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Standard Of Competence For Attorneys Who Represent Defendants Before The International Criminal Tribunal For Rwanda

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MEMORANDUM FOR
OFFICE OF THE PROSECUTOR

ISSUE #10:

STANDARD OF COMPETENCE FOR ATTORNEYS WHO REPRESENT DEFENDANTS BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

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I. Introduction and Summary of Conclusions

A. ISSUE

This research memorandum seeks to examine the following issue:

> Appropriate Standard Of Competence For Attorneys Who Represent Defendants Before The International Criminal Tribunal For Rwanda.[1]

B. SUMMARY OF CONCLUSIONS

The countries discussed, Canada, the United States, the United Kingdom, and South Africa, either have or are moving toward a requirement for effective attorney assistance. The standards vary. The United States and Canada look at both attorney competence and the validity of the trial result.[2] The United Kingdom looks only to whether there has been a miscarriage of justice and frowns upon an examination of attorney competence.[3] South African courts have yet to declare a right of effective assistance of counsel, but experts anticipate that when the appropriate case arises, they will recognize the right.[4]

Thus, a standard appropriate for adoption by the Rwanda Tribunal which would

[1] *See* International Criminal Tribunal for Rwanda, Office of the Prosecutor, Legal Research Topic No. 10, Facsimile dated 27 August 2000. The focus of the memorandum is based on that facsimile, which in part asked what standard of competence should apply to attorneys representing defendants before the Tribunal, what standards might apply and how the Office of the Prosecutor should shape its argument if the issue of ineffective assistance is brought on appeal.

[2] *See* infra Part V(A),(B).

[3] *See* infra Part V(C).

[4] *See* infra Part V(D).

address the fair trial concerns underlying the approach of these countries would be a miscarriage of justice test. Although the United States and Canada look also to attorney performance, where this performance is grossly inadequate it will follow that a miscarriage of justice likely results. In addition, this standard is most likely to be acceptable to countries generally which use the adversarial system. As countries such as South Africa have not yet recognized the right to effective assistance of counsel, this standard provides more protection for defendants than they would otherwise have in such jurisdictions. Thus, it is a fair standard for the Tribunal to apply, but is still a very difficult standard for the defendant to prove.

Finally, it should be noted that in assessing effective assistance of counsel, national courts frown upon counsel conflict of interest, such as where counsel represents two parties with conflicting defenses. Such a situation will often lead to a presumption, if not a per se determination, of ineffective assistance of counsel. In South Africa, where Courts have not recognized the right to effective assistance of counsel, a conflict of interest, such as where counsel represents two parties whose defenses are mutually exclusive, would result in automatic vitiation of the proceedings.[5] In Canada, an accused is deprived of effective assistance of counsel where one lawyer represents two defendants who might be able to place the blame on each other.[6] And in the United States, where counsel's conflict of interest actually affected the adequacy of the defendant's representation, that defendant need not demonstrate prejudice to obtain relief.[7]

II. Factual Background

[5]*See* Criminal Procedure: A Worldwide Study 354 (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[6]*See id.* at 77. [Reproduced in the Accompanying Notebook at Tab 4]

[7]*See Cuyler v. Sullivan,* 446 U.S. 335, 349-350 (1980). [Reproduced in the Accompanying Notebook at Tab 15]

The appropriate standard of attorney competence for defendants before the Tribunal is anticipated to arise in the appeals of convicted war criminals.

III. Applicable Rules

There are no guidelines in the Rwanda Tribunal Statute which address the standard for attorney competence. There is a stated right to an attorney, as well as baseline standards for attorney qualifications. However, ensuring full respect for the rights of the accused is considered one of the most important responsibilities of the Rwanda Tribunal.[8] To this end, it is important the Tribunal comply with international standards of human rights.[9]

A. Attorney qualifications and appointment

1. Article 13

Article 13 provides that a defense attorney before the Tribunal must be admitted to practice law or a professor of law; must speak one of the working languages of the Tribunal, English or French; must agree to be assigned to represent a suspect or accused; and must be included on the Registrar's list per Art. 45(A) of the Rules.

2. Rule 45(A)

[8]*See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 513 (1998). [Reproduced in the Accompanying Notebook at Tab 8]

[9]*Id.* [Reproduced in the Accompanying Notebook at Tab 8]

Per Rule 45(A), counsel is assigned as follows:

> A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44 (satisfies the Register he is admitted to practice law in a State, or is a professor of law) and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar.[10]

B. Defendant's right to counsel:

The accused has the right to choose counsel if the accused has means to pay for his or her defense, and the counsel of choice has the necessary qualifications.[11]

1. Article 17(3)

Article 17(3) provides that if questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment.

2. Article 20

Article 20 provides that the accused shall be entitled to (b) "communicate with counsel of his or her own choosing; . . . and (d) to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance of this right; and to have legal assistance assigned to him or her, in

[10]Rule 45 (amended June 1998) (John R.W.D. Jones, *The Practice of International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 569 (2000)). [Reproduced in the Accompanying Notebook at Tab 5]

[11]1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 521 (1998). [Reproduced in the Accompanying Notebook at Tab 8]

any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it."[12]

C. Appeals: Article 24

Article 24 provides that "(1) The Appeals Chamber shall hear appeals [based on] (a) An error on a question of law invalidating the decision; or (b) An error of fact which has occasioned a miscarriage of justice."

IV. Legislative History of the Rwanda Rules

A. The Adversarial vs. Inquisitorial Systems

The Yugoslavia Tribunal's Rules of Procedure and Evidence, from which the Rwanda rules were drawn,[13] were modeled in large part on a draft submitted by the United States, which reflected an adversarial system as opposed to the inquisitorial system used in civil law countries.[14] The Yugoslavia Tribunal's approach was also influenced by the Nuremberg Tribunal and the Tokyo Tribunal precedents, which followed a largely adversarial approach.[15]

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[12]Rwanda Tribunal Statute, Article 20 (1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 512 (1998)). [Reproduced in the Accompanying Notebook at Tab 8]

[13]*See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 417 (1998). [Reproduced in the Accompanying Notebook at Tab 8]

[14]Michael P. Scharf, *Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal*, 30 N.Y.U. J. Int'l L. & Pol. 167, 171 (1998). [Reproduced in the Accompanying Notebook at Tab 11]

[15]*See* 1 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda*, 416 (1998). [Reproduced in the Accompanying Notebook at Tab 8]

In the adversarial system, attorneys conduct the trial, with each side a committed advocate fighting to convince the decision maker of the correctness of his or her position.[16] The inherent hostility of the government toward the accused is openly displayed.[17]

In the inquisitorial system, by contrast, "neither counsel has much of a role, if the defendant even has counsel."[18] This is because the trial is conducted by a theoretically neutral judge, rather than by opposing parties.[19] The opposing counsel rarely even cross-examines a witness.[20]

There are fewer rules in place to safeguard a defendant's rights in the inquisitorial system because of the more significant role played by disinterested parties, the judge and the magistrate.[21] Conversely, the adversarial system sees as necessary rights for the accused including the right to confront one's accusers, the right against unreasonable searches, the right to silence, and the right to counsel.[22]

Because the Rwanda Tribunal is based on the adversarial model, such rights should be guaranteed to the defendants before the tribunal, including the right to counsel. Such a right encompasses effective assistance of counsel, not just assistance of counsel.[23]

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[16]*See* Criminal Procedure: A Worldwide Study xv, xvi (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[17]*See id.* at xvi. [Reproduced in the Accompanying Notebook at Tab 4]

