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Wrongful Convictions: Causes and Remedies  
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*This is an addendum to the October 19, 2007 memorandum written by Emily Fowler and Caraine Leon Guerrero regarding the legal obstacles to asserting civil claims against criminal defense attorneys in wrongful conviction cases, submitted to the California Commission on the Fair Administration of Justice (hereinafter referred to as the “CCFAJ memorandum”).*

The defendant suing for legal malpractice faces a Herculean task. Notwithstanding the satisfaction of the statute of limitations of § 340.6,<sup>1</sup> one of the elements a defendant must prove is that his or her counsel had a duty to act as other members of the profession would towards the defendant and that the attorney breached this duty.<sup>2</sup> Essentially, the defendant must be able to show that his attorney provided “ineffective assistance of counsel.”

“Ineffective assistance of counsel” is a legal term of art derived from a defendant’s constitutional right. The Sixth Amendment of the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>3</sup> In *Gideon v. Wainwright*, the United States Supreme Court extended this right (once primarily reserved for capital cases in federal courts) to all states and non-capital cases.<sup>4</sup> The Court held that a criminal defendant<sup>5</sup> has a Sixth Amendment right to have “the guiding hand of counsel at every step in the proceedings against him [or her]” and that this is a ***fundamental right*** essential to assure fair trials.<sup>6</sup> As fundamental as this right is, however, the Court did not elaborate on what this right entailed until twenty years later, in *Strickland v.*

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<sup>1</sup> Cal. Civ. Proc. Code § 340.6(a) (West 1977). See the CCFAJ memorandum.

<sup>2</sup> *Wiley v. County of San Diego*, 19 Cal. 4th 532, 536 (Cal. 1998).

<sup>3</sup> U.S. Const. amend. VI.

<sup>4</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>5</sup> For purposes of this essay, “criminal defendant” is defined as a defendant charged/convicted in a criminal proceeding.

<sup>6</sup> *Id.* at 344-345.

*Washington*.<sup>7</sup> In *Strickland*, the Court reaffirmed that criminal defendants have a right to counsel and that this right “plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”<sup>8</sup> The Court then held that “[t]he right to counsel is the right to the *effective assistance* of counsel [emphasis added].”<sup>9</sup> The Court then set forth a standard for determining what it meant by “effective assistance” by delineating what the criminal defendant would have to prove when claiming that he or she did not receive this effective assistance from his or her attorney.<sup>10</sup> The criminal defendant would have to show that he or she received *ineffective* assistance of counsel. Thus was born the term of art and cause of action.

To show “ineffective assistance of counsel” under the *Strickland* standard, the criminal defendant must satisfy a two-pronged test.<sup>11</sup> First, the criminal defendant must show that his or her attorney made errors so serious that the attorney was not functioning in a way that was guaranteed by the Sixth Amendment.<sup>12</sup> Even if the criminal defendant has made such a showing, he or she must then show that the attorney’s errors were so serious that they prejudicially deprived the defendant of a fair trial.<sup>13</sup> If the criminal defendant can satisfy both prongs of the test, then he or she has proven the claim and is entitled to a reversal of conviction.<sup>14</sup>

The *Strickland* test was purposefully set to be vague and ambiguous.<sup>15</sup> The Court attempted to lend some guidance as to what would constitute an attorney error that was so

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<sup>7</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>8</sup> *Id.* at 684.

<sup>9</sup> *Id.* at 686 (quoting *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970)).

<sup>10</sup> *Id.* at 687.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* The Court expressly stated “[m]ore specific guidelines are not appropriate.”

serious that the attorney violated the criminal defendant's constitutional right. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."<sup>16</sup> This guidance, however, was still as vague and ambiguous as the test itself. What the Court did expressly state, though, is "[t]hat a person who happens to be a lawyer [who] is present at trial alongside the accused . . . is not enough to satisfy the constitutional command."<sup>17</sup> Mere presence is not enough. The attorney must do something more for the criminal defendant, his client. What that entails has been the subject of much controversy and division in the lower courts.

