PROTECTING THE INTEGRITY OF THE COURT: TRIAL COURT RESPONSIBILITY FOR PREVENTING INEFFECTIVE ASSISTANCE OF COUNSEL IN CRIMINAL CASES

GALIA BENSON-AMRAM*

* Law Clerk to the Honorable Royal Furgeson, Western District of Texas. J.D., May 2003, New York University School of Law. I would like to thank Professor Anthony Amsterdam and Professor Bryan Stevenson for their advice and assistance.

Based largely on information provided by the original suspect, James Fisher was indicted for capital murder.[1] The state portrayed Mr. Fisher as a bisexual prostitute who killed the victim after having sex with him.[2] Because Mr. Fisher was too poor to hire a lawyer, the court appointed one for him. The appointed lawyer, E. Melvin Porter, thought "homosexuals were among the worst people in the world,"[3] and as a result was very hostile to Mr. Fisher during the trial.[4] While Mr. Fisher was testifying, his lawyer badgered him and "elicited damaging and irrelevant testimony" through generally inappropriate questions.[5] In contrast, when the prosecution's primary witness was on the stand, Mr. Fisher's lawyer suggested that he believed the witness's side of the story, appeared to sympathize with the witness, and emphasized that the crime was horrible.[6] In addition, Mr. Porter failed to present any witnesses during the trial, aside from Mr. Fisher's direct testimony, or make an opening or closing statement.[7] During the sentencing phase, Mr. Fisher's lawyer again waived both the opening and closing statement, and did not present any evidence.[8] Because defense counsel exhibited such obvious hostility to his client during the trial, the judge presiding over the case should have been aware of Mr. Porter's disgust for, and consequential treatment of, the client before the court.[9]

Mr. Fisher was ultimately convicted and sentenced to death.[10] He then appealed to the Oklahoma Criminal Court of Appeals, claiming that his Sixth Amendment right to counsel had been violated by the incompetence of his

1. Fisher v. State, 736 P.2d 1003, 1006 (Okla. Crim. App. 1987), *reh'g granted,* 739 P.2d 523 (Okla. Crim. App. 1987), *cert. denied,* Fisher v. Oklahoma, 486 U.S. 1061 (1988).

2. *Id.*

3. Fisher v. Gibson, 282 F.3d 1283, 1298 (10th Cir. 2002).

4. *Id.* Defense counsel admitted that "my personal feelings towards James Fisher affected my representation of him." *Id.*

5. *Id.* at 1300.

6. *Id.* at 1302.

7. *Id.* at 1288.

8. *Id.*

9. *See* note 20, *infra* (citing the court's observation of defense counsel's incompetent lawyering during the trial phase).

10. *Fisher,* 736 P.2d at 1006.

lawyer.[11] The court, while stating that it was "deeply disturbed by defense counsel's lack of participation and advocacy,"[12] and conceding that this was a "close case,"[13] concluded that Mr. Fisher had failed to establish that his lawyer's failings sufficiently affected the trial or sentencing hearing, and denied his claim.[14] Despite denying relief, the Court noted that, in the future, "in situations where defense counsel fails to actively participate in the sentencing proceeding, . . . the better practice would be for the trial judge to conduct an appropriate interrogation of the defendant out of the presence of the jury to determine whether the defendant personally is expressly consenting to such trial strategy on the part of defense counsel."[15]

Mr. Fisher then applied for relief in federal district court, still claiming that his Sixth Amendment right to counsel had been violated.[16] Although the district court overturned Mr. Fisher's death sentence, it found that Mr. Fisher had failed to demonstrate that his lawyer's deficient performance had a significant enough effect on the determination of his guilt to justify overturning his conviction for capital murder.[17] As a result, his conviction was once again upheld.[18]

Eighteen years after being found guilty in the trial court, Mr. Fisher appealed to the United States Court of Appeals for the Tenth Circuit, which overturned his conviction.[19] In doing so, the court emphasized the "singular lack of preparation on Mr. Porter's part,"[20] and noted that "[t]he lack of

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11. *Id.*

12. Fisher v. State, 739 P.2d 523, 525 (Okla. Crim. App. 1987).

13. *Id.*

14. *Id.*

15. *Id.* *See* Moore v. State, 736 P.2d 161, 166 (Okla. Crim. App. 1987) (trial court questioned defendant on the record in a capital case and determined that the defendant wished to follow the advice of his attorney, resulting in the waiver of closing argument during sentencing stage).

16. Fisher v. Gibson, 282 F.3d 1283, 1288 (10th Cir. 2002). Mr. Fisher's ineffective assistance petition claimed the following guilt-phase errors:

> 1) failure to conduct an adequate investigation; 2) failure to pursue mental health issues; 3) failure to rehabilitate jurors excused for cause; 4) failure to object to prosecutor misconduct; 5) improper direct examination of his client by eliciting evidence of other crimes and dwelling on negative aspects of Mr. Fisher's history; 6) failure to object to jury instructions; and 7) failure to present a closing argument.

Id. at 1289.

17. *Id.* at 1287, 1289.

18. *Id.* at 1289. Capital trials are bifurcated into a guilt/innocence phase and a sentencing phase. When appellate courts review a death sentence, they can review both the conviction for capital murder and the sentencing proceeding. Appellate courts can find fault with the sentencing proceeding while upholding the underlying conviction for capital murder. *See, e.g.*, Turner v. Murray, 476 U.S. 28 (1986).

19. *Fisher*, 282 F.3d. at 1283. Mr. Fisher's death sentence was handed down on September 20, 1984. *Id.* at 1288.

20. *Id.* at 1294. The court pointed out that "[t]he trial transcript reveals that throughout most of Mr. Porter's examination of witnesses, including his own client, he had no idea what answers he would receive to his questions and was not pursuing any particular strategy of defense." *Id.* Also, the court noted the failure of defense counsel to utilize the fact that the police had initially charged

preparation . . . indicates an objectively unreasonable failure to investigate."[21] Furthermore, the court found that defense counsel "exhibited hostility to his client and sympathy and agreement with the prosecution."[22]

Although a court eventually remedied the constitutional violations that pervaded Mr. Fisher's trial, the vacating of his conviction cannot return to him the eighteen years he spent incarcerated. Nor does the eventual action by a federal appeals court, after seven prior appeals had been heard and denied,[23] restore the integrity of the judicial system inevitably lost when a trial replete with flagrant unfairness is not only conducted, but repeatedly affirmed. Tragically, the judicial system continues to fail to promptly identify and remedy similarly-conducted ineffective and egregious lawyering.

I.
INTRODUCTION

The problem of incompetent counsel for criminal defendants has been addressed numerous times by the United States Supreme Court.[24] In *Strickland v. Washington*, the Court established the standard for reviewing claims of ineffective assistance of counsel raised on appeal after a conviction has been obtained.[25] With the exception of claims of ineffectiveness based on a conflict of interest, the jurisprudence on ineffective assistance of counsel does not address the trial court's responsibility for preventing violations of defendants' Sixth Amendment rights. Ineffective counsel is seen as an issue for appellate courts to address years after a trial.

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the key state witness with the murder, and the witness thus "had a motive to exonerate himself by accusing the defendant." *Id.* at 1298.

21. *Id.* at 1296.

22. *Id.* at 1298.

23. Fisher v. State, 736 P.2d 1003 (Okla. Crim. App. 1987), *aff'd*, Fisher v. State, 739 P.2d 523 (Okla. Crim. App. 1987), *cert. denied*, Fisher v. Oklahoma, 486 U.S. 1061 (1988), *reh'g denied*, Fisher v. Oklahoma, 487 U.S. 1246 (1988), *post-conviction proceeding at*, Fisher v. State, 845 P.2d 1272 (Okla. Crim. App. 1992), *cert. denied*, Fisher v. Oklahoma, 509 U.S. 911 (1993), *habeas corpus granted*, Fisher v. Gibson, 282 F.3d 1283 (10th Cir. 2002). After a person is convicted of capital murder and sentenced to death, she has an automatic right to an appeal of her conviction to the state's highest court. She may then seek discretionary review at the United States Supreme Court. During these two appeals, the court can only address matters on the record. At the end of this process, the conviction is considered final. Afterwards, a person under sentence of death can seek post-conviction review in which issues outside the record, such as ineffective assistance of counsel, juror misconduct, prosecutorial suppression of evidence, and newly discovered evidence can be addressed. Post-conviction relief must first be sought in the state courts before a petitioner can appeal to the federal courts for relief. *See* 28 U.S.C. § 2254 (2000) (outlining steps for habeas corpus proceedings); Williams v. Taylor, 529 U.S. 362 (2000) (providing example of these steps).

24. *See Williams*, 529 U.S. 362; Strickland v. Washington, 466 U.S. 668 (1984); U.S. v. Cronic, 466 U.S. 648 (1984); Polk County v. Dodson, 454 U.S. 312 (1981); Cuyler v. Sullivan, 446 U.S. 335 (1980); McMann v. Richardson, 397 U.S. 759 (1970).

25. *Strickland*, 466 U.S. at 668. The Court has since established two exceptions to the *Strickland* standard. *See* part III, *infra*.

Mr. Fisher's case illustrates that trial courts face the problem of ineffective assistance of counsel. Furthermore, trials like Mr. Fisher's, in which visibly poor representation by defense counsel is not addressed by the judge, are harmful not only to the individual defendant, but to the judicial system as a whole and to the public confidence in it; they pose serious threats to the integrity of the court. In this article, I propose improvements to the trial court's role in addressing this problem.

There is significant jurisprudence holding that the integrity of the court is a factor that must be taken into account by courts when fashioning claims of and remedies for a number of different constitutional violations. However, for cases involving ineffective assistance of counsel, no court has defined when the integrity of the court is implicated. Both a definition of these cases and an approach to preventing them are necessary in order to prevent the recurrence of what occurred in Mr. Fisher's trial.

"Egregious ineffectiveness" is a term I have developed for use in this article to describe the subset of ineffectiveness cases that affect the integrity of the court. The cases in this subset are those in which attorney incompetence is so obvious that a trial judge is or should be aware of the threat to the defendant's Sixth Amendment right to counsel. Thus, the distinction between the cases of ineffectiveness that are "egregious" and those that are not depends upon the trial judge's awareness of attorney incompetence.

The category of cases defined by the egregious ineffectiveness standard is by definition narrower than the category of ineffective counsel cases defined by *Strickland* because in the former, the ineffectiveness should have been identified and addressed by the trial court. While any case of poor attorney performance is important, I argue in this article that there is a unique harm to the judicial system when the inadequacy of attorney performance is especially flagrant. Thus, the definition of "egregious ineffectiveness" captures the subset of cases in which the nature of the ineffectiveness places judicial integrity at risk.[26]

The solution posed by this article to the problem of egregious ineffectiveness is simple: the Sixth Amendment should be interpreted as requiring trial judges to inquire into egregious ineffectiveness occurring before them.[27] Furthermore, the court should presume prejudice when the issue of

26. I believe Mr. Fisher's case and many of the other cases cited in this article are examples of cases in which the trial court should have protected the defendant's constitutional rights. Certainly, cases where the record shows that the trial judge noted the failings of defense counsel, but did not remedy the situation, would qualify.

27. A trial court inquiry need not interfere with defense counsel's advocacy. Though the basic proposition of this article does not depend on a specific formulation of a duty to inquire, an inquiry could entail the following: The trial judge would stop the proceedings, take defense counsel aside, and inform defense counsel of the concern. The trial court would inform defense counsel that if defense counsel is pursuing some strategy it should be memorialized in a file. The trial court would not see this file but the file, as is typically the case, would be available should ineffective assistance of counsel be litigated in post-conviction. The inquiry would be ex parte. In the event of post-conviction litigation, defense counsel's conduct would be litigated under the

attorney incompetence is raised on appeal, and an appeals court finds that the trial judge failed to inquire into ineffectiveness about which the judge knew or should have known. This presumptive prejudice standard for unremedied egregious ineffectiveness is not a replacement for or rejection of the *Strickland* standard for addressing claims of ineffective assistance of counsel. Rather, with this standard I provide a procedure for avoiding constitutional violations in the first place.

