University of Arkansas at Little Rock Law Review

Volume 28
Issue 1 *The Ben J. Altheimer Symposium: Courtroom With a View: Perspectives on Judicial Independence*

Article 6

2005

Criminal Law—The Sixth Amendment Right to Counsel—The Supreme Court Minimizes the Right to Effective Assistance of Counsel by Maximizing the Deference Awarded to Barely Competent Defense Attorneys. Florida v. Nixon, 125 S. Ct. 551 (2004).

Jennifer Williams

CRIMINAL LAW—THE SIXTH AMENDMENT RIGHT TO COUNSEL—THE SUPREME COURT MINIMIZES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BY MAXIMIZING THE DEFERENCE AWARDED TO BARELY COMPETENT DEFENSE ATTORNEYS. *Florida v. Nixon*, 125 S. Ct. 551 (2004).

I. INTRODUCTION

The Sixth Amendment right to counsel is of utmost importance in ensuring that a criminal defendant is treated fairly throughout the criminal proceedings against him.[1] This right has continuously evolved throughout the last three centuries and continues to evolve today.[2] Originally, the right to counsel was highly restricted, allowing only those who could afford counsel and those who were being tried in the federal system to have assistance of counsel.[3] Today, the Sixth Amendment, together with the Fourteenth Amendment, guarantees that all criminal defendants in state and federal courts are afforded assistance of counsel, regardless of their financial situation.[4]

The right to counsel today is the right to effective assistance of counsel.[5] Twenty years ago the United States Supreme Court addressed the issue of what constituted effective assistance and handed down standards to be used when determining if an attorney's performance met this competency requirement.[6] In making this determination, the Court found that an attorney's conduct must meet a reasonableness requirement and must not be prejudicial to the defendant.[7] In evaluating a defense counsel's performance, the court's ultimate inquiry is whether the trial was fair.[8]

This note explains the development of the current standards used by courts in evaluating ineffective assistance of counsel claims and how the United States Supreme Court utilized these standards in *Florida v. Nixon*,[9] a case that broadens the range of reasonableness of an attorney's perform-

---

1. DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY, 208 (1976).
2. *Id.* at 209–18.
3. Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 417–18 (1988).
4. *Id.* at 418. The Supreme Court has held that although all defendants accused of felonies have an absolute right to counsel, those accused of misdemeanors are guaranteed the right to counsel only in cases where the possible punishment is imprisonment, regardless of the amount of time. Argersingler v. Hamlin, 407 U.S. 25 (1972).
5. Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 431 (1996).
6. *Id.* at 434–39.
7. *Id.* at 434–37.
8. *Id.* at 438.
9. 125 S. Ct. 551 (2004).

ance.[10] This note first details the facts behind *Florida v. Nixon* that brought the parties involved before the Supreme Court.[11] Next, it explores the history of the right to effective assistance of counsel and how that right has evolved and expanded from early English common law into what it is today.[12] This note then explains and elaborates on the reasoning behind the Supreme Court's decision in *Nixon*, and finally ends with a discussion of the significance of this decision and what the future may hold for defendants who assert a violation of their right to effective assistance of counsel.[13]

II. FACTS

On August 14, 1984, Joe Elton Nixon was arrested for the kidnapping and murder of Jeanne Bickner.[14] The police found her body the day before in a wooded area outside Tallahassee, Florida.[15] Bickner had been tied to a tree with jumper cables and burned alive.[16] Her left leg, left arm, and almost all of her hair and skin had been burned away.[17] Bickner's car was found by police the next day in Tallahassee after having been set on fire.[18] Nixon was arrested after his brother notified the police that Nixon had told him of the murder.[19]

Nixon gave police a lengthy confession of the crime.[20] He told police that he had approached Bickner in a mall, and, after he asked for her assistance in starting his car, she offered him a ride home.[21] Nixon later forced Bickner into her trunk and drove her to a secluded area where he then murdered her.[22] Nixon admitted that Bickner had begged for her life but that he decided to kill her anyway, burning her along with some of the personal items from her car. [23]

Aside from his confession, the police had overwhelming evidence of Nixon's guilt.[24] Eyewitness testimony placed Nixon with Bickner in the

10. *Id.*
11. *See infra* Part II.
12. *See infra* Part III.
13. *See infra* Parts IV and V.
14. *Nixon*, 125 S. Ct. at 556.
15. Petitioner's Brief on the Merits at 4, Florida v. Nixon, 125 S. Ct. 551 (2004) (No. 03-931).
16. *Id.* at 3.
17. *Id.*
18. *Nixon*, 125 S. Ct. at 556.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. Petitioner's Brief on the Merits at 3, Florida v. Nixon, 125 S. Ct. 551 (2004) (No. 03-931).

mall parking lot on the day of the offense, and he was spotted driving her car alone later that same day.[25] Nixon's brother, along with his girlfriend, stated to police that Nixon had told them of the murder and showed them her car and two rings he had stolen from her, which he later pawned.[26] After Bickner's car was discovered, police found Nixon's fingerprints throughout the car, and the keys and gas cap were found after Nixon told police where he had hid them.[27]

Nixon was indicted for first-degree murder, kidnapping, robbery, and arson, and a public defender, Michael Corin, was appointed to represent him.[28] Corin filed a plea of not guilty on Nixon's behalf, but after beginning the discovery process, realized that there was overwhelming evidence against his client.[29] Corin tried to negotiate with the prosecution, but the state refused to recommend a sentence of life imprisonment instead of death.[30] Fearing that he would be discredited by the jury if he argued at trial that Nixon was innocent in light of all the evidence against him, Corin decided to concede Nixon's involvement in the crime, and focus on providing mitigating evidence of Nixon's mental condition during the penalty phase of the trial.[31] Corin discussed this proposal with Nixon, but Nixon never approved or disapproved of his strategy, so Corin proceeded on his own professional judgment.[32]

During voir dire Nixon demonstrated strange and disruptive behavior.[33] He refused to enter the courtroom and stated that he did not want to attend his trial.[34] The trial judge ruled that he had voluntarily waived his right to attend his own trial, and except for a brief amount of time during the second day of trial, Nixon was absent from the courtroom.[35] After the trial began, Corin emphasized to the jury the importance of the penalty phase of the trial.[36] He conceded Nixon's guilt during opening statements, presented no defense, cross-examined very few witnesses, and did not object to the introduction of crime scene evidence.[37] Nixon was ultimately convicted on all counts.[38]

---

25. *Id.*
26. *Id.*
27. *Id.* at 4.
28. *Nixon*, 125 S. Ct. at 556.
29. *Id.*
30. *Id.* at 557.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Nixon*, 125 S. Ct. at 557.
35. *Id.* at 557 & n.3.
36. *Id.* at 557–58.
37. *Id.* at 558.
38. *Id.*