[18]*Id.* at xv. [Reproduced in the Accompanying Notebook at Tab 4]

[19]*See id.* at xvi. [Reproduced in the Accompanying Notebook at Tab 4]

[20]*See* 1 Virginia Morris & Michael P. Scharf, The International Criminal Tribunal for Rwanda 7 (1998). [Reproduced in the Accompanying Notebook at Tab 8]

[21]Michael P. Scharf, Trial and Error: An Assessment of the First Judgment of the Yugoslavia War Crimes Tribunal, 30 N.Y.U. J. Int'l L. & Pol. 167, 172 (1998). [Reproduced in the Accompanying Notebook at Tab 11]

[22]*See* Criminal Procedure: A Worldwide Study xvi (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[23]*See* Sienho Yee, The Erdemovic Sentencing Judgement, 26 Ga. J. Int'l & Comp. L. 263, 284 (1997). [Reproduced in the Accompanying Notebook at Tab 12]

As a result, ineffective assistance of counsel as a ground for appeal should likely be recognized by the Rwanda Tribunal.[24]

B. The Tadic case

The Appeals Chamber held in *Prosecutor v. Dusko Tadic*[25] that "the essential characteristic of a tribunal 'established by law' is that it 'genuinely afford the accused the full guarantees of fair trial set out in Art. 14 of the International Covenant on Civil and Political Rights.'"[26] The Covenant provides, among other rights, the right to counsel of the accused's choosing.[27] The Yugoslavia Tribunal, on which the Rwanda Tribunal was based, has also attributed particular importance to European regional and human rights standards.[28]

V. Standards for Attorney Effectiveness in Common Law Countries

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[24]*See id.* (argument that ineffective assistance of counsel should be ground for post-conviction relief at the Yugoslavia Tribunal). [Reproduced in the Accompanying Notebook at Tab 12]

[25]Case No. IT-94-1-AR72.

[26]Virginia Morris & Michael P. Scharf, 1 *The International Criminal Tribunal for Rwanda*, 514 (1998) [Reproduced in the Accompanying Notebook at Tab 8]. Article 14 of the Covenant provides in part that the accused shall be entitled to communicate with counsel of his own choosing, to defend himself in person or through legal counsel of his choosing; to have legal assistance assigned to him, in any case where the interests of justice so require; and to examine, or have examined, witnesses against him. *See Basic Documents Supplement to International Law* 156 (Henkin et al. eds., 1993). [Reproduced in the Accompanying Notebook at Tab 2]

[27]Article 14 of the Covenant provides in part that the accused shall be entitled to communicate with counsel of his own choosing, to defend himself in person or through legal counsel of his choosing; to have legal assistance assigned to him, in any case where the interests of justice so require; and to examine, or have examined, witnesses against him. *See Basic Documents Supplement to International Law* 156 (Henkin, et al., eds., 1993). [Reproduced in the Accompanying Notebook at Tab 2]

[28]*See* Virginia Morris & Michael P. Scharf, 1 *The International Criminal Tribunal for Rwanda* 514 (1998). [Reproduced in the Accompanying Notebook at Tab 8]

A. The United States

1. The Sixth Amendment right to counsel

In the United States, the right to counsel is guaranteed in the Sixth Amendment to the U.S. Constitution, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[29]

This right has been interpreted to include the obligation of the state to provide defense counsel for the indigent.[30] The selection of such appointed counsel is a matter at the absolute discretion of the trial court, assuming that such appointed counsel is competent.[31]

2. Ineffective assistance claims based on lawyer incompetence

Setting the standard: Strickland v. Washington[32]

The U.S. Supreme Court in *Strickland v. Washington* established the standard for attorney competence, noting that "the right to counsel is the right to the *effective* assistance of counsel."[33] The Court held that to establish ineffective assistance requiring

[29]Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* 519 (2d ed. 1992). [Reproduced in the Accompanying Notebook at Tab 9]

[30]*See id.* at 519. [Reproduced in the Accompanying Notebook at Tab 9]

[31]*See id.* at 546-47. [Reproduced in the Accompanying Notebook at Tab 9]

[32]466 U.S. 668 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

[33]*Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14) (emphasis added). [Reproduced in the Accompanying Notebook at Tab 26]

reversal of a conviction, "a defendant must show both (i) that 'counsel made errors so serious that counsel was not functioning as "counsel" guaranteed . . . by the Sixth Amendment,' and (ii) that 'counsel made errors so serious that the deficient performance prejudiced the defense."[34] Canada has also adopted this standard.[35]

The standard for measuring performance is that of "reasonably effective assistance" as guided by "prevailing professional norms" and consideration of "all circumstances" relevant to the attorney's performance.[36] More specific guidelines in applying the standard were considered inappropriate.[37]

The standard for measuring prejudice is whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would be different."[38]

The defendant David Leroy Washington committed crimes including "three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft"[39] during a 10-day period in September 1976. He subsequently surrendered to police and gave a lengthy confession to the third murder.[40]

Washington was sentenced to death on each of the three counts of murder.[41] He

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[34]*See* Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* 585 (2d ed. 1992). [Reproduced in the Accompanying Notebook at Tab 9]

[35]*See R. v. G.D.B.* [2000] S.C.J. 22 [Reproduced in the Accompanying Notebook at Tab 33]. *See also supra* Part B.

[36]*See* Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* 585 (2d ed. 1992). [Reproduced in the Accompanying Notebook at Tab 9]

[37]*See id.* [Reproduced in the Accompanying Notebook at Tab 9]

[38]*Id.* [Reproduced in the Accompanying Notebook at Tab 9]

[39]*Strickland v. Washington*, 466 U.S. 668, 672 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

[40]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[41]*See id.* at 675. [Reproduced in the Accompanying Notebook at Tab 26]

appealed on numerous grounds, including ineffective assistance of counsel at the sentencing hearing.[42]

Washington's counsel, an experienced criminal lawyer, actively pursued pretrial motions and discovery.[43] He cut his efforts short, however, after experiencing a sense of "hopelessness" about the case when he learned that Washington, against his advice, had confessed to the first two murders.[44] Washington subsequently waived his right to a jury trial, and pleaded guilty to all of the numerous charges against him, again against his counsel's advice.[45]

In his plea, Washington told the trial judge that he had no significant prior criminal record before this spree, and that at the time of the spree he was under extreme stress due to his inability to support his family.[46] He also stated that he accepted responsibility for the crimes.[47] The judge responded that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement about his sentencing decision.[48]

Washington's counsel advised him to invoke his right under Florida law for an advisory jury at the sentencing hearing.[49] Again rejecting his counsel's advice,

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[42]*See id.* A capital sentencing proceeding such as this one, as opposed to an ordinary sentencing, was held to be sufficiently like a trial that counsel's duties would be similar. *See id.* at 686-687. [Reproduced in the Accompanying Notebook at Tab 26]

[43]*See id.* at 672. [Reproduced in the Accompanying Notebook at Tab 26]

[44]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[45]*See Strickland v. Washington*, 466 U.S. 668, 672 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

[46]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[47]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[48]*Id.* [Reproduced in the Accompanying Notebook at Tab 26]

[49]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

Washington waived this right and chose to be sentenced by the trial judge alone.[50]

In preparation for the sentencing hearing, Washington's counsel spoke with Washington about his background, and also spoke by telephone with his wife and mother, although he did not follow up on an unsuccessful effort to meet with them.[51] He did not seek out other character witnesses, nor did he request a psychiatric examination, since he had no indication that his client had psychological problems.[52]

