NORTH CAROLINA LAW REVIEW

Volume 72 | Number 5 Article 10

6-1-1994

Lockhart v. Fretwell: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel

Jennifer N. Foster

Lockhart v. Fretwell: Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel

It is the nightmare of every criminal defendant facing the death penalty: His attorney makes a mistake during the penalty phase of the trial, and as a result, the jury returns a death sentence rather than life imprisonment. To guard against such injustice, the United States Supreme Court has recognized that the Sixth Amendment right to counsel protects against "ineffective assistance of counsel."[1] In *Strickland v. Washington*,[2] decided in 1984, the Court had recognized that defendants are entitled to relief if they can establish deficient performance and prejudice.[3] During its October 1992 term, in *Lockhart v. Fretwell*,[4] the Supreme Court re-examined *Strickland*'s prejudice component. The Court clarified that prejudice exists when counsel's errors render the proceeding fundamentally unfair or make the result unreliable,[5] but only when counsel's errors deprive the defendant of a substantive or procedural right.[6] The Court also addressed whether a subsequent change in the law can affect the prejudice determination.[7] Answering in the affirmative, the Court held that prejudice may be assessed from the vantage point of hindsight.[8]

At issue was the defendant Fretwell's right to object to the "double-counting" of aggravating factors under the Eighth Circuit's decision in *Collins v. Lockhart*.[9] Defense counsel failed to make the *Collins* objection, and the jury returned a sentence of death, rather than life imprisonment.[10] Fretwell asserted that counsel's failure to object amounted to ineffective assistance of counsel, even though the Eighth Circuit overruled *Collins* after Fretwell's trial.[11] The Court held that Fretwell no longer had a right to prevent the "double-counting" of aggravating circumstances and therefore suffered no prejudice from counsel's failure to object.[12] In her concurring opinion, Justice O'Connor explained that when defendants seek to benefit

1. Nix v. Whiteside, 475 U.S. 157, 164-65 (1986); Strickland v. Washington, 466 U.S. 668, 686 (1984); United States v. Cronic, 466 U.S. 648, 654 (1984); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).
2. 466 U.S. 668 (1984).
3. *Id.* at 687.
4. 113 S. Ct. 838 (1993).
5. *Id.* at 840.
6. *Id.* at 843.
7. *Id.*
8. *Id.* at 844.
9. 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985), *overruled by* Perry v. Lockhart, 871 F.2d 1384 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989).
10. *Fretwell*, 113 S. Ct. at 841.
11. *Id.* at 842; *Perry*, 871 F.2d at 1391.
12. *Fretwell*, 113 S. Ct. at 844.

from an objection that no longer has merit under present law, they claim the "luck of a lawless decisionmaker," which *Strickland* prohibits.[13] Conversely, Justice Stevens's dissent argued that the subsequent fairness of a defendant's conviction or sentence is irrelevant; Justice Stevens asserted that *Strickland* prohibits the use of hindsight in the prejudice inquiry.[14]

The *Fretwell* Court also held that "new rules" of criminal procedure restricting the rights of habeas petitioners may be applied retroactively.[15] The Court found that such application does not violate the nonretroactivity rule of *Teague v. Lane*,[16] which prohibits defendants from claiming the benefit of a "new rule" of criminal procedure announced after their convictions or sentences became final.[17] The dissent, on the other hand, charged that allowing states to benefit from a "new rule" that erodes the rights of defendants, while not permitting the defendants to benefit from the new rules, violates fundamental notions of fairness and equality.[18]

This Note explores the reasoning of the majority, concurring, and dissenting opinions in *Fretwell*.[19] It outlines the history of the Sixth Amendment right to effective assistance[20] and specifically traces the development of the prejudice requirement.[21] The Note then discusses the *Strickland v. Washington* standard[22] and examines the cases that have developed *Strickland*'s prejudice component.[23] Next, the Note analyzes *Fretwell*'s holding that to establish prejudice, counsel's actions must have violated the defendant's rights.[24] The Note argues that this requirement represents the same concern as *Strickland*'s exclusion of "lawless decisionmakers."[25] The Note then evaluates the Court's use of hindsight to evaluate prejudice, arguing that this practice represents a departure from *Strickland*.[26] The Note concludes that the use of hindsight undermines consistency in the evaluation of

13. *Id.* at 844 (O'Connor, J., concurring).

14. *Id.* at 846-49 (Stevens, J., dissenting).

15. *Id.* at 844.

16. 489 U.S. 288 (1989).

17. *Id.* at 310.

18. *Fretwell*, 113 S. Ct. at 852 (Stevens, J., dissenting).

19. *See infra* notes 58-81 and accompanying text. This Note primarily examines *Fretwell*'s holding on the prejudice component in claims of ineffective assistance of counsel; a thorough analysis of the Court's retroactivity holding is beyond the scope of this Note. See *infra* notes 68-72 and accompanying text for discussion of the Court's retroactivity holding, and see *infra* notes 182-91 and accompanying text for the history of this decision.

20. *See infra* notes 101-13 and accompanying text.

21. *See infra* notes 114-38 and accompanying text.

22. *See infra* notes 139-56 and accompanying text.

23. *See infra* notes 157-81 and accompanying text.

24. *See infra* notes 182-99 and accompanying text.

25. *See infra* notes 199-226 and accompanying text.

26. *See infra* notes 227-46 and accompanying text.

prejudicial error.[27] Finally, the Note examines how lower federal courts have applied *Fretwell* thus far.[28]

Sherman Sullins was shot and killed in his home during the course of a robbery.[29] Bobby Ray Fretwell confessed to the crime upon arrest[30] and admitted his guilt throughout his trial for felony robbery and murder.[31] In August of 1985, an Arkansas jury found Fretwell guilty of capital murder.[32] At the sentencing phase,[33] the prosecution relied on the evidence it presented at trial and the court submitted two aggravating factors: first, that the murder was committed for pecuniary gain, and second, that the murder was committed to facilitate the defendant's escape.[34]

Seven months before Fretwell's sentencing hearing, the United States Court of Appeals for the Eighth Circuit decided *Collins v. Lockhart*.[35] In *Collins*, the court held that when the underlying capital crime is robbery and felony murder, pecuniary gain—an element of the crime—may not serve as an additional aggravating factor.[36] Even though *Collins* was directly on point in Fretwell's case, defense counsel apparently overlooked the law and failed to object to the double submission of pecuniary gain as an aggravating factor.[37]

Having found the defendant guilty of robbery/murder, and absent a *Collins* objection, the jury determined that Fretwell had committed the crime for pecuniary gain.[38] However, it rejected the argument that Fretwell

---

27. *See infra* note 247 and accompanying text.

28. *See infra* notes 247-74 and accompanying text.

29. Fretwell v. Lockhart, 739 F. Supp. 1334, 1335 (E.D. Ark. 1990), *aff'd*, 946 F.2d 571 (8th Cir. 1991), *rev'd*, 113 S. Ct. 838 (1993).

30. *Id.* Fretwell confessed twice, once to authorities in Wyoming where he was apprehended, and again to officials in Arkansas. *Id.*

31. *Id.* The trial court refused to accept a guilty plea based on the prosecutor's objection. *Id.* Fretwell's trial counsel then decided that the best defense strategy would be to concede Fretwell's culpability and appeal to the mercy of the jury. *Id.*

32. *Id.*

33. Arkansas has a bifurcated capital sentencing scheme in which the jury weighs aggravating circumstances against mitigating circumstances during a sentencing hearing. If the jury does not find any aggravating circumstances, it must impose a sentence of life without parole. ARK. CODE ANN. §§ 5-4-602 to -604 (Michie 1987).

34. 739 F. Supp. at 1335; *see also* ARK. CODE ANN. § 5-4-604 (Michie 1987) (enumerating the aggravating factors).

35. 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013 (1985).

36. *Id.* at 263. *Collins* held that the practice of resubmitting an element of the crime as an aggravating circumstance violated the Eighth and Fourteenth Amendments because the procedure did not sufficiently narrow the class of defendants eligible for the death penalty. *Id.* at 263-64. According to the common law, pecuniary gain is an element of the offense of robbery felony murder in Arkansas. *See, e.g.*, Miller v. State, 605 S.W.2d 430, 440 (Ark. 1980), *cert. denied*, 450 U.S. 1035 (1981). For this reason, the *Collins* Court determined that it may not also serve as an aggravating factor. *Collins*, 754 F.2d at 264.

37. *Fretwell*, 739 F. Supp. at 1337.

38. *Id.* at 1335.

committed the murder to escape.[39] Having found no mitigating factors in the defendant's favor and basing its decision solely on the pecuniary gain factor,[40] the jury determined that Fretwell should receive the death penalty.[41]

The Arkansas Supreme Court upheld Fretwell's conviction and death sentence[42] and later denied state post-conviction relief.[43] Fretwell then filed a habeas corpus petition in the United States District Court for the Eastern District of Arkansas claiming, among other things,[44] that defense counsel's failure to make the *Collins* objection constituted ineffective assistance of counsel.[45]

In 1989, four years after Fretwell's sentencing hearing, the Eighth Circuit determined that the United States Supreme Court had overruled *Collins*[46] in *Lowenfield v. Phelps*,[47] which declared that the practice of "double-counting" aggravating circumstances does not violate the Eighth Amendment.[48] The Arkansas Supreme Court did not address the *Collins* question until 1988, when it determined that *Lowenfield* validated the "double-counting" of aggravating circumstances.[49]

Notwithstanding *Collins*, the district court found that trial counsel's ignorance of *Collins* was a "serious and significant error[ ]" constituting deficient performance.[50] Addressing *Strickland*'s second prong, the court stated that "[t]he prejudice to petitioner from counsel's error is obvious" because, had counsel objected, the trial court would have most likely fol-

---

39. *Id.* at 1337.

40. *Id.* The defense submitted one mitigating factor to the jury—that Fretwell had a difficult and disadvantaged childhood. *Id.* at 1335.

41. *Id.*

42. Fretwell v. State, 708 S.W.2d 630, 631 (Ark. 1986). The Arkansas Supreme Court did not consider whether Fretwell was ineligible for the death penalty under *Collins* because counsel had not objected at trial. *Id.* at 634.

43. Fretwell v. State, 728 S.W.2d 180, 183 (Ark. 1987). The court noted that the validity of "double-counting" had never been litigated in Arkansas state courts; as a result, the court determined that counsel was not ineffective for failing to object because there is no duty to raise novel issues. *Id.* at 181.