During the penalty phase of the trial, Corin argued to the jury that Nixon was mentally unstable and presented testimony from eight witnesses, including a psychologist and a psychiatrist, to support his argument.[39] He also introduced over forty exhibits that described or explained Nixon's behavioral problems.[40] The prosecution presented little evidence to contradict Corin's argument.[41] Nevertheless, the jury recommended a sentence of death, which was imposed by the trial court.[42]

On direct appeal, Nixon argued through new counsel to the Florida Supreme Court that Corin's performance amounted to ineffective assistance of counsel.[43] Nixon argued that Corin's concession of his guilt during trial was the "functional equivalent of a guilty plea" that he had not expressly consented to.[44] Nixon argued that prejudice should be presumed because Corin did not put the state's case through "meaningful adversarial testing."[45] The Florida Supreme Court remanded the case to the trial court for a hearing to determine if Nixon had consented to Corin's strategy, but later affirmed his conviction without ruling on the ineffective assistance issue.[46]

Nixon then filed a motion for postconviction relief in the Florida state judicial system, reaffirming his "'presumption of prejudice' ineffective assistance of counsel claim."[47] The trial court rejected Nixon's claim and affirmed his conviction, but the Florida Supreme Court ultimately reversed, finding that there was no evidence in the record to indicate whether or not Nixon expressly approved or disapproved of Corin's strategy.[48] Without express consent the court stated that a defense counsel who concedes his client's guilt is per se ineffective, and prejudice is presumed against the defendant.[49] The Florida Supreme Court granted Nixon a new trial, and the United States Supreme Court granted certiorari to determine whether a defense counsel's performance is automatically ineffective if he concedes his client's guilt during trial without his client's express permission.[50]

---

39. Petitioner's Brief on the Merits at 9, Florida v. Nixon, 125 S. Ct. 551 (2004) (No. 03-931).

40. *Id.* at 10.

41. *See id.* at 9.

42. *Nixon*, 125 S. Ct. at 558.

43. *Id.* at 559.

44. Petitioner's Brief on the Merits at 11, Florida v. Nixon, 125 S. Ct. 551 (2004) (No. 03-931).

45. *Nixon*, 125 S. Ct. at 559.

46. *Id.*

47. *Id.*

48. *Id.* at 560.

49. *Id.* at 559.

50. *Id.* at 560.

III. BACKGROUND

The right to effective assistance of counsel has a long and fascinating history that began an entire century before the Sixth Amendment to the United States Constitution was even in existence.[51] This section explores the evolution of the modern day right to counsel, beginning with its origin in early English common law.[52] Next, this section traces the continued transformation of this right during the American colonial period and throughout the formation and development of the Sixth Amendment.[53] Finally, this section examines the United States Supreme Court's landmark decisions during the last century that have expanded the right to effective assistance of counsel to what it is today.[54]

A. Early English Beginnings

Until the middle of the eighteenth century, English common law strictly prohibited the use of counsel to represent criminal defendants accused of felonies.[55] Only defendants accused of misdemeanors, less serious crimes not punishable by death, had the right to be represented by a lawyer, while those accused of felonies or treason did not have this option.[56] Some-

51. JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION, 2 (2002).

52. *See infra* Part III.A.

53. *See infra* Part III.B

54. *See infra* Part III.C.

55. TOMKOVICZ, *supra* note 51, at 3.

56. FELLMAN, *supra* note 1, at 209. Experts have given three reasons for the strict adherence to the common law rule in England. TOMKOVICZ, *supra* note 51, at 3. First of all, the English government was in constant fear of its own demise. *Id.* The survival of the English monarchy was thought to be in constant jeopardy, and felons were seen as direct threats against the government. *Id.* at 4. The monarchy lacked the police forces necessary to enforce its laws and to gather evidence of crimes. *Id.* Therefore, cases against criminal defendants were often very weak, and allowing the defendants to retain professional representation would only impair the monarchy's ability to isolate governmental threats. *Id.* at 4. Those accused of misdemeanors were not considered to be as dangerous a threat, and thus, they were allowed to hire an attorney. *Id.* Only defendants who put the government most at peril were denied counsel. *Id.*

A second reason was that criminal proceedings during that time were thought to be simple, and, therefore, defendants did not need counsel. *Id.* Some historians have dismissed this reason as unfounded because it makes little sense to allow a defendant accused of a minor offense to retain counsel, while the defendants with the most at stake could not. *Id.* at 5.

The third explanation is that a neutral judge presided over all criminal proceedings and was in the best position to adequately protect the interests of the defendant. *Id.* Under this theory, all parties involved in a criminal trial had a duty to look after the defendant's interests. *Id.* Historians agree that the practical effect of this explanation is limited. *Id.* For example, the defendant was incarcerated up until the time of trial, so any prepared defense

times a judge might allow an attorney to assist a defendant before trial in understanding the nature of the law and the accusations against him, but the attorney was never allowed to appear on behalf of the defendant in court.[57] On the other hand, there was no rule preventing trained lawyers from representing the victims in the case.[58] There were no public prosecutors, but the victim was allowed to hire an attorney to prosecute the case.[59] However, this was rare because there was little need for a trained attorney to conduct the prosecution when the defendant was forced to represent himself.[60]

The first codified change of the common law rule denying counsel came in 1695 when Parliament enacted The Treason Act, which stated that every person accused of treason was allowed to retain an attorney.[61] After the passage of The Treason Act, though the rights it provided were limited, judges began to slowly allow those accused of felonies to have legal representation.[62] It is uncertain why this came about, but most likely it began with the judges' own sense of unfairness within the court system.[63] The trial judges had complete discretion in determining if and how much a defense attorney could be utilized by the defendant.[64] This varied greatly from court to court, but by the middle of the eighteenth century, the common law denial of defense counsel had become lax.[65] Though more and more courts were allowing the accused to retain a lawyer, a statutory right to effective assistance of counsel was not enacted by the English Parliament until 1836, almost fifty years after the Sixth Amendment was ratified in the United States.[66]

B. The Right to Counsel in Colonial America and the Formation of the Sixth Amendment

By the beginning of the eighteenth century, colonists in America had already developed different attitudes toward the legal profession than their

---

was prepared behind bars. *Id.* Also, the defendant had no right to require witnesses to testify on his behalf, and every defendant was assumed to be guilty. *Id.*

57. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 352–53 (1986).

58. *Id.*

59. *Id.*

60. *Id.*

61. FELLMAN, *supra* note 1, at 210. This Act was adopted by the Whigs after several of the party's members were falsely accused of treason. Before the Act was passed, the crime was prosecuted by trained lawyers, often the attorney general, and those accused of treason were unable to adequately defend themselves against these prosecutors. TOMKOVICZ, *supra* note 51, at 6.

62. BEATTIE, *supra* note 57, at 359.

63. *Id.*

64. TOMKOVICZ, *supra* note 51, at 7.

65. *Id.* at 8.