The framework I propose for resolving egregious ineffectiveness cases—increased trial court responsibility and a different standard of appellate review—is already in use for another subset of ineffectiveness cases: those based on a conflict of interest. The conflict cases thus provide a model for the duty to inquire in cases in which the trial judge knows or reasonably should know of the threat to the defendant's right to counsel, and also for the proper standard of appellate review when the trial judge fails to inquire.

This article is structured as follows: In Part II, I discuss the role of trial judges in appointing, compensating, and overseeing counsel for criminal defendants. This section also reviews the nature of the ineffective counsel problem. In Part III, I describe the different standards and procedures for review for different types of violations of the Sixth Amendment right to effective counsel.

In Part IV, I examine the intersection of the Sixth Amendment right to counsel and the importance of the judicial function of maintaining the integrity of the court. This section provides an overview of the jurisprudence on the significance of the integrity of the court and shows that concern about the integrity of the court has been a force for many doctrinal changes. Part V discusses the jurisprudence surrounding conflict-of-interest cases. In conflict-of-interest cases, the Supreme Court has established the duty of the trial judge to protect defendants' Sixth Amendment rights, and provided an alternative to *Strickland*'s standard for judging claims of ineffectiveness when trial courts fail to protect defendants' rights.

Finally, in Part VI, I argue that the model for the role of trial courts in protecting defendants' rights in ineffectiveness cases based on a conflict of interest should be applied to the egregious ineffectiveness cases, and that when a trial court fails to protect a defendant's rights, prejudice should be presumed.

Strickland standard. The file resulting from the trial court inquiry would prevent post hoc justification of defense counsel's conduct. The inquiry could be similar to the one suggested by the state court in Mr. Fisher's case. *See* Fisher v. State, 739 P.2d at 525. The duty to inquire is substantively similar to the duty to make a record, a common requirement in enforcing constitutional rights. *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975) (determining that defendant had Sixth Amendment right to self-representation, but that he should be "made aware of the dangers and disadvantages of self-representation" so that record will establish that he knows what he is doing); Boykin v. Alabama, 395 U.S. 238 (1969) (finding reversible error where record did not disclose that defendant understood and voluntarily entered his pleas of guilty); Johnson v. Zerbst, 304 U.S. 458 (1938) (stating that "it would be fitting and appropriate" for the record to show that waiver of counsel was found by the trial court to be proper).

II.
THE ROLE OF TRIAL JUDGES AND THE PROBLEM OF INEFFECTIVE COUNSEL

In this section, I will examine the problem of ineffective counsel and the connection in many cases between the role of the trial judge and ineffective representation. The preponderance of the information in this section focuses on attorneys representing capital defendants, because there have been many studies of the quality of representation afforded capital defendants, and thus there is a wide array of data from many states on the quality of lawyers in such cases.

Because many of the people who are charged with capital crimes are poor and cannot afford to retain private counsel, they often have court-appointed lawyers. [28] In jurisdictions where there is no public defender or state agency to handle the appointment of counsel, it is the responsibility of the trial judge to choose, appoint, and compensate defense attorneys.[29] Trial judges must make these appointments in accordance with any proscribed standards for attorneys.[30]

Empirical evidence shows that in certain states, three-quarters of those convicted of capital murder while represented by court-appointed lawyers were sentenced to death, while only about one-third of those represented by private attorneys received the death penalty.[31] Lawyers have been found to be drunk or drugged,[32] mentally ill,[33] or asleep[34] while representing a defendant. In

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28. *See* Mathew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67, 68, n.6 (2002), *citing*, Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2065 (2000) (according to most estimates, indigent defenders represent about eighty percent of all criminal defendants); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 334 n.18 (1995) (approximately ninety percent of people on death row had appointed counsel when they were convicted); Gary Hengstler, *Attorneys for the Damned*, 73 A.B.A. J. 57 (1987) (noting that as of the 1980s, 99.5% of the 1800 inmates on death row were indigent); Michael G. Millman, *Financing the Right to Counsel in Capital Cases*, 19 LOY. L.A. L. REV. 383, 384 (1985).

29. *See, e.g.*, WASH. REV. CODE ANN. § 36.26.090 (2004); White v. Bd. of County Comm'rs, 537 So.2d 1376, 1378 (Fla. 1989) (noting court's authority to establish compensation for court-appointed attorneys); Kovarik v. County of Banner, 224 N.W.2d 761, 763 (Neb. 1975) (noting inherent power of court to appoint counsel to represent indigent misdemeanor defendants).

30. *See, e.g.*, WASH. SUPER. CT. SPECIAL PROCEEDINGS R. 2 (requiring judges to appoint two attorneys in capital cases, and to choose appointed counsel from a list of judges "learned in the law of capital punishment"); Chrisco v. Sun Indus., Inc., 800 S.W.2d 717, 718–19 (Ark. 1990) (suggesting factors court may consider in determining computation of attorney fees).

31. Richard J. Wilson, *Empty-Handed Justice*, 22 JUDGES' J. 20, 22 (1983). *See also*, Bob Sablatura, *Study Confirms Money Counts in County's Courts: Those Using Appointed Lawyers are Twice as Likely to Serve Time*, HOUS. CHRON., Oct. 17, 1999, at 1; Fogelman, *Justice Asleep Is Justice Denied*, 26 J. LEGAL PROF. at 68.

32. *See, e.g.*, United States v. St. Germain, 76 F.3d 376, 1996 WL 43578, at *4–5 (4th Cir. Feb. 5, 1996) (per curiam) (discussing allegations that attorney's intoxication affected his competence during Rule 11 hearing for cocaine possession); Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (noting that defendant charged with robbery "could smell alcohol on his attorney's breath [during trial]; and after the trial, [the attorney] entered a facility for treatment of alcohol abuse"); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985) (holding that the fact that an attorney

addition, several recent studies of capital trials reveal that lawyers who represented death row inmates at trial were subsequently disbarred, suspended, or otherwise disciplined at a rate three to forty-six times the average for the relevant states.[35] For example, nearly a quarter of Kentucky's death row inmates

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used drugs during a capital murder trial is not, under *Strickland*, "*in and of itself*, relevant to an ineffective assistance claim"); Young v. Zant, 727 F.2d 1489, 1492 (11th Cir. 1984) (noting that defense counsel testified at state habeas corpus proceedings that he had a drug problem, and was convicted for possession of marijuana shortly after Young's capital murder trial); Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982) (noting that defendant's trial attorney was later found incompetent to practice law because the attorney admitted he was an alcoholic and suffered blackouts during the time he represented the defendant charged with embezzlement); Haney v. State, 603 So.2d 368, 377–78 (Ala. Crim. App. 1991) (noting that trial attorney appeared in court intoxicated in the middle of the capital murder trial and spent the night in jail); People v. Garrison, 765 P.2d 419, 440–41 (Cal. 1989) (finding it "undisputed that the attorney was an alcoholic at the time of the representation and that he consumed large amounts of alcohol each day of the trial," where evidence was submitted that attorney drank in the morning, during court recesses, and throughout the evenings during the capital murder trial; during the second day of jury selection, the attorney was arrested for driving to the courthouse with a .27 blood-alcohol content); People v. Hinkley, 238 Cal. Rptr. 272, 274 (Ct. App. 1987) (noting that attorney had been placed on "inactive" list for nonpayment of dues prior to defendant's trial, and that the State Bar Court found that the attorney had "failed to protect the interests of his clients"); State v. Coates, 786 P.2d 1182, 1186–87 (Mont. 1990) (holding that attorney's use of cocaine was not independent evidence of ineffective assistance of counsel when alleged errors were rejected by the court).

33. *See, e.g.*, Bellamy v. Cogdell, 974 F.2d 302, 304 (2d Cir. 1992) (en banc) (rejecting application of per se rule finding ineffectiveness when the attorney is not "duly licensed to practice law," despite fact that Bellamy's lawyer was "virtually incapacitated" at the time of representation and was suspended from practice two months after defendant's conviction); Smith v. Ylst, 826 F.2d 872, 874–77 (9th Cir. 1987) (rejecting claim that per se ineffectiveness rule should apply where the defense attorney is mentally ill). In *Smith*, the attorney believed that his life was in danger and he discussed a conspiracy theory during his opening argument. The attorney's secretary said that the attorney told her he was crazy and wanted to go to an insane asylum. *Id.* at 874.

34. *See, e.g.*, Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996); United States v. Petersen, 777 F.2d 482, 484 (9th Cir. 1985); Javor v. United States, 724 F.2d 831 (9th Cir. 1984); Fellman v. Poole, 1993 WL 248693, at *5 (N.D. Cal. 1993).

35. Marcia Coyle, Fred Strasser & Marianne Lavelle, *Fatal Defense: Trial and Error in the Nation's Death Belt*, NAT'L L.J., June 11, 1990, at 30, 44 (chart noting that 10% of prisoners Alabama has executed or placed on death row had trial lawyers who have since been disbarred or disciplined, and that in Louisiana, that number is 12.9%); Alan Berlow, *The Wrong Man*, ATLANTIC MONTHLY, Nov. 1999, at 66, 68 (discussing a "Kentucky study showing that 25% of state's death row inmates had been represented by attorneys who had since been disbarred or had resigned to avoid disbarment; Louisiana study showing that lawyers of inmates executed in state had bar discipline rate 68% higher than bar members as a whole; and Texas Judicial Council study showing that capital defendants with appointed lawyers were 28% more likely than those with retained counsel to be convicted and, if convicted, were 44% more likely to be sentenced to die"); Diane Jennings, Dan Malone, Steve McGonigle & Pete Slover, *Defense Called Lacking for Death Row Indigents: But System Supporters Say Most Attorneys Effective*, DALLAS MORNING NEWS, Sept. 10, 2000, at 1A (reporting, based on an examination of 461 Texas capital cases, that "nearly one in four condemned inmates has been represented at trial or on appeal by court-appointed attorneys who have been disciplined for professional misconduct at some point in their careers," in "about half" of which cases, "the misconduct occurred before the attorney was appointed to handle the capital case"); Steve Mills, Ken Armstrong & Douglas Holt, *Flawed Trials Lead to Death Chamber: Bush Confident in System Rife with Problems*, CHI. TRIB., June 11, 2000, at N1 (reporting that 33% of the individuals executed in Texas during George W. Bush's tenure as

as of 1989 had been represented at trial by counsel who subsequently were disbarred or had their licenses suspended.[36] As of January 1990, attorneys in Alabama who represented defendants sentenced to death had been subject to disciplinary action, including disbarment, at a rate twenty times that of the Alabama bar as a whole. For those attorneys whose clients were executed, the rate of disciplinary sanctions was almost forty times that of the bar as a whole.[37] Furthermore, "surveys indicate that judges rate the overall performance of around one-tenth of the lawyers appearing before them as less than adequate and prejudicial to their client's cause."[38]

One of the reasons for the prevalence of incompetent attorneys is a lack of standards for the appointment of lawyers who handle criminal cases.[39] When these standards are either nonexistent or insufficient, the trial judge may be left with discretion over whom to appoint.[40] States in which there are no rigorous standards for the appointment of counsel therefore put more responsibility on the trial judge for ensuring that competent counsel for the defendant is chosen.[41]

In many instances, appellate courts have found that an appointed lawyer was completely unqualified to handle a capital case. For example, in *Goodwin v. Balkcom*, the court found ineffective assistance in part because counsel were unaware of the governing death penalty statute.[42] Likewise, in *Young v. Zant*, the court found that defense counsel was not even aware that a separate sentencing proceeding would be held in a capital case.[43] In an Idaho case, *Paradis v. Arave*, the judge appointed a lawyer who had passed the bar only six

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governor were represented by lawyers who had been or thereafter were disciplined by the bar, including following criminal convictions for extortion, forgery, stealing from clients, contempt, and sexual assault, and including at least five lawyers—some with multiple executions under their belt—who were disciplined five times or more); *but see* Commonwealth v. Vance, 546 A.2d 632, 637 (Pa. Super. Ct. 1988) (finding no Sixth Amendment violation where attorney was disbarred because disbarment is not the same as never having been admitted to the bar).

