

DISCUSSION

SUSAN HERMAN, MODERATOR*

SUSAN HERMAN: In defining and articulating standards for effective assistance of counsel, one could take any number of different approaches. One perspective might focus on how to formulate systemic standards for defense counsel, and how to communicate to the criminal defense bar what it needs to do to become effective. An example of this is the ABA standards.

A second view might concentrate on how to measure whether counsel in a particular case is providing or has provided effective assistance of counsel. If standards exist, accurate measurement may be a matter of monitoring compliance with those standards. If standards do not exist, there is the more general problem of measuring effectiveness in individual cases. Both views present the same question for our consideration today: under what circumstances should a criminal conviction be reversed on the ground that counsel was so ineffective as to violate the sixth amendment?

Before opening up the floor to a general discussion, I'd like to allow Professor Goodpaster about two minutes to reply.

GARY GOODPASTER: Thank you. My aim is not to nitpick the Supreme Court's decision in *Strickland v. Washington*.¹ I don't believe the problem of ineffective assistance of counsel is going to be solved by the Supreme Court. It's generally a systemic problem. What we need is law which helps us with a systemic problem. I don't think the *Strickland* standard helps at all in that regard. For example, the *Strickland* Court requires that in order to establish ineffective assistance of counsel, one of the things a defendant must show is that counsel's representation falls below an objective standard of reasonableness. This fails to provide a rationale for a funding request. Compare California's standard for effective assistance of counsel which entitles defendants to "reasonably competent attorneys acting as diligent advocates."² That's not much of a change in phraseology, but it provides a much better basis for explaining to a legislature or county government what defender offices need. There cannot be diligent advocates without the resources to assist them.

Secondly, I would like to respond to Professor Grano's support of the prejudice standard announced in *Strickland*.³ A court will always utilize some

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1. 466 U.S. 668 (1984).

2. *People v. Pope*, 23 Cal. 3d 412, 425, 590 P.2d 859, 866, 152 Cal. Rptr. 732, 739 (1979)(en banc).

3. *Effective Assistance of Counsel for the Indigent Criminal Defendant: Has the Promise*

prejudice standard. But, as a practical matter, it is virtually impossible for any convicted defendant to meet the *Strickland* standard. Let me explain why.

The issue of ineffective assistance of counsel must be raised on appeal; however, the record on appeal will usually not indicate the way in which counsel was ineffective. Without this information, the appellate court will reject the appeal, thereby leaving the convicted defendant to bring a writ of habeas corpus. The defendant will probably not receive appointed counsel to assist her. Even if she gets appointed counsel, the defendant must establish the standard for reasonably competent counsel. To do this, she must call reasonably competent counsel as experts. Who will pay them? Will they appear voluntarily? Who will finance this hearing? The simple answer is that, in most cases, it will not be financed. The *Knighton* case, which I discuss in my paper,⁴ was financed by Julian Murray, the criminal defense attorney. He paid between ten and twenty thousand dollars of his own money to bring that case. How many defendants are going to get volunteers like him? In many cases, the defendant will proceed pro se or have an incompetent attorney and be unable to meet the *Strickland* prejudice standard. If the defendant cannot prove prejudice, the appellate court will simply hold that her charges are mere allegations, insufficient to reverse a conviction.

Professor Grano says that I have misapprehended the application of *Strickland* to cases involving "stunningly incompetent" attorneys. He claims that the test applies only to those cases in which a lawyer has made *alleged* mistakes.⁵ Consider *Crisp v. Duckworth*.⁶ *Crisp* was a case in which a lawyer was defending an individual charged with murder. The issue was whether the defendant had intent to kill. The lawyer did not make an opening statement. He said it was his practice never to make one.⁷ He did not interview any of the prosecution witnesses or any defense witnesses, apparently as part of his trial strategy.⁸ What happened? The Court of Appeals for the Seventh Circuit held that the lawyer was not incompetent under *Strickland*.

AUDIENCE COMMENT: I am Rick McGahey from the New York University Urban Research Center. In most cases, it seems obvious that some counsel is better than no counsel. However, the working assumption today seems to be that more resources will automatically result in more effective assistance of counsel. Lawyers, like most people working within a system, often fail to consider alternatives that might draw on standards and program models from outside of that system. If we want an effective assistance of counsel standard

Been Fulfilled?, 14 N.Y.U. REV. L. & SOC. CHANGE 98-99 (1986) [hereinafter cited as *Effective Assistance*] (Remarks of Joseph Grano).

4. Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 76-78 (1986).

5. *Effective Assistance*, *supra* note 3, at 99 n.12 (Remarks of Joseph Grano).

6. 743 F.2d 580 (7th Cir. 1984).

7. *Id.* at 587.

8. *Id.* at 583-85.

which focuses on the practical results of counsel's actions, shouldn't we be thinking about ways in which to define standards of effective assistance of counsel which are not limited to a legal framework?

VIVIAN BERGER: My comment is in the form of a question back to you. Is it wrong to assume that public defenders could use more money, if they could intelligently and empirically justify the use of that money for things like training programs?

AUDIENCE COMMENT: I was raising an empirical question, but I'm also raising a normative question. We have to realize that society has finite resources upon which many claims are made. The criminal justice system is not alone in its need for additional resources. There are many other legitimate claims, like welfare claims, for the very same resources that some people would have us pour into the criminal justice system, and the provision of more effective assistance of counsel may require better management of existing resources, not expansion.

BENJAMIN LERNER: We aren't talking about borderline deficiencies in criminal defense and indigent defense spending. We're talking about gross inadequacies—systems throughout the country where effective assistance of counsel is not possible with the resources committed to public defenders' offices. The issue posed is truly a value judgment. I think that the values represented in the Bill of Rights are receiving short shrift in this society.

GARY GOODPASTER: As a matter of equal protection, an attorney should have enough time and money to investigate cases. She should be able to interview witnesses in every case and should not have to carry a caseload which is humanly impossible to handle.

AUDIENCE COMMENT: I am Jabar Abdul Karim from the Conference on Juvenile and Criminal Justice. Mr. Grano, are you saying that because of limited resources no case should be appealed all the way through state and federal courts to the Supreme Court?

JOSEPH GRANO: No. What I'm concerned with is a resource problem. We have created a very cumbersome, protracted system that has many steps in it; we should reconsider. If I were reshaping the world of criminal justice, I would eliminate some of the opportunities to relitigate issues. I question whether providing the opportunity to relitigate the same issue is a good use of resources or whether by repeated litigation, the meritorious cases get lost in the shuffle. A system which allows challenges to be made so easily, with a minimal burden of proof, creates cynicism. However, I am not suggesting that

it's inappropriate for a lawyer, under the current system, to use repeated appeals and post-conviction attacks.

GARY GOODPASTER: If effective assistance of counsel standards are going to change, they will probably change first in capital cases because the stakes are so high. It would not be burdensome to require lawyers, at a minimum, to conduct thorough investigations, particularly with regard to the sentencing phase. Some case law exists by which a court could establish such minimum standards.⁹

VIVIAN BERGER: In determining how society should expend its resources, we must remember that the criminal justice system is perhaps the one system that can kill people or do something very close to it—lock them up for many, many years. It is within this framework that we must view the question of resource allocation.

9. *See, e.g.*, *Blake v. Kemp*, 758 F.2d 523, 533-35 (11th Cir. 1985); *Tyler v. Kemp*, 755 F.2d 741, 744-45 (11th Cir. 1985); *Dillon v. Duckworth*, 751 F.2d 895, 900-01 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2344 (1985); *King v. Strickland*, 748 F.2d 1462, 1464-65 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 2020 (1985).