66. *Id.*

English counterparts.[67] The forward progress of the right to counsel moved at a much faster pace in America.[68] Americans generally felt that criminal defendants should have more rights than those afforded in England.[69] Trained lawyers were more widely available than in England, and it was easier for criminal defendants to have access to these lawyers. [70] Naturally, as more and more judges in America were allowing the accused to consult counsel, the colonists began to realize how unfair it was to deny legal representation to those who needed it most. [71]

Before the federal constitution was adopted, many colonies were ensuring the constitutional or statutory right to assistance of counsel for criminal defendants.[72] Even those colonies who had not codified this right allowed their criminal defendants to retain an attorney through their common law.[73] The only state that still enforced the strict English common law by the time the federal constitution was adopted was Georgia, which even after the Sixth Amendment was adopted still strictly limited the right to counsel for another seven years.[74]

When the Framers of the United States Constitution gathered in Philadelphia during the summer of 1787, it was obvious that the colonists deeply valued the security of established fundamental rights, such as the right to counsel, as a vast majority of the states had already guaranteed these personal rights and liberties to their citizens through their state constitutions.[75] When the Framers finally recognized that a federal constitution would never be ratified by every state until they were promised a Bill of Rights, the dispute turned to what liberties should actually be included in the Bill of Rights.[76] After the Constitution had been ratified by all thirteen states, James Madison focused his attention on the drafting of the declaration of rights.[77] He reported his proposed amendments to Congress in 1789, one of which contained that "in all criminal prosecutions, the accused shall enjoy

67. *Id.* at 9.

68. FELLMAN, *supra* note 1, at 209.

69. *Id.*

70. TOMKOVICZ, *supra* note 51, at 9. The colonists used public prosecutors to prosecute crimes against the accused rather than allowing the victims to do so. *Id.* This is the reason there were more trained lawyers in America than in England at this time. *Id.*

71. *Id.* at 10.

72. FELLMAN, *supra* note 1, at 210.

73. *Id.* Justice Sutherland, in *Powell v. Alabama*, found that the English common law rule had been rejected in at least twelve of the thirteen original colonies. 287 U.S. 45, 64 (1932).

74. TOMKOVICZ, *supra* note 51, at 13.

75. *Id.* at 14.

76. *Id.* at 17.

77. *Id.* at 19.

the right . . . to have the assistance of counsel for his defense."[78] The proposals were slightly changed as they were forwarded through both houses of Congress but at all times the right of counsel remained.[79] Ten amendments were ratified by the states, and in 1791, the right to assistance of counsel became a part of the Sixth Amendment to the United States Constitution.[80]

C. The United States Supreme Court's Landmark Decisions

From the time of its ratification in 1791, the Sixth Amendment right to counsel, along with all other rights afforded in the Bill of Rights, protected citizens only from actions taken by the federal government.[81] The Bill of Rights did not apply to the states.[82] The Fourteenth Amendment was added to the Constitution in 1868, which stated that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of law." [83] Though this required that each state afford its citizens due process, it would still be years before the right to effective assistance of counsel was guaranteed for all criminal defendants in state courts.[84]

1. *Powell v. Alabama*

The first case in which the Supreme Court tackled the decision of how the right to assistance of counsel would apply in state courts, *Powell v. Alabama,*[85] was not until 1932.[86] Before 1932, the Court had not decided whether indigent defendants were entitled to appointed counsel in federal proceedings, and it had not decided at all whether state criminal defendants were entitled to any rights through the federal Constitution.[87] The main question the Court was confronted with was whether the due process clause of the Fourteenth Amendment was violated when a state court failed to adequately appoint counsel for indigent defendants.[88]

In *Powell v. Alabama*, the Supreme Court held that

78. *Id.*
79. *Id.*
80. TOMKOVICZ, *supra* note 51, at 20.
81. Barron v. Baltimore, 32 U.S. 243, 250 (1833). In reality, the right to counsel at this time had a very limited effect on criminal prosecutions. TOMKOVICZ, *supra* note 51, at 21. Very few criminal cases were tried at the federal level, so very few defendants actually enjoyed this right. *Id.*
82. *Barron*, 32 U.S. at 250; TOMKOVICZ, *supra* note 51, at 21.
83. U.S. CONST. amend. XIV, § 1.
84. TOMKOVICZ, *supra* note 51, at 21.
85. 287 U.S. 45 (1932).
86. *Id.* at 45.
87. *Id.*
88. *Id.*

> In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law[.][89]

The Court determined that the defendants in this case, seven young black males charged with the rape of two white girls, were "ignorant and illiterate," were not given a fair opportunity to retain counsel, and because counsel was not designated for the defendants until the morning of trial, any assistance received from the appointed attorney could not have been effective.[90] The Court stated that during the most critical times of the proceedings against the defendants, they were without the assistance of counsel, and because of this, they were denied a fundamental right, one which the due process clause of the Fourteenth Amendment was meant to protect.[91] The Court limited its holding to the unique circumstances in the case, and refused to rule on whether there was a right to appointed counsel in non-capital cases.[92] The Supreme Court had drawn a distinction between capital and non-capital offenses, and this mandated the lower courts to do the same.[93]

This was the first instance in which the Court recognized that counsel must also be effective.[94] Though counsel had technically been appointed for the defendants, they presented no defense on their behalf whatsoever, and the Court found this unacceptable.[95] However, it would still be half a century before the Court would fully develop the standard for effective assistance of counsel.[96]

---

89. *Id.* at 71. The facts of this case were disturbing. Seven young African American males were charged with the crime of raping two young white girls. *Id.* On the day of the incident, the defendants were on a train in Alabama along with seven white boys and the two alleged victims. *Id.* After a fight broke out between the young men, the majority of the white boys were thrown from the train, after which, the victims claimed they were sexually assaulted by the defendants. *Id.* The defendants were escorted from the train by the local militia, pled not guilty at their arraignment, and were incarcerated until trial. *Id.*

90. *Id.* at 52–56.

91. *Powell*, 281 U.S. at 67. The defendants were not appointed counsel until the morning of trial. *Id.* at 57. The Court noted what they considered the "critical periods of the proceedings" as "from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important." *Id.*

92. *Id.* at 71.

93. FELLMAN, *supra* note 1, at 212.

94. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 710 (2002).