36. Stephanie Saul, *When Death Is the Penalty: Attorneys for Poor Defendants Often Lack Experience and Skill*, N.Y. NEWSDAY, Nov. 25, 1991, at 8, *available at* 1991 WL 4041497.

37. Vick, *Poorhouse Justice*, 43 BUFF. L. REV. at 398. "As of January 1990, nearly 13% of the defendants executed in Louisiana had been represented by lawyers who had been disciplined, while the disciplinary rate for the Louisiana bar as a whole was 0.19%. In Texas, the attorneys who represented defendants sentenced to death have been disciplined at a rate nine times that of the Texas bar as a whole; similar disparities exist in Georgia, Mississippi, and Florida." *Id.*

38. William Schwarzer, *Dealing with Incompetent Trial Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 634 n.7 (1980) (arguing that direct action by trial judge to ensure competence of trial counsel is both desirable and necessary).

39. Michael D. Moore, *Tinkering with the Machinery of Death: An Examination and Analysis for State Indigent Defense Systems and Their Application to Death Eligible Defendants*, 37 WM. & MARY L. REV. 1617, 1639–40 (1996).

40. *Id.* at 1633–36.

41. *Id.*

42. 684 F.2d 794, 817–20 (11th Cir. 1982).

43. 677 F.2d 792, 797 (11th Cir. 1982); *see also* Greer v. Mitchell, 264 F.3d 663, 676–77 (6th Cir. 2001) (noting that lawyer did not begin preparation for penalty phase of capital trial until after the first phase completed, and failed to interview family members, review school records, or call mental health experts).

months before the capital trial, had never tried a case to a jury before, and had failed to investigate physical evidence.[44] Additionally, death penalty resource centers all too frequently receive calls from capital defense lawyers who, just hours before the penalty phase begins, do not know how to proceed.[45]

The lack of standards for appointing attorneys in capital cases is particularly egregious in the "death belt"—the nine states in the South that have accounted for ninety percent of the nation's executions since capital punishment was reinstated in 1976.[46] In the death belt, one-third of attorneys whose clients received a death sentence practiced mostly civil law, and most had never handled a capital case before.[47] Unsurprisingly, the average length of capital trials in states with rigorous attorney-appointment standards is as high as three months,[48] while capital trials in states with insufficient or nonexistent standards average as short as two days.[49]

Insufficient resources also contribute to attorney ineffectiveness.[50] While a lack of resources can result from statutory barriers that are beyond the control of the trial judge,[51] there are many cases in which trial judges refuse to provide

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44. *See* 954 F.2d 1483, 1490–92 (9th Cir. 1992) (finding attorney constitutionally adequate); *vacated on other grounds by* Arave v. Paradis, 507 U.S. 1026 (1993), *remanded to* Paradis v. Arave, 20 F.3d 950, 959 (9th Cir. 1994).

45. Coyle, Strasser & Lavelle, *supra* note 35, at 44.

46. Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1924–25 (1993–1994). The death belt states, in order of frequency of execution, are: Texas, Florida, Louisiana, Georgia, Virginia, Alabama, Mississippi, North Carolina, and South Carolina. *See* Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 682, n.12 (1990).

47. Coyle, Strasser & Lavelle, *supra* note 35, at 40 (noting that 54.2% of lawyers with clients on death row had never tried a capital case before and that 44.1% would not accept another capital appointment, and concluding that standards for appointment of counsel to capital cases are "inadequate or non-existent"); *see also* Irving v. State, 441 So.2d 846, 856 (Miss. 1983) (finding that few attorneys have even a surface familiarity with the seemingly innumerable refinements of capital litigation) (citations and internal quotations omitted); TASK FORCE ON DEATH PENALTY HABEAS CORPUS, AMERICAN BAR ASSOCIATION, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 55 (1990) [hereinafter ABA REPORT] (finding a lack of adequate training in the death belt); Jonathan E. Gradess, *The Road from Scottsboro: We're Not as Far Along as We Think*, CRIM. JUST., Summer 1987, at 45–46 (calling for comprehensive and systematic training of lawyers in capital cases); Note, *supra* note 46, at 1928 (noting that death belt states neither train lawyers to handle capital cases nor screen out unqualified attorneys appointed in capital cases).

48. Note, *supra* note 46, at 1928 n.53 (noting that in states with mandatory training or rigorous appointment standards for death penalty defense, trials average from three weeks to two months); *see also* ABA REPORT, *supra* note 47, at 56 n.174 (finding that in California capital trials average sixty-seven days); Coyle, Strasser & Lavelle, *supra* note 35, at 38 (finding that in Ohio, trials average three weeks).

49. Saul, *supra* note 36 (finding that as a result of lack of training, the average capital trial in the death belt lasts two or three days).

50. Moore, *supra* note 39, at 1631.

51. *See, e.g.*, MISS. CODE ANN. § 99-15-17 (1990) (providing that in Mississippi, capital counsel can be paid no more than $1000); FLA. STAT. ANN. § 925.036(d) (West 1985), *to be repealed by* FLA. STAT. ANN. § 27.5304 (West Supp. 2004) (providing fees for capital case limited

attorneys representing capital defendants with resources that are otherwise available.[52] The effect of denying adequate resources can be devastating, tantamount to "'an economic presumption of guilt.'"[53] Adequate representation of a capital defendant requires extensive investigation and use of expert witnesses,[54] as well as extensive attorney time.[55] However, attorneys who fully prepare their cases often earn less than the minimum wage,[56] and many lawyers actually lose money in forgone business and overhead expenses when they accept appointment to capital cases.[57] Attorneys often handle the financial difficulty by devoting less time and effort to capital cases.[58]

Trial judges influence the quality of representation afforded indigent criminal defendants through the ability to appoint counsel and provide financial and expert resources. The current state of indigent criminal defense shows that in some cases, trial judges have been abdicating their responsibility by either acquiescing in the incompetence or by creating incompetence by refusing to provide adequate resources or enforce minimum standards for the appointment of lawyers in criminal cases. Mr. Fisher's case is thus just one example of a significant threat to the integrity of the judicial process both for the individual defendants who come before the system and the public faith in the system as a whole.

III.
THE SUPREME COURT'S APPROACHES TO THE PROBLEM OF INEFFECTIVE COUNSEL

In this section, I will explain the current judicial approach to ineffective assistance of counsel cases by examining the different standards the Supreme

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to $3500); S.C. CODE ANN. § 17-3-50 (Law.Co-op.1976 & Supp.1993) (fees for capital case limited to $3500); Albert L. Vreeland, II, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 642–45 (1991) (describing the effect of fee caps).

52. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. § 26.05 (Vernon 1992) (providing that compensation is in the discretion of the trial court); VA. CODE ANN. § 19.2-163 (Michie 2000) (same); Nancy Gist, *Assigned Counsel: Is the Representation Effective?*, CRIM. JUST., Summer 1989, at 16, 18 (finding that in Virginia—a state without a fee cap—counsel in capital cases were paid approximately $13 per hour after overhead costs).

53. Coyle, Strasser & Lavelle, *supra* note 35, at 38 (quoting a Georgia lawyer).

54. *See* Gradess, *supra* note 47, at 46.

55. *See* Saul, *supra* note 36 (noting that experts estimate that a capital trial requires 400 to 1000 hours of investigation and research); Vreeland, II, *supra* note 51, at 648 (pointing out that an actual trial requires about 850 to 1000 lawyer hours).

56. Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 367 (1993).

57. Vreeland, II, *supra* note 51, at 643.

58. Coyle, Strasser & Lavelle, *supra* note 35, at 41; *see also* ABA REPORT, *supra* note 47, at 63–64; Klein, *supra* note 56, at 367 (arguing that low fees result in ineffective assistance of counsel); Gradess, *supra* note 47, at 46; Saul, *supra* note 36 (noting that in one Alabama county notorious for its high death sentence rate, the highest bill submitted for capital defense was for 116 hours; in one case, two lawyers billed a total of 30 hours).

Court has adopted for the variety of ineffectiveness claims. The Court has set forth two standards to determine when the Sixth Amendment right to effective assistance of counsel has been violated. The standards vary as to which party bears the burden of proof and the degree of the burden. *Strickland v. Washington* provides the default standard for showing a constitutional violation due to ineffective assistance of counsel; courts apply the *Strickland* standard unless a petitioner is able to show that it is not appropriate for her particular case.[59]

A. Strickland v. Washington*: Two-Pronged Test*

The *Strickland* standard sets forth a two-pronged test, with the burden on the defendant to prove a constitutional violation of her Sixth Amendment right to effective assistance.[60] "First, the defendant must show that counsel's performance was deficient ... Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is not reliable."[61]

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59. *See Strickland*, 466 U.S. 668; United States v. Cronic, 466 U.S. 648 (1984).

60. *See* Chandler v. United States, 218 F.3d 1305, 1333 (11th Cir. 2000) "[P]etitioner has the burden of proof on the issue of the constitutional adequacy of his attorney's performance." (Tjoflat, J., concurring in part and dissenting in part).

61. *Strickland*, 466 U.S. at 687. The performance prong is judged by the standard of "reasonably effective assistance," which means that "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 687–88. The *Strickland* Court held that there is a strong presumption that defense counsel was competent. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* at 689 (internal quotations omitted).

The prejudice prong is based on two factors. The first factor is concern for the effect of the deficient performance on the outcome of the case. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696. The second factor is concern for the overall fairness of the proceeding as opposed to the vindication of an individual's constitutional rights: "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* at 691–92.

The prejudice standard is less than a preponderance because, as compared to the standard for newly discovered evidence:

> An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Id. at 694.

In order to prove prejudice, the defendant must therefore show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[62] The requirement that the defendant show prejudice is based on the belief that "not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding."[63] Also, the *Strickland* Court held that ineffectiveness claims alleging a deficiency in attorney performance are generally subject to a prejudice requirement because the errors are of the type that "[t]he government is not responsible for, and hence not able to prevent."[64]

B. United States v. Cronic*: Presumptive Prejudice*

The *Strickland* two-pronged test does not apply to all claims of ineffective assistance of counsel. For certain types of claims of a violation of the Sixth Amendment right to effective assistance of counsel, prejudice is presumed. In *United States v. Cronic*, the Supreme Court held that prejudice is presumed when there has been an actual or constructive denial of the assistance of counsel.[65] The *Strickland* Court describes cases that fall under *Cronic* as ones where prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost."[66] Cases that fall under *Cronic* involve impairments of the Sixth Amendment right that are "easy to identify and . . . easy for the government to prevent."[67]

The Court applies *Cronic*'s presumption of prejudice in a number of different situations. First, when defense counsel is somehow absent from trial, prejudice may be presumed.[68] For example, *Cronic*'s presumption of prejudice

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62. *Id.*

63. *Id.* at 693.