44. Fretwell also contended his defense counsel's strategy to admit culpability, his submission of an erroneous jury instruction, and his failure to call mitigation witnesses amounted to ineffective assistance. *Id.* The Arkansas Supreme Court rejected these claims. *Id.* at 181-83.

45. Fretwell v. Lockhart, 739 F. Supp. 1334 (E.D. Ark. 1990), *aff'd*, 946 F.2d 571 (8th Cir. 1991), *rev'd*, 113 S. Ct. 838 (1993). The district court applied the test described in Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing of deficient representation and prejudice. *Fretwell*, 739 F. Supp. at 1336-37.

46. Perry v. Lockhart, 871 F.2d 1384, 1393 (8th Cir.), *cert. denied*, 493 U.S. 959 (1989).

47. 484 U.S. 231 (1988).

48. *Id.* at 246.

49. O'Rourke v. State, 746 S.W.2d 52, 55-56 (Ark. 1988).

50. *Fretwell*, 739 F. Supp. at 1337. The court held that Fretwell's attorney provided deficient representation because he violated the duty to be aware of all relevant capital sentencing law. *Id.*

lowed *Collins* and not submitted pecuniary gain as an aggravating circumstance.[51] Given that the jury must find at least one aggravating circumstance to impose the death penalty,[52] and that the only aggravating circumstance found by the jury was that the crime was committed for pecuniary gain, the court found that if Fretwell's counsel had made the proper *Collins* objection, "the jury would have had no option but to sentence petitioner to life imprisonment without parole."[53] Fretwell established prejudicial error by demonstrating a reasonable probability that, had counsel not erred, the result of the proceeding would have been different.[54] The State of Arkansas appealed to the United States Court of Appeals for the Eighth Circuit, which affirmed.[55]

The Supreme Court granted certiorari[56] and reversed.[57] The Court addressed whether Fretwell demonstrated prejudice under the standard announced in *Strickland v. Washington*.[58] Traditionally, courts interpreted *Strickland*'s prejudice component as being met once a defendant demonstrated a reasonable probability that, but for counsel's errors, the proceeding's result would have been different.[59] However, according to the *Fretwell* Court, outcome-determination does not automatically establish

---

51. *Id.* The court noted that it was

> confident that the trial court would have followed the ruling in *Collins* had trial counsel made an appropriate motion. Although *Collins* has since been overruled, it was the law in the Eighth Circuit at the time of petitioner's trial and this Court has no reason to believe that the trial court would have chosen to disregard it.

Id.

In Snell v. Lockhart, 791 F. Supp. 1367 (E.D. Ark. 1992), the Court addressed the exact same claim that *Fretwell* presented. Snell's attorney failed to object under *Collins* to the submission of pecuniary gain as an aggravating circumstance. *Id.* at 1380. As in *Fretwell*, the district court found that counsel's failure prejudiced the defendant, even though *Collins* had been subsequently overruled. *Id.* at 1387-88.

52. *See* ARK. CODE ANN. § 5-4-603 (Michie 1987).

53. *Fretwell*, 739 F. Supp. at 1337.

54. *Id.* The district court granted Fretwell relief based on counsel's failure to object and did not address the remaining claims of ineffectiveness. *Id.* at 1337-38. The court vacated Fretwell's death sentence and granted the State of Arkansas the right to conduct another sentencing hearing within 90 days. *Id.* at 1338.

55. Fretwell v. Lockhart, 946 F.2d 571 (8th Cir. 1991), *rev'd*, 113 S. Ct. 838 (1993). The parties conceded that counsel's performance was deficient, so the court of appeals only addressed whether the defendant suffered prejudice. *Id.* at 574. The court of appeals affirmed by a divided vote, with the majority adhering to an outcome-determinative test of prejudice. *Id.* at 578. The dissenting judge asserted that no prejudice existed because of the lack of fundamental unfairness. *Id.* at 578-79 (Luken, J., dissenting). Granting relief, the court of appeals ordered the district court to reduce Fretwell's sentence unconditionally to life without parole to prevent further prejudice. *Id.* at 578.

56. Lockhart v. Fretwell, 112 S. Ct. 1935 (1992).

57. Lockhart v. Fretwell, 113 S. Ct. 838 (1993).

58. *Id.* at 840.

59. *See infra* note 181 and accompanying text.

prejudicial error.[60] Writing for the majority,[61] Chief Justice Rehnquist stated that the prejudice component of *Strickland* asks "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair."[62] The Court added that "[u]nreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him."[63]

The Court denied Fretwell relief, holding that his death sentence was neither unfair nor unreliable.[64] The Court implied that because *Collins* was subsequently overruled, Fretwell did not have a right to prevent the submission of pecuniary gain as an aggravating circumstance.[65] The Court reasoned that Fretwell did not have the right to the *Collins* objection; therefore, defense counsel's ignorance of the law did not contribute to an unreliable verdict establishing prejudice.[66] The Court further held that *Strickland* does not require that prejudice be assessed from the time of the trial.[67]

The Court also announced that its holding does not violate the *Teague v. Lane*[68] rule against applying new rules of criminal procedure retroactively in a way that favors the defendant.[69] The Court explained that the states' interests in comity and finality, rationales supporting *Teague*,[70] are not shared by criminal defendants.[71] A habeas defendant "has no interest in the finality of . . . judgment[s]" nor any reliance interests comparable to that of the states.[72] According to the Court, these differences warrant dif-

60. *Fretwell*, 113 S. Ct. at 842.

61. Justices White, Scalia, Kennedy, and Souter joined the majority opinion. *Id.* at 840. Justices O'Connor and Thomas filed separate concurrences. *Id.* at 845-46. For a discussion of Justice O'Connor's concurrence, see *infra* notes 218-24 and accompanying text.

62. *Fretwell*, 113 S. Ct. at 844. The Court asserted that "[o]ur opinion does nothing more than apply the case-by-case prejudice inquiry that has always been built into the *Strickland* test." *Id.* at 843 n.2.

63. *Id.* at 844. For an analysis of the requirement that counsel's errors must deprive the defendant of a right, see *infra* notes 214-17 and accompanying text.

64. *Fretwell*, 113 S. Ct. at 843.

65. *See infra* notes 227-29 and accompanying text.

66. The Court declared that the only thing Fretwell was deprived of was "'the chance to have the state court make an error in his favor.'" *Id.* at 843 (quoting Brief for United States as Amicus Curiae at 10, *Fretwell* (No. 91-1393)). Because the issue was not directly raised, the Court refused to consider whether *Collins* remained good law in spite of the Court's decision in Lowenfield v. Phelps, 484 U.S. 231, 246 (1988). *Fretwell*, 113 S. Ct. at 843 n.4.

67. *Fretwell*, 113 S. Ct. at 844. For an analysis of the Court's use of hindsight to evaluate prejudice, see *infra* notes 227-35 and accompanying text.

68. 489 U.S. 288 (1989).

69. *Fretwell*, 113 S. Ct. at 844.

70. For the history and reasoning of *Teague*, see *infra* notes 183-91 and accompanying text.

71. *Fretwell*, 113 S. Ct. at 844.

72. *Id.*

ferential treatment such that "the State will benefit from our *Teague* decision in some federal habeas cases, while the habeas petitioner will not."[73]

Justice O'Connor agreed that defense counsel's performance did not rise to the level of prejudicial error, but she objected to interpreting *Strickland* to reject outcome determination as the definitive standard of prejudice.[74] In Justice O'Connor's view, Fretwell did not suffer prejudice because courts should not recognize the effect of an objection that has become moot under current law in their prejudice inquiry.[75] She based this conclusion on the fact that *Strickland* denies a defendant "the luck of a lawless decisionmaker."[76]

Justice Stevens, in dissent, rejected the notion that the subsequent fairness or reliability of the result indicates the extent of prejudice suffered.[77] Instead of focusing on the result, he insisted that the prejudice inquiry must examine whether counsel's errors were serious enough to cause a breakdown in the adversarial process at trial.[78] Justice Stevens contended that, if the error is reasonably likely to have affected the outcome of the proceeding, the defendant has been deprived of a fair trial.[79] According to the dissent, a separate inquiry into the fairness and reliability of the result "from

---

73. *Id.* The dissent argued, however, that applying laws retroactively to curtail the rights of defendants, while not doing the same for the state, is inequitable and results in a windfall to the state. *Id.* at 852-53 (Stevens, J., dissenting). In contrast, the majority contended that this policy does not convey a windfall to the State and is a "perfectly logical limitation of *Teague*." *Id.* at 844.

74. *Id.* at 844 (O'Connor, J., concurring). She stated that "[t]he determinative question—whether there is 'a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different' . . . —remains unchanged." *Id.* (O'Connor, J., concurring) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). She added that "in the vast majority of cases," the holding of *Fretwell* will not affect the prejudice determination. *Id.* (O'Connor, J., concurring).

75. *Id.* at 845 (O'Connor, J., concurring). Justice O'Connor claimed that *Strickland* precludes consideration of the effect of an objection that is "wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission." *Id.* (O'Connor, J., concurring).

76. *Id.* (O'Connor, J., concurring). For a discussion of *Strickland*'s exclusion of "lawless decisionmakers," see *infra* notes 204-213 and accompanying text.

77. *Fretwell*, 113 S. Ct. at 846-49 (Stevens, J., dissenting). Justice Blackmun joined Justice Steven's dissent. *Id.* at 846 (Stevens, J., dissenting).

78. *Id.* at 847-48 (Stevens, J., dissenting).