95. *Id.*

96. *Id.*

2. *Johnson v. Zerbst*

Six years after *Powell* was decided, the Supreme Court expanded the provisions of the Sixth Amendment by holding that every criminal defendant in the federal system had the right to court-appointed counsel unless that right was waived in *Johnson v. Zerbst*.[97] The Court once again emphasized the difficulties faced by a layman who is brought before the court without an attorney.[98] The Court stated that the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel."[99] Though the Court expressed its belief that a defendant could not receive a fair trial without assistance of counsel, the Court realized that even such a fundamental right can be waived.[100] This waiver, however, is only effective if the defendant makes an "intelligent and competent" waiver of his rights, and it is up to the trial court to determine if the waiver has been properly executed.[101] The Court explained that in order for a court to have proper jurisdiction to secure a conviction of a criminal defendant, the court must first ensure that the defendant had assistance of counsel throughout the proceedings, or that the defendant "competently and intelligently" waived that right.[102]

3. *Betts v. Brady*

In 1942 the Supreme Court seemed to reverse its position when it refused to hold that all indigent defendants in state criminal proceedings had the right to appointed counsel through the due process clause of the Fourteenth Amendment in *Betts v. Brady*.[103] Instead of continuing to expand the right to counsel as it had done in recent cases, the Court developed what some scholars call the "special circumstances" rule.[104] This rule required

97. 304 U.S. 458, 468 (1938). The defendant was an enlisted marine who had been charged with the possession and use of counterfeit money. *Id.* at 459. He, and a co-defendant, were told of their indictment, arraigned, and convicted all in the same day, all without the assistance of an attorney. *Id.* at 460.

98. *Id.* at 463.

99. *Id.* at 462–63.

100. *Id.* at 464.

101. *Id.* at 465. There was no evidence that the defendant had requested an attorney from the trial court, and the District Attorney asserted that because there was no request, the defendant had waived his right to counsel. *Id.* at 461.

102. *Id.* at 468.

103. 316 U.S. 455, 473 (1942).

104. Kimberly Helene Zelnick, *In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 371 (2003).

courts to examine the particular circumstances in each case and then make a determination as to whether the appointment of counsel would be necessary to "promote fundamental fairness."[105] The Court explained that due process under the Fourteenth Amendment did not incorporate the Bill of Rights to the states, but that under certain circumstances, the Fourteenth Amendment could be violated by a state's denial of these rights.[106] The Court discussed the right of counsel in terms of the states' constitutions and relied on the fact that the majority of the states did not consider the right to appointed counsel a fundamental right.[107] The Court also deferred to the trial judge's position that, because the defendant waived his right to a jury trial, the trial judge was able to "control the course of the trial" and "see impartial justice done."[108] The Court reasoned that the defendant was not at a serious disadvantage in this case, and, therefore, was given a fair trial even without the assistance of counsel.[109]

4. *Chandler v. Fretag*

Though the Supreme Court continued its "special circumstances" analysis for twenty years after *Betts*, the Court distinguished between the right to have counsel appointed and the right to retain counsel in 1954.[110] In *Chandler v. Fretag*, the Court declared an absolute right to retain counsel no matter the circumstances.[111] Chief Justice Warren, writing for the Court, distinguished this case from *Betts* in that the defendant did not ask the trial judge to appoint an attorney, but rather requested a continuance so that he could obtain his own attorney.[112] The Court held that any time a defendant is denied a reasonable opportunity to retain a lawyer, regardless of whether

105. *Id.*

106. *Betts*, 316 U.S. at 462. In a dissenting opinion, Justice Black expressed his view that the Sixth Amendment should be applied to the states through the Fourteenth Amendment. *Id.* at 474–76 (Black, J., dissenting). He disagreed with the majority that the right to counsel is not a fundamental right, and stated that a trial can never be fair if there is a possibility that an innocent man will be convicted because of his poverty. *Id.* (Black, J., dissenting). Justice Black was later vindicated. He wrote the opinion in *Gideon v. Wainwright*, which overturned *Betts*. 372 U.S. 335 (1963).

107. *Betts*, 316 U.S. at 471. At the time, Maryland, the state in which the trial took place, only appointed counsel for defendants charged with rape or murder. *Id.* at 457.
Also, the *Betts* Court reasoned that if the right to counsel was awarded to those whose "liberty" only was at stake through the due process clause of the Fourteenth Amendment, the Court would also have to award the right to counsel in civil cases where "property" was at stake. *Id.* at 473.

108. *Id.* at 472.

109. *Id.* at 472–73.

110. Chandler v. Fretag, 348 U.S. 3, 9 (1954).

111. *Id.* at 10.

112. *Id.* at 9.

he would be entitled to have one appointed for him, he is ultimately deprived of due process under the Fourteenth Amendment.[113]

5. *Gideon v. Wainwright*

The last major decision in the expansion of the right to counsel occurred in 1963.[114] In *Gideon v. Wainwright*, the Supreme Court held once and for all that the due process clause of the Fourteenth Amendment guaranteed the right to government-appointed counsel by the states to all indigent criminal defendants.[115] The Court overturned *Betts*, abandoned its "special circumstances" analysis, and concluded that the right to counsel is a right which is "fundamental and essential to a fair trial."[116] In doing so, the Court relied on its own past precedent and reasoning and concluded that the decision of *Betts* was misguided and that the Court had therefore erred in failing to follow the path of its earlier precedents.[117] The Court emphasized its earlier reasoning that it would not be fair to require a layperson to defend himself against a trained prosecutor, and while many defendants can afford to retain his own counsel, some cannot.[118] Allowing some defendants to retain their own defense attorney while others must face the prosecutors alone because of their financial situation undermines the idea that all are equal under the law, one of the very ideas that the due process clause was founded on.[119]

Though not mentioned by the Court, scholars have suggested several other factors that could have played a part in overturning *Betts*.[120] One, though the *Betts* doctrine was still good law and was still followed by many state courts, the Supreme Court had already seemed to disregard the "special circumstances" rule.[121] Second, during the time that *Gideon* was decided, the country was in a state of social unrest.[122] Minorities were demanding equality and civil rights activists were prominent.[123] Many of the

113. *Id.* at 10.

114. Gideon v. Wainwright, 372 U.S. 335 (1963).

115. *Id.* at 344. The Court later interpreted this decision to mean that only defendants charged with a felony have the right to government-appointed counsel, *Nichols v. United States*, 511 U.S. 738 (1994), and defendants charged with misdemeanors that have a possible sentence of imprisonment are afforded the right to government-appointed counsel, *Scott v. Illinois*, 440 U.S. 367 (1979). For a full discussion of *Gideon v. Wainwright*, see ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

116. Zelnick, *supra* note 104, at 372.

117. *Gideon*, 372 U.S. at 344.

118. *Id.*

119. *Id.*

120. TOMKOVICZ, *supra* note 51, at 33.

121. *Id.*

122. *Id.* at 34.