Counsel in his judgment decided not to look for further evidence concerning Washington's character and emotional state, a decision which reflected his sense of hopelessness about overcoming the effect of Washington's confessions and the gruesome nature of the crimes.[53] These decisions were also based on his judgment that it was advisable to rely on Washington's plea for evidence about his background and level of stress.[54] By so doing, counsel prevented the State from cross-examining Washington and from putting on its own psychiatric evidence.[55]

Counsel was also able to exclude other evidence which was potentially harmful to Washington, including his "rap sheet" and presentence report, which included Washington's criminal history that would have demonstrated the falsity of the claim in his plea of no significant criminal history.[56] Thus, counsel's strategy at the sentencing hearing was based on the trial judge's remarks at the plea colloquy, as well as his reputation as a judge who found it important for defendants to admit responsibility for

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[50]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[51]*See Strickland v. Washington*, 466 U.S. 668, 672-673 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

[52]*See id.* at 673. [Reproduced in the Accompanying Notebook at Tab 26]

[53]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[54]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[55]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[56]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

their actions.[57]

Counsel argued that Washington's acceptance of responsibility and remorse should prevent him from receiving the death penalty.[58] He also argued that Washington had no criminal history and had committed the crimes under extreme mental or emotional disturbance, both mitigating circumstances.[59] He did not cross-examine the medical examiner about the manner of death of Washington's victims.[60]

In sentencing Washington to death, the trial judge found that aggravating circumstances such as the gruesomeness of the crimes, Washington's pattern of stealing during this crime spree, that all three murders were committed to avoid arrest for the accompanying crimes, and that Washington did not suffer from an emotional or mental disturbance, were not outweighed by mitigating circumstances.[61]

Washington appealed, and the Supreme Court applied the two-part test asking: (1) whether counsel's performance was deficient and (2) if so, whether the deficiency prejudiced the defense.[62]

As to the first question, the Court held that the proper standard for attorney performance is that of "reasonably effective assistance,"[63] with more specific guidelines

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[57]*See Strickland v. Washington*, 466 U.S. 668, 673 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

[58]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[59]*See id.* at 673-674. [Reproduced in the Accompanying Notebook at Tab 26]

[60]*See id.* at 674. [Reproduced in the Accompanying Notebook at Tab 26]

[61]*See id.* at 674-675. [Reproduced in the Accompanying Notebook at Tab 26]

[62]*See id.* at 687 [Reproduced in the Accompanying Notebook at Tab 26]. Prejudice is presumed where there is actual or constructive denial of assistance of counsel, or state interference with counsel's assistance. *See id.* at 692. A more limited presumption of prejudice is applied where counsel has a conflict of interest. *See id. See also Kimmelman v. Morrison*, 477 U.S. 365 (1986). [Reproduced in the Accompanying Notebook at Tab 20]

[63]For cases applying the reasonableness standard, *see Tollet v. Henderson*, 411 U.S. 258, 266-267 (1973) (counsel's failure to evaluate facts giving rise to constitutional claim, or failure to inform himself of facts which might have shown the existence of such claim, might in certain situations indicate incompetence of counsel) [Reproduced in the Accompanying Notebook at Tab 27]; *Kimmelman v. Morrison; Burger v.*

not appropriate.[64] This requirement comes from counsel's duty to advocate for the defendant's cause, and to ensure that the trial is a reliable adversarial process.[65]

Judicial scrutiny of counsel's performance is "highly deferential" with a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[66] The Court noted that fairness dictates making every effort to "eliminate the distorting effects of hindsight," and further

that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way."[67]

Thus the Court promulgated a flexible standard for what constitutes an effective attorney. The reason for this is indicated in part by the Court's stated concern that it not encourage a "proliferation of ineffectiveness challenges"; that counsel's performance and willingness to serve would be affected, and that intense scrutiny would impair the ardor and independence of defense counsel, and undermine the trust between attorney and client.[68]

Applied to this case, the Court held that Washington failed to prove the

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Kemp, 483 U.S. 776, 784, 794-795 (1987) (decision to forgo lesser culpability argument had sound strategic basis where Court opined that the defendant's actions were "outrageously and wantonly vile and inhuman"; failure to develop and present mitigating evidence supported by reasonable professional judgment that explanation of petitioner's history would not have minimized risk of death penalty) [Reproduced in the Accompanying Notebook at Tab 20]; *Smith v. Murray*, 477 U.S. 527, 536 (1986) (failure to pursue objection to admission of evidence fell within wide range of professionally competent assistance) [Reproduced in the Accompanying Notebook at Tab 24]; *Nix v. Whiteside*, 457 U.S. 157, 171 (counsel's refusal to offer perjured testimony falls within range of reasonable professional conduct) [Reproduced in the Accompanying Notebook at Tab 22].

[64]*See Strickland v. Washington*, 466 U.S. 668, 687 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

[65]*See id.* at 688. [Reproduced in the Accompanying Notebook at Tab 26]

[66]*Id.* at 689. [Reproduced in the Accompanying Notebook at Tab 26]

[67]*Id.* [Reproduced in the Accompanying Notebook at Tab 26]

[68]*See id.* at 690. [Reproduced in the Accompanying Notebook at Tab 26]

ineffectiveness component of his claim.[69] It based this conclusion on the assessment that counsel's decisions were based on strategy and fell within the range of professionally reasonable judgments.[70] The Court also noted that nothing in the record indicated that counsel's "understandabl[e]" hopelessness affected his professional judgment.[71]

As to the second question (whether counsel's performance prejudiced the case against the defendant), the Court found the lack of merit in this component "even more stark."[72] The evidence Washington claimed his counsel should have offered at his sentencing hearing, regarding his character and mental condition, "would barely have altered the sentencing profile presented."[73] The admission of such evidence would have shown that numerous people who knew Washington thought he was a good person, but likely would not outweigh the aggravating circumstances noted by the judge.[74] Further, admission of certain information, such as the rap sheet and psychological report, might have been harmful to Washington's case.[75]

After consideration and denial of both components, deficient performance and prejudice, the Court noted more generally that there was no showing that the justice of Washington's sentence was rendered unreliable by a breakdown in the adversary process.[76]

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[69]*See id.* at 699. [Reproduced in the Accompanying Notebook at Tab 26]

[70]*See Strickland v. Washington*, 466 U.S. 668, 699 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

[71]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[72]*Id.* [Reproduced in the Accompanying Notebook at Tab 26]

[73]*Id.* at 700. [Reproduced in the Accompanying Notebook at Tab 26]

[74]*See id.* (no reasonable probability omitted evidence would have changed conclusion). [Reproduced in the Accompanying Notebook at Tab 26]

[75]*See id.* [Reproduced in the Accompanying Notebook at Tab 26]

[76]*Strickland v. Washington*, 466 U.S. 668, 700 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

3. Applying the Rule in the United States[77]

i. Generally

Counsel's competence is presumed, whether counsel is retained by the accused or court-appointed.[78] The defendant has the burden to rebut this heavy presumption.[79]

The right to effective assistance of counsel is generally not violated where the counsel's actions are the result of an exercise of discretion regarding tactics or strategy.[80] "Strategic choices made after a thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable."[81] However, it has been held that where counsel has reason to doubt a defendant's competency to stand trial he must raise the issue, despite considerations of strategy and tactics.[82]

ii. Discovery and investigation

Counsel's representation was found to be ineffective in Kimmelman v. Morrison[83], where counsel failed to timely move for suppression of certain evidence, which was due to his failure to conduct adequate pretrial discovery.[84]

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[77]*See generally* 83 L. Ed. 1112 (1987) for cases and categories. [Reproduced in the Accompanying Notebook at Tab 6]