79. *Id.* at 847 (Stevens, J., dissenting). The dissent argued that the *Strickland* standard is "well-established" and clearly delineates the errors that constitute inadequate representation. *Id.* at 848 (Stevens, J., dissenting). Thus, when a defendant shows outcome determination, "the adversary process has malfunctioned, and the resulting verdict is therefore, and without more, constitutionally unacceptable." *Id.* (Stevens, J., dissenting). The dissent also emphasized that Fretwell clearly met the traditional *Strickland* test, *id.* at 850-51 (Stevens, J., dissenting), and that under the circumstances of this case, the errors may have been so egregious as to warrant presuming prejudice. *Id.* at 851 (Stevens, J., dissenting).

the vantage point of hindsight"[80] is not only unnecessary, but actually redefines the standard of prejudice that *Strickland* announced.[81]

The right of a criminal defendant to the assistance of counsel is grounded in both the express guarantee of the Sixth Amendment and the Due Process Clauses of the Fifth or Fourteenth Amendments.[82] Originally, the right of counsel was intended only to grant a criminal defendant the right to obtain and to have counsel present.[83] It was not until 1932, in *Powell v. Alabama*,[84] that the Supreme Court first recognized that due process may require the appointment of counsel.[85] This initial due process right was limited to cases where the defendant could not provide for his own defense because of "ignorance, feeble-mindedness, illiteracy, or the like."[86]

Ten years later, in *Betts v. Brady*,[87] the Court rejected the argument that due process required counsel to be provided in every case.[88] Instead, it held that counsel will only be appointed when the circumstances indicate that a deprivation would "constitute a denial of fundamental fairness, shocking to the universal sense of justice."[89] Thus, according to *Betts*, defendants in state criminal proceedings did not have an absolute right, under either the Sixth Amendment or the Due Process Clause of the Fourteenth

---

80. *Id.* at 849 (Stevens, J., dissenting). Arguing that Strickland requires prejudice to be determined at the time of trial, rather than from the vantage point of hindsight, the dissent rejected the Court's conclusion that the result of Fretwell's sentencing hearing was not unreliable in light of subsequent law. *Id.* (Stevens, J., dissenting). For a discussion of the appropriateness of a hindsight inquiry, see *infra* notes 243-35 and accompanying text.

81. *Fretwell*, 113 S. Ct. at 849 (Stevens, J., dissenting). Justice Stevens stated that the holding represented an "unprincipled transformation of the standards governing ineffective assistance claims, through the introduction of an element of hindsight that has no place in our Sixth Amendment jurisprudence." *Id.* at 846 (Stevens, J., dissenting). Justice Stevens also charged that the majority incorrectly held that the right to effective assistance is premised on the protection of a defendant's independent rights. *Id.* at 848-49 (Stevens, J., dissenting). Justice Stevens observed that, by requiring a showing of fundamental unfairness, "the Court now demands that respondent point to some *additional* indicia of unreliability, some specific way in which the breakdown of the adversarial process affected respondent's discrete trial rights." *Id.* at 848 (Stevens, J., dissenting).

82. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The Fifth Amendment states: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

83. Powell v. Alabama, 287 U.S. 45, 60-65, 68 (1932).

84. *Id.*

85. *Id.* at 71.

86. *Id.*

87. 316 U.S. 455 (1942), *overruled by* Gideon v. Wainwright, 372 U.S. 335 (1963).

88. *Id.* at 473.

89. *Id.* at 462.

Amendment, to the appointment of counsel; instead, courts determined on a case-by-case basis whether "fundamental fairness" warranted appointment.[90]

Courts typically weighed the competing interests of the defendant and the State to decide whether to provide counsel. Although the State had interests in conserving resources, preserving verdicts, and maintaining the integrity of its judicial system, the interests of the defendant were more difficult to ascertain. Courts often measured the defendant's interest in obtaining counsel by the gravity and complexity of the charge[91] and by the age and education of the defendant.[92] These factors proved difficult for courts to identify at the outset of trial; as a result, appellate courts often inquired into the actual harm or prejudice the defendant suffered as the result of the denial of counsel.[93]

Until 1963, "fundamental fairness" remained the test for a state defendant's right to counsel.[94] In that year the Supreme Court overruled *Betts* in *Gideon v. Wainwright*.[95] In *Gideon*, the Court held that the right to counsel was a fundamental right essential to a fair trial.[96] Lower courts would no longer have to examine, on a case-by-case basis, the extent to which fairness dictated the need for counsel. The Court's desire to extend to state defendants the same Sixth Amendment protection that existed at the federal level motivated this per se rule that a denial of counsel violated due process.[97]

Thus, in *Gideon*, the Court incorporated the defendant's Sixth Amendment right to counsel as a necessary component of the due process right to a fair trial. Since then, the Sixth Amendment right to counsel has been regarded as a procedural right, designed to protect the other substantive and procedural rights afforded the accused.[98] The Sixth Amendment envisions

---

90. *Id.*

91. Courts generally hold that a defendant's interest in life in a capital case is sufficient to require the appointment of counsel. *See, e.g.*, Reece v. Georgia, 350 U.S. 85, 90 (1955).

92. *See* Bruce A. Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1052, 1055 (1980).

93. *See id.* at 1055. The author states that "the due process inquiry eventually shifted to whether 'the disadvantage from absence of counsel [was] . . . aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of, or prejudiced.'" *Id.* (quoting Townsend v. Burke, 334 U.S. 736, 739 (1948)).

94. In 1938, the Supreme Court extended the Sixth Amendment right to counsel to all felony defendants in federal courts. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

95. 372 U.S. 335 (1963).

96. *Id.* at 343-45.

97. *See* Green, *supra* note 92, at 1055.

98. *See* Richard L. Gabriel, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1268-69 (1988); Green, *supra* note 92, at 1056.

counsel as an active advocate of her client's cause[99] whose vigorous representation is necessary to ensure that the adversarial system functions properly. The fundamental role of counsel as an effective advocate was the foundation for both the Court's conclusion in *Gideon* and its later view that the right to counsel implies a right to the effective assistance of counsel.[100]

The Supreme Court has declared that the Sixth Amendment right to counsel is a right to "effective" counsel.[101] In its early interpretation of the right to "effective counsel," the Supreme Court loosely referred to the concept and provided few criteria for lower courts to assess inadequate representation. The Court first suggested that counsel must perform "effectively" in *Powell v. Alabama*,[102] in which the trial court did not appoint the defendant's counsel until the day of trial, leaving little time to prepare a defense.[103] The Court specifically noted that a denial of "an effective appointment of counsel" violates due process.[104] The Court expounded on this initial pronouncement in *Avery v. Alabama*,[105] stating that the right to counsel "cannot be satisfied by mere formal appointment" and may be violated where counsel is denied the opportunity "to confer, to consult with the accused and to prepare his defense."[106] Shortly thereafter, the Court held that an attorney's actual conflict of interest may render representation ineffective.[107]

Due process formed the exclusive basis of the early entitlement to the effective assistance of counsel, as courts decided if counsel was appointed in a manner that precluded effective representation.[108] When the Court returned to the more exacting Sixth Amendment inquiry of *Gideon*, it laid the foundation for a declaration of a specific Sixth Amendment right to effective counsel.[109] The Court stood virtually silent, however, until 1970, when

---

99. *See* Gabriel, *supra* note 98, at 1270 ("For the adversary system to work properly, a defendant's lawyer must exhibit 'entire devotion,' 'warm zeal,' and the 'utmost learning' in her client's cause." (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 15 (1980))).

100. *See infra* text accompanying notes 148-50, 244.

101. For a general history of the right to effective counsel, see Robert J. Conflitti, Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AMER. CRIM. L. REV. 29, 29-32 (1983); Helen Gredd, Comment, Washington v. Strickland*: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1549-50 (1983); Green, *supra* note 92, at 1057-73; Richard P. Rhodes, Note, Strickland v. Washington: *Protection of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121 *passim* (1992).

102. 287 U.S. 45 (1932).

103. *Id.* at 71.

104. *Id.* The Court further stated that a court cannot discharge its duty by appointing counsel in a manner that precludes effective assistance. *Id.*

105. 308 U.S. 444, 446 (1940).

106. *Id.*

107. Glasser v. United States, 315 U.S. 60, 75-76 (1942).

108. *See supra* notes 82-107 and accompanying text.

109. *See supra* notes 101-07 and accompanying text.

it announced in *McMann v. Richardson*[110] that "the right to counsel is the right to the effective assistance of counsel."[111] The *McMann* Court provided little substantive guidance, except to establish that a defendant could challenge counsel's performance if it fell below "the range of competence demanded of attorneys in criminal cases."[112] The Court left to the lower courts the task of defining the minimum level of competence the Constitution requires.[113]

Before *Strickland*, courts took various approaches to prejudice. State and lower federal courts had recognized the right to effective assistance prior to *McMann*[114] and had developed a wide variety of tests to evaluate the claims.[115] Initially, courts held that an attorney's ineffectiveness must violate the "fundamental fairness" of the proceeding.[116] This pure due process approach evolved into the "farce and mockery" test, whereby a defendant had to demonstrate that counsel's errors rendered "the proceeding[ ] . . . a farce and a mockery of justice."[117] The "farce and mockery" standard focused on the overall fairness of the proceeding, without regard to the specific instances of attorney misconduct.[118] A defendant not only had to prove affirmative harm, but also had to meet the much heavier burden of showing that counsel's performance adversely affected the entire nature of the proceeding.[119]

Early cases held that counsel's errors must have been so egregious that they implicated the court in the failure to protect the defendant.[120] However, later decisions indicated that the "farce and mockery" test was merely

---

110. 397 U.S. 759 (1970).

111. *Id.* at 771.

112. *Id.*

113. *Id.*

114. For a decision that recognized an ineffective assistance claim long before *McMann*, see State v. Gunter, 30 La. Ann. 536, 549 (1878); *see also* Gredd, *supra* note 101, at 1550 (noting that early recognition of an ineffective assistance of counsel claim was a rare use of a court's supervisory powers).

115. For a complete account of the test that the lower federal courts used prior to *Strickland*, see Rhodes, *supra* note 101, at 124-35.

116. *E.g.*, Lunce v. Overlade, 244 F.2d 108, 111 (7th Cir. 1957); Annotation, *Incompetency, Negligence, Illness or the Like of Counsel as a Ground for New Trial or Reversal in Criminal Case*, 24 A.L.R. 1025, 1025-31 (1923).

117. Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). The "farce and mockery" test emerged as the dominant test in the federal circuits. *See* J. Gregory Mermelstein, Note, *Ineffective Assistance of Counsel Claims: Towards a Uniform Framework for Review*, 50 Mo. L. REV. 651, 656 (1985). For a list of state courts that adopted the standard, see Green, *supra* note 92, at 1058 n.41.

118. *See* Green, *supra* note 92, at 1059.

119. *See, e.g.*, United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) ("The proof of the efficiency of such assistance lies in the character of the resultant proceedings . . . .").

