals for the Second Circuit, the defendant in *Cruz* stated that he received ineffective assistance of counsel.[97] The defendant contended that, whether considered individually or cumulatively, counsel's errors constituted ineffective assistance.[98] The Second Circuit in *Cruz* accepted the defendant's contention that the court should consider counsel's errors both individually and cumulatively, but stated that to prevail the defendant must satisfy both the deficiency and prejudice requirements of the *Strickland* standard.[99] After examining the defendant's claims of ineffective assistance of counsel both individually and cumulatively, however, the Second Circuit concluded that Cruz had failed to satisfy his burden of proving either a deficiency in counsel's performance or resulting prejudice.[100] Accordingly, the Second Circuit in *Cruz* dismissed the defendant's claim that he received ineffective assistance of counsel and affirmed the district court's decision.[101]

The Supreme Court in *Strickland* stated that the purpose of the sixth amendment right to effective assistance of counsel is to ensure that criminal defendants receive a fair trial and to ensure that the public justifiably may rely on the outcome of that trial.[102] The *Strickland* Court failed, however, to address specifically whether courts are better able to ensure a fair and reliable trial by considering the individual effect or the cumulative effect of counsel's errors in determining prejudice under *Strickland*.[103] In determining prejudice under the *Strickland* standard for deciding ineffective assistance of counsel claims, the federal circuit courts have not explained why they have

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counsel's actions satisfied the *Strickland* prejudice requirement when considered either separately or in combination. *Id.*; *see* Jones v. Smith, 599 F. Supp. 1292, 1300 (S.D. Ala. 1984) (district court in *Jones* applying *Strickland* standard both individually and cumulatively), *aff'd*, 772 F.2d 668 (11th Cir. 1985).

94. 785 F.2d 399 (2d Cir. 1986).

95. *Id.* at 404-05.

96. *Id.* at 401.

97. *Id.* 404.

98. *Id.*

99. *Id.* at 405.

100. *Id.*

101. *Id.* at 405, 408.

102. *See Strickland*, 466 U.S. at 691-92 (discussing purpose and goal of sixth amendment right to effective assistance of counsel as ensuring fair and reliable trial); Note, *Federal Habeas Review of Ineffective Assistance Claims: A Conflict Between* Strickland *and* Stone?, 53 U. Chi. L. Rev. 183, 193 (1986) (purpose of sixth amendment right to counsel is to ensure fair trial rather than to improve quality of legal counsel).

103. *See generally, Strickland*, 466 U.S. 668, (1984) (failure of Supreme Court in *Strickland* to discuss issue of whether courts should examine counsel's errors individually or cumulatively in determining prejudice).

distinguished between the individual or the cumulative effect of counsel's unprofessional errors.[104] The federal circuit courts have not explained, furthermore, why one application of the *Strickland* test is better than the other, nor have they discussed whether it makes any difference how courts apply the *Strickland* test.[105] Language from *Strickland*, however, suggests that the Supreme Court intended courts to consider the cumulative effect of counsel's unprofessional errors in determining prejudice.[106] Indeed, in outlining the prejudice prong of the *Strickland* test, the Supreme Court repeatedly used the plural form of the word "error."[107] The Supreme Court in *Strickland* added, furthermore, that courts must consider the totality of the evidence in determining if counsel's errors prejudiced the defendant.[108] The Supreme Court in *Strickland* noted that, depending on the evidence in the case, some attorney errors will have affected the outcome of the trial pervasively, while other errors will have affected the outcome only trivially.[109] Furthermore, the *Strickland* Court noted that counsel's errors are more likely to affect a verdict which the record supports weakly than a verdict with substantial support from the record.[110] The *Strickland* Court apparently realized that depending on the particular facts of each case, the manner in which courts consider counsel's errors in determining prejudice under *Strickland* might affect the outcome of the trial.[111] In applying the prejudice prong of the *Strickland* standard to each individual claim of ineffective assistance of counsel, therefore, courts fail to comply with the Supreme Court's mandate in *Strickland* that

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104. *See infra* note 105 and accompanying text (discussing failure of federal circuit courts to explain reasoning behind their application of *Strickland* test for determining prejudice).

105. *See generally*, United States v. Lewis, 786 F.2d 1278 (5th Cir. 1986) (5th Circuit in *Lewis* does not discuss why it applies *Strickland* individually); Wilson v. McMacken, 786 F.2d 216 (6th Cir. 1986) (6th Cir. in *Wilson* does not give reasoning for decision to apply *Strickland* test both cumulatively and individually); McNeil v. Cuyler, 782 F.2d 443 (3d Cir. 1986) (3d Circuit in *Cuyler* does not give reasoning behind decision to apply *Strickland* test both cumulatively and individually); Roach v. Martin, 757 F.2d 1463 (4th Cir. 1985) (*Roach* court does not mention reasoning behind applying *Strickland* test individually).