[78]*See* 22 C.J.S. 305 (1989). [Reproduced in the Accompanying Notebook at Tab 3]

[79]*See id.* [Reproduced in the Accompanying Notebook at Tab 3]

[80]*See id.* [Reproduced in the Accompanying Notebook at Tab 3]

[81]*Id.* [Reproduced in the Accompanying Notebook at Tab 3]

[82]*See id.* (There is authority to the contrary). [Reproduced in the Accompanying Notebook at Tab 3]

[83] 477 U.S. 365 (1986). [Reproduced in the Accompanying Notebook at Tab 20]

[84] *See* 83 L.Ed. 1112, 1130 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

Neil Morrison was convicted of raping a 15-year-old girl in his apartment.[85] At trial, the State called as a witness Detective Dolores Most, one of the officers who investigated the rape complaint.[86] Most stated that she accompanied the victim back to Morrison's apartment, where a neighbor let them in.[87] While there, she took a sheet from Morrison's bed.[88]

At this point, Morrison's counsel objected to the introduction of the sheet and any testimony concerning it, as it had been seized without a warrant.[89] New Jersey Court Rules, however, required suppression motions be made within 30 days of indictment, unless extended by the trial court for good cause.[90] Morrison's counsel explained that he had not heard of the seizure until the day before.[91] The prosecutor responded that the defense counsel, who had been on the case from the beginning, never asked for any discovery.[92] Had he done so, the prosecutor stated, police reports would have revealed the search and seizure.[93] In addition, the prosecutor had sent defense counsel a copy of the laboratory report concerning tests conducted on the sheet one month before trial.[94]

The defense counsel asserted that it was the State's obligation to inform him of

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[85] *See Kimmelman v. Morrison*, 477 U.S. 365, 368 (1986). [Reproduced in the Accompanying Notebook at Tab 20]

[86] *See id.* [Reproduced in the Accompanying Notebook at Tab 20]

[87] *See id.* [Reproduced in the Accompanying Notebook at Tab 20]

[88] *See id.* [Reproduced in the Accompanying Notebook at Tab 20]

[89] *See id.* [Reproduced in the Accompanying Notebook at Tab 20]

[90] *See id.* at 368, 369. [Reproduced in the Accompanying Notebook at Tab 20]

[91] *See Kimmelman v. Morrison*, 477 U.S. 365, 369 (1986). [Reproduced in the Accompanying Notebook at Tab 20]

[92] *See id.* at 369. [Reproduced in the Accompanying Notebook at Tab 20]

[93] *See id.* [Reproduced in the Accompanying Notebook at Tab 20]

[94] *See id.* [Reproduced in the Accompanying Notebook at Tab 20]

the case against his client, even though he had not made a discovery request.[95] The judge rejected this assertion, telling counsel that he was remiss.[96] The judge further stated that the basis for suppression was "very valid," but that he would not consider it in the middle of trial.[97]

The evidence against the defendant as a result of the admission of the sheet was damaging, as it confirmed that stains on the defendant's sheet matched stains on the victim's underwear, and that hairs recovered from the sheet was similar to both the defendant and the victim.[98]

The U.S. Supreme Court held that failure to file a suppression motion does not constitute per se ineffective assistance of counsel.[99] However, applying a "heavy measure of deference" to counsel's judgment, the Court found counsel's failure to conduct any pretrial discovery unreasonable, and contrary to prevailing professional norms.[100] The Court also noted that the counsel's justification for failing to conduct discovery betrayed either a "startling ignorance of the law -- or a weak attempt to shift blame for inadequate preparation."[101]

Having established the first prong of the test, that counsel's performance was deficient, the Court remanded the case for a determination of the second prong, prejudice.[102]

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[95] *See id.* [Reproduced in the Accompanying Notebook at Tab 20]

[96] *See id.* [Reproduced in the Accompanying Notebook at Tab 20]

[97] *See Kimmelman v. Morrison*, 477 U.S. 365, 369 (1986). [Reproduced in the Accompanying Notebook at Tab 20]

[98] *See id.* at 370. [Reproduced in the Accompanying Notebook at Tab 20]

[99] *See id.* at 384. [Reproduced in the Accompanying Notebook at Tab 20]

[100] *See id.* at 385. [Reproduced in the Accompanying Notebook at Tab 20]

[101] *Id.* [Reproduced in the Accompanying Notebook at Tab 20]

[102] *See id.* at 390-91. [Reproduced in the Accompanying Notebook at Tab 20]

In the following cases, the Supreme Court directly or indirectly held that counsel's representation was not ineffective by his alleged failure to investigate.

The Court in United States v. Agurs[103] observed that counsel's failure to obtain the victim's record, due to his belief that it was inadmissible, did not constitute ineffective representation. The Court noted that the trial judge had considered the record, and that it did not change the judge's conviction that the defendant was guilty beyond a reasonable doubt.[104]

The Court in Hill v. Lockhart,[105] observed that in a case where the issue is whether counsel's failure to discover potentially exculpatory evidence prejudiced the defendant by causing him to plead guilty, the ineffectiveness determination depends on the likelihood that the evidence would have led counsel to change his recommendation as to the plea, which in turn would depend largely on whether the evidence would have been likely to change the outcome of the trial.[106]

iii. Pleading

To succeed on an appeal based on ineffective assistance of counsel in connection with a guilty plea, the defendant must show that counsel's advice was not within the range of competence demanded of criminal attorneys, and that there is a reasonable probability he otherwise would have not pleaded guilty.[107] However, while counsel may advise his client whether to plead guilty or go to trial, counsel's failure to make a

[103] 427 U.S. 97 (1976). [Reproduced in the Accompanying Notebook at Tab 28]

[104] *See United States v. Agurs*, 427 U.S. 97, 114 (1976). [Reproduced in the Accompanying Notebook at Tab 28]

[105] 474 U.S. 52 (1985). [Reproduced in the Accompanying Notebook at Tab 19]

[106] *See* 83 L.Ed. 1112, 1130 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

[107] *See* 22 C.J.S. 308 (1989). [Reproduced in the Accompanying Notebook at Tab 3]

recommendation does not necessarily constitute ineffective assistance of counsel.[108] The test is whether counsel's assistance allowed the client to make an informed and voluntary choice.

In the following decisions, guilty pleas were held not to be involuntary by reason of ineffective assistance of counsel.

In Hill v. Lockhart,[109] the Court applied the Strickland standard to determine whether counsel's assistance was ineffective during the plea process as a result of his failure to inform the defendant of his eligibility for parole.[110] The Court observed that "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[111] The Court held that the District Court did not err in its decision not to hold a hearing on the defendant's ineffective assistance of counsel claim, as Petitioner did not allege in his habeas corpus petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial.[112]

The U.S. Supreme Court held in McMann v. Richardson[113] that the fact that a confession might be subsequently held inadmissible does not justify a conclusion that defense counsel was ineffective or incompetent because he thought the confession would probably be admissible and thus advised his client to plead guilty.[114]

Richardson alleged that his plea of guilty to murder was induced by a coerced

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[108] *See id.* at 305. [Reproduced in the Accompanying Notebook at Tab 3]

[109] 474 U.S. 52 (1985). [Reproduced in the Accompanying Notebook at Tab 19]

[110] *See Hill v. Lockhart*, 474 U.S. 52, 60 (1985). [Reproduced in the Accompanying Notebook at Tab 19]

[111] *Id.* at 59. [Reproduced in the Accompanying Notebook at Tab 19]

[112] *See id.* at 60. [Reproduced in the Accompanying Notebook at Tab 19]