120. United States v. Aulet, 618 F.2d 182, 187-88 (2d Cir. 1980).

a metaphor for the heavy burden that a defendant faced in proving a violation of due process.[121] In a more recent application of the "farce and mockery" standard, the United States Court of Appeals for the Second Circuit stated that a conviction would not be reversed "unless [counsel's performance] prevented [the defendant] from receiving a fair trial."[122]

Courts and commentators sharply criticized the "farce and mockery" standard.[123] They charged that the test failed to promote the procedural interests of the Sixth Amendment,[124] was too vague to be administered uniformly,[125] and imposed an undue burden upon defendants.[126] By overruling the analogous "fundamental fairness . . . shocking to the universal sense of justice" standard in *Gideon v. Wainwright*,[127] the Supreme Court hastened the demise of the "farce and mockery" analysis.[128]

Various tests focusing on the "reasonableness" of counsel's actions replaced the vague "farce and mockery" analysis.[129] In addition to showing that specific errors by counsel were "unreasonable," most courts required that the defendant demonstrate affirmative harm resulting from the attorney's poor performance.[130] Some courts conducted a harmless error analysis while others required the defendant affirmatively to establish prejudice.[131] This early element of prejudice took many forms, ranging

---

121. *See, e.g.*, McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974).

122. United States v. Katz, 425 F.2d 928, 931 (2d Cir. 1970). The court in *Katz* refused to find ineffective assistance when the defense attorney slept through testimony. *Id.* It determined that the defendant did in fact receive a fair trial because counsel's failures had not altered the nature of the proceeding. *Id.*

123. *See, e.g.*, David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973). Every federal circuit court of appeals rejected the "farce and mockery" test, except for the Second Circuit, which retained the test until 1983. *See* Trapnell v. United States, 725 F.2d 149, 154 (2d Cir. 1983); Conflitti, *supra* note 101, at 33.

124. *See* Green, *supra* note 92, at 1059.

125. *See* Mermelstein, *supra* note 117, at 656.

126. *See* Conflitti, *supra* note 101, at 34-35; Mermelstein, *supra* note 117, at 657.

127. 372 U.S. 335, 339 (1963).

128. *See, e.g.*, Marzullo v. Maryland, 561 F.2d 540, 542 (rejecting the "farce and mockery" analysis in light of *Gideon*), *cert. denied*, 435 U.S. 1011 (1978).

129. For the various approaches to the "reasonableness" standard, see Rhodes, *supra* note 101, at 129-35.

130. The origin of this requirement of prejudice is unclear. The Court has rejected an affirmative showing of harm, or even a harmless error analysis, in certain categories of effective assistance cases. *See, e.g.*, Geders v. United States, 425 U.S. 80 (1976) (refusing to require a showing of prejudice for overturning trial court's refusal to let an attorney consult with his client overnight). Some commentators suggest that courts may have adopted this initial requirement of prejudice through a misreading of Chambers v. Maroney, 399 U.S. 42, 54 (1970), in which the Supreme Court stated that a belated appointment of counsel had not resulted in prejudice to the defendant. *See, e.g.*, Green, *supra* note 92, at 1064-65 (finding it unlikely that the Supreme Court intended to require an element of prejudice in *Chambers*).

131. *See* Green, *supra* note 92, at 1062. Some courts used different variants of the harmless error test to determine prejudice. The Third Circuit required the defendant to demonstrate unrea-

from simply requiring that the error be relevant to the outcome of the proceeding,[132] to reversing only if an attorney's inadequate performance undermined the factual reliability of the result.[133] Most courts, however, employed a materiality standard that weighed the gravity of the error against all admissible evidence to determine if it adversely affected the outcome.[134]

For a certain limited category of ineffectiveness claims, a defendant has never been required to show actual harm. In cases when state action denies effective assistance[135] or when the attorney operates under a conflict of interest,[136] the Supreme Court has declared that prejudice is so likely to result that reversal is automatic.[137] In the context of attorney errors, however, courts have consistently required a showing of prejudice, either as an element of the claim or under a harmless error analysis.[138]

Fourteen years after *McMann*, in its review of an Eleventh Circuit case,[139] the Supreme Court dispensed with the various lower court approaches and announced a national standard to govern claims of ineffectiveness. The defendant in *Strickland v. Washington*[140] asserted that his appointed counsel's failure to investigate and present mitigating evidence at

---

sonable performance was not harmless beyond a reasonable doubt, while the Fourth Circuit placed the burden on the government to establish lack of harm. *See* Conflitti, *supra* note 101, at 37.

132. *See, e.g.*, Garton v. Swenson, 417 F. Supp. 697, 704 (W.D. Mo. 1976).

133. *See* Harvey E. Bines, *Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 962 (1973) (advocating the position that a defendant must establish a claim of innocence before habeas relief is warranted for ineffective assistance of counsel).

134. *See* Green, *supra* note 92, at 1061. Jurisdictions required varying degrees—including a simple probability, a reasonable probability, or a near certainty—of the error's effect upon the outcome. For a discussion of materiality, see United States v. Agurs, 427 U.S. 97, 103-07 (1976).

135. *See, e.g.*, Geders v. United States, 425 U.S. 80, 82 (1976) (trial court ordered counsel not to confer overnight with his client); Herring v. New York, 422 U.S. 853, 856 (1975) (state statute making closing statement by defense counsel discretionary held to have denied due process); Hamilton v. Alabama, 368 U.S. 52, 52-53 (1961) (counsel denied at arraignment).

136. *See, e.g.*, United States v. Cronic, 466 U.S. 648, 658-61 (1984); Holloway v. Arkansas, 435 U.S. 475, 489 (1978); Glasser v. United States, 315 U.S. 60, 76 (1942).

137. *See Cronic*, 466 U.S. at 659-60; *Holloway*, 435 U.S. at 489 ("When a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic."); *Glasser*, 315 U.S. at 76 ("[T]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.").

138. *See* Green, *supra* note 92, at 1065. The author contended that an affirmative showing of prejudice may have arisen because courts continued to adhere to a due process analysis after *McMann*. *Id.* Considering claims of due process violations often require a showing of actual harm, the author suggested that the courts analogized claims of ineffective assistance to other due process violations. *Id.*

139. Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (en banc), *rev'd*, Strickland v. Washington, 466 U.S. 668 (1984).

140. 466 U.S. 668 (1984).

his capital sentencing hearing amounted to ineffective assistance.[141] The federal district court concluded that the errors were unreasonable, yet harmless.[142] The United States Court of Appeals for the Eleventh Circuit affirmed the decision but modified the test to require a showing of actual and substantial prejudice as an element of the claim.[143]

The Supreme Court upheld the two-prong test, declaring that a defendant must prove deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel.[144] Prejudice exists, according to *Strickland*, when the errors are "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[145] The Court further stated that the defendant must demonstrate a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different."[146] A reasonable probability that the outcome would have been different exists when there is a "sufficient" probability that the deficient performance undermined the reliability of the result.[147]

The *Strickland* Court repeatedly emphasized that the Sixth Amendment right to the effective assistance of counsel protects a defendant's fundamental right to a fair trial.[148] The Court defined a fair trial as one in which evidence is presented subject to sufficient "adversarial testing."[149] Writing for the majority, Justice O'Connor explained that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[150] Thus, prejudice results when there has been a breakdown in the adversarial process as the result of counsel's poor performance.

---

141. *Id.* at 675-76.

142. *Id.* at 678-79.

143. *Id.* at 680-83.

144. *Id.* at 687. Under the first prong, an attorney is deficient when she does not function as counsel under the Sixth Amendment. *Id.* The Court developed a more concrete test requiring that a defendant show the attorney's performance "fell below an objective standard of reasonableness . . . under prevailing professional norms." *Id.* at 688. Review must be "highly deferential," and the court must evaluate the reasonableness of counsel's performance at the time of trial, not with the benefit of the "distorting effects of hindsight." *Id.* at 689-90.

145. *Id.* at 687.

146. *Id.* at 694.

147. *Id.*

148. *Id.* at 684, 687, 689, 696.

149. *Id.* at 685.

150. *Id.* at 686; *see also* Nix v. Whiteside, 475 U.S. 157, 175 (1986) (holding that the "benchmark" of the right to counsel under *Strickland* is the "fairness of the adversary proceeding"); United States v. Cronic, 466 U.S. 648, 658 (1984) (stating that the right to effective assistance exists "because of the effect it has on the ability of the accused to receive a fair trial"); U.S. v. Morrison, 449 U.S. 361, 364 (1981) (noting that the constitutional right to effective assistance is grounded in protecting the adversary system).

In adopting the "reasonable likelihood" standard of prejudice,[151] the Court rejected both a more stringent standard requiring proof that the errors "more likely than not" affected the outcome, and a lesser test that would deem prejudicial all errors that could have conceivably influenced the result or impaired the defense.[152] The Court reasoned that neither of these alternatives would consistently assess the extent to which the attorney's performance contributed to an unreliable result.[153]

The Court qualified the outcome-determination definition of prejudice by excluding certain considerations from its assessment. When evaluating the likelihood of a more favorable result for the defendant, a court should not account for the "idiosyncrasies of the particular decisionmaker," nor consider the possibility of "arbitrariness, whimsy, caprice, 'nullification,' and the like."[154] The Court reasoned that accounting for these factors, would give the defendant the benefit of "the luck of a lawless decisionmaker [who fails to] reasonably, conscientiously, and impartially apply[ ] the standards that govern the decision."[155]

Strickland's prejudice component did not alter most lower federal courts' formulations of ineffective assistance. By this time, all the circuit courts had abandoned the "farce and mockery" test and adopted a two-tiered analysis requiring that a defendant prove both deficient performance and prejudice.[156] The significance of *Strickland* was its announcement that a defendant need only establish a reasonable probability that counsel's errors adversely affected the outcome. Thus, the *Strickland* Court articulated a national standard that would be applied uniformly to all habeas petitioners seeking relief from inadequate performance by defense counsel.

Nix v. Whiteside[157] presented the Court with its first test of the prejudice component after *Strickland*. The defendant in *Nix* wanted to testify falsely at trial to strengthen his claim of self-defense.[158] Knowing such testimony would be false, defense counsel warned his client that he would have an ethical duty to inform the court of the perjury and would seek to

151. The Court noted that the "reasonable probability" test comes from the materiality standard used as the test for exculpatory information not disclosed and testimony prevented by government deportation. *Strickland*, 466 U.S. at 694.

152. *Id.* at 693-94.

153. *Id.* at 694.