64. *Id.*

65. 466 U.S. 648, 659; *see also* Osborn v. Schillinger, 861 F.2d 612 (10th Cir. 1988) (presuming prejudice when trial counsel's errors, including lack of preparation and abandonment of duty of loyalty, result in a breakdown of the adversarial process). In *Bell v. Cone*, 535 U.S. 685 (2002), the Court significantly qualified the *Cronic* formulation by effectively reading into *Cronic* a requirement of complete denial of counsel.

66. 466 U.S. at 692.

> Circumstances of that magnitude [enough to warrant presumptive prejudice] may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Id. at 659.

67. *Strickland*, 466 U.S. at 692; *cf. Cronic*, 466 U.S. at 658 ("[t]here are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.").

68. *See, e.g.*, United States v. Mateo, 950 F.2d 44 (1st Cir. 1991) (prejudice presumed when attorney does not appear); Green v. Arn, 809 F.2d 1257, 1263 (6th Cir. 1987) (prejudice presumed when counsel absent from trial during critical stage); *but see* Hunte v. Keane, 1999 WL 754273

was applied when defense counsel was absent from sentencing because of a fee dispute,[69] and when counsel slept during significant portions of the trial.[70] In *Olden v. United States*, *Cronic*'s presumption of prejudice was applied when the defense attorney was absent for two days during the trial.[71] And in *Mitchell v. Mason*, prejudice was presumed when defense counsel was absent from a pre-trial period because he was suspended.[72]

Prejudice is also presumed when a trial judge interferes with a defense attorney's ability to be a vigorous advocate for her client. Trial judges have interfered with defense representation by denying the right to cross-examine,[73] refusing to allow closing argument,[74] preventing attorney-client consultations,[75] and denying the assistance of counsel during arraignment.[76]

In certain cases, courts have presumed prejudice under *Cronic* when defense counsel failed to participate in the trial.[77] For example, in *Harding v. Davis*, defense counsel remained silent through most of the trial and did not object when the court directed a verdict against the defendant.[78] In *Martin v. Rose*, the defense attorney refused to participate at trial because he thought participation

(E.D.N.Y. 1999) (rejecting *Cronic* and applying *Strickland* to defendant's claim of ineffectiveness of counsel based on counsel's absence from a status conference).

69. Abbamonte v. United States, 2001 WL 290524 (2d Cir. 2001); *cf.* United States v. Reiter, 897 F.2d 639 (2d Cir. 1990) (holding that, in light of overwhelming evidence against defendant, there was no constructive absence and hence no per se prejudice despite fact that attorney had been late or absent numerous times and had been reprimanded by judge, including two findings of contempt and a court order for attorney's incarceration in order to ensure attorney's appearance at trial).

70. Burdine v. Johnson, 262 F.3d 336, 344 (5th Cir. 2001) (en banc); Tippins v. Walker, 77 F.3d 682 (2d Cir. 1996) (noting that ordinarily the *Strickland* analysis would be sufficient for episodes of inattention or sleep).

71. 224 F.3d 561, 568 (6th Cir. 2000).

72. 257 F.3d 554, 565 (6th Cir. 2001).

73. *See* Davis v. Alaska, 415 U.S. 308 (1974).

74. *See* Herring v. New York, 422 U.S. 853, 863–64 (1975).

75. *See id.*

76. Hamilton v. Alabama, 368 U.S. 52 (1961).

77. Generally, courts evaluate a counsel's failure to participate during the trial under the *Strickland* standard. *See, e.g.*, Martin v. McCotter, 796 F.2d 813 (5th Cir. 1986) (refusing to apply per se prejudice, and finding that prejudice was not proven when counsel had made no argument during sentencing phase of capital trial); Warner v. Ford, 752 F.2d 622, 625 (11th Cir. 1985) (holding that attorney's lack of participation was trial strategy and that therefore a prejudice presumption did not apply). In a few cases, courts have presumed prejudice when defense counsel failed to adequately investigate or put on witnesses at trial. In *King v. State*, 810 P.2d 119 (Wyo. 1991), the defense attorney failed to interview or secure trial testimony of two potential eyewitnesses. And in *Appel v. Horn*, 250 F.3d 203 (3d Cir. 2001), the Court applied presumptive prejudice when the defense attorney did nothing to investigate competence during competency hearing. However, in the vast majority of cases, claims of failure to investigate and present witnesses are judged under the *Strickland* standard. *See, e.g.*, Glover v. Miro, 262 F.3d 268, 277 (4th Cir. 2001).

78. 878 F.2d 1341, 1345 (11th Cir. 1989); *see also* Tucker v. Day, 969 F.2d 155, 159 (5th Cir. 1992) (prejudice presumed where the attorney stated she was merely "'standing in'" during defendant's sentencing).

would waive pretrial motions.[79] And in *Reyes-Vasquez v. United States*, the defense attorney did not participate in the trial because he believed that an appeal of his pretrial motions would be successful.[80] Likewise, in *Gardiner v. United States*, the defense attorney failed to aid the defendant in any manner with respect to sentencing,[81] and in *State v. Harvey*, defense counsel attended but did not participate in a capital murder trial.[82]

Sparingly and inconsistently, *Cronic*'s presumption of prejudice has also been applied to what amounts to an abdication of the advocacy role by defense counsel.[83] For example, in *United States v. Swanson*, the defense lawyer stated that he did not think there was reasonable doubt in the case as to the identity of his client as the perpetrator of the crime, and that if the jurors found his client guilty, they should not agonize over it in retrospect.[84] The appeals court presumed prejudice under *Cronic* because the court found that the defense counsel's statement resulted in depriving the defendant of the right to due process and effective assistance of counsel—that is, there was a breakdown of the adversarial process.[85] In *Frazer v. United States*, the court stated that prejudice would be presumed if the defense attorney had in fact called the defendant by a racial slur and threatened to be ineffective if the defendant insisted on going to trial.[86] The Court has also presumed prejudice when defense counsel was at risk for beng prosecuted for a crime related to the crime for which the defendant was charged.[87]

Prejudice has also been presumed in cases where the qualifications of the

79. 744 F.2d 1245, 1250–51 (6th Cir. 1984).

80. 865 F. Supp. 1539, 1548 (S.D. Fla. 1994).

81. 679 F. Supp. 1143, 1147 (D. Me. 1988).

82. 692 S.W.2d 290, 292 (Mo. 1985) (en banc).

83. It may appear from these cases that instances of "egregious ineffectiveness," as defined by this article, fall under the *Cronic* standard. However, *Cronic* has been very inconsistently used and there is no guiding principle for when defense counsel's performance constitutes a complete denial of counsel such that prejudice is presumed. *See, e.g.*, Bell v. Cone, 535 U.S. 685 (2002) (rejecting application of *Cronic* standard where counsel had entirely failed to subject prosecutor's case to meaningful adversarial testing). I argue in this article that the guiding principle for the application of *Cronic* should be when the trial court fails to inquire into egregious ineffectiveness.

84. 943 F.2d 1070, 1071–75 (9th Cir. 1991).

85. *Id. But see* Ramirez v. United States, 17 F. Supp. 2d 63 (D.R.I. 1998) (applying *Strickland*, not *Cronic*, when defense counsel conceded two counts in closing argument); Baker v. Corcoran, 220 F.3d 276 (4th Cir. 2000) (refusing to presume prejudice though counsel conceded guilt); Young v. Catoe, 205 F.3d 750 (4th Cir. 2000) (holding that conceding guilt does not automatically mean prejudice should be presumed, and, under *Strickland*, finding no prejudice resulted from attorney's concession of guilt, two misstatements of law in the opening statement, and failure to cross-examine only half the witnesses); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (applying *Strickland* and finding no prejudice where counsel admitted guilt on kidnapping charge of a murder/kidnapping indictment in capital case).

86. 18 F.3d 778, 785 (9th Cir. 1994).

87. Government of Virgin Islands v. Zepp, 748 F.2d 125 (3d Cir. 1984) (finding per se prejudice when defense counsel was called to testify against client in the trial and was himself at risk of prosecution for aiding and abetting); Triana v. United States, 205 F.3d 36 (2d Cir. 2000).

appointed lawyer were somehow suspect. For example, prejudice has been presumed when defense counsel obtained admission to the bar through fraudulent means,[88] was not licensed to practice law,[89] or was suspended from the practice of law.[90] However, most courts reject the application of *Cronic* to disbarred or otherwise disqualified lawyers.[91]

IV.
THE SIXTH AMENDMENT RIGHT TO COUNSEL AND THE INTEGRITY OF THE COURT

In the previous section, I showed that the Court has formulated different standards for judging claims of ineffective counsel based on the underlying nature of the deprivation of the right to counsel. In this section, I examine the jurisprudence on the integrity of the court, which shows that a change in the current method for addressing ineffectiveness cases is necessary to protect the integrity of the court and is well within the Supreme Court's jurisprudence.

In many instances, the Supreme Court has addressed the "imperative of judicial integrity"[92] and has demanded that lower courts "must ever be concerned with preserving the integrity of the judicial process."[93] The plain error doctrine is an example of one instance in which the Court alters traditional jurisprudential standards—in this case jurisdictional rules—out of concern for the integrity of the court. This doctrine, which allows appellate courts to address issues not raised at trial, is based on the principle that an appellate court, especially in criminal cases, may, in the public interest, address errors that "seriously affect the fairness, integrity or public reputation of judicial proceedings."[94]

Concern for the integrity of the court has also allowed for relief under the Equal Protection Clause of the Fourteenth Amendment that would otherwise not

88. United States v. Novak, 903 F.2d 883 (2d Cir. 1990).

89. Solina v. United States, 709 F.2d 160 (2d Cir. 1983).

90. *In re* Johnson, 822 P.2d 1317 (Cal. 1992) (en banc); State v. Newcome, 577 N.E.2d 125, 126 (Ohio App. 1989).

91. *See, e.g.*, Vance v. Lehman, 64 F.3d 119 (3d Cir. 1995) (refusing to find per se prejudice when counsel lied on application for Pennsylvania Bar, denying he had charges related to professional responsibility that stemmed from his prior practice in California); Commonwealth v. Vance, 546 A.2d 632, 636–37 (Pa. 1988) (finding no Sixth Amendment violation where attorney was disbarred because disbarment is not the same as never having been admitted to the bar).

92. Elkins v. United States, 364 U.S. 206, 222 (1960).

93. Stone v. Powell, 428 U.S. 465, 485 (1976); *see also* Illinois v. Allen, 397 U.S. 337, 343 (1970) ("It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country.").

94. United States v. Atkinson, 297 U.S. 157, 160 (1936); *see also* Neder v. United States, 527 U.S. 1, 9 (1999) (erroneous jury instruction should be judged under harmless error analysis because the error did not seriously affect the "'fairness, integrity or public reputation'" of the proceedings) (quoting Johnson v. United States, 520 U.S. 461, 469 (1997)).

be available. For example, reversal is the only acceptable remedy for discrimination in the selection of grand jurors. Because racial discrimination in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole," the Court held that not even a subsequent trial could cure the taint of the prior discrimination.[95]

Likewise, in *Powers v. Ohio*, the Court held that racial discrimination in the selection of jurors, even when the defendant is white, threatens the integrity of the court.[96] The Court stated that a *Batson* discrimination claim is cognizable

> not because the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant . . . Rather, it is because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," . . . and places the fairness of a criminal proceeding in doubt.[97]

Concerns for the integrity of the court have also informed jurisprudence on the Sixth Amendment. In *Faretta v. California*, the Court held that under the Sixth Amendment, a defendant has a right to represent him or herself.[98] Later, however, in *Martinez v. Court of Appeal*, the Court held that the integrity of the judicial process can outweigh this Sixth Amendment right because, "[e]ven at the trial level . . . the government's interest in ensuring the integrity and efficiency of the trial at times outweighs the defendant's interest in acting as his own lawyer."[99]

In addition, protection of the integrity of the judicial process is cause for excluding illegally seized evidence.[100] Violations of the *Miranda* rule requiring that an accused be informed of her constitutional rights by the police prior to interrogation also implicate the integrity of the judicial process. "Thus, when *Miranda* claims are raised on federal habeas, the integrity of the factfinding process of the state trial court is called into question."[101]

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95. Rose v. Mitchell, 443 U.S. 545, 556 (1979), *quoted in* Vasquez v. Hillery, 474 U.S. 254, 262 (1986).