[113] 397 U.S. 759 (1970). [Reproduced in the Accompanying Notebook at Tab 21]

[114] *See* 83 L.Ed. 1112, 1130 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

confession because he was beaten up, and by ineffective counsel.[115] Richardson's assigned attorney conferred with him 10 minutes prior to the day the plea of guilty was taken.[116] He advised his attorney that he did not want to plead guilty to something he did not do, and was told to plead guilty to avoid the electric chair.[117]

The Court held that whether counsel's advice was effective depended not on whether it is retrospectively right or wrong, but whether it was within the range of competence for attorneys in criminal cases.[118]

In Tollett v. Henderson,[119] the Court held that where a defendant has solemnly admitted his guilt in open court, he may not subsequently raise claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea, but may only attack the voluntary and intelligent nature of the plea by showing the advice he received from counsel was not competent.[120] It is not sufficient to show that the defendant was not advised of every conceivable constitutional plea that might have been raised, or that a factual inquiry that might have been made would have uncovered a possible constitutional infirmity in the proceedings.[121]

The Court held in United States v. Cronic,[122] that even where there is a bona fide defense, counsel may advise his client to plead guilty if that advice falls within the range

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[115] *See McMann v. Richardson*, 397 U.S. 759, 763 (1970). [Reproduced in the Accompanying Notebook at Tab 21]

[116] *See id.* [Reproduced in the Accompanying Notebook at Tab 21]

[117] *See id.* [Reproduced in the Accompanying Notebook at Tab 21]

[118] *See id.* at 770 [Reproduced in the Accompanying Notebook at Tab 21]; 83 L.Ed. 1112, 1131 (1987) [Reproduced in the Accompanying Notebook at Tab 6]. *See also Parker v. North Carolina*, 397 U.S. 790 (1970) [Reproduced in the Accompanying Notebook at Tab 23].

[119] 411 U.S. 258 (1973). [Reproduced in the Accompanying Notebook at Tab 27]

[120] *See* 83 L.Ed. 1112, 1131-32 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

[121] *See id.* at 1132. [Reproduced in the Accompanying Notebook at Tab 6]

[122] 466 U.S. 648 (1984). [Reproduced in the Accompanying Notebook at Tab 29]

of reasonable competence under the circumstances.[123]

iv. Argument

In the following case, a defendant's right to effective assistance of counsel was not violated with regard to his attorney's opening statement.

In United States v. Cronic,[124] the U.S. Supreme Court held that counsel's decision to use notes during his opening statement, and his statement to the jury that this was his first trial, did not justify a presumption that the trial was unfair and in fact may have been a strategical decision.[125]

v. Introduction of Evidence

In the following U.S. Supreme Court cases, counsel's failure or refusal to introduce certain evidence did not violate the defendants' right to effective assistance of counsel.[126]

The Court in Nix v. Whiteside[127] held that the refusal of counsel to cooperate with the defendant's intent to give perjured testimony did not constitute ineffective assistance of counsel. The attorney had acted according to professional standards and the defendant could not, as a matter of law, be considered prejudiced by having to present truthful testimony.[128]

Whiteside was convicted of second-degree murder.[129] He and two others went to

[123] *See* 83 L.Ed. 1112, 1132 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

[124] 466 U.S. 648 (1984). [Reproduced in the Accompanying Notebook at Tab 29]

[125] *See* 83 L.Ed. 1112, 1134 (1987). [Reproduced in the Accompanying Notebook at Tab 29]

[126] *See also Strickland v. Washington*, supra Part V.A.2.

[127] 475 U.S. 157 (1986). [Reproduced in the Accompanying Notebook at Tab 22]

[128] *See* 83 L.Ed. 1112, 1136 (1987).[Reproduced in the Accompanying Notebook at Tab 6]

[129] *See Nix v. Whiteside*, 475 U.S. 157, 160 (1986). [Reproduced in the Accompanying Notebook at Tab

the victim, Calvin Love's apartment seeking marihuana late one night, and an argument ensued.[130] Love, who was in bed, told his girlfriend to get his "piece" and then started to reach under his pillow and move toward Whiteside.[131] Whiteside fatally stabbed him in the chest.[132]

Whiteside consistently told his attorney that although he had not seen a gun in Love's hand, he was convinced that Love had one.[133] Whiteside's counsel advised him that the existence of a gun was not necessary to establish a claim of self-defense, but only a reasonable belief that the victim had a gun nearby.[134]

About a week before his trial, Whiteside told his attorney that he had seen something "metallic" in Love's hand.[135] Asked about this, Whiteside said that "[i]f I don't say I saw a gun, I'm dead."[136]

Whiteside's counsel told Whiteside such testimony would be perjury, and told him that he could not allow him to testify falsely, because that would be suborning perjury.[137] Whiteside testified at trial that he had not seen a gun and was convicted; he moved for a new trial based on counsel's refusal to allow him to testify that he had seen a gun.[138]

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[130] *See id.* [Reproduced in the Accompanying Notebook at Tab 22]

[131] *See id.* [Reproduced in the Accompanying Notebook at Tab 22]

[132] *See id.* [Reproduced in the Accompanying Notebook at Tab 22]

[133] *See id.* at 160-161. [Reproduced in the Accompanying Notebook at Tab 22]

[134] *See id.* at 160. [Reproduced in the Accompanying Notebook at Tab 22]

[135] *See Nix v. Whiteside*, 475 U.S. 157, 161 (1986). [Reproduced in the Accompanying Notebook at Tab 22]

[136] *See id.* [Reproduced in the Accompanying Notebook at Tab 22]

[137] *See id.* [Reproduced in the Accompanying Notebook at Tab 22]

[138] *See id.* at 161-162. [Reproduced in the Accompanying Notebook at Tab 22]

The Supreme Court analyzed the duty of an attorney when confronted with a client's intention to testify falsely, and found that counsel's response adhered to reasonable professional standards.[139] The Court further found that Whiteside's truthful testimony could not have prejudiced his trial.[140]

In Darden v. Wainwright,[141] the defendant was sentenced to death after his conviction for murder, robbery and assault with intent to kill.[142] He contended that he was denied effective assistance of counsel at the sentencing phase of the trial, arguing that his counsel did not delve sufficiently into his background, and thus did not present mitigating evidence.[143] Applying the Strickland test, the U.S. Supreme Court held that the public defender's decision not to introduce certain mitigating evidence was sound trial strategy, and thus the defendant's argument failed the first prong of the test dealing with counsel's performance.[144] The Court noted that any effort to portray the defendant as nonviolent would have allowed the prosecution to rebut with evidence of his past convictions; any attempt to portray that the defendant was incapable of committing the crimes would have been rebutted with a psychiatric report to the contrary; and an effort to portray the defendant as a family man would have been met with evidence of a girlfriend.[145]

vi. Suppression of evidence

[139] *See id.* at 171. [Reproduced in the Accompanying Notebook at Tab 22]

[140] *See id.* at 176. [Reproduced in the Accompanying Notebook at Tab 22]

[141] 477 U.S. 168 (1986). [Reproduced in the Accompanying Notebook at Tab 16]

[142] *See Darden v. Wainwright*, 477 U.S. 168, 170 (1986). [Reproduced in the Accompanying Notebook at Tab 16]

[143] *See id.* at 184. [Reproduced in the Accompanying Notebook at Tab 16]

[144] *See id.* at 186-187. [Reproduced in the Accompanying Notebook at Tab 16]

[145] *See* 83 L.Ed. 1112, 1137 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