154. *Id.* at 695.

155. *Id.*

156. *Id.* at 697.

157. 475 U.S. 157 (1986).

158. *Id.* at 160-61. The defendant consistently stated before trial that although he had not seen a gun in his victim's hand, he shot in self-defense. *Id.* About a week before trial, the defendant changed his story to state that he had seen his victim holding a gun. *Id.* Counsel advised him that only a reasonable belief was necessary to establish self-defense, but apparently, the defendant felt he needed to perjure himself to convince the jury that he had acted in self-defense. *Id.*

withdraw from the case.[159] The defendant did not present the perjured testimony, and the jury returned a verdict of second-degree murder.[160]

Although the Supreme Court focused primarily on the reasonableness of counsel's course of action,[161] it held, as a matter of law, that the failure to assist in the presentation of perjured testimony could not constitute prejudicial error.[162] Rejecting the argument that counsel acted under a conflict of interest,[163] the Court refused to let a defendant claim that an attorney's failure to cooperate in a plan of perjury undermined the reliability of the verdict.[164] The Court stressed that under *Strickland*, a defendant is not entitled to the "'luck of a lawless decisionmaker.'"[165] Justice Blackmun, in his concurring opinion, added that acquittals based on perjury are fundamentally unfair and that a defendant does not have a right to present perjured testimony.[166] He asserted that prejudice can exist only when a defendant is deprived of a fair trial or a "specific constitutional right designed to guarantee a fair trial."[167]

During the same term, in *Kimmelman v. Morrison*,[168] the Court addressed whether a Fourth Amendment claim, when barred from federal habeas review, can form the basis of an ineffective assistance claim.[169] The Court held that it can.[170] The Court also examined whether counsel's failure to file a motion to suppress evidence obtained without a search warrant constituted ineffective assistance,[171] although neither party had presented such a claim.[172]

---

159. *Id.* at 161.

160. *Id.* at 161-62.

161. *Id.* at 165-75. The Court concluded that counsel's exposition of the perjury was reasonable and that counsel's duty of loyalty only extended to legal acts. *Id.* at 174.

162. *Id.* at 175.

163. *Id.* at 176. The lower court held that counsel acted subject to a conflict of interest because the threat to reveal the perjury constituted a breach of the duty of confidence and loyalty. *Id.* at 163. The Supreme Court determined that the defendant's desire did create a conflict, but it was "not remotely the kind of conflict of interests dealt with in *Cuyler v. Sullivan*." *Id.* at 176 (citing Cuyler v. Sullivan, 446 U.S. 335 (1980)).

164. *Id.* at 175.

165. *Id.* (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)). For an analysis of the holding of *Nix*, see *infra* text accompanying notes 200-07, 217.

166. *Nix*, 475 U.S. at 185-86 (Blackmun, J., concurring).

167. *Id.* at 186-87 (Blackmun, J., concurring).

168. 477 U.S. 365 (1986).

169. *Id.* at 373-83. This issue arises because Stone v. Powell, 428 U.S. 465 (1976), bars Fourth Amendment claims on habeas review when the state provided the defendant a full and fair opportunity to litigate the claim below. *Kimmelman*, 477 U.S. at 486.

170. *Kimmelman*, 477 U.S. at 382-83.

171. *Id.* at 374-75.

172. *Id.* at 383. Because the parties did not raise the claim directly, all discussion of whether counsel's performance constituted ineffective assistance amounts to dicta.

All members of the Court agreed that defense counsel's omission constituted unreasonable and deficient representation under *Strickland*'s first prong.[173] The justices divided six to three, however, on the proper standard of prejudice under *Strickland.* The majority adhered to the outcome-determination test and held that relief would be warranted if the defendant could establish a reasonable probability that counsel's omission affected the outcome.[174] The concurring opinion, written by Justice Powell and joined by Chief Justice Burger and Justice Rehnquist, argued that *Strickland* does not establish outcome determination as the controlling test.[175] Instead, Justice Powell asserted that a court must ask whether the attorney's error rendered the proceeding unfair or the result unreliable[176] and that *Strickland* "strongly suggests that only errors that call into question the basic justice of the defendant's conviction suffice to establish prejudice."[177] Justice Powell concluded that "fundamental fairness" could not be violated in this case because the illegally obtained evidence that the attorney failed to suppress reliably indicated the defendant's guilt.[178] Thus, the concurring opinion in *Kimmelman* suggests that a defendant must prove that counsel's errors undermined the factual reliability of the verdict or sentence to establish prejudice under *Strickland.*[179]

A survey of state and lower federal courts reveals that courts have consistently, if not exclusively, interpreted *Strickland* as holding that prejudice exists when a defendant demonstrates a reasonable probability that counsel's errors adversely affected the outcome of the proceeding.[180]

---

173. *Id.* at 389-90; *id.* at 394 (Powell, J., concurring).

174. *Id.* at 389-91.

175. *Id.* at 394-95 (Powell, J., concurring).

176. *Id.* at 391-97 (Powell, J., concurring).

177. *Id.* at 395 (Powell, J., concurring). Quoting *Strickland,* Justice Powell explained:

> A court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.*

Id. (Powell, J., concurring) (quoting Strickland v. Washington, 466 U.S. 668, 696 (1984)) (emphasis added).

178. *Id.* at 394, 396-97 (Powell, J., concurring).

179. See *infra* text accompanying notes 243-46 for a comparison of Justice Powell's view with *Fretwell.*

180. *See, e.g.,* United States v. Tarricone, 996 F.2d 1414, 1419 (2nd Cir. 1993); Ward v. United States, 995 F.2d 1317, 1321 (6th Cir. 1993); United States v. Peak, 992 F.2d 39, 41 (4th Cir. 1993); Carson v. Collins, 993 F.2d 461, 465-66 (5th Cir. 1993); Haislip v. Attorney General, 992 F.2d 1085, 1087 (10th Cir. 1993); Linnen v. Armanis, 991 F.2d 1102, 1106 (3d Cir. 1993); United States v. Harley, 990 F.2d 1340, 1343 (D.C. Cir. 1993); United States v. Garfield, 987 F.2d 1424, 1427 (9th Cir. 1993); Laird v. United States, 987 F.2d 527, 529 (8th Cir. 1993); Lema v.

Strickland's language of fairness and reliability has appeared in many decisions, but no court prior to *Fretwell* justified its holding solely on the basis of the overall fairness or reliability of the result, without regard to outcome determination.[181] The Supreme Court did not address the potential tension between the two standards until its decision in *Fretwell*.

In addition to its determination that no prejudice existed in *Fretwell*,[182] the Court held that "new rules" of constitutional criminal procedure that cut back the rights of criminal defendants can be applied retroactively. In 1989, a plurality of the Supreme Court held in *Teague v. Lane*[183] that, subject to two exceptions,[184] habeas petitioners may not seek the benefit of a "new rule" of law announced after petitioner's conviction or sentence became final.[185] The *Teague* non-retroactivity doctrine serves to protect the finality interests of the states[186] and recognizes that a state should not be penalized for relying on the standards that prevailed at the original proceeding.[187]

United States, 987 F.2d 48, 51 (1st Cir. 1993); Yech v. Goodwin, 985 F.2d 538, 540 (11th Cir. 1993); United States v. Sanchez, 984 F.2d 769, 772 (7th Cir. 1993).

181. *See, e.g.*, Henderson v. Dugger, 925 F.2d 1309, 1320 (11th Cir. 1991) (holding that failure to appeal trial court instruction to the jury may have constituted inadequate representation, but that no prejudice was established because the error did not cause the unfair outcome); United States v. Miller, 907 F.2d 994, 997 (10th Cir. 1990) (failing to find ineffective assistance but asserting that the right only guarantees fair representation, not perfect performance); Bertolotti v. Dugger, 883 F.2d 1503, 1510 (11th Cir. 1989) (finding adequate representation but stating that the focus should be on the fundamental fairness of the proceedings).

182. *See supra* notes 58-67 and accompanying text.

183. 489 U.S. 288 (1989).

184. *Teague* provided that a "new rule" that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" will be applied retroactively. *Id.* at 307 (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)); *accord* Penry v. Lynaugh, 492 U.S. 302, 329 (1989). Second, a rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.'" *Teague*, 489 U.S. at 307 (plurality opinion) (quoting *Mackey*, 401 U.S. at 693).

185. *See generally* John Blume & William Pratt, *Understanding* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 325 (1991) (arguing that the *Teague* Court's attempt to modify retroactivity doctrine was largely unsuccessful); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1736 (1991) (arguing for reform in constitutional new law doctrines); Kathleen Patchel, *The New Habeas*, 42 HASTINGS L.J. 941, 958-1001 (1991) (examining retroactivity doctrine in context with the historical development of habeas corpus doctrine); Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9, 19-27 (1990) (arguing that *Teague* initiated the Court's campaign to restrict the writ of habeas corpus); Karl N. Metzner, Note, *Retroactivity, Habeas Corpus, and the Death Penalty: An Unholy Alliance*, 41 DUKE L.J. 160, 182-90 (1991) (arguing for modification of retroactivity doctrine).

186. *Teague*, 489 U.S. at 308-09. The Court stated: "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Id.* at 309.

187. *Id.* at 306.

Prior to *Fretwell*, the Supreme Court did not address the application of *Teague*'s non-retroactivity principle to "new rules" that constrict—rather than expand—the rights of criminal defendants and habeas petitioners.[188] For the most part, the few circuit court decisions that had addressed the question determined that *Teague* applied and prevented retroactive application.[189] Before *Fretwell*, Professor Liebman had suggested that *Teague*'s policy of treating like litigants alike[190] dictates that decisions which restrict the rights of habeas defendants not be applied retroactively.[191] Furthermore, he argued:

> Any other approach would even further erode habeas corpus' deterrent policy because it would increase the 'incentive' on the part of state courts to ignore existing constitutional law based on the probability that some part of that law will be cut back by the increasingly large and cohesive conservative majority of the Supreme Court.[192]

---

188. *See* Butler v. McKellar, 494 U.S. 407, 422 n.4 (1990) (Brennan, J., dissenting) (asking whether the Court intended to apply *Teague* when decisions cut back rights).