96. 499 U.S. 400 (1991) (extending Batson v. Kentucky, 476 U.S. 79 (1986), which held in case of black defendant that State may not exclude jurors on the basis of race).

97. *Id.* at 411 (quoting *Rose*, 443 U.S. at 556).

98. 422 U.S. 806, 834 (1975).

99. 528 U.S. 152, 162 (2000); Russell v. State, 383 N.E.2d 309, 312 (Ind. 1978) (recognizing that right to self-representation is limited by the "state's interest in preserving the orderly processes of criminal justice and courtroom decorum"); People v. McIntyre, 324 N.E.2d 322, 327 (N.Y. 1974) (holding that defendant forfeits right of self-representation when he engages "in conduct which would prevent the fair and orderly exposition of the issues"); *see also Faretta*, 422 U.S. at 834 n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom.").

100. Stone v. Powell, 428 U.S. 465, 484 (1976) ("The Court in *Elkins* [v. United States, 364 U.S. 206 (1960)], for example, in the context of its special supervisory role over the lower federal courts, referred to the 'imperative of judicial integrity,' suggesting that exclusion of illegally seized evidence prevents contamination of the judicial process.").

101. Duckworth v. Eagan, 492 U.S. 195, 225 (1989) (Marshall, J., dissenting) (quoting Brewer v. Williams, 430 U.S. 387, 414 (1977) (Powell, J., concurring)).

Concern for the integrity of the judicial process is one of the reasons the Court cites for maintaining the jurisprudential doctrine of *stare decisis*. The doctrine of *stare decisis* encourages the Court to adhere to precedent. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."[102]

The integrity of the court has also been cited in death penalty cases. The Supreme Court has stated that in death penalty cases, maintaining public confidence in the judicial process by ensuring the integrity of the court has been especially crucial.[103] This is because "[g]iven the current and continuing concerns about the reliability and, hence, the viability of the death penalty, it is critical for the courts to set a standard of attorney performance which merits the public's confidence."[104]

In the plea context, the failure of a trial judge to protect defendants' rights has been found to implicate the integrity of the court. In *McCarthy v. United States*, the Court addressed a situation in which the trial judge had failed to perform the statutorily-mandated duty of personally addressing a defendant and determining whether the plea was voluntary.[105] The Court held that the plea must be set aside.[106] The Court later noted that "the judge's indifference was an affront to the integrity of the judicial system."[107]

Concern for the integrity of the court is not limited to actual fairness, but extends to appearances of impropriety. The Court is cognizant and protective of public perception. Public perception is paramount because "justice must satisfy the appearance of justice,"[108] and the "appearance of impropriety . . . diminishes faith in the fairness of the criminal justice system."[109] Accordingly, a trial error is prejudicial if it "undermines confidence in the integrity of the criminal proceeding."[110] The concern with public confidence in the integrity of the

102. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

103. *See* Gardner v. Florida, 430 U.S. 349, 357–58 (1976).

104. Chandler v. United States, 218 F.3d 1305, 1343 (Birch, J., dissenting).

105. 394 U.S. 459 (1969).

106. *Id.* at 472.

107. United States v. Vonn, 535 U.S. 55, 69 (2002) (commenting on the *McCarthy* decision).

108. Offutt v. United States, 348 U.S. 11, 14 (1954); *see also* Stephens v. Kemp, 464 U.S. 1027, 1032 (1983) (Powell, J., dissenting) (contending that the procedure by which stay applications are considered "undermines public confidence in the courts and in the laws we are required to follow").

109. Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 811 (1987).

110. *Id.* at 810; *see also id.* at 811 ("A concern for actual prejudice . . . misses the point, for what is at stake is the public perception of the integrity of our criminal judicial system."); Wheat v. United States, 486 U.S. 153, 160 (1988) ("Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."); Amos Treat & Co. v. S.E.C., 306 F.2d 260, 267 (D.C. Cir. 1962) ("An administrative hearing of such importance and vast potential consequences must be attended, not only with every element of fairness but with the very appearance of

judicial process has been explicitly relevant in the right-to-counsel jurisprudence. "[W]hat is clear from *Strickland*... is that the right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings."[111]

V.
CONFLICT-OF-INTEREST JURISPRUDENCE

The previous section established that concern for the integrity of the court justifies different legal doctrines and standards. I will now address how this concern should alter the existing framework for addressing ineffective assistance of counsel claims by exploring the subset of ineffectiveness cases based on a conflict-of-interest. The conflict cases are relevant because, unlike other areas of ineffective assistance of counsel jurisprudence, which focus only on the standard of appellate review, they provide a model for trial court responsibility for protecting defendants' Sixth Amendment right to counsel.

In this section I will provide an overview of the three major cases which make up the Supreme Court's conflict-of-interest jurisprudence: *Holloway v. Arkansas*, *Cuyler v. Sullivan*, and *Mickens v. Taylor*. These cases demonstrate that trial judges have a constitutionally-mandated duty to protect the constitutional rights of defendants by inquiring into conflicts of which they are or should be aware, although the burden of proof for showing a constitutional violation may vary when the trial court fails to inquire. I will conclude this section by explaining why the Court's jurisprudence on the subset of ineffectiveness cases based on conflict-of-interest is a more appropriate model than the *Strickland* standard for the subset of egregious ineffectiveness cases identified by this article.

A. Holloway v. Arkansas

1. Establishing a Duty to Inquire When Trial Judges Are Aware of a Threat to a Defendant's Sixth Amendment Right to Counsel

In *Holloway v. Arkansas*, one defense attorney was appointed to represent three codefendants.[112] The defense attorney objected to the multiple representation, but the trial court did not address the objection. On appeal, the Supreme Court found that the defendant's Sixth Amendment right to assistance of counsel had been violated because the trial court was aware of the conflict-of-interest and failed to inquire into the possible threat to the defendant's right to

fairness.").

111. Mickens v. Taylor, 535 U.S. 162, 207 n.12 (2002) (Souter, J., dissenting) (discussing Holloway v. Arkansas, 435 U.S. 475, 484 (1978)).

112. Holloway v. State, 539 S.W.2d 435 (Ark. 1976).

effective assistance.[113] The constitutional violation in *Holloway* was not the mere fact of multiple representation.[114] Nor was the violation the existence of a conflict-of-interest that was found to have actually hampered defense counsel's advocacy and caused deficient performance.[115] Rather, the Court states that it was the trial judge's failure to inquire into a potential conflict, after having been informed of the possibility, which deprived the defendant of his Sixth Amendment right to effective assistance of counsel.[116] The Court "simply held that the trial court's error unconstitutionally endangered the right to counsel."[117] *Holloway* establishes the trial court's duty to inquire into potential conflicts, and holds that a Sixth Amendment violation occurs when the trial court fails to fulfill its duty to protect the defendant's right to effective representation.[118]

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113. Holloway v. Arkansas, 435 U.S. 475, 484 (1978); *see also* Caban v. United States, 281 F.3d 778, 781 (8th Cir. 2002) (noting that "*Holloway* . . . addressed situations where the trial court is made aware of a potential conflict of interest before, during, or in some instances, after trial. Under those circumstances, the Court held the trial court has a duty to conduct a searching inquiry into the possibility of a constitutional violation arising from that conflict."). The *Holloway* Court explicitly did not resolve two issues that arise when trial counsel does not inform the court of a potential conflict of interest. First, the Court did not state how strong a showing of conflict must be made or how certain the reviewing court must be that the asserted conflict actually existed. Second, the *Holloway* Court did not discuss the nature of the affirmative duty of the trial judge to protect a criminal defendant's right to effective assistance of counsel free from a conflict-of-interest. *See Holloway*, 435 U.S. at 483–84.

114. *See Holloway*, 435 U.S. at 482.

115. *See id.* at 484–85; Hamilton v. Ford, 969 F.2d 1006, 1011–12 (11th Cir. 1992) ("We now hold that when defendants make timely objections to joint representation, they need not show an actual conflict of interest when a trial court fails to inquire adequately into the basis of the objection. In such circumstances the trial court has failed to discharge its constitutional duty under *Holloway* to determine whether the defendants are receiving adequate assistance of counsel . . . [W]e hold that in the situation where there is both a timely objection *and* the trial court fails to appoint separate counsel *or* to inquire adequately into the possibility of a conflict of interest, the reversal will be automatic.").

116. *Holloway,* 435 U.S. at 484; *see also Hamilton*, 969 F.2d at 1013 ("[T]he trial court failed adequately to explore the possibility of conflict of interest as required by *Holloway.* Hamilton's Sixth and Fourteenth Amendment rights of effective assistance of counsel were violated and reversal is automatic."); United States v. Sutton, 794 F.2d 1415, 1419 (9th Cir. 1986) (noting that Sixth Amendment violation requiring automatic reversal occurs when "trial judge fails either to appoint separate counsel or to take adequate steps to ascertain whether the risk is too remote to warrant individual representation"); United States v. Cirrincione, 780 F.2d 620, 625 (7th Cir. 1985) (noting that automatic reversal is not required unless a trial court fails to conduct an inquiry after a timely objection, or if the court "'knows or reasonably should know a particular conflict exists'") (citing Cuyler v. Sullivan, 446 U.S. 335, 347 (1980)); *cf.* United States v. Punch, 722 F.2d 146, 152 (5th Cir. 1983) (observing that a district court is required to inquire into the joint representation of two or more defendants by one counsel and "take appropriate measures to protect each defendant's right to counsel").

117. *Sullivan*, 446 U.S. at 345 (citing *Holloway*, 435 U.S. at 483–87).

118. *Holloway*, 435 U.S. at 484 (noting that "[t]he judge . . . failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel. We hold that the failure . . . deprived petitioners of the guarantee of 'assistance of counsel.'").

2. Establishing Presumptive Prejudice for Failure to Inquire

In addition to establishing the duty of the trial court to protect the constitutional rights of defendants appearing before them, *Holloway* also established that when trial courts fail in their duty, prejudice is presumed.[119] Subsequent courts addressing the issue have likewise interpreted *Holloway* as holding that "when a trial court fails to discharge its constitutional duty to determine whether the defendant is receiving assistance of counsel unburdened by a conflict of interest, prejudice is presumed and reversal of the conviction is automatic."[120]

B. Cuyler v. Sullivan

1. Limited Presumption When Court Is Not Notified of Threat to Defendant's Sixth Amendment Right to Counsel

In *Cuyler v. Sullivan*, two privately retained attorneys represented Sullivan and his two codefendants.[121] However, unlike in *Holloway*, Sullivan's lawyers did not object to the joint representation.[122] *Sullivan* thus addressed situations in which the trial court is never made aware of the conflict of interest by the defense counsel. The Court held that to establish a conflict of interest the defendant must show that "an actual conflict of interest adversely affected his lawyer's performance."[123]

However, unlike *Strickland*, where a showing of prejudice is required for defective performance to amount to a constitutional violation, the *Sullivan* "adverse effect" standard does not explicitly require proving a probable effect

119. *Id.* at 487–91; *see also* Austin v. Erickson, 477 F.2d 620 (8th Cir. 1973); United States v. Gougis, 374 F.2d 758 (7th Cir. 1967); Hall v. State, 217 N.W.2d 352 (Wis. 1974); Commonwealth *ex rel.* Whitling v. Russell, 176 A.2d 641 (Pa. 1962); *cf.* Snyder v. Massachusetts, 291 U.S. 97, 116 (1934); Patton v. United States, 281 U.S. 276, 292 (1930); Tumey v. Ohio, 273 U.S. 510 (1927). In *Mickens v. Taylor*, 535 U.S. 162 (2002), the Court clarified that prejudice is only presumed when defense counsel objected to the conflict and the trial judge failed to inquire. However, even when there is no objection, defendants are still not required to prove prejudice in the *Strickland* sense. Rather, they prove "adverse effect" where a conflict affected the counsel's judgment. *Id.* at 1243–46.