Failure to file a motion to suppress evidence does not constitute per se ineffective assistance of counsel, but may constitute ineffective assistance under certain circumstances.[146]

In Kimmelman v. Morrison,[147] supra at Part A(3)(i), counsel's conduct with regard to suppression of evidence that was allegedly illegally obtained was held so professionally deficient as to constitute ineffective assistance of counsel.[148] Counsel's failure to suppress evidence was due to his ignorance of the illegal search, based on his mistaken belief that the prosecution was obliged to disclosure all inculpatory evidence on its own initiative.[149]

In Chambers v. Maroney,[150] the petitioner sought a writ of habeas corpus from his robbery conviction, contending that his attorney's appearance a few minutes before trial was so belated as to render his assistance ineffective.[151] Specifically, the petitioner argued that counsel's efforts to exclude from evidence guns and ammunition were ineffective.[152] The Supreme Court held the claim of prejudice was without substantial basis, upholding the judgment of the Court of Appeals that admission of bullets was harmless error, and that the guns were admissible evidence.[153]

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[146]*See* 22 C.J.S. 309 (1989). [Reproduced in the Accompanying Notebook at Tab 3]

[147]477 U.S. 365, 370 (1986). [Reproduced in the Accompanying Notebook at Tab 20]

[148]*See* 83 L.Ed. 1112, 1137 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

[149]*See id.* [Reproduced in the Accompanying Notebook at Tab 6]

[150]399 U.S. 42 (1970). [Reproduced in the Accompanying Notebook at Tab 14]

[151]*See Chambers v. Maroney*, 399 U.S. 42, 53 (1970). [Reproduced in the Accompanying Notebook at Tab 14]

[152]*See id.* at 53-54. [Reproduced in the Accompanying Notebook at Tab 14]

[153]*See id.* at 54 [Reproduced in the Accompanying Notebook at Tab 14]. *But see State v. Knight*, 611 So.2d 1381 (1993) (defendant constructively denied counsel where public defender's office designated unprepared attorney on morning of trial) [Reproduced in the Accompanying Notebook at Tab 25]. 22 C.J.S. 312 (Supp. 2000) [Reproduced in the Accompanying Notebook at Tab 3].

vii. Conflict of Interest and other Presumptions of Prejudice

Counsel is presumed to be competent, but prejudice will be presumed in certain circumstances.[154] The U.S. Supreme Court in the following cases held that counsel's assistance may be ineffective where counsel represents other parties, such as codefendants, whose interests conflict with the defendant's.[155]

In Cuyler v. Sullivan,[156] defendant John Sullivan and two companions were indicted for the shooting deaths of two victims.[157] Sullivan initially had his own lawyer, but subsequently accepted representation from the two lawyers representing the other defendants because he could not afford to pay his own lawyer.[158] Sullivan at no time objected to the multiple representation.[159]

Where a defendant raised no objection at trial that a conflict existed, to show ineffective assistance of counsel the defendant must demonstrate that an "actual conflict of interest adversely affected his lawyer's performance."[160] An example of such adverse effect was shown in Glasser v. United States,[161] where defense counsel failed to cross-examine a prosecution witness as a result of his desire to diminish the jury's perception of a codefendant's guilt.[162] Conversely, in Dukes v. Warden,[163] counsel who sought leniency

[154]21A Am. Jur. 2d *Criminal Law* § 1224 n.71 (1998). [Reproduced in the Accompanying Notebook at Tab 1]

[155]*See* 83 L.Ed. 1112, 1142 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

[156]446 U.S. 335 (1980). [Reproduced in the Accompanying Notebook at Tab 15]

[157]*See Cuyler v. Sullivan*, 446 U.S. 335, 337 (1980). [Reproduced in the Accompanying Notebook at Tab 15]

[158]*See id.* [Reproduced in the Accompanying Notebook at Tab 15]

[159]*See id.* at 337-338. [Reproduced in the Accompanying Notebook at Tab 15]

[160]*Id.* at 348. [Reproduced in the Accompanying Notebook at Tab 15]

[161]315 U.S. 60 (1942). [Reproduced in the Accompanying Notebook at Tab 18]

[162]*See Cuyler v. Sullivan*, 446 U.S. 335, 348-349 (1980). [Reproduced in the Accompanying Notebook at

for codefendants by arguing that their cooperation with police led the defendant in question to plead guilty was held not to be ineffective, where nothing in the record indicated the alleged conflict did in fact render the guilty plea involuntary and unintelligent.[164]

In the instant case, Cuyler v. Sullivan,[165] the Court noted that a defendant who shows a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice to obtain relief.[166] But such a defendant must show that his counsel actively represented conflicting interests.[167] Sullivan's contention that the multiple representation involved a possible conflict of interest was insufficient to demonstrate a violation of his right to effective assistance of counsel, absent a showing that counsel's performance was actually affected.[168]

In Wood v. Georgia,[169] the Court held that where defense counsel hired and paid for by the defendant's employer is influenced in his basis strategic decisions by that employer, the due process rights of the defendant are not upheld.[170]

In addition to conflict of interest, the United States v. Cronic[171] Court held that prejudice will be presumed in the following circumstances: "where [the] accused is

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Tab 15]

[163]406 U.S. 250 (1972). [Reproduced in the Accompanying Notebook at Tab 17]

[164]*See Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980). [Reproduced in the Accompanying Notebook at Tab 15]

[165]446 U.S. 335 (1980). [Reproduced in the Accompanying Notebook at Tab 15]

[166]*See id.* at 349-350. [Reproduced in the Accompanying Notebook at Tab 15]

[167]*See id.* at 350. [Reproduced in the Accompanying Notebook at Tab 15]

[168]*See id.* [Reproduced in the Accompanying Notebook at Tab 15]

[169]450 U.S. 261 (1981). [Reproduced in the Accompanying Notebook at Tab 30]

[170]*See* 83 L.Ed. 1112, 1143 (1987). [Reproduced in the Accompanying Notebook at Tab 6]

[171]466 U.S. 648 (1984). [Reproduced in the Accompanying Notebook at Tab 29]

completely denied counsel at [a] critical stage of [the] proceeding; where counsel fails to subject [the] prosecution's case to meaningful adversarial testing; and where surrounding circumstances may justify [a] presumption of ineffectiveness without [inquiring] into counsel's actual performance at trial."[172]

B. Canada

Litigation over ineffective assistance of counsel in Canada is still in an "embryonic stage" but is anticipated to increase.[173] The right to effective assistance of counsel derives from common law, § 650(3) of the Criminal Code of Canada and §§ 7 and 11(d) of the Canadian Charter of Rights and Freedoms.[174] An accused's right to effective assistance of counsel is violated in Canada if it is "negligent and results in reasonable probability of a miscarriage of justice."[175]

As in the United States, a lawyer with a conflict of interest has been held to deprive the accused of effective assistance of counsel.[176] As did a lawyer who failed to investigate witnesses' supporting the accused's alibi.[177] The Canadian Courts have referenced the United States' Strickland[178] standard in deciding its own appeals based on

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[172]21A Am. Jur. 2d *Criminal Law* § 1224 n.71 (1998). [Reproduced in the Accompanying Notebook at Tab 1]

[173]*See* Criminal Procedure: A Worldwide Study 77 (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[174]*See R. v. G.D.B.* [2000] S.C.J. No. 22 at 17 (Q.L.). [Reproduced in the Accompanying Notebook at Tab 33]

[175]Criminal Procedure: A Worldwide Study 77 (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[176]*See id.* (citing *Silvini* (1991) 68 C.C.C.(3d) 251 (Ont.C.A.)). [Reproduced in the Accompanying Notebook at Tab 4]