189. *See* Andiarena v. United States, 967 F.2d 715, 717 (1st Cir. 1992) (finding that the more rigorous cause and prejudice standard announced in McCleskey v. Zant, 499 U.S. 467, 493 (1991), did not constitute a "new rule" under *Teague*, and thus could be applied retroactively), *denial of post-conviction relief aff'd by* 7 F.3d 218 (1st Cir. 1993); Williams v. Withrow, 944 F.2d 284, 290 (6th Cir. 1991) (finding that the harmless error rule of Arizona v. Fulminate, 499 U.S. 279, 295-96 (1991), should be applied retroactively because it created a 'new rule' and fits within *Teague*'s second exception), *aff'd in part and rev'd in part*, 113 S. Ct. 1745 (1993); Church v. Sullivan, 942 F.2d 1501, 1517 n.13 (10th Cir. 1991) (dicta) ("[T]he *Fulminante* harmless error rule does not apply retroactively to collateral review cases because it creates a 'new rule' within the meaning of *Teague v. Lane* . . . and does not fit within any of the *Teague* exceptions."); Harris v. Vasquez, 949 F.2d 1497, 1512 (9th Cir. 1990) (finding that rule proposed by prisoner could not be applied retroactively to his case because it was a "new rule" under *Teague*), *cert. denied*, 112 S. Ct. 1275 (1992). *But see Andriarena*, 967 F.2d at 717 n.3 (listing cases in which courts have retroactively applied law without a *Teague* inquiry).

The dissent in Harris v. Vasquez, 949 F.2d at 1542 (Reinhardt, J., dissenting), argued that the *Teague* analysis is inappropriate when the question is whether to restrict, rather than expand, the rights of the defendant. *Id.* (Reinhardt, J., dissenting). Instead of relying on *Teague*, the dissent suggested an alternative analysis in which the court should first inquire whether a defendant reasonably relied upon the old rule and then ask whether applying the new rule retroactively would be inequitable. *Id.* at 1542-43 (Reinhardt, J., dissenting). The dissent stated:

> In rights-contracting cases, it is the *defendant*'s reliance on the old rule that is implicated. The defendant's reliance cannot, of course, be equated with an interest in maintaining the finality of his conviction; habeas petitioners by definition are attacking that very finality. Thus, the application of the *Teague* standard to rights-contracting decisions borders on the irrational or absurd.

Id. at 1543 (Reinhardt, J., dissenting).

190. *Teague*, 489 U.S. at 303-05 (plurality opinion) ("[H]arm caused by the failure to treat similarly situated defendants alike cannot be exaggerated").

191. JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 234 (Supp. 1992).

192. *Id.*

The Court in *Fretwell*, however, did not consider any countervailing policies against applying restrictive law retroactively against a habeas petitioner's interest.

Fretwell directs courts, when evaluating prejudice in ineffective assistance of counsel claims, to examine whether counsel's deficient performance rendered the proceeding fundamentally unfair or led to an unreliable result.[193] To the extent that *Fretwell* declares fundamental fairness to be the guide in ineffectiveness claims, it merely restates precedent. From the time the Court recognized the right to counsel in *Powell v. Alabama*,[194] the purpose of the right has been to ensure that a criminal defendant receives a fair trial; only attorney errors that render the proceeding unfair or the result unreliable suffice to establish prejudice.[195]

Strickland established that attorney errors rise to this level when counsel's representation is deficient and "there is a reasonable probability that, but for [the unreasonable performance], the result of the proceeding would have been different."[196] *Fretwell* declares, however, that "an analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."[197] This statement should not be interpreted as rejecting outcome determination as a valid measure of unfairness and unreliability, nor should *Fretwell* be read as removing the defendant's burden to establish outcome determination. *Fretwell* merely addresses a limited question, one that the *Strickland* Court apparently never considered—whether a defendant can claim prejudice from counsel's failure to invoke a law that is no longer valid. For most cases, outcome determination remains the definitive test of prejudicial error.[198]

Only when a defendant is unable to demonstrate that counsel's errors deprived him of a substantive or procedural right will *Fretwell* apply.

193. *Fretwell*, 113 S. Ct. at 842.

194. 287 U.S. 45, 71 (1932); *supra* text accompanying notes 102-04.

195. *See* Kimmelman v. Morrison, 477 U.S. 365, 374 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."); Nix v. Whiteside, 475 U.S. 157, 175 (1986) (stating that the "benchmark" of the right to effective counsel is to protect the "fairness of the adversary process"); Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that prejudice exists when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"); United States v. Cronic, 466 U.S. 648, 658 (1984) ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."); United States v. Morrison, 449 U.S. 361, 364 (1981) (stating that the right to counsel "is meant to assure fairness in the adversary criminal process").

196. *Strickland*, 466 U.S. at 694.

197. *Fretwell*, 113 S. Ct. at 842.

198. *Id.* at 845 (O'Connor, J., concurring); *see also infra* notes 250-74 and accompanying text (discussing lower court decisions applying *Fretwell*).

Although *Strickland* does not explicitly provide for this foundational requirement, the Court asserted that its "rights requirement" serves to clarify, rather than alter, the *Strickland* analysis.[199] The *Strickland* Court also contended that this interpretation of *Strickland* was not a new one, but that the decision of *Nix v. Whiteside*[200] employed the same reasoning.[201]

In his concurring opinion in *Nix*, Justice Blackmun noted that a defendant does not have a right to testify falsely and that by claiming counsel's obstruction of a plan of perjury prejudiced his interests, the defendant "claims a right the law simply does not recognize."[202] *Fretwell* interpreted *Nix* as holding that because a defendant does not have the right to present perjured testimony, counsel's actions to prevent false testimony cannot establish prejudice.[203] Thus, Justice Blackmun's reasoning supports *Fretwell*. The *Nix* Court appears, however, to have based its holding on the fact that a defendant is "not entitled to the luck of a lawless decisionmaker" under *Strickland*.[204] Both opinions in *Nix* emphasized this prohibition and the Court implied that a jury acting under the influence of perjury would in fact be a "lawless decisionmaker" within the meaning of *Strickland*.[205] In *Fretwell*, both Justices O'Connor and Stevens concluded that *Nix* relied on this aspect of *Strickland*.[206] Justice Stevens argued that perjury represents a "paradigmatic example of the 'lawlessness' to which *Strickland* referred."[207]

Excluding "lawless decisionmakers" from the prejudice inquiry appears to have two purposes. First, this entire passage in *Strickland* suggests that courts must evaluate prejudice *objectively*, without accounting for the "idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency."[208] A defendant may not claim that the particular sentencing practices of a judge or the idiosyncratic decisionmaking process of the jury would have led to a more favorable outcome.[209] Instead, the court must proceed on the assumption that the judge or jury "reasonably, conscientiously, and impartially appl[ied] the standards that govern[ed] the decision."[210]

199. *Fretwell*, 113 S. Ct. at 842 n.2 (O'Connor, J., concurring).
200. Nix v. Whiteside, 475 U.S. 157 (1986).
201. *Id.* at 183.
202. *Id.* at 186 (1986) (Blackmun, J., concurring).
203. *Fretwell*, 113 S. Ct. at 843.
204. *Id.* at 175; *Strickland*, 466 U.S. at 695.
205. *Nix*, 475 U.S. at 175; *id.* at 186 (Blackmun, J., concurring).
206. *Fretwell*, 113 S. Ct. at 845 (O'Connor, J., concurring); *id.* at 850 (Stevens, J., dissenting).
207. *Id.* at 850 (Stevens, J., dissenting).
208. Strickland v. Washington, 466 U.S. 668, 694-95 (1984).
209. *Id.* at 695.
210. *Id.*

As well as establishing an objective inquiry, this aspect of *Strickland* sought to preclude the defendant from claiming prejudice in situations where there is no possibility that counsel's errors contributed to an unreliable result. Reliability and fairness are the touchstones of the prejudice inquiry; a judge or jury that does not "act[ ] according to the law"[211] and apply "the standards that govern the decision"[212] can never produce an accurate, reliable outcome. Therefore, a defendant may not claim that his defense was prejudiced by attorney errors that prevent the decisionmaker from acting "lawlessly." When examined in this light, *Nix* is a perfect example of this concern: Perjury cannot contribute to a more reliable, accurate outcome, so a defendant may not claim prejudice from an attorney's failure to promote false testimony.[213]

Fretwell makes this same point with its "rights requirement"—attorney errors that do not deprive the defendant of a right cannot contribute to an unreliable outcome.[214] In this situation, the reliability of the result is determined without reference to the possible outcome-determinative effects of counsel's errors.[215] Thus, the reasoning behind *Fretwell*'s "rights requirement" is exactly the same as *Strickland*'s exclusion of "lawless decisionmakers."[216] The Court in *Fretwell* easily could have declared that if the decisionmaker gives the defendant the benefit of a right to which he is not entitled, it acts "lawlessly" under the meaning of *Strickland*. Justice Blackmun, in his concurring opinion in *Nix*, appears to have done just that by asserting both that a defendant does not have a right to present perjured testimony and that such testimony cannot contribute to a reliable outcome.[217] The Court in *Fretwell* did not expressly equate the two concepts, and it apparently did not intend to hold that Fretwell claimed the "luck of a lawless decisionmaker."

Justice O'Connor, in her concurring opinion, insisted that Fretwell was impermissibly claiming the "luck of a lawless decisionmaker" by "advocating a decidedly incorrect point of law."[218] Under the plain meaning of the phrase, Fretwell certainly would be claiming the "luck of a lawless decisionmaker" if, at the time of his sentencing hearing, state law expressly permitted pecuniary gain to be both an element of robbery/murder and an

211. *Id.* at 694.

212. *Id.* at 695.

213. Nix v. Whiteside, 475 U.S. 157, 175-76 (1986) (stating that the defendant "has no valid claim that confidence in the result of his trial has been diminished by his desisting from the contemplated perjury").

214. *Fretwell*, 113 S. Ct. at 842-43.

215. *Id.* at 844.

216. *See supra* notes 208-10 and accompanying text.

217. *Nix*, 475 U.S. at 185-87 (Blackmun, J., concurring).