120. Atley v. Ault, 191 F.3d 865, 870 (8th Cir. 1999); *see also* Wood v. Georgia, 450 U.S. 261, 272 n.18 (1981); *Sullivan*, 446 U.S. at 347 (1980).

121. 446 U.S. at 337, 348.

122. *Id.* at 337–38.

123. *Id; see also* United States v. Hanoum, 33 F.3d 1128, 1130–32 (9th Cir. 1994) (applying *Sullivan* where attorney was allegedly having sex with defendant's wife and thus had an incentive to ensure defendant was found guilty); United States v. Horton, 845 F.2d 1414, 1418–21 (7th Cir. 1988) (applying *Sullivan* where attorney was candidate for U.S. Attorney during his representation of defendant); United States v. McLain, 823 F.2d 1457, 1463–64 (11th Cir. 1987) (applying *Sullivan* where lawyer was under investigation for bribery); Roach v. Martin, 757 F.2d 1463, 1479–80 (4th Cir. 1985) (applying *Sullivan* where attorney was being investigated by state bar while representing defendant).

upon the outcome of the trial.[124]

2. Affirmance of Duty to Inquire

In addition to formulating the standard a defendant must meet in order to establish a constitutional violation when the trial court is not aware of the conflict, the *Sullivan* Court also addressed to what extent the trial court has a constitutional duty to inquire into the adequacy of the defendant's representation. The Court construed *Holloway* to require inquiry only when "the trial court knows or reasonably should know that a particular conflict exists."[125] *Sullivan* therefore clarified that the duty to inquire exists either when defense counsel objects to a potential conflict or when "special circumstance" exists such that it is not reasonable for a judge to assume that multiple representation does not pose a threat to effective assistance.[126]

C. Mickens v. Taylor

1. Burden of Proof When Trial Court Reasonably Should Have Known of Threat to Defendant's Sixth Amendment Rights

Recently, in *Mickens v. Taylor*, the Court clarified the question left open in *Sullivan*: the proper burden of proof for establishing a constitutional violation when the trial court fails to inquire into a conflict about which it knew or reasonably should have known for reasons other than an objection by defense counsel.[127] In *Mickens*, the defendant was charged with murder and was represented by counsel who had been representing the victim on an unrelated assault and concealed-weapon charge at the time of the crime.[128] Because the court had appointed the same lawyer to both cases, the court should have known of the conflict-of-interest.

The *Mickens* Court held that "[t]he trial court's awareness of a potential conflict neither renders it more likely that counsel's performance was significantly affected nor in any other way renders the verdict unreliable."[129] In addition, the Court held that automatic reversal was not an appropriate means of

124. *See* Mickens v. Taylor, 535 U.S. 162, 174–75 (2002); *see also* Foxworth v. Wainwright, 516 F.2d 1072, 1077 n.7 (5th Cir. 1975) ("If an actual, significant conflict is found, however, the degree of prejudice is not to be considered.").

125. *Sullivan*, 446 U.S. at 347.

126. *Id.* at 346–47; *Mickens*, 535 U.S. at 186 (Stevens, J., dissenting) (citing *Sullivan*, 447 U.S. at 346) ("This duty was triggered either via defense counsel's objection, as was the case in *Holloway,* or some other 'special circumstances' whereby the serious potential for conflict was brought to the attention of the trial court judge.").

127. 535 U.S. at 164.

128. *Id.* at 163.

129. *Id.* at 173 (citing United States v. Cronic, 466 U.S. 648, 662 n.31 (1984)).

enforcing the duty to inquire.[130] Accordingly, the Court decided that the trial court's failure to make the *Sullivan*-mandated inquiry did not alter the defendant's burden of proof.[131] As a result, after *Mickens*, defendants must meet the *Sullivan* standard for showing a constitutional violation regardless of whether the trial judge should have known of a potential conflict of interest. The *Holloway* standard of presumptive prejudice is reserved for situations in which the judge knew of a potential conflict because an objection was made.

2. Duty to Inquire When Trial Court Reasonably Should Know of Threat to Defendant's Sixth Amendment Rights

Implicit in the Court's argument that the failure of the trial judge to make the *Sullivan* inquiry does not reduce petitioner's burden of proof is the understanding that there was a duty to inquire in *Mickens*, even though there was no objection.[132] The *Mickens* Court does not question the duty to inquire because *Sullivan* conclusively established that the duty to inquire is based on what the judge knew or reasonably should have known, not on the existence of an objection.[133] Although the issue in *Mickens* was the proper handling of a situation in which there is no objection, but nonetheless "special circumstances" existed such that the trial court reasonably should have known of the conflict, the issue centered on the appropriate burden of proof, not the validity of the duty to

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130. *Id.* The dissenting Justices were concerned with the effect of this ruling on the integrity of the court. *See id.* at 189 (Stevens, J., dissenting); *id.* at 207–08 nn.12–13 (Souter, J., dissenting).

131. *Id.* at 173–74.

132. Justice Souter's dissent addressed the fact that the majority did not support the duty to inquire with a lower burden of proof for failure on the part of the trial court to fulfill the duty. In so doing, the dissent based its claim that a duty to inquire existed in *Mickens*, and that the majority was

> treating breaches of a judge's duty to enquire into prospective conflicts differently depending on whether defense counsel explicitly objected . . . The distinction is irrational on its face, it creates a scheme of incentives to judicial vigilance that is weakest in those cases presenting the greatest risk of conflict and unfair trial, and it reduces the so-called judicial duty to enquire into so many empty words.

Id. at 202 (Souter, J., dissenting).

> The state judge, however, did nothing to discharge her constitutional duty of care. In the one case in which we have devised a remedy for such judicial dereliction, we held that the ensuing judgment of conviction must be reversed and the defendant afforded a new trial. That should be the result here.

Id. at 190 (Souter, J., dissenting) (citing Holloway v. Arkansas, 435 U.S. 475, 491 (1978); Wood v. Georgia, 450 U.S. 261, 272 n.18 (1981)) (internal citations omitted). *See also id.* at 206 n.11 (Souter, J., dissenting) ("Lest anyone be wary that a rule requiring reversal for failure to enquire when on notice would be too onerous a check on trial judges, a survey of Courts of Appeals already applying the *Holloway* rule in no-objection cases shows a commendable measure of restraint and respect for the circumstances of fellow judges in state and federal trial courts, finding the duty to enquire violated only in truly outrageous cases.").

133. Because the duty to inquire can be triggered by either an objection or "special circumstances," a trial judge is put on notice of a potential threat to effective representation. *See supra* Part V.B.2.

inquire.[134]

D. *Comparison of* Holloway, Sullivan, *and* Mickens *Models*

In *Mickens* and *Sullivan*, the Court distinguished between the burden of proof for proving a constitutional violation based on an unreasonable failure of the trial court to inquire into the adequacy of the defendant's representation when there is an objection, and one based on an unreasonable failure to inquire when there is no objection. The basis for the distinction is twofold. First, the Court presumes that when there is an objection, there is an actual conflict. *Mickens* interprets *Holloway* as establishing a constitutional violation not for a potential conflict of which the court is aware but fails to remedy, but for an actual conflict, the existence of which is presumed because of defense counsel's objection, of which the trial judge is aware and which she fails to remedy.[135] The distinction that the *Mickens* Court makes between situations that fall under *Holloway* and those that fall under *Sullivan* is therefore whether the circumstances are such that the existence of an actual conflict can be presumed.[136]

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134. For an argument against using an objection to determine the appropriate standards, see *Mickens*, 535 U.S. at 205–06 (Souter, J., dissenting) (citing Wheat v. United States, 486 U.S. 153, 161 (1988)) ("The irrationality of taxing defendants with a heavier burden for silent lawyers naturally produces an equally irrational scheme of incentives operating on the judges. The judge's duty independent of objection, as described in *Sullivan* and *Wood*, is made concrete by reversal for failure to honor it. The plain fact is that the specter of reversal for failure to enquire into risk is an incentive to trial judges to keep their eyes peeled for lawyers who wittingly or otherwise play loose with loyalty to their clients and the fundamental guarantee of a fair trial. That incentive is needed least when defense counsel points out the risk with a formal objection, and needed most with the lawyer who keeps risk to himself, quite possibly out of self-interest.").

135. *Id.* at 178 (Kennedy, J., concurring) ("These facts, and others relied upon by the District Court, provide compelling evidence that a theoretical conflict does not establish a constitutional violation, even when the conflict is one about which the trial judge should have known.").

136. An alternative approach is presented by Justice Souter's dissent in *Mickens*:

> When the problem comes to the trial court's attention before any potential conflict has become actual, the court has a duty to act prospectively to assess the risk and, if the risk is not too remote, to eliminate it or to render it acceptable through a defendant's knowing and intelligent waiver. This duty is something more than the general responsibility to rule without committing legal error; it is an affirmative obligation to investigate a disclosed possibility that defense counsel will be unable to act with uncompromised loyalty to his client. It was the judge's failure to fulfill that duty of care to enquire further and do what might be necessary that the *Holloway* Court remedied by vacating the defendant's subsequent conviction. The error occurred when the judge failed to act, and the remedy restored the defendant to the position he would have occupied if the judge had taken reasonable steps to fulfill his obligation. But when the problem of conflict comes to judicial attention not prospectively, but only after the fact, the defendant must show an actual conflict with adverse consequence to him in order to get relief. Fairness requires nothing more, for no judge was at fault in allowing a trial to proceed even though fraught with hidden risk.

Id. at 194 (Souter, J., dissenting) (citations and footnotes omitted); *see also id.* at 209 (Breyer, J., dissenting) (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)) ("By appointing this lawyer to represent Mickens, the Commonwealth created a 'structural defect affecting the framework within which the trial [and sentencing] proceeds, rather than simply an error in the trial process itself.'").

Second, the Court relies on the ability of defense attorneys to protect their clients' interests and bring any possible conflicts to the attention of the trial court. The Court has stated that the conflict jurisprudence is based on deference to the judgment of defense counsel, "recognizing that a defense attorney is in the best position to determine when a conflict exists,"[137] and that "[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."[138]

Because defense counsel are presumed capable of bringing any threat to effective representation to the attention of the court, the lack of an objection is a reasonable basis for allowing trial courts to assume that such a threat does not exist.

> Absent special circumstances, therefore, trial courts may assume either that multiple representation entails no conflict or that the lawyer and her clients knowingly accept such risk of conflict as may exist. Indeed, as the Court noted in *Holloway*, trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. 'An attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'[139]

In conflict cases, defense counsel's obligation to object to a conflict of interest provides a mechanism for informing the court of potential ineffectiveness. However, while the burden of proof depends on whether counsel objected, the duty to inquire does not. *Sullivan* and *Mickens* did not limit the duty to inquire to cases where defense counsel objected. The Court held that there is a duty to inquire where "the trial court knows or reasonably should know that a particular conflict exists . . ."[140] Thus, to protect the defendant's Sixth Amendment rights, the trial judge must inquire when there is a reason for the trial court to be aware of a potential threat to effective assistance, even if there is no objection.[141]

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137. 535 U.S. at 167 (citing Holloway v. Arkansas, 435 U.S. 475, 485–86 (1978)).