Adding to the controversy and division of applying this vague and ambiguous test was what the Court further held in *Strickland*. After creating the two-pronged test, the Court then undermined it by cautioning that "a court must indulge a ***strong presumption*** [emphasis added] that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>18</sup> This presumption includes the belief that the attorney did or did not do something as a result of sound trial strategy or the like.<sup>19</sup> The Court's justification for this almost iron-clad presumption is that without it, there would be intense scrutiny and second-guessing of the attorney, which would "dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between the attorney and the client."<sup>20</sup> Unfortunately, what has resulted from the deferential presumption set forth is far worse than the undermining of independence or trust. What has resulted is the common occurrence and lack of accountability of attorney conduct that would shock the public conscience.

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<sup>16</sup> *Id.* at 688.

<sup>17</sup> *Id.* at 685.

<sup>18</sup> *Id.* at 689.

<sup>19</sup> *Id.* at 689-690.

<sup>20</sup> *Id.* at 690.

Calvin Burdine’s lawyer fell asleep on several occasions *during* a significant portion of Burdine’s capital murder trial.<sup>21</sup> Burdine was convicted and served ten years in prison before an evidentiary hearing was held to address his claim that his sleeping lawyer provided ineffective assistance of counsel.<sup>22</sup> The jury foreperson, several other jurors, the court clerk, and even the presiding judge testified that they noticed Burdine’s lawyer “nodding” off during the trial.<sup>23</sup> The district court therefore granted Burdine’s petition for habeas corpus relief.<sup>24</sup> The Fifth Circuit, however, reversed the grant, holding that Burdine should receive a new trial instead because counsel’s sleeping during trial did not rise to the level of prejudice required to satisfy the *Strickland* standard.<sup>25</sup> The Fifth Circuit never denied that the attorney falling asleep during the trial was not deficient conduct. The Fifth Circuit held that this conduct may not have been prejudicial enough (under *Strickland*) because it was only speculation to say whether the attorney fell asleep during a *critical stage* at trial.<sup>26</sup>

The Fifth Circuit followed this highly deferential analysis in another unrelated case, but involving the same lawyer who represented Burdine. Carl Johnson also filed an ineffective assistance of counsel claim when the lawyer also slept through his trial.<sup>27</sup> In addition, the lawyer neglected to interview witnesses he was using for the defense prior to putting them up on the stand, not knowing what they were going to say.<sup>28</sup> Even with such outrageous conduct, the Fifth

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<sup>21</sup> Bright, Stephen B., *Turning Celebrated Principles Into Reality*, 27 Feb Champion 6, 9 (2003)(citing to *Burdine v. Johnson*, 66 F. Supp. 2d 854(S.D. Tex. 1999)).

<sup>22</sup> *Burdine v. Johnson*, 66 F. Supp.2d 854, 855 (S.D. Tex. 1999).

<sup>23</sup> *Id.* at 858-859. Note that the presiding judge testified that he saw Burdine’s attorney closing his eyes on multiple occasions, but did not directly opine that the attorney was asleep (unlike the jurors testimonies) because the judge emphasized paying more attention to the attorney questioning the witness and taking his own notes during the trial.

<sup>24</sup> *Id.* at 867.

<sup>25</sup> *Burdine v. Johnson*, 231 F.3d 950, 964 (5th Cir. 2000).

<sup>26</sup> *Id.*

<sup>27</sup> Bright, Stephen B., 27 Feb Champion at 9 (citing to David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. Rev. 691 (1996)).

<sup>28</sup> David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. Rev. 691, 696 (1996).

Circuit upheld Johnson's conviction.<sup>29</sup> Johnson was sentenced to death and thereafter executed.<sup>30</sup>

In both of these cases, the Fifth Circuit did not find that the attorney's representation was ineffective. It is beyond comprehension how the Supreme Court's express statement that mere presence in court by an attorney does not constitute effective counsel can be reconciled by the Fifth Circuit's holding that an attorney who was unconscious during the trial was not ineffective counsel. Worst yet, these two cases are a drop in the ocean of cases where the lower courts' application of the *Strickland* standard has resulted in findings where the lawyer's conduct, albeit shocking, was not enough to reverse the criminal defendant's conviction.