123. *Id.*

accused who were denied appointed counsel were minorities, and the Court's actions in *Gideon* were another step in ensuring that all racial and ethnic groups were afforded equal justice.[124] Finally, the Court must have completely disagreed with some of the reasoning behind *Betts*.[125] *Betts* relied on the principles that many defendants could receive a fair trial without assistance of counsel and that these defendants could always be identified.[126] The Court, however, must have realized that this was only true in very few cases, and that the right of counsel must be guaranteed to all defendants.[127]

Gideon was the last case in which the United States Supreme Court reviewed the applicability of the Sixth Amendment right to counsel to state felony proceedings.[128] In cases following the *Gideon* decision, the Court shifted its focus from whether a right to counsel existed at all to whether the counsel had met a minimum level of representation as to assure that the right to counsel had been fulfilled. [129]

D. The Modern Standard of Right to Counsel

After *Gideon* was decided, it was no longer in question whether the government, federal or state, was required to either appoint or allow the retention of defense counsel.[130] The question became whether or not the counsel performed at a constitutionally accepted level.[131] The Supreme Court had not specified a standard for determining the adequacy of defense counsel's performance, and it would not do so for over twenty years after the *Gideon* case was decided.[132] It was clear, however, that the right to assistance of counsel meant more than simply an attorney standing next to a defendant in court.[133] The Court had recognized that "the right to assistance of counsel is the right to the effective assistance of counsel."[134] The notion of effective assistance of counsel can be found as early as the *Powell* decision, where the situation reversed by the Court was one of "inadequate representation" instead of a "complete denial of counsel."[135]

---

124. *Id.*
125. *Id.*
126. TOMKOVICZ, *supra* note 51, at 34.
127. *Id.*
128. Kirchmeier, *supra* note 5, at 432.
129. *Id.*
130. Zelnick, *supra* note 104, at 373.
131. Kirchmeier, *supra* note 5, at 432.
132. Zelnick, *supra* note 104, at 373.
133. Calhoun, *supra* note 3, at 415.
134. McMann v. Richardson, 397 U.S. 759, 771 (1970).
135. Zelnick, *supra* note 104, at 375.

Before *Gideon*, lower courts often found that due process violations due to incompetent counsel occurred when the counsel's performance amounted to a "farce and mockery of justice."[136] After *Gideon* was handed down, courts began to abandon this standard, and differing standards for evaluating the effectiveness of counsel emerged.[137] Most circuits agreed that counsel's performance must be reasonable; however, many disagreed as to whether, and how much, prejudice should have been shown for the defendant's conviction to be overturned.[138] Some courts put the burden of proving prejudice on the defendant, while others determined that it was the prosecution's duty to show that a counsel's deficient performance was harmless error.[139] Finally, in 1984, the Supreme Court granted certiorari in two separate cases to issue a nationwide standard to determine the adequacy of counsel.[140]

1. *The Current Tests of Strickland and Cronic*

In *Strickland v. Washington*,[141] the Court handed down a two-prong test for determining whether a conviction should be overturned due to ineffective assistance of counsel.[142] First, the defendant seeking relief must

136. Keith Cunningham-Parmeter, *Dreaming of Effective Assistance: The Awakening of* Cronic's *Call to Presume Prejudice From Representational Absence,* 76 TEMP. L. REV. 827, 837 (2003).

137. *Id.*

138. Zelnick, *supra* note 104 at 376–77. In 1980, the Supreme Court shed some light on the issue of prejudice when it held prejudice can be presumed when the defendant's counsel represents a conflict of interest. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980). The Court held that in order to presume prejudice, the defendant must prove that "an actual conflict of interest adversely affected his lawyer's performance." *Id.*

139. Cunningham-Parmeter, *supra* note 135, at 837.

140. Strickland v. Washington, 466 U.S. 668 (1984); U.S. v. Cronic, 466 U.S. 648 (1984).

141. 466 U.S. 668, 687 (1984).

142. *Id.* at 687. In this case, the defendant was indicted on charges of kidnapping, murder and several other crimes after he and two accomplices were arrested after going on a ten day crime spree. *Id.* at 672. An attorney was appointed to represent him. *Id.* Against his counsel's advice, the defendant confessed to the murders, waived his right to a jury trial, and plead guilty to all charges. *Id.* In preparing for the sentencing hearing, counsel did not present any evidence concerning the defendant's emotional state but instead relied on the defendant's declared remorse and earlier cooperation with police to try to spare him from receiving the death penalty. *Id.* at 673–74. The judge did in fact sentence the defendant to death, and the defendant challenged the sentence claiming that his counsel's performance during the sentencing proceedings amounted to ineffective assistance. *Id.* at 675.

After failing in his attempt to seek relief in the state postconviction system, the defendant filed a writ of habeas corpus in the Federal District Court, once again claiming ineffective assistance of counsel. *Id.* at 678. The District Court affirmed the conviction, concluding that although the defense counsel made errors throughout the proceedings, the defendant was not prejudiced by these errors. *Id.* at 679. The District Court further found that

show that his or her counsel's performance was deficient.[143] The Court defined deficiency in terms of reasonableness, stating that "the proper standard for attorney performance is that of reasonably effective assistance."[144] Second, the defendant must then show that he or she was prejudiced by this deficient performance.[145] In order to show prejudice, the defendant must show by a reasonable probability that the outcome of the trial would have been different if not for the counsel's deficient performance.[146] The Court established a high level of deference to be given to defense attorneys, and warned that the differing circumstances in each case required the lower courts to examine ineffective assistance claims on a case-by-case basis.[147] The Court urged lower courts to always presume that the counsel's performance was not deficient, but rather that it "[fell] within the wide range of reasonable professional assistance."[148]

On the same day as *Strickland*, the Court decided a second case to specify when prejudice could be presumed under the second prong of the *Strickland* test.[149] In *United States v. Cronic*, the Supreme Court recognized three exceptions to the *Strickland* test, declaring that anytime one of these three circumstances is present, prejudice against the defendant is presumed and the *Strickland* test does not have to be met.[150] First, prejudice is presumed anytime there is a "complete denial of counsel" at a critical stage in the trial.[151] Second, anytime that "counsel entirely fails to subject the prose-

---

there was no possibility that the outcome of the sentencing hearing would have been different if defense counsel had not committed any errors. *Id.*

The then Fifth Circuit Court of Appeals (now the Eleventh Circuit) reversed the judgment of the District Court and remanded the case. *Id.* The Court of Appeals stated that ineffective assistance claims should be viewed under a totality of the circumstances standard and that to be granted relief, a defendant must show that his counsel's errors resulted in a "substantial disadvantage" to his defense. *Id.* at 680–82. The Supreme Court ultimately affirmed the defendant's conviction. *Id.* at 700.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 694.

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

148. *Id.* at 689.

149. United States v. Cronic, 466 U.S. 648 (1984).

150. *Id.* at 658–63. In this case, the defendant was indicted on mail fraud charges. *Id.* at 649. After his retained lawyer withdrew from the case, the court appointed a young attorney with real estate experience twenty-five days before trial. *Id.* The Government had investigated the case for over four years. *Id.* The defendant was convicted after a four day trial in which his counsel put on no defense. *Id.* The Court ultimately denied relief, stating that the circumstances in this case did not "make it unlikely that the defendant could have received the effective assistance of counsel." *Id.* at 666.