138. Cuyler v. Sullivan, 446 U.S. 335, 346 (1980).

139. *Id.* at 346–47 (quoting *Holloway,* 435 U.S. at 485) (internal quotations omitted).

140. *Id.* at 347.

141. *Id.*; *see also Mickens*, 535 U.S. at 186–87; Wood v. Georgia, 450 U.S. 261, 280 (1981) (White, J., dissenting) ("[*Sullivan*] held only that if a trial court 'reasonably should know that a particular conflict exists,' then a failure to initiate an inquiry may constitute a Sixth Amendment violation."); Hamilton v. Ford, 969 F.2d 1006, 1011 (11th Cir. 1992) ("[*Sullivan*] is limited to those cases in which a defendant raises no objection to joint representation at trial."). *Sullivan* is also limited to cases where the individual claiming her right to counsel has been violated "does not allege that state officials knew or should have known that her lawyers had a conflict of interest." *Sullivan*, 446 U.S. at 343. Justice Stevens in *Mickens* implied that the duty to inquire is not limited to circumstances where defense counsel objects. *See Mickens*, 535 U.S. at 187 n.11 (Stevens, J., dissenting) ("In *Sullivan* we did not ask *only* whether an objection was made in order to ascertain whether the trial court had a duty to inquire. Rather, we stated that 'nothing in the circumstances of this case indicates that the trial court had a duty to inquire whether there was a conflict of

VI.
EXTENDING THE CONFLICT MODEL'S DUTY TO INQUIRE TO INEFFECTIVE ASSISTANCE OF COUNSEL IMPLICATING THE INTEGRITY OF THE COURT

A. The Model for Trial Court Responsibility and Appellate Review in the Conflict Subset of Ineffectiveness Cases Is Relevant to the Integrity of the Court Subset of Ineffectiveness Cases

As the previous section explained, the Sixth Amendment analysis in conflict-of-interest jurisprudence is about the constitutional duty of the trial court to protect the defendant's right and the consequences of the failure of the trial court to fulfill that mandate. The conflict jurisprudence thus establishes the constitutional responsibility of the trial judge to actively protect a defendant's Sixth Amendment right to effective assistance through a duty to inquire in cases where the judge knows or reasonably should know of a threat to constitutionally adequate representation. This jurisprudence should serve as a general model for trial court responsibility for inquiring into threats to a defendant's constitutional rights.

The model provided by the conflict cases is a better fit for egregious ineffectiveness cases[142] than the current *Strickland* model. *Strickland* addresses only the appellate court role in remedying convictions obtained without the effective assistance of counsel. Even the *Cronic* jurisprudence, an exception to the *Strickland* standard for a subset of cases in which there was actual or constructive denial of assistance of counsel,[143] and which, like the conflict subset of ineffectiveness cases, presumes prejudice, addresses only the standard of review applicable on appeal. In formulating and clarifying the presumptive prejudice standard, the *Cronic* line of cases does not address the trial judge's role in assessing the underlying conduct that becomes the basis for a claim of ineffectiveness raised later on appeal.[144]

The absence of jurisprudence on the role of the trial court in addressing ineffectiveness that is not the result of a conflict may very well explain why the Court has not applied the conflict model to non-conflict ineffectiveness that is nevertheless brought to the attention of the trial judge. The awareness of the trial judge has simply not been considered a factor in the Court's non-conflict ineffective counsel jurisprudence. Not surprisingly, the issue of whether the effect on the integrity of the court resulting from such awareness should

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interest.'").

142. I use "egregious ineffectiveness" to describe the subset of ineffectiveness cases that affect the integrity of the court. *See supra* discussion in Part I.

143. United States v. Cronic, 466 U.S. 648, 662 (1984).

144. One major exception to this is when *Cronic* presumed prejudice is applied to cases where the "actual or constructive" denial of counsel is based on interference with defense counsel advocacy by the trial judge. In these cases, the conduct of the trial judge is the sole source of the substance of the appeal. *See supra* discussion in Part III.

influence the constitutional analysis has also not been addressed. As a result, the Court's jurisprudence in the conflict cases, where the role of the trial judge is a factor in the constitutional analysis, provides a better standard for judging claims of ineffectiveness that implicate the integrity of the court than the *Strickland* jurisprudence, in which the trial judge's awareness of ineffectiveness is irrelevant to the constitutional analysis.

B. A Duty to Inquire into Egregious Ineffective Assistance of Counsel Should Be Established

In the previous section, I showed why the jurisprudential model of ineffective assistance of counsel cases based on a conflict should apply to ineffective assistance of counsel cases that impact the integrity of the court.[145] I will now address the specific aspects of the conflict model and explain why the duty-to-inquire component of the conflict cases should be applied to cases of egregious ineffective assistance of counsel that impacts the integrity of the court.[146]

Presently, the Court's jurisprudence on non-conflict ineffective assistance of counsel cases concerns only the standards appellate courts should use in reviewing claims raised on appeal after a conviction has been obtained.[147] However, postponing an inquiry into ineffectiveness known at the time of trial is illogical and unresponsive to the hardship that faces defendants trying to show constitutional trial errors many years later on appeal. As Justice Souter has argued:

> While a defendant can fairly be saddled with the characteristically difficult burden of proving adverse effects of conflicted decisions after the fact when the judicial system was not to blame in tolerating the risk of conflict, the burden is indefensible when a judge was on notice of the risk but did nothing.[148]

A failure on the part of the trial judge to act early in addressing potential threats to a defendant's constitutional rights "raises the specter . . . that failures on the part of conflicted counsel will elude demonstration after the fact, simply because they so often consist of what did not happen."[149]

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145. A trial judge's duty to inquire into threats to a defendant's constitutional right is not limited to the conflict-of-interest context. The Court has also established a duty to hold a hearing, sua sponte, if there is reason to believe the defendant may not be competent to stand trial. Pate v. Robinson, 383 U.S. 375, 378, 385 (1966) ("The State concedes that the conviction of an accused person while he is legally incompetent violates due process, and that state procedures must be adequate to protect this right . . . The court's failure to make such inquiry thus deprived Robinson of his constitutional right to a fair trial.") (citations omitted).

146. For an explanation of what an inquiry would look like and the consequences of an inquiry, see *supra* note 27.

147. Strickland v. Washington, 466 U.S. 668 (1984).

148. Mickens v. Taylor, 535 U.S. 162, 203 (2002) (Souter, J., dissenting).

149. *Id.* Justice Souter also states that:

It should go without saying that the best time to deal with a known threat to the basic

In many cases, ineffectiveness will not be apparent at the time of trial. There are cases, however, where defense counsel "perform with such manifest incompetence that litigants' rights are prejudiced."[150] When that occurs, the adversary process has effectively ceased to function. The judge then faces the choice of "taking over from counsel or allowing the case to stumble toward a fortuitous result."[151] During these instances, the trial court cannot sit by and wait for an appeal to retrospectively remedy the harm. For "[i]nasmuch as the administration of justice is the judge's ultimate responsibility, he cannot be indifferent to events which diminish the quality of justice in his court."[152] Reversals resulting from incompetent defense attorneys "impair the orderliness, predictability, and fairness of the judicial process and undermine public confidence."[153]

Though the appellate process exists to remedy constitutional violations that occur at trial, the state should not conduct trials while aware that constitutional rights are being violated. When ineffectiveness is so egregious that the trial judge is put on notice of the threat to the defendant's constitutional rights, and the trial judge fails to inquire into the threat and instead proceeds with a trial fully knowing that the defendant's rights are not being adequately protected, the integrity of the trial and the judicial system as a whole are implicated.

> guarantee of fair trial is before the trial has proceeded to become unfair. It would be absurd, after all, to suggest that a judge should sit quiescent in the face of an apparent risk that a lawyer's conflict will render representation illusory and the formal trial a waste of time, emotion, and a good deal of public money.

Id. (citations omitted).

150. Schwarzer, *supra* note 38, at 637. As explained in Part I, *supra*, the subset of cases at issue in this article—those implicating "egregious ineffectiveness"—are characterized by ineffectiveness of which the judge is aware or should be aware. It is this awareness that causes the integrity of the court to be implicated. For further explanation, see *supra* note 27.

151. Schwarzer, *supra* note 38, at 637.

152. *Id.* at 638; *see* Ake v. Oklahoma, 470 U.S. 68, 76 (1985); *see also* Argersinger v. Hamlin, 407 U.S. 25, 29–33 (1972); McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."); Johnson v. Zerbst, 304 U.S. 458, 467–68 (1938); West v. Louisiana, 478 F.2d 1026, 1032–34 (5th Cir. 1973) (en banc), *vacated in part and remanded*, 510 F.2d 363 (1975); Fitzgerald v. Estelle, 505 F.2d 1334, 1337 (5th Cir. 1974) ("[I]t must be shown that some responsible state official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused . . . Furthermore, if the incompetency of a retained attorney's representation is so apparent that a reasonably attentive official of the state should have been aware of and could have corrected it then again the state action requirement is satisfied.").

153. Schwarzer, *supra* note 38, at 638 (noting that "[t]he propriety of sua sponte intervention is unquestioned when counsel's conduct disrupts the proceeding. Its propriety should be equally clear when counsel is manifestly incompetent. For the effect of incompetence on the administration of justice, even if less dramatic, is likely to be just as destructive.").

C. *The Nature of Defense Counsel and Trial Judge's Conduct in Integrity of the Court Cases Warrants a Presumption of Prejudice*

In the previous section I explained why the duty-to-inquire component of the conflict-of-interest model should be applied to cases of egregious ineffectiveness that implicate the integrity of the court. I will now explain why the burden-of-proof component of conflict cases should also apply to ineffectiveness cases that implicate the integrity of the court. First, I will address why the current method for assessing non-conflict ineffectiveness is inappropriate for ineffectiveness cases that impact the integrity of the court. Second, I will state why the *Holloway* presumed prejudice model, as opposed to the *Sullivan* adverse effect model, should be adopted.

1. Strickland *Is Not the Appropriate Standard*

Strickland's two-pronged inquiry for establishing a constitutional violation is an inadequate standard for egregious ineffectiveness claims.[154] The analysis in *Strickland* was based on certain presumptions that do not apply when the trial judge fails in her duty to inquire into ineffectiveness. Review under *Strickland*'s second prong, which requires a defendant to show that defense counsel's performance was deficient, is highly deferential. Courts will indulge a strong presumption that defense counsel's decisions were strategic.[155] Deferential review makes sense when a claim of ineffectiveness becomes an issue for the first time on appeal and when there is no preexisting reason to doubt the judgment of defense counsel.

However, in cases where the claim of ineffectiveness is based on a failure of the trial judge to conduct an inquiry into defense counsel conduct so egregious that the trial judge either knew, or reasonably should have known, of the potential constitutional violation, the claim of ineffectiveness is not being made

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154. Additionally, there is concern that *Strickland* is unworkable and does not adequately protect the integrity of the court and ensure fair trials even for those cases which fall squarely within its purview. Specifically, complaints center on the idea that *Strickland* only works to separate the innocent from the guilty and does not adequately address whether the trial was fair. *See, e.g.*, Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. RICH. L. REV. 1327, 1362 (1995); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 67 (1986) (arguing that *Strickland* and *Cronic* appear to be "designed to help reviewing courts deal efficiently with these claims rather than seriously address the potential injustice problems caused by incompetent trial counsel").