Then there are the cases where the criminal defendant's conviction was reversed and a finding of wrongful conviction was determined. Yet even in these cases, the reversal was not due to the satisfaction of the *Strickland* test, even though it certainly should have been. Looking at the ineffective assistance of counsel claims in wrongful conviction cases sheds more light on the incredibly huge burden of overcoming the *Strickland* presumption favoring the attorney.

Dennis Williams was represented at his first trial by an attorney who was later disbarred and at his second trial by a different attorney who was later suspended.<sup>31</sup> Both times he was convicted for murder, until DNA exonerated him.<sup>32</sup> Gary Drinkard was sentenced to death at a trial where he was represented by lawyers who, prior to being assigned to the case, handled collections and bankruptcy cases.<sup>33</sup> Drinkard was exonerated after serving seven years on death row.<sup>34</sup> In Kentucky, an attorney whose business address was the local bar, was assigned to a

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<sup>29</sup> *Id.* at 701.

<sup>30</sup> *Id.* at 691.

<sup>31</sup> Bright, Stephen B., 27 Feb Champion at 8.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

capital case.<sup>35</sup> He came to the trial drunk, yet the court said the lawyer's behavior did not adversely affect his client.<sup>36</sup> Steven Toney, charged with rape, begged his attorney to have his semen tested and pursue a mistaken identity defense, but his attorney refused to do so.<sup>37</sup> After fourteen years of incarceration and obtaining a new attorney, he was exonerated.<sup>38</sup> Ed Honaker was convicted of rape in large part due to the testimony of a criminalist who examined the rapist's semen.<sup>39</sup> His attorney never mentioned to the criminalist that Honaker had a vasectomy several years prior to the incident and could not produce semen.<sup>40</sup> He was exonerated after serving ten years in prison.<sup>41</sup>

These cases, along with Pete Rose's case, should not leave a doubt to any court that their attorney provided ineffective or deficient representation. Falling asleep during trial, coming to trial drunk, and not investigating critical evidence are not within the prevailing norms of the professional community. These attorneys were merely physically present in the courtroom, especially in the cases where the attorney is falling asleep or drunk. This is what *Strickland* expressly held was not acceptable. Criminal defendants, especially those wrongfully convicted, suffer terrible injustices when not provided with their Sixth Amendment right to *effective* assistance of counsel. It is important, therefore, to be aware of several factors that contribute to the common occurrence of ineffective assistance of counsel.

Of course, the *Strickland* test and deferential presumption is a major contributing factor. As seen by the Fifth Circuit's decisions in *Burdine* and *Johnson*, the test is very forgiving towards the attorneys. It can not effectively serve as a deterrent for attorneys to act in strict

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<sup>35</sup> Barry Scheck, Peter Neufeld, Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* 244 (New American Library 2003)(2000).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 247.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 248.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

accordance with local professional rules. It does not hold an attorney accountable for his or her actions or inactions.

Another contributing factor is the inadequate funding of the defense of poor defendants.<sup>42</sup> Court-appointed attorneys are compensated so inadequately that few accomplished lawyers can be enticed to defend certain cases.<sup>43</sup> “Even many lawyers who have an interest in criminal defense work simply cannot afford to continue to represent indigents while also repaying their student loans and meeting their familial obligations.”<sup>44</sup> In many jurisdictions, judges appoint private attorneys who may not even want the case, may lack any interest in criminal law, and may not have the skill to defend the criminal defendant.<sup>45</sup> These criminal defendants are represented by lawyers who “view their responsibilities as unwanted burdens, have no inclination to help their clients, and have no incentive to develop criminal trial skills.”<sup>46</sup> The Court in *Strickland* believed that the deferential presumption would prevent this. Ironically, it appears that because of the presumption, what it cautioned against is occurring.