151. *Id.* at 659. An example of this is when the defendant is denied access to his counsel. Kirchmeier, *supra* note 5, at 441. For example, in *Geders v. United States*, prejudice against the defendant was presumed when a state judge refused to allow him to speak with his coun-

cution's case to meaningful adversarial testing," prejudice is also presumed.[152] Third, "when surrounding circumstances justify a presumption of ineffectiveness," such as when the circumstances are such that even a competent attorney would unlikely be able to effectively assist the defendant, prejudice is presumed.[153]

Recent cases have seemed to lower the standard set in *Strickland* and *Cronic*.[154] The Supreme Court revisited the issue in *Cronic* in 2002 when it granted certiorari in *Bell v. Cone*.[155] *Bell* allowed the Court to elaborate on the second exception in *Cronic*, where the Court stated that a counsel's failure to put the state's case through meaningful adversarial testing "must be complete" in order to fit within the *Cronic* exception.[156] In *Bell*, the defense counsel only failed to test specific parts of the state's case, not the entire case, and because of this the Court refused to presume prejudice against the defendant.[157] One year later, in *Yarborough v. Gentry*,[158] the Court reaffirmed its position that courts, especially when hearing a case through federal habeas corpus, should be highly deferential to a defense attorney's strategy.[159] The Court stated that "counsel has wide latitude in deciding how

---

sel during a seventeen hour overnight recess. 425 U.S. 80, 91 (1976). This is also the case when counsel is absent during critical stages of the trial. Kirchmeier, *supra* note 5, at 444. There has been some debate as to whether the word "denial" in *Cronic* implies that the absence of counsel must be due to state intervention in order for prejudice to be presumed. Cunningham-Parmeter, *supra* note 134, at 858. However, the Supreme Court's interpretation indicates that state action is not required for there to be a denial of counsel. *Id.* Prejudice may be presumed even when counsel is absent due to his or her own personal reasons. *Id.*

152. *Cronic*, 466 U.S. at 659. Courts have held that this is the case when the conduct of the attorney is extremely poor. Kirchmeier, *supra* note 5, at 447. For example, prejudice was presumed against the defendant when his counsel was at trial but refused to participate and did not object when the court directed a verdict against his client. *Harding v. Davis*, 878 F.2d 1341, 1345 (11th Cir. 1989). Other examples of this include when a defense counsel refuses to investigate or interview alleged eye witnesses, *Gist v. State*, 737 P.2d 336, 344 (Wyo. 1987), and when the defense counsel sleeps during trial, *Burdine v. Johnson*, 262 F.3d 336, 349 (5th Cir. 2001).

153. *Cronic*, 466 U.S. at 660–62. In cases such as this, the idea is that the attorney cannot provide adequate representation because of "an outside influence beyond the lawyer's control." Cunningham-Parmeter, *supra* note 134, at 853. An example is when an attorney has a conflict of interest in representing his client. *Id.* Under *Holloway v. Arkansas*, prejudice is presumed when a trial judge refuses to address an objection made by the defendant as to a possible conflict of interest. 435 U.S. 475, 488 (1978). If an objection is not made at trial, there is a limited presumption of prejudice when the conflict has an "adverse impact" on the defendant's trial. *Cuyler v. Sullivan*, 466 U.S. 335, 349–50 (1980).

154. Zelnick, *supra* note 104, at 379.

155. Donald J. Hall, *Effectiveness of Counsel in Death Penalty Cases*, 42 BRANDEIS L.J. 225, 226 (2003–04).

156. Bell v. Cone, 535 U.S. 685, 696 (2002).

157. Hall, *supra* note 155, at 227.

158. 540 U.S. 1 (2003).

159. *Id.* at 6.

best to represent a client," and emphasized the importance of allowing counsel to freely determine his own strategy and make tactical decisions regarding how to proceed in closing statements.[160] The Court reiterated the presumption that an attorney's strategy is reasonable unless a defendant can prove otherwise.[161]

In 2004 the United States Supreme Court granted certiorari in *Florida v. Nixon* to once again evaluate whether a defense counsel's performance should be evaluated under the two-prong *Strickland* test, or whether prejudice should be presumed under *Cronic*.[162]

IV. REASONING

In *Florida v. Nixon*, the United States Supreme Court unanimously held that a defense counsel's performance does not automatically amount to ineffective assistance when the counsel does not obtain his client's express consent to a trial strategy of conceding his guilt.[163] The Court rejected Nixon's argument that prejudice should be presumed against a defendant when his attorney concedes his involvement in the crime in order to focus on the penalty phase of the trial.[164] In reaching this conclusion, the Court focused its decision on two main concerns.[165] First, the Court held that Corin's concession of Nixon's guilt during the guilty phase of a trial was not the functional equivalent of a guilty plea, and, therefore, Nixon's express consent was not required.[166] Second, the Court determined that because this concession was not a guilty plea, Corin's performance should have been analyzed under the *Strickland* standard for ineffective assistance of counsel instead of the *Cronic* standard.[167]

A. A Concession of Guilt is Not a Guilty Plea

The Supreme Court stated in *Taylor v. Illinois* that although a defense counsel has the obligation to discuss with his client possible trial strategies, he is not required to "obtain the defendant's consent to 'every tactical decision.'"[168] However, the Court realized the limitations imposed on an attorney's authority to make decisions regarding his client.[169] Only the defendant

160. *Id.*
161. *Id.* at 8.
162. 125 S. Ct. 551 (2004).
163. *Id.* at 563.
164. *Id.*
165. *Id.* at 560–63.
166. *Id.* at 560.
167. *Id.* at 561.
168. *Nixon*, 125 S. Ct. at 560 (quoting *Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988)).
169. *Id.*

may choose to waive his constitutional rights at trial or to plead guilty.[170] Before an attorney may act on behalf of the client concerning these issues, the attorney must, after consultation with his client, obtain his express consent to whatever action the attorney is about to take.[171]

In *Nixon* the Court distinguished between an actual guilty plea and a trial strategy.[172] The Court stated that a defendant who pleads guilty no longer has the rights that would have been afforded to him throughout the criminal trial.[173] The guilty plea itself is a conviction of the defendant, and the prosecution is not required to come forward with evidence to prove the defendant's guilt.[174] In order to plead guilty, the defense counsel must have the defendant's consent, and mere acquiescence is not enough.[175]

The Florida Supreme Court found that Corin's concession of Nixon's guilt was the "functional equivalent of a guilty plea" that required Nixon's express consent.[176] The United States Supreme Court did not agree.[177] The Court emphasized that Nixon still had his rights at trial, and the prosecution was still required to prove his guilt of all crimes charged to the jury beyond a reasonable doubt.[178] Nixon had the right, through his counsel, to object to the prosecution's evidence and to cross-examine their witnesses.[179] If Corin had entered an actual guilty plea, Nixon would not have retained these rights.[180] The Court put significant weight on the fact that though the state's case was mostly uncontested, the state was still required to present its case to the jury.[181]

Because Corin's statements were not a guilty plea, the Court reasoned that he was not required to obtain Nixon's express consent to his strategy.[182] Corin explained his proposed strategy to Nixon on more than one occasion.[183] Each time, Nixon was silent and refused to approve or disapprove.[184] The Court concluded that Corin acted reasonably in continuing with his strategy to try to save Nixon's life.[185]