106. *See infra* text accompanying notes 107-111 (discussing Supreme Court's language in articulating prejudice prong of *Strickland* standard for determining ineffective assistance of counsel claims).

107. *See Strickland*, 466 U.S. at 694 (discussing appropriate test for determining prejudice under *Strickland* standard for deciding ineffective assistance of counsel claims); *Hoots v. Allsbrook*, 785 F.2d 1214, 1223 n.4 (Ervin, J., dissenting) (discussing Supreme Court's use of word "errors" in *Strickland* in suggesting framework for determining prejudice from counsel's unprofessional errors in deciding ineffective assistance of counsel claims). Throughout *Strickland*, the Supreme Court used the plural form of the word "error" to explain how courts should evaluate counsel's conduct in determining prejudice in ineffective assistance of counsel cases. *Strickland*, 466 U.S. at 694-96.

108. *Strickland*, 466 U.S. at 695.

109. *Id.* at 695-96.

110. *Id.* at 696.

111. *See supra* text accompanying notes 109-110 (discussing *Strickland* Court's consideration of how counsel's errors might affect trial depending on particular facts of each case).

courts should consider the effect of "counsel's unprofessional errors" in determining prejudice.[112] Furthermore, as the dissent in *Hoots* noted, making a separate determination of prejudice on each of counsel's unprofessional errors results in treating each attorney error as a separate petition making the same claim of ineffective assistance of counsel.[113] As the dissent in *Hoots* also noted, while the attorney's individual errors independently might not have prejudiced the defendant in *Hoots*, the sum of the attorney's errors may have prejudiced the defense.[114] Accordingly, the Fourth Circuit in *Hoots* erred by not considering the cumulative effect of all of counsel's unprofessional errors in determining prejudice under the second prong of the *Strickland* standard for deciding ineffective assistance of counsel claims.[115]

In *Hoots v. Allsbrook* the Fourth Circuit examined defendant *Hoots'* several claims of ineffective assistance of counsel.[116] In evaluating Hoots' claims, the Fourth Circuit applied the two-prong *Strickland* test for evaluating counsel's effectiveness.[117] The Fourth Circuit separately examined each individual claim of ineffective assistance to determine if Hoots had satisfied the prejudice prong of the *Strickland* standard for determining ineffective assistance of counsel claims.[118] Although the Fourth Circuit applied the *Strickland* standard consistently with some circuit court decisions, many circuit courts favor the cumulative approach of evaluating ineffective assistance of counsel claims.[119] Courts are better able to meet the sixth amendment goal of ensuring a fair and reliable trial by considering the cumulative effect of all of counsel's unprofessional errors in deciding ineffective assistance of counsel claims.[120]

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112. *See supra* notes 106-107 and accompanying text (analysis of language which suggests that *Strickland* Court intended courts to consider the cumulative effect of counsel's unprofessional errors).

113. *See Hoots v. Allsbrook*, 785 F.2d 1214, 1223 (Ervin, J., dissenting) (discussing reasons for considering cumulative effect of attorney errors in determining prejudice under *Strickland*). In *Hoots* the defendant relied on two attorney errors to sustain his petition for a writ of habeas corpus. *Id.* The dissent in *Hoots* stated that the majority's determination of prejudice under *Strickland* treated the defendant's petition for a writ of habeas corpus as two separate petitions. *Id.*

114. *See id.* at 1223-25 (discussing why cumulative consideration of attorney's errors in *Hoots* would have satisfied prejudice prong of *Strickland* test and would have resulted in different outcome of trial).

115. *See supra* text accompanying notes 106-114 (discussing Fourth Circuit's misapplication in *Hoots* of *Strickland* test for determining prejudice).

116. *Hoots*, 785 F.2d at 1219.

117. *See id.* (applying *Strickland* test to determine defendant's ineffective assistance of counsel claim).

118. *See supra* text accompanying notes 35-53 (discussing Fourth Circuit's application of *Strickland* standard for determining ineffective assistance of counsel in *Hoots*).

119. *See supra* notes 61-101 and accompanying text (discussing how various federal circuit courts have determined prejudice under *Strickland*).

120. *See supra* notes 105-115 and accompanying text (discussing reasons for applying *Strickland* cumulatively rather than individually in determining prejudicial effect of counsel's errors).