Another consequence of the inadequate funding is that the public defender systems are unequaled to the funding and resources available to the prosecution. The prosecution is usually from the district attorney or attorney general offices. These are attorneys who have the expertise and experience because they specialize in the criminal field and their duties are to prosecute the criminal defendant.<sup>47</sup>

The specialists in the offices of both the district attorneys and the attorneys general have at their call local, state, and, when needed, federal investigative and law enforcement agencies. They have a group of full-time experts at the crime laboratory and in the medical examiner's offices to respond to crime scenes and

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<sup>42</sup> Bright, Stephen B., *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L. J. 1835, 1843-1844 (1994).

<sup>43</sup> *Id.* at 1844.

<sup>44</sup> *Id.* at 1850.

<sup>45</sup> *Id.* at 1849.

<sup>46</sup> *Id.* at 1850.

<sup>47</sup> *Id.* at 1844.

provide expert testimony when needed. If mental health issues are raised, the prosecution has a group of mental health professionals at the state mental facilities.<sup>48</sup>

The same cannot be said to be true for most public defender offices. With funding so limited at most of these offices, some defense attorneys cannot afford the experts and specialists that are needed to support their cases.<sup>49</sup> The imbalance is so significant, yet continues to remain.

The third, arguably most important, contributing factor to the common occurrence of ineffective assistance of counsel, are the strict procedural doctrines set forth by the Supreme Court and the state courts to effectively bar a defendant from claims of ineffective assistance of counsel (and ultimately, legal malpractice).<sup>50</sup> “Failure of counsel to recognize and preserve an issue, due to ignorance, neglect, or failure to discover and rely upon proper grounds or facts, even in the heat of trial, will bar federal review of that issue.”<sup>51</sup> The same court that will not review an issue that was not properly preserved by counsel on the record (through objection or similar), will also not generally consider an attorney’s failure to object as ineffective assistance of counsel. It is a “catch twenty-two” for the criminal defendant.

This “catch twenty-two” is similarly evident in the requirements of *Coscia*.<sup>52</sup> It is simply unreasonable and unjust for the court to require an incarcerated defendant to file claims for both postconviction relief and legal malpractice, or suffer the bar of any future legal malpractice claim once actual innocence is proven. The same contributing factors leading to ineffective assistance of counsel will likely contribute to the bar of an exoneree’s quest to hold his or her attorney accountable.

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<sup>48</sup> *Id.* at 1845.

<sup>49</sup> *Id.* at 1846.

<sup>50</sup> *Id.* at 1862.

<sup>51</sup> *Id.*

<sup>52</sup> Referring to the CCFJAJ memorandum at 6-7, discussing *Coscia*’s requirement that the defendant timely file postconviction relief while simultaneously filing a legal malpractice claim to preserve any future claim.

In all cases where the criminal defendant has received representation that is less than what was expressed in *Gideon* as guaranteed by the Sixth Amendment, the criminal defendant has an almost insurmountable burden of proving ineffective assistance of counsel. What the courts should take into account when examining the criminal defendant's claim for legal malpractice are the contributing factors of ineffective assistance of counsel that may have led up to this claim. It should also consider that the procedural bars set as safeguards may sometimes instead be hindrances of justice. The requirements of *Coscia* and the unavailable tolling of § 340.6 for a defendant while incarcerated is an example of such a hindrance to justice. With such egregious conduct of many attorneys occurring so commonly, the courts should especially allow tolling in the cases of those who are found to be wrongfully convicted and now seek justice by holding their attorney accountable. The lower courts must look to the spirit of *Gideon* and *Strickland*, which held that the right to *effective* assistance of counsel is a fundamental right. If the criminal defendant is denied this right, the one who denied it (the ineffective attorney) is the one who should be held liable. The exonerees are victims of the system and already have the Herculean task of proving a claim for legal malpractice. Subjecting them to additional victimization by procedurally barring them from trying to hold their attorneys accountable would be nothing short of inhumane.