[177]*See id.* (citing *McKellar* (1994) 34 C.R.(4th) 28 (Ont.C.A.)). [Reproduced in the Accompanying Notebook at Tab 4]

[178]*See Strickland v. Washington*, 466 U.S. 668 (1984). [Reproduced in the Accompanying Notebook at Tab

counsel's incompetence.[179]

1. Standard per R. v. G.D.B. [180]

Citing Strickland, the Court in R. v. G.D.B. [181] noted that for an ineffective assistance of counsel appeal to succeed the counsel's acts or omissions must constitute incompetence, and a miscarriage of justice must have resulted.[182]

Incompetence is based on a reasonableness standard, with the burden on the appellant to establish that counsel's conduct was not the result of reasonable professional judgment, with hindsight playing no part in the assessment.[183] A miscarriage of justice constitutes a procedural unfairness or a compromise of the trial's reliability.[184]

Veering slightly from the Strickland Court's approach, however, the Court here noted that where there is no prejudice, it is "undesirable" for courts to consider the performance component.[185]

In R. v. G.D.B., the appellant was convicted of the sexual and indecent assault of

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[179]*See R. v. G.D.B.* [2000] S.C.J. No. 22 (Q.L.) (2000 Can. Sup. Ct. LEXIS 22). [Reproduced in the Accompanying Notebook at Tab 33]

[180][2000] S.C.J. No. 22 (Q.L.). [Reproduced in the Accompanying Notebook at Tab 33]

[181]*Id.* [Reproduced in the Accompanying Notebook at Tab 33]

[182]*See R. v. G.D.B.* [2000] S.C.J. No. 22, 18 (Q.L.)(2000 Can. Sup. Ct. LEXIS 22, at *18). [Reproduced in the Accompanying Notebook at Tab 33]

[183]*See id.* [Reproduced in the Accompanying Notebook at Tab 33]

[184]*See id.* [Reproduced in the Accompanying Notebook at Tab 33]

[185]*See id.* ("the object of an ineffectiveness claim is not to grade counsel's performance or professional conduct") [Reproduced in the Accompanying Notebook at Tab 33]. *But see Strickland v. Washington*, 466 U.S. 668, 700 (1984) (failure to show either deficient performance or sufficient prejudice was a "double failure"). [Reproduced in the Accompanying Notebook at Tab 26]

his adopted daughter.[186] At issue in the appeal was counsel's decision not to introduce into evidence a tape on which the daughter, J.W., denied to her mother, M.B., that she had been sexually assaulted by the appellant.[187] Instead, counsel raised questions about the content of the tape during cross-examination of J.W., who did not know the tape existed.[188]

In applying these facts to the Strickland standard, the Court asked whether it was appropriate that the decision not to use the tape was made solely by defendant's counsel and, if not, what was the result of the defendant being excluded from the decision.[189]

Counsel's decision not to use the tape was based on the fact that the complainant's mother asked leading questions and secretly taped the conversation, actions which counsel feared would destroy the mother's credibility.[190] As she was the defense's main witness, this would force counsel to put the appellant, whom counsel considered a poor witness, on the stand.[191]

The Court held that where counsel makes a decision in good faith and in the best interests of his client, as here, a court should not question it except to prevent a miscarriage of justice.[192] In some situations, such as decisions whether or not to plead guilty, or whether to testify, defense counsel must consult with the defendant, and failure to do so may in some circumstances result in a miscarriage of justice.[193] This is not such

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[186]*See R. v. G.D.B.* [2000] S.C.J. No. 22, 18 (Q.L.)(2000 Can. Sup. Ct. LEXIS 22, at *6). [Reproduced in the Accompanying Notebook at Tab 33]

[187]*See id.* at *7. [Reproduced in the Accompanying Notebook at Tab 33]

[188]*See id.* at *8. [Reproduced in the Accompanying Notebook at Tab 33]

[189]*See id.* at *19-20. [Reproduced in the Accompanying Notebook at Tab 33]

[190]*See id.* at *20. [Reproduced in the Accompanying Notebook at Tab 33]

[191]*See id.* [Reproduced in the Accompanying Notebook at Tab 33]

[192]*R. v. G.D.B.* [2000] S.C.J. No. 22 (Q.L.)(2000 Can. Sup. Ct. LEXIS 22, at *21-22). [Reproduced in the Accompanying Notebook at Tab 33]

[193]*See id.* at *21. [Reproduced in the Accompanying Notebook at Tab 33]

a case, as counsel had the "implied authority to make tactical decisions."[194] Failure to consult with the defendant for instructions regarding the tape's use did not affect the outcome of the trial -- there was no miscarriage of justice.[195]

2. Applying the Rule in Canada

i. R v. Petitpas[196]

The respondent Petitpas while driving was stopped by a police officer, who noticed a smell of alcohol.[197] The officer asked Petitpas to take a roadside test, which he failed.[198] Petitpas was then taken to the police department to be given a breathalyzer test, at which time he called his lawyer.[199] His lawyer advised him not to take the test (or "not to blow").[200]

Petitpas argued at trial that this advice was incorrect and that he should not have been instructed to refuse the test; that counsel's advice amounted to no advice.[201] The trial judge ruled that the advice not to take the test amounted to "no advice."

Although this was an argument of counsel's incompetence prior to trial, rather than during a trial or a capital sentencing hearing as in Strickland, the appeals Court in

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[194]*Id.* [Reproduced in the Accompanying Notebook at Tab 33]

[195]*See id.* [Reproduced in the Accompanying Notebook at Tab 33]

[196]2000 WCBJ LEXIS 1104. [Reproduced in the Accompanying Notebook at Tab 34]

[197]*See R. v. Petitpas*, 2000 WCBJ LEXIS 1104, at *1. [Reproduced in the Accompanying Notebook at Tab 34]

[198]*See id.* [Reproduced in the Accompanying Notebook at Tab 34]

[199]*See id.* [Reproduced in the Accompanying Notebook at Tab 34]

[200]*Id.* at *2. [Reproduced in the Accompanying Notebook at Tab 34]

[201]*See id.* at *3. [Reproduced in the Accompanying Notebook at Tab 34]

the instant case applied the Strickland standard. The Court held that there was not enough evidence to support the trial judge's decision. The Court held that counsel's advice to his client to not take the breathalyzer test could have been wrong, but that it did not meet the standard enunciated in R v. G.D.B. Because the appeals court felt, however, that there was a potential for miscarriage of justice, and that the trial judge did not sufficiently state his reasons, the case was remanded for a new trial.