218. *Fretwell*, 113 S. Ct. at 845 (O'Connor, J., concurring).

aggravating circumstance. Fretwell would be asking the jury to violate "the standards that govern the decision"[219] to return a more favorable sentence. This was not the situation in August of 1985, when the sentencing jury convened to determine Fretwell's punishment. The Eighth Circuit had prohibited the "double-counting" of aggravating factors in *Collins* seven months earlier,[220] and no Arkansas state court had considered the issue.[221] The Arkansas Supreme Court did not address the *Collins* question until 1988, two years after Fretwell's conviction became final on direct appeal.[222] In fact, Fretwell was the first defendant to claim in the state supreme court that "double-counting" rendered him ineligible for the death penalty.[223] Therefore, because no Arkansas law existed on the issue at the time of Fretwell's sentencing hearing, the jury would not have been acting "lawlessly" had the trial court sustained an objection under *Collins* and prevented pecuniary gain from serving as an aggravating circumstance.

Justice O'Connor concluded that even if the decision would have been proper at the time, a subsequent change in the law can render it "lawless."[224] *Strickland* does not appear to support this expansive interpretation of the prohibition against "lawless decisionmakers." By declaring that a jury is "lawless" if it fails to apply the "*standards which govern the decision*,"[225] the *Strickland* Court focused on the time of the proceeding and defined a "lawless decisionmaker" as one who fails to apply the existing law.[226]

Perhaps realizing that the "lawlessness" aspect of *Strickland* would not support a hindsight inquiry, the *Fretwell* Court announced a similar "rights requirement" and concluded that courts may evaluate the scope of a defendant's rights under current law.[227] The Court held that under *Collins*, Fretwell was not entitled to prevent the "double-counting" of aggravating circumstances.[228] The Court stated that "it was the premise of our grant in this case that *Perry* was correctly decided, *i.e.*, that respondent was not entitled to an objection based on 'double counting.'"[229] To reach this conclusion, the Court either determined that Fretwell did not have the right at the time of his sentencing hearing or that, even if he did, any right at trial was extinguished because *Collins* was no longer good law.

---

219. Strickland v. Washington, 466 U.S. 668, 695 (1984).
220. *See supra* notes 35-37 and accompanying text.
221. *See supra* note 41, 46-47 and accompanying text.
222. *See supra* note 41 and accompanying text.
223. *See* Fretwell v. State, 708 S.W.2d 630, 634 (Ark. 1986).
224. *Fretwell*, 113 S. Ct. at 845 (O'Connor, J., concurring).
225. Strickland v. Washington, 466 U.S. 668, 695 (1984) (emphasis added).
226. *Id.* at 694-95.
227. *Fretwell*, 113 S. Ct. at 843.
228. *Id.*
229. *Id.* at 844.

Although the Arkansas state court was not obligated to follow the Eighth Circuit precedent of *Collins*[230] had counsel invoked it, nothing prevented the trial court from applying it because no state precedent existed.[231] In its review of Fretwell's habeas corpus petition, the United States District Court for the Eastern District of Arkansas noted that it was confident that the trial court would have followed *Collins*.[232] The *Fretwell* Court appears to suggest that because *Collins* was "correctly" overruled, Fretwell did not have a right to utilize its reasoning at that time. However, because the court could have applied *Collins* without violating precedent, it would be difficult to suggest that Fretwell did not have a right to the *Collins* objection at the time of his sentencing hearing.

Therefore, the Court most likely used hindsight to determine that Fretwell did not have a right to the *Collins* objections. In fact, the Court specifically held that *Strickland* does not prohibit the use of hindsight when evaluating prejudice; only *Strickland*'s first prong—the reasonableness of counsel's actions—is limited to the time of trial.[233] *Strickland* explained that the determination of competence must focus on the time of the trial because to do otherwise "could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client."[234] The *Fretwell* Court reasoned that the prejudice component does not implicate these concerns because it focuses on the overall fairness of the proceeding and reliability of the result; therefore, the use of hindsight is acceptable.[235]

Although a defendant must demonstrate that counsel's errors undermined confidence in the outcome to establish prejudice,[236] *Strickland* largely defined when errors rise to this level through its outcome-determination test. The Court stated that the "appropriate test for prejudice" is whether there is a reasonable probability that counsel's errors adversely affected the outcome of the proceeding.[237] *Strickland* directed courts to assess outcome determination from "the totality of the evidence before the judge or jury,"[238] and this language establishes the time of trial as the frame of reference for evaluating outcome determination. Common sense also

230. *Id.* at 846 (Thomas, J., concurring) (citing Steffel v. Thompson, 415 U.S. 452, 482 n.3 (1974)).

231. *See supra* notes 41, 46-47 and accompanying text.

232. Fretwell v. Lockhart, 739 F. Supp. 1334, 1337 (E.D. Ark. 1990), *aff'd*, 946 F.2d 571 (8th Cir. 1991), *rev'd*, 113 S. Ct. 838 (1993).

233. *Fretwell*, 113 S. Ct. at 844.

234. Strickland v. Washington, 466 U.S. 668, 690 (1984).

235. *Fretwell*, 113 S. Ct. at 844.

236. *See supra* text accompanying notes 193-97.

237. *Strickland*, 466 U.S. at 694.

238. *Id.* at 695.

dictates that hindsight has no role in determining the impact of counsel's errors upon the outcome.

Even if outcome determination does not establish prejudice automatically, as *Fretwell* declared,[239] *Strickland* clearly holds that a "breakdown" in the adversarial process renders the result of the proceeding unreliable.[240] Again, a court must look to the time of trial to determine if counsel's mistakes were so egregious as to upset the adversarial balance. Nowhere does *Strickland* define prejudice apart from the harm a defendant suffered at trial. The entire premise behind *Strickland* and the right to effective counsel is the protection the defendant's right to a fair trial. A defendant is denied a fair trial when the prosecution's evidence is not subject to meaningful adversary testing. Quite rightly, this determination should not the benefit of hindsight. To suggest that a subsequent change in the law in any way alters the quality of counsel's performance or the harm a defendant suffered at trial would be disingenuous.

Fretwell does not focus, however, on the effects of attorney errors on the outcome of the proceeding or on the adversarial balance at trial. As discussed above, *Fretwell* represents a situation in which the Court determined there was no *possibility* that prejudice resulted from counsel's errors.[241] Although *Strickland* provided the exclusion of "lawless decisionmakers" to preclude these same claims, as noted previously, this passage cannot be interpreted as rendering a once "lawful" decision invalid on the basis of hindsight.[242] Instead of interpreting this aspect of *Strickland* to permit hindsight, the Court chose to articulate a separate "rights requirement," not found in *Strickland,* that allowed for the flexibility to evaluate the scope of a defendant's rights from the vantage point of current law.

The Court's use of hindsight may reflect the view of prejudice suggested by Justice Powell in his concurring opinion in *Kimmelman v. Morrison*—only errors that undermine the accuracy of the result serve to establish prejudice under *Strickland.*[243] The *Fretwell* Court clearly did not intend to go this far. Instead, the Court emphasized that the right to effective counsel exists to protect fairness in the adversary process; when counsel's inadequate performance upsets the adversarial balance at trial, the result of the proceeding is rendered unreliable.[244] In this regard, *Fretwell* reaffirms *Strickland*'s recognition that a defendant is entitled to counsel who not only protects against truly inaccurate outcomes, but also attempts

239. *Fretwell,* 113 S. Ct. at 842.

240. *Strickland,* 466 U.S. at 687.

241. *See supra* notes 214-17 and accompanying text.

242. *See supra* notes 227-29 and accompanying text.

243. Kimmelman v. Morrison, 477 U.S. 365, 395 (1986) (Powell, J., concurring); *see also supra* notes 175-79 and accompanying text (discussing Justice Powell's reasoning).

244. *Fretwell,* 113 S. Ct. at 842.

to obtain the best result possible, absent illegality, for her client.[245] When counsel fails to perform as an effective advocate, both *Strickland* and *Fretwell* declare that the result is unreliable and prejudice exists.[246] As long as a defendant has a valid right, for example, to suppress evidence obtained in violation of the Fourth Amendment, *Fretwell* does not change the fact that counsel's failure to assert her client's interest effectively can undermine the reliability of the verdict or sentence without regard to the overall accuracy of the result.

By refusing to limit the prejudice inquiry to the time of trial, the *Fretwell* Court increased the risk of inconsistent determinations of ineffectiveness. If prejudice is to be evaluated under current law, what would happen if the law were to change again? This situation almost occurred on the exact issue that *Fretwell* presented when, in its October 1993 term, the Supreme Court granted certiorari and heard oral arguments in *Tennessee v. Middlebrooks*.[247] *Middlebrooks* posed the question of whether the "double-counting" of aggravating circumstances violates the Eighth Amendment,[248] but was dismissed without decision on the basis that certiorari was improvidently granted.[249] If the Court were to declare the practice of "double-counting" unconstitutional, several questions would be raised. Could it still deny Fretwell the right to a *Collins* objection? Would *Collins* regain the status of "correct" law, while Fretwell's death sentence remained reliable and fair? Could another habeas petitioner who happened to raise the same claim of ineffectiveness at a later date establish prejudice in light of the new ruling? Any principled application of *Fretwell*'s prejudice analysis would determine that prejudice exists when the present state of the law favors the defendant, and this application could result in inequitable treatment of similarly situated defendants. Although the Court should be commended for announcing a clear "rights" standard to determine when counsel's errors did not undermine confidence in the outcome, to maintain consistency, this inquiry should look to the time of trial to determine if counsel's errors deprived the defendant of a fair trial.

---

245. Strickland v. Washington, 466 U.S. 668, 691-98 (1984) (establishing prejudice when counsel's errors adversely affect the outcome of the proceeding or cause a "breakdown" in the adversarial process at trial).

246. *Fretwell*, 113 S. Ct. at 842; *Strickland*, 466 U.S. at 691-98.

247. 113 S. Ct. 1840, *cert. dismissed*, 114 S. Ct. 651 (1993).

248. State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), *cert. granted sub nom.* Tennessee v. Middlebrooks, 113 S. Ct. 1840, *cert. dismissed*, 114 S. Ct. 651 (1993).

249. *Middlebrooks*, 114 S. Ct. at 651. In State v. Howell, 868 S.W.2d 238 (Tenn. 1993), the Tennessee Supreme Court noted that *Middlebrooks* was based on the Tennessee state constitution, not the Eighth Amendment to the United States Constitution. *Id.* at 259 n.7. Thus, the Supreme Court dismissed certiorari because *Middlebrooks* was decided on independent and adequate state grounds. *See* Michigan v. Long, 463 U.S. 1032, 1040 (1983).