---

170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Nixon*, 125 S. Ct. at 560.
175. *Id.*
176. Nixon v. Singletary, 758 So.2d 618, 624 (2000).
177. Florida v. Nixon, 125 S. Ct. 551, 561 (2004).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Nixon*, 125 S. Ct. at 561.
184. *Id.*
185. *Id.*

B. *Strickland*, Rather than *Cronic*, Is the Appropriate Standard

The United States Supreme Court found that the court below had applied the wrong standard in analyzing Corin's performance.[186] In finding that Corin's statements to the jury were essentially a guilty plea, the Florida Supreme Court presumed prejudice against Nixon under *United States v. Cronic*[187] instead of applying the standard in *Strickland v. Washington*,[188] which would have placed the burden on Nixon to prove that Corin's performance was deficient and that this deficiency prejudiced him.[189] The Court explained that *Cronic* put forth exceptions to the *Strickland* standard such that prejudice is presumed in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[190] One such circumstance is when there is a complete failure to put the state's case through "meaningful adversarial testing."[191] The Court noted that it will only presume prejudice under *Cronic* in very few instances.[192]

Focusing on the case at hand, the United States Supreme Court stated that, under the present circumstances, Corin's performance was not a complete failure to test the state's case.[193] Rather, the Court found that Corin's decision to focus on the penalty phase of the trial was well founded.[194] Because of the nature of two-phase criminal trials, the Court realized the difficult decisions defense attorneys must often make when constructing their trial strategies, especially when they know they are dealing with a guilty client.[195] Furthermore, when plea negotiations between the prosecution and the defense fail because the prosecution refuses to give up the death penalty, saving the defendant's life is the defense counsel's most important objective at trial; usually in circumstances such as this, evading the death penalty is the most hopeful outcome the defendant may realistically have.[196] Noting that jurors will discredit a defense attorney who completely denies the allegations against his client during the guilt phase of the trial, and then begs the jury to forgive his client during the penalty phase, the Court reasoned

186. *Id.*
187. 466 U.S. 648 (1984).
188. 466 U.S. 668 (1984).
189. *Id.*
190. *Id.* at 562 (quoting *Cronic*, 466 U.S. at 658).
191. *Nixon*, 125 S. Ct. at 562.
192. *Id.*
193. *Id.*
194. *Id.* at 562–63.
195. *Id.* at 562.
196. *Id.* at 563.

that an attorney is not ineffective just because he employs a strategy that he hopes will put him in a favorable light to the jury.[197]

C. The Court's Conclusion

The United States Supreme Court held that Corin's concession of Nixon's guilt during the guilt phase of his trial was not the equivalent of a guilty plea, and Corin, therefore, was not required to obtain Nixon's express consent.[198] Because consent was not required, Corin's performance was not rendered unreasonable, and Nixon was not entitled to a presumption of prejudice against him under *Cronic*.[199] In order for Nixon to succeed on his ineffective assistance of counsel claim, he must meet the *Strickland* test by making an affirmative showing that Corin's performance was deficient and that this deficiency amounted to prejudice.[200]

V. SIGNIFICANCE

The United States Supreme Court's decision in *Florida v. Nixon* is significant in that it follows recent precedent in lowering the standard for effective assistance of counsel.[201] In an attempt to clarify the application of the standards for ineffective assistance, the Court once again raised the burden for defendants trying to seek postconviction relief. First, the *Nixon* holding broadens what is considered a reasonable strategy for defense attorneys.[202] Second, it further limits when prejudice can be presumed against a defendant.[203] Third, it gives attorneys a wider range of authority to act on behalf of their clients without express assent from the client.[204] Finally, the decision overall makes it harder for a defendant to receive relief based on ineffective assistance of counsel.[205]

A. The Wide Range of Reasonableness in Defense Counsel Strategies

The United States Supreme Court has stated that a defense counsel's performance is not deficient if it falls within "the wide range of reasonable professional assistance."[206] The reasonableness of an attorney's conduct is

197. *Nixon*, 125 S. Ct. at 563.
198. *Id.* at 561.
199. *Id.* at 562.
200. *Id.*
201. Hall, *supra* note 155, at 225.
202. *See infra* Part V.A.
203. *See infra* Part V.B.
204. *See infra* Part V.C.
205. *See infra* Part V.D.
206. Strickland v. Washington, 466 U.S. 668, 689 (1984).

evaluated in light of the surrounding circumstances and turns on the issue of whether the trial was ultimately fair.[207] The *Nixon* decision goes one step further in widening what the courts can determine to be reasonable assistance.

Though reviewing courts have previously been instructed always to presume that a defense counsel's conduct was reasonable, *Nixon* strengthens this presumption in that it allows attorneys to disregard the guilt phase of their client's criminal trial almost completely.[208] The Court noted that, due to the specific facts in *Nixon*, the defense counsel had no real expectation that, in light of the state's evidence against his client, he could put on a defense adequate to raise a reasonable doubt in the jurors' minds that Nixon was not guilty of the crimes charged against him.[209] Though defense counsel's conduct might have been reasonable here, *Nixon* opens the door for abuse. *Nixon* does not give guidance as to how much pretrial discovery and preparation should be done before an attorney may reasonably decide to forego challenging the prosecution in the guilt phase of a trial in order to concentrate on the penalty phase. Often, a defensive strategy only emerges after intense investigation. A lack of diligence on the part of defense counsel could lead him or her to prematurely decide that the best strategy would be to avoid disputing the state's evidence. This could especially be a problem for indigent defendants who are often appointed a counsel with an unworkable caseload.[210] Attorneys who are overworked and underpaid might be especially prone to abuse the reasoning in *Nixon*.[211]

Nixon seems to suggest that the reasonableness of a defense counsel's strategy depends on the appearance of guilt or innocence of the defendant. This has been recognized as the "guilty anyway syndrome."[212] An attorney who represents a defendant who is "factually culpable," meaning there is little doubt that the defendant is guilty of the crime charged, seems to be held to a lesser standard of reasonableness than an attorney whose client is not factually culpable.[213] A major criticism of the *Strickland* standard is that it only helps defendants who are factually innocent.[214] The holding in *Nixon* only reaffirms this criticism.

---

207. Kirchmeier, *supra* note 5, at 435–40.
208. *Id.*
209. *Nixon*, 125 S. Ct. at 556–58.
210. *See generally* Hall, *supra* note 155, at 235.
211. *Id.*
212. Calhoun, *supra* note 3, at 428.
213. *Id.*
214. *Id.*

B. A Limited Presumption of Prejudice

The United States Supreme Court has held that prejudice can be presumed against a defendant when the "circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."[215] In *Bell v. Cone*,216 the Court held that in order to show a presumption of prejudice because of counsel's failure to challenge the state's case, the failure must be complete.[217] The holding in *Nixon* implies that, in some instances, even a complete failure is not enough.