155. *See, e.g.*, Wilson v. Greene, 155 F.3d 396, 403 (4th Cir. 1998) (noting that regarding defendant's burden on deficient performance prong, "[o]ur review of counsel's performance in this regard is highly deferential"); *see also* Michel v. Louisiana, 350 U.S. 91, 100–01 (1955); *cf.* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

an issue for the first time on appeal. Ineffectiveness must have been an issue at trial for there to be a duty to inquire. Additionally, because ineffectiveness was made an issue at trial, there is a preexisting reason to doubt the judgment of defense counsel. Accordingly, when the issue being litigated is whether the trial judge unreasonably failed to inquire into egregious representation, there is no reason for a presumption that defense counsel's actions were strategic.

Additionally, encouraging trial courts to conduct contemporaneous inquiries into ineffectiveness will mitigate the concerns about appellate review that led to the formation of the *Strickland* doctrine.[156] One of the reasons the *Strickland* Court held that appellate scrutiny of counsel's performance must be highly deferential is that "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable."[157] As a result, on appeal:

> [A] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .[158]

If trial courts make ineffectiveness inquiries, concerns about the "distorting effects of hindsight," "reconstruct[ing] the circumstances of counsel's challenged conduct," and evaluating "conduct from counsel's perspective at the time," are moot.[159] Therefore, in addition to removing any justification for a presumption of defense counsel competence in failure-to-inquire cases, establishing a presumption of prejudice for failure to inquire will address the concerns of delayed appellate review of ineffectiveness at trial by encouraging trial courts to fulfill their mandate to conduct such inquiries.

Deferential review under *Strickland* also makes sense as a way of respecting the integrity of the trial court judgment and the trial judge's handling of the trial.

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156. In addition, the appeals process has been criticized as unresponsive to potentially meritorious claims of constitutional violations during trials. *See* TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS IN TEXAS DEATH PENALTY APPEALS x (2002), *at* http://www.texasdefender.org/publications.htm (concluding that "[d]eath row inmates today face a one-in-three chance of being executed without having the case properly investigated by a competent attorney and without having any claims of innocence or unfairness presented or heard"). Also, the appeals process is not sufficient because innocence is not an appropriate ground for overturning a conviction on appeal. *See* Herrera v. Collins, 506 U.S. 390 (1993).

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

158. *Id.*

159. *Id.*

However, when the appeals court is litigating a claim that the trial judge unreasonably failed to inquire, there is no basis for deferring to the trial judge's handling of the case and, accordingly, the integrity of the trial court judgment. When the issue being litigated is whether counsel was so blatantly deficient as to trigger the trial court's duty to inquire, a demonstration of prejudice is not necessary to show that there was a breakdown in the adversary process that "renders the result unreliable."[160]

Additionally, according to the Court's analysis in *Strickland*, prejudice is presumed under the circumstances detailed in *Cronic*, because in those circumstances prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and . . . easy for the government to prevent."[161] Under the standard I articulate for non-conflict cases, there is only a duty to inquire in cases of egregious ineffectiveness, which is premised on the actual or constructive knowledge of the trial judge of the ineffectiveness.[162] This standard is therefore based on situations in which the Sixth Amendment threat is already identified and in which the likelihood of prejudice is very high.[163]

For the above reasons, *Strickland* should not apply to egregious ineffectiveness when the trial judge fails to inquire. However, when the trial judge does inquire into egregious ineffectiveness and the ineffectiveness is later raised on appeal, *Strickland* will apply at that point, and a defendant will have to show prejudice in order to prevail on the claim. Thus, the recognition of a different standard for egregious ineffectiveness does not replace the *Strickland* standard. It merely requires trial judges to address egregious ineffectiveness occurring before them. Should a trial judge fail to do so—as when a trial judge fails to inquire into a conflict—then, prejudice will be presumed.[164] However, if the trial judge does conduct an inquiry when defense counsel meets the standard for egregious ineffectiveness, then prejudice is not presumed, and *Strickland* would apply, just as in cases of ineffectiveness that do not meet the egregiousness standard.

2. *The* Holloway *Standard of Presumed Prejudice, Rather than the* Sullivan *Adverse Effect Standard, Is the Appropriate Standard*

The previous section showed that the *Strickland* standard for judging claims of ineffective assistance of counsel should not be applied to claims of

160. *Id.* at 687.

161. *Strickland*, 466 U.S. at 692 (citations omitted); *cf.* United States v. Cronic, 466 U.S. 648, 658 (1984) ("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.").

162. *See* discussion in part I, *supra*.

163. *See id.*

164. *See id.*

ineffectiveness based on a trial judge's failure to inquire into egregiously defective defense counsel performance. I will now turn to the conflict cases to demonstrate that the *Holloway* presumed prejudice standard, as opposed to the *Sullivan* adverse effect standard, should be adopted for ineffectiveness cases that implicate the integrity of the court.

The burden of proof in conflict-of-interest cases is based on whether defense counsel objected to the conflict: if counsel objected, prejudice is presumed, but if counsel failed to object, the defendant must show adverse effect. For egregious ineffectiveness, the lack of an objection should not heighten the burden of proof for a defendant. As a result, prejudice should be presumed in cases of egregious ineffectiveness in which the trial judge failed to inquire.

In *Holloway*, the Court held that when the trial judge is informed of a potential conflict through an objection, a failure to inquire will result in presumed prejudice.[165] In *Sullivan*, the Court held that when the trial court is reasonably unaware of any potential conflict, prejudice will still be presumed but the defendant must show "actual ineffectiveness" by demonstrating that the conflict had an "adverse effect" on counsel's representation.[166] In *Mickens*, the Court held that when the trial court knows, or reasonably should know, of a potential conflict from something other than an objection by defense counsel, and fails to inquire, the burden is the same as in *Sullivan*, when there is no reasonable basis for the trial judge to be aware of a threat to the defendant's Sixth Amendment rights.[167]

The justification for the difference between the proof model in *Holloway* (where the trial judge is made aware of the conflict through an objection) and that in *Mickens* (where the trial judge is made aware of the conflict through other "special circumstances") is in large part the ability of the defense attorney to protect her client's interests and bring any possible conflicts to the attention of the court.[168] However, when a lawyer is ineffective, not because of a conflict-of-interest but because of her own failings, it is unreasonable to base a defendant's burden of proof for proving ineffectiveness on whether her ineffective lawyer objected to her own ineffectiveness. In such circumstances, the court should not rely on the good faith and good judgment of defense counsel regarding the possibility of a threat to the defendant's Sixth Amendment rights.

Furthermore, objection requirements are largely based on the need to ensure that trial courts are not reversed for errors of which they were not aware, or reasonably could not have been aware. However, the definition of egregious ineffectiveness is premised on the awareness of the trial court. The reasons for an objection rule—to put the court on notice and give the trial court an

165. Holloway v. Arkansas, 435 U.S. 475 (1978).
166. Cuyler v. Sullivan, 446 U.S. 335, 343 (1980).
167. Mickens v. Taylor, 535 U.S. 162 (2002).
168. *Supra* Part V.C.

opportunity to remedy—are therefore not applicable.[169] As a result, in egregious ineffectiveness cases, it is imprudent and illogical to base the defendant's burden of proof on whether defense counsel objected.

The implausibility of ineffective lawyers objecting to their own failings, the high likelihood of prejudice in circumstances where defense counsel's behavior is so flagrant as to put the court on notice of potential ineffectiveness, and the threat to the integrity of the court from such representation are the reasons why prejudice should be presumed when the trial court fails to inquire into egregious ineffectiveness.

VII.
CONCLUSION

Concern over the integrity of the court has proven to be a powerful force requiring the recognition of otherwise non-cognizable claims, the application of different standards of review, and heightened duty on the part of the trial judge. Integrity-of-the-court jurisprudence has been applied to the Sixth Amendment, including, specifically, claims based on the right to counsel. Yet, even though trial judges are responsible for ensuring the integrity of the proceedings before them in other instances, in the right-to-counsel context, concern for the integrity of the proceeding is addressed by courts on appeal only, not trial courts viewing the errors at the time.

The Supreme Court's recognition of the importance of protecting the integrity of the court mandates that trial judges not sit quietly as the constitutional rights of the defendants appearing before them are flagrantly unprotected. For cases involving such egregious ineffectiveness—those in which the trial judge knows or reasonably should know of the threat to the

169. Justice Souter, dissenting in *Mickens*, made this point:

> With so much at stake, why should it matter how a judge learns whatever it is that would point out the risk to anyone paying attention? Of course an objection from a conscientious lawyer suffices to put a court on notice, as it did in *Holloway*; and probably in the run of multiple-representation cases nothing short of objection will raise the specter of trouble. But sometimes a wide-awake judge will not need any formal objection to see a risk of conflict, as the federal habeas court's finding in this very case shows. Why, then, pretend contrary to fact that a judge can never perceive a risk unless a lawyer points it out? Why excuse a judge's breach of judicial duty just because a lawyer has fallen down in his own ethics or is short on competence? Transforming the factually sufficient trigger of a formal objection into a legal necessity for responding to any breach of judicial duty is irrational.

Mickens, 535 U.S. at 203–04 (Souter, J., dissenting); *see also* ABA Project on Standards for Criminal Justice, Function of the Trial Judge § 3.4(b) (App. Draft 1972). Several Courts of Appeals already invoke their supervisory power to require similar inquiries. *See, e.g.*, United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978); United States v. Waldman, 579 F.2d 649, 651–52 (1st Cir. 1978); United States v. Lawriw, 568 F.2d 98, 104 (8th Cir. 1977); United States v. DeBerry, 487 F.2d 448, 452–54 (2d Cir. 1973); *cf.* Ford v. United States, 379 F.2d 123, 125–26 (D.C. Cir. 1967); *see generally* Cuyler v. Sullivan, 446 U.S. 335, 346 n.10 (1980); Schwarzer, *supra* note 38, at 653–54.

defendant's Sixth Amendment right to counsel—trial judges must address the situation. Protecting the right to counsel should not be viewed as a task only for the appellate court. Trial judges are, and should be, responsible for protecting an accused's right to counsel.[170]

However, as shown in Part II, trial judges often abdicate that responsibility. Mr. Fisher's case is an example of what happens when trial courts allow egregious ineffectiveness by defense counsel to go unnoticed. The solution that our judicial system employed in Mr. Fisher's case, and many others like it, is to address allegations of ineffectiveness many years later. The standard for addressing such claims, *Strickland*, is not as protective as it should be. In formulating the *Strickland* standard, the Court struck a balance between remedying constitutional violations and the difficulty in setting aside convictions years later. The *Strickland* standard thus incorporates both the need to address violations of defendants' constitutional rights and the need to "eliminate the distorting effects of hindsight"[171] and to respect concerns of finality[172] when claims of constitutional violations are raised years after a conviction.

The balance struck by *Strickland* is appropriate for appellate review of claims of ineffectiveness. But it leaves a vacancy in cases where the ineffectiveness is egregious and thus evident at the time of trial. In those limited instances, more is required to maintain the integrity of the court. A model for filling this vacancy is provided by the conflict-of-interest cases. Just as with conflicts-of-interest that are known or should be known, trial judges should inquire into egregious ineffectiveness: ineffectiveness that is known or should be known. If the trial judge inquires and a claim of ineffectiveness is later raised on appeal, the *Strickland* standard applies as usual. If the trial judge fails to inquire and ineffectiveness is later raised on appeal, prejudice is presumed. It may be that an inquiry by the trial judge does not remedy defense counsel's inadequacy. However, the inquiry itself and the understanding that the trial judge has a duty to protect the right of the defendant will go far in addressing the threat to the integrity of the court from cases like Mr. Fisher's.

170. *Holloway*, 435 U.S. 475, 484 (citing Glasser v. United States, 315 U.S. 60, 71 (1942)).

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

172. *See id.*; United States v. Cronic, 466 U.S. 648, 655 (1984).