Thus this case suggests that in Canada, faulty advice prior to trial may constitute ineffective assistance of counsel justifying an appeal.

ii. R. v. Rodgers[202]

The appellant Rodgers alleged ineffective assistance of counsel for four failures on the part of counsel to bring out evidence, in an effort to have that fresh evidence considered.[203] The Court held that the suggested fresh evidence would not have resulted in a different verdict and did not demonstrate a miscarriage of justice.[204]

In the first alleged error, Rodgers claimed that counsel should have pointed blame to another suspect.[205] The Court opined that this suggested strategy would have been problematic, as it would have opened the door to the defendant's record for sexual interference and a psychological assessment labeling him a psychopathic deviant.[206]

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[202]2000 Ont. C.A. LEXIS 262. [Reproduced in the Accompanying Notebook at Tab 35]

[203]*See R. v. Rodgers*, 2000 Ont. C.A. LEXIS 262, at *2-4. [Reproduced in the Accompanying Notebook at Tab 35]

[204]*See id.* at *4. [Reproduced in the Accompanying Notebook at Tab 35]

[205]*See id.* at *2. [Reproduced in the Accompanying Notebook at Tab 35]

[206]*See id.* [Reproduced in the Accompanying Notebook at Tab 35]

Second, Rodgers contended that counsel proceeded to trial without full disclosure, by failing to interview defense witnesses prior to giving a list of such witnesses to the Crown (by which Crown learned of two witnesses whose testimony was unhelpful to the defense).[207] The Court noted that in fact, the police already knew the names of these witnesses because Rodgers, contrary to counsel's advice, made a statement to the police in which he gave their names.[208]

Third, Rodgers claimed that counsel failed to sufficiently prepare the defense witnesses.[209] The Court found, based on cross-examination of these witnesses on Rodger's application to admit fresh evidence, that further preparation by trial counsel would have yielded evidence that was detrimental to Rodgers' case.[210]

Finally, Rodgers claimed that consciousness of his innocence should have been brought out more fully, a suggestion the Court found to be a rehash of evidence already before the jury and of minimal assistance to his defense.[211]

In sum, the Court rejected each of Rodgers' claims that his counsel was ineffective either because the suggested evidence would have harmed him more than helped him, or would have had no effect at all, and thus could not result in a different verdict or a miscarriage of justice.

C. The United Kingdom

[207]*See id.* at *3. [Reproduced in the Accompanying Notebook at Tab 35]

[208]*See id.* [Reproduced in the Accompanying Notebook at Tab 35]

[209]*See R. v. Rodgers*, 2000 Ont. C.A. LEXIS 262, at *3. [Reproduced in the Accompanying Notebook at Tab 35]

[210]*See id.* at *3-4. [Reproduced in the Accompanying Notebook at Tab 35]

[211]*See id.* at *4. [Reproduced in the Accompanying Notebook at Tab 35]

The United Kingdom, though it follows an adversarial or common law system, generally does not allow ineffective assistance of counsel as a ground for appeal.[212] Incompetent representation in a magistrate court may be remedied by competent representation in a rehearing to the Crown Court.[213] While a decision may be quashed where the court refused an adjournment allowing counsel adequate time to prepare his case, generally the defendant may not argue that his own counsel's conduct made the proceedings unfair.[214]

A Full Bench decision in Scotland, HMA v. Anderson, [215] reviewed the law in the United Kingdom and elsewhere to answer the question of whether alleged incompetency of counsel could be grounds for an appeal.[216] HMA v. Anderson is seen as a particularly important case because a full bench, necessary to overrule a previous appeal court precedent, only occurs four or five times a decade.[217]

The decision overturned previous cases[218] which held that even if the conduct of counsel deprives the accused of the right to a fair trial, the court cannot interfere on the ground that there was a miscarriage of justice.[219] The Anderson v. HMA Court said that "if the system breaks down to such an extent that the defence is not presented, it would be

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[212]*See* Criminal Procedure: A Worldwide Study 136 (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[213]*See id.* at 137. [Reproduced in the Accompanying Notebook at Tab 4]

[214]*See id.* (citing *Al-Mehdawi v. Secretary of State for the Home Dept*. [1990] 1 A.C. 876, H.L.). [Reproduced in the Accompanying Notebook at Tab 4]

[215]1996 SLT 155. [Reproduced in the Accompanying Notebook at Tab 31]

[216]*See* Neil Gow, *"Flagrant Incompetency" of counsel*, 146 New L.J. 453 (1996). [Reproduced in the Accompanying Notebook at Tab 10]

[217]*See id.* [Reproduced in the Accompanying Notebook at Tab 10]

[218]*See id.* [Reproduced in the Accompanying Notebook at Tab 10]

[219]*See Anderson v. HMA* 1996, SLT 155, 160. [Reproduced in the Accompanying Notebook at Tab 31]

a denial of justice for the court not to intervene in order to set aside the conviction and allow a new trial."[220]

The new standard promulgated by the Court looks to whether counsel's conduct deprived the defendant of his right to a fair trial, such that a miscarriage of justice results.[221] For instance, this may occur where the accused was deprived of the opportunity to present his defense, or where his counsel acted contrary to his instructions.[222] However, the Court was clear in saying that while counsel must act according to the accused's instruction as to what the defense is, it is to counsel's own discretion as to how he conducts that defense.[223]

Thus Scotland has a stricter standard, looking only at what the United States would consider the second part of a two-prong test: whether a miscarriage of justice results. This is also the primary consideration in Canada, which does not address attorney competency if the outcome of the trial would not have been changed. However, whether a miscarriage would result necessary requires a look at counsel's actions in representing the accused.

In Anderson v. HMA, the appellant was convicted of forcing his way into a home and assaulting Patrick Hugh McHugh, Sr., and his wife and three children. Anderson appealed his conviction, saying that he was misrepresented by his solicitor advocate.[224]

Anderson stated that tactics for his defense which were agreed to were ignored and changed by counsel without his agreement or consultation.[225] Specifically, he felt it

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[220]*Id.* [Reproduced in the Accompanying Notebook at Tab 31]

[221]*See id.* at 164. [Reproduced in the Accompanying Notebook at Tab 31]

[222]*See id.* [Reproduced in the Accompanying Notebook at Tab 31]

[223]*See id.* [Reproduced in the Accompanying Notebook at Tab 31]

[224]*See id.* at 156. [Reproduced in the Accompanying Notebook at Tab 31]

[225]*See Anderson v. HMA* 1996, SLT 155, 156. [Reproduced in the Accompanying Notebook at Tab 31]

imperative that McHugh's character be brought out at trial, including his criminal record.[226] The Court held that the solicitor advocate was "fully justified" in his decision not to attack the character of McHugh, especially considering that Anderson was incorrect about his criminal record, that rather than a recent prison sentence McHugh spent a short time in prison over fifteen years earlier.[227]

Because putting McHugh's character on trial would have resulted in Anderson's character also being put into evidence, the Court found that the solicitor advocate "exercised a wise discretion in not putting Mr. McHugh's character in issue."[228] The Court found that the conduct of the solicitor advocate "fell far short" of depriving Anderson of a fair trial.[229] The Court thus refused the appeal.[230]

In setting the standard for appeals based on attorney ineffectiveness, the Anderson v. HMA Court looked to the position taken by other countries. In general, the Court noted that England,[231] New Zealand, the United States,[232] Canada and Australia take the position that if the right to fair trial is denied by incompetency or some other failure of counsel, the court should intervene on the ground of miscarriage of justice.[233] In South

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[226]*See id.* at 165. [Reproduced in the Accompanying Notebook at Tab 31]

[227]*See id.* [Reproduced in the Accompanying Notebook at Tab 31]

[228]*Id.* [Reproduced in the Accompanying Notebook at Tab 31]

[229]*Id.* [Reproduced in the Accompanying Notebook at Tab 31]

[230]*See id.* at 166. [Reproduced in the Accompanying Notebook at Tab 31]

[231]*See R. v. Clinton* [1993] 2 All ER (where counsel made decisions in good faith after consideration of competing arguments, and where appropriate after discussion with client, such decisions cannot render verdict unsafe or unsatisfactory). "Cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional." *Id.* at 1004. [Reproduced in the Accompanying Notebook at Tab 32]

[232]Citing *Strickland v. Washington*, 466 U.S. 668, 699 (1984). [Reproduced in the Accompanying Notebook at Tab 26]

[233]*See Anderson v. HMA* 1996, SLT 155, 160. [Reproduced in the Accompanying Notebook at Tab 31]