In *Nixon*, the defense counsel did not put on a defense, cross-examined very few witnesses, and did not object to crime scene evidence, all after conceding the defendant's guilt to the jury.[218] Yet, the Supreme Court found that this was not a failure to test the prosecution's case.[219] *Nixon* seems to indicate that as long as a defense counsel does something more than sit quietly in the courtroom, prejudice cannot be presumed for a failure to materially challenge the state's case. This means that in order for a defendant to forgo proving prejudice under *Strickland*, one of the other two exceptions under *Cronic* must apply.[220] Therefore, as long as the defendant is not denied counsel totally and as long as the counsel participates in the trial, the only way the defendant is afforded a presumption of prejudice under *Cronic* is if the circumstances are such that even a competent attorney would not be able to effectively assist the defendant.[221]

C. The Attorney's Decision-Making Authority

The *Strickland* and *Cronic* decisions began a decline in the defendant's right to make his own decisions regarding his criminal trial.[222] Later cases indicated that even when a defendant could prove that his attorney overrode his wishes and interfered with his fundamental right to participate in the management of his own trial, he still had to prove he was prejudiced under *Strickland* in order to obtain relief.[223] The holding in *Nixon* reaffirms this position and continues with the trend of declining defendant autonomy.[224]

---

215. Florida v. Nixon, 125 S. Ct. 551, 562 (2004) (quoting U.S. v. Cronic, 466 U.S. 648, 658 (1984)).

216. 535 U.S. 685 (2002).

217. *Id.* at 696–97.

218. *Nixon*, 125 S. Ct. at 557–58.

219. *Id.* at 562.

220. U.S. v. Cronic, 466 U.S. 648 (1984).

221. *Id.*

222. Zelnick, *supra* note 104, at 384–85.

223. *Id. See generally* Nix v. Whiteside, 475 U.S. 157 (1985) (holding that there is no constitutional right to give perjured testimony and defense counsel was not per se ineffective when he blackmailed his client into changing his testimony in order to refrain from perjuring

Even before *Nixon*, case law has recognized that an attorney has almost complete discretion in making decisions against the client's wishes as long as these decisions can be considered a reasonable trial strategy.[225] *Nixon* extends this discretion to concessions of guilt. According to *Nixon*, a defendant, who has a constitutional right to testify in his own defense, can take the stand, give his side of the story, declare his innocence, and his attorney may then turn around and tell the jury that the defendant is guilty, implying that the defendant committed perjury. An attorney's concession can invalidate a defendant's right to testify, and in many situations, it can even impose on the defendant's right to a jury trial by taking the issue of guilt or innocence out of the hands of the jury.[226] The Supreme Court in *Nixon* ultimately said that a criminal defendant's fundamental, and even constitutional, rights can be sidestepped by his defense counsel as long as the counsel's decision to do so can be labeled as a reasonable trial strategy.

D. The Defendant's Ability to Seek Relief

The *Strickland* standard for ineffective assistance of counsel has repeatedly been criticized as creating "an almost insurmountable hurdle" for defendants seeking postconviction relief.[227] *Nixon* only adds to this hurdle. *Nixon* stands for the proposition that a defendant, who may be mentally ill, is subject to the decisions made for him by his appointed defense counsel, even without his consent, and if his counsel makes an error, the defendant then also holds the burden of convincing a reviewing court that this error amounted to a deficiency, and that this deficiency prejudiced him.

The United States Supreme Court embodies a strong belief that criminal trial attorneys provide adequate representation and that most ineffective assistance claims are without merit.[228] This mind-set, along with the enormous burden of proof that *Nixon* and past precedent places on the defendant, seems to almost negate the idea that criminal defendants are innocent until proven guilty. If an attorney concedes the defendant's guilt to the jury, as *Nixon* allows, the burden is on the defendant to persuade a reviewing court that there was a possibility he could have been found innocent. The defendant never had an opportunity to actually be innocent in the jury's minds, and the state never actually held the burden of proving his guilt. Thinking in these terms, a trial where a defendant is deprived of his consti-

himself); Roe v. Flores-Ortega, 528 U.S. 470 (2000) (holding that a defense counsel's failure to file a notice of appeal was not per se deficient).

224. Zelnick, *supra* note 104, at 384–85.

225. *Id.* at 387.

226. *Id.* at 388.

227. Calhoun, *supra* note 3, at 427.

228. *Id.* at 430.

tutional right to have a jury determine his guilt or innocence cannot produce a fair and just result, and when the burden is on the defendant to show this, his ability to obtain postconviction relief is almost nonexistent.

VI. CONCLUSION

The Sixth Amendment of the United States Constitution guarantees all criminal defendants the right to effective assistance of counsel during the criminal proceedings against him.[229] Though this right was once expanding rapidly, United States Supreme Court precedent throughout the last twenty years has all but slowed this expansion to a halt. Defendants making ineffective assistance of counsel claims face an extraordinary burden under the *Strickland* standards.[230] Even if a defendant can show a reviewing court that his defense counsel was deficient, he must still prove prejudice.[231] It is difficult for a defendant to prove prejudice when the trial record reveals damning evidence against him.[232] Though at first, the exceptions of *Cronic* were thought to provide some relief, later holdings, including *Nixon*, have narrowed these exceptions to the point where they are almost impossible to reach.

Though the *Strickland* standard has been the subject of an enormous amount of criticism, the Court has refused to depart from the rule it handed down over twenty years ago.[233] *Nixon* is only the most recent reminder of

229. U.S. CONST. amend. VI § 1.

230. Calhoun, *supra* note 3, at 427.

231. George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 547 (2004).

232. *Id.*

233. Calhoun, *supra* note 3, at 427.

this. *Nixon* creates an even harsher burden on defendants who believe they have been denied their right to competent counsel by allowing more deference to be given to defense counsel regarding the reasonableness of their performance, both by further limiting the circumstances under which the defendant is relieved from proving prejudice and by giving the defense counsel more authority to make decisions that contradict the wishes of the defendant. If the Court continues to decide ineffective assistance of counsel cases in the manner that it did in *Nixon*, the idea that a defendant convicted at trial can successfully challenge the competency of his defense counsel and receive a new, fair trial will continue to diminish. The heavy burden placed on defendants seeking relief from an ineffective counsel will continue to grow heavier and heavier until the defendant's ability to obtain this relief is almost nonexistent.

*Jennifer Williams**

* J.D. expected May 2006. M.B.A. expected December 2006, University of Arkansas at Little Rock. B.B.A., August 2003, University of North Texas. I would first like to thank my advisor, Erin Vinett, for all of the help and support she provided throughout the writing process, as well as all members of the UALR Law Review who helped edit my paper and turn it in to what it has become. I would also like to thank my family and friends who have always been there for me, and have continued to encourage and support me throughout law school, and lastly I would like to Jake, who has always found a way to make me smile when I need it the most.