Just as Justice O'Connor predicted, the Court's decision in *Fretwell* has not dramatically altered the prejudice inquiry under *Strickland.* Although lower courts require the petitioner to show that "counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair,"[250] most courts have either addressed overall fairness and reliability in addition to the outcome-determination test[251] or simply equated outcome determination to fundamental fairness.[252] A few decisions have examined prejudice without reference to outcome determination.[253] Apparently no court has utilized hindsight to evaluate prejudice or has determined that prejudice does not exist even though the defendant has established outcome determination.

Alvernaz v. Ratelle[254] is an example of a decision evaluating fundamental unfairness on the basis of whether the defendant established outcome determination. In *Alvernaz,* defense counsel failed to inform the defendant that if he refused an offered plea bargain for a five-year sentence, he could face life imprisonment if convicted.[255] Believing that the possible sentence would not exceed a maximum of eight years, the defendant rejected the plea offer and received a life sentence when convicted at trial.[256] The United States District Court for the Southern District of California held that counsel's error rendered the proceeding unfair and the result unreliable because the defendant demonstrated that, had he known the possible sentence, he would have accepted the plea offer.[257] Thus, the traditional out-

250. *E.g.*, United States v. Garcia, 997 F.2d 1273, 1283 (9th Cir. 1993); Jackson v. Lockhart, 992 F.2d 167, 169 (8th Cir. 1993); Alvernaz v. Ratelle, 831 F. Supp. 790, 797 (S.D. Cal. 1993); United States v. Sims, 818 F. Supp. 1199, 1203 (N.D. Ill. 1993); *see, e.g.*, Yarrington v. Davies, 992 F.2d 1077, 1079 (10th Cir. 1993); Hollenback v. United States, 987 F.2d 1272, 1275 (7th Cir. 1993); Lema v. United States, 987 F.2d 48, 51 (1st Cir. 1993); United States v. Lively, 817 F. Supp. 453, 459 (D. Del. 1993), *aff'd*, No. 93-7307, 1993 U.S. App. LEXIS 32797 (3d Cir. Nov. 12, 1993).

251. *See* Whitmore v. Lockhart, 8 F.3d 614, 622-24 (8th Cir. 1993) (finding that the defendant had not established outcome determination, then determining that counsel's errors had not rendered the trial unfair or the result unreliable); *Yarrington*, 992 F.2d at 1080-81 (reaching the same result).

252. *See Jackson*, 992 F.2d at 169-70 (holding that unfairness and unreliability did not result from counsel's failure to renew a motion for acquittal at the close of the evidence because it was highly unlikely the court would have granted the motion).

253. *See* Novak v. Purkett, 4 F.3d 625, 627 (8th Cir. 1993) (finding no unfairness because counsel informed the defendant of his right to appeal); *Garcia*, 997 F.2d at 1283 (bypassing an outcome-determination analysis in favor of finding no fundamental unfairness); *Holland*, 992 F.2d at 691 (determining that because the attorney was somewhat effective in his performance, errors, even if deficient, did not render the trial unfair or its result unreliable).

254. 831 F. Supp. 790 (S.D. Cal. 1993).

255. *Id.* at 794.

256. *Id.*

257. *Id.* at 797.

come determinative test formed the basis of the court's decision that fundamental unfairness resulted.[258]

Two decisions have applied *Fretwell* in a non-capital sentencing context and, apparently, have reached different results than *Strickland* would yield. In *Durrive v. United States*,[259] the petitioner claimed that, had counsel requested that the trial court properly apply the sentencing guidelines, his ten-year sentence would have been reduced by a year.[260] The U.S. Court of Appeals for the Seventh Circuit acknowledged that prejudice would exist if it applied *Strickland* literally, because counsel's errors did adversely affect the outcome.[261] It concluded, however, that *Fretwell* rejected outcome determination as automatically establishing prejudice, and it held that a possible one-year reduction in the sentence did not render the entire sentence fundamentally unfair or unreliable.[262] Similarly, in *Spriggs v. Collins*,[263] the Fifth Circuit addressed a misapplication of the sentencing guidelines that resulted in a modest increase in the defendant's sentence. It held that to constitute outcome determination under *Strickland*, counsel's errors must have *significantly* affected the result of the proceeding.[264] The court reasoned that this alteration of *Strickland* was proper because *Fretwell* determined that prejudice must be "rather appreciable before a new trial is warranted."[265]

These decisions illustrate the dangers the *Fretwell* Court created by broadly announcing fundamental fairness, rather than outcome determination, as the test for prejudice. These decisions fail to realize that *Fretwell* did not reject *Strickland*'s outcome determination test in place of "fundamental fairness," nor did it increase the defendant's burden in establishing outcome determination. The Court simply reaffirmed under *Strickland* that, in the limited situation in which there is no possibility that counsel's errors undermined confidence in the result, outcome determination is not the proper inquiry.[266] As discussed above, *Fretwell* did not alter *Strickland*'s recognition that a defendant is entitled to counsel who obtains the most favorable result possible for her client,[267] and even a modest increase in the defendant's sentence establishes outcome determination under *Strickland*. Although these decisions represent a misapplication of *Fretwell*, several

258. *Id.*
259. 4 F.3d 548 (7th Cir. 1993).
260. *Id.* at 551.
261. *Id.* at 550-51.
262. *Id.* at 551.
263. 993 F.2d 85, 88 (5th Cir. 1993).
264. *Id.*
265. *Id.* at 88 n.4.
266. *See supra* text accompanying notes 214-16.
267. *See supra* notes 245-46 and accompanying text.

other courts have realized that *Fretwell* did not alter *Strickland*'s basic pronouncement that fairness in the adversary system is the benchmark in determining prejudicial error.[268]

A few courts have applied *Fretwell*'s holding that a defendant must demonstrate that counsel's errors deprived him of a right to which he is entitled. The defendant in *United States v. Sims*[269] claimed that counsel's poor advice caused him to plead guilty.[270] Rejecting the assertion that counsel's performance was unreasonable and concluding that the defendant did not demonstrate outcome determination, the district court stated that the defendant was not deprived of a substantive or procedural right because there is no entitlement to a conscious waiver with respect to each defense.[271]

Perhaps more on point with *Fretwell* is *United States v. Garcia*,[272] in which the Ninth Circuit Court of Appeals determined that fundamental unfairness did not result from counsel's failure to cite an inapplicable law that would have produced a more favorable result for the defendant.[273] Although the court did not explain its reasoning,[274] it could have held that because the case did not control, the defendant did not have a right to benefit from it. Just as easily, the court could have found that the defendant claimed the "luck of a lawless decisionmaker" by asserting the benefit of an irrelevant law. If this case had arisen prior to *Fretwell*, the "lawlessness" aspect of *Strickland* would have prevented the defendant from arguing outcome determination. Thus, *Garcia* illustrates how *Fretwell*'s "rights requirement" mirrors the "lawlessness" prohibited by *Strickland*.

Although the *Fretwell* Court sought to resolve the unique situation in which the defendant claimed the benefit of a law that was subsequently overruled, it may have established a dangerous precedent. The Court correctly held that "fundamental fairness" is the overriding concern when evaluating prejudice, but it failed to clarify that outcome determination remains

268. *See* Resnover v. Pearson, 965 F.2d 1453, 1460 (7th Cir. 1992) ("*Strickland* requires us to focus, not upon whether counsel could have done a better job, but upon whether counsel provided the assistance necessary to ensure the fundamental fairness of the proceeding."), *cert. denied*, 113 S. Ct. 2935 (1993); Novak v. Purkett, 4 F.3d 625, 627 (8th Cir. 1993) (requiring that counsel's errors prejudice the defendant to such an extent that the "adversarial process is rendered unreliable"); English v. United States, 998 F.2d 609, 613 (8th Cir. 1993) (focusing on whether attorney errors were "so prejudicial that the adversarial balance between defense and prosecution is upset, and the verdict is rendered suspect"), *cert. denied*, 114 S. Ct. 573 (1993); Albanese v. McGinnis, 823 F. Supp. 521, 534 (N.D. Ill. 1993) (stating that a court must ask whether "the attorney's performance was adequate to allow the adversarial *process* to operate in the particular case").

269. 818 F. Supp. 1199 (N.D. Ill. 1993).

270. *Id.* at 1201-02.

271. *Id.* at 1203.

272. 997 F.2d 1273, 1283-84 (9th Cir. 1993).

273. *Id.* at 1283-84.

274. *Id.* at 1284.

the test except in situations where it can be said that counsel's errors did not undermine confidence in the outcome. The Court's declaration that outcome determination does not automatically establish prejudice may reduce the centrality of the test and encourage lower courts to deviate from *Strickland* when evaluating prejudice.

The Court wisely concluded that if counsel's errors do not undermine confidence in the outcome, prejudice cannot exist; the Court should be commended for establishing a clear "rights" standard to evaluate this possibility. What is questionable, however, is the Court's use of hindsight to evaluate the scope of a defendant's rights. The Court's conclusion that counsel only deprived Fretwell of the opportunity to have "the state court make an error in his favor"[275] does not adequately address the harm he actually suffered—receiving a death sentence rather than life imprisonment solely on the basis of attorney error. Clearly, the adversarial process broke down at Fretwell's sentencing hearing when counsel failed to object to the impermissible aggravating circumstance. The subsequent change in the law did not affect the nature of the proceeding.

Strickland never contemplated the use of hindsight to determine prejudice; it specifically fixed the time of trial as the reference for its outcome-determination test and clearly focuses on the adversarial process at trial. The only other aspect of *Strickland*'s prejudice analysis is the exclusion of "lawless decisionmakers." The Court quite clearly defined the term to mean one who fails to apply the *governing* law. Thus, *Fretwell*'s use of hindsight to evaluate the extent of prejudice suffered serves to alter, rather than clarify the meaning of prejudice under *Strickland.*

The use of hindsight to evaluate prejudice not only deviates from precedent, but also creates the potential for grave injustice and inconsistent determinations. Not only may a defendant who receives ineffective counsel at trial be denied relief, but the possibility that the law will change again, in his favor, also renders him unable to remedy an invalid verdict or sentence. In addition, the use of hindsight poses the threat that a future change in law will provide relief for some, yet, by virtue of timing, deny relief to others. It would seem that rationality and consistency demand that prejudice be assessed at the time of the trial.

JENNIFER N. FOSTER

275. *Fretwell*, 113 S. Ct. at 843 (quoting Brief for United States as *Amicus Curiae* at 10 (No. 91-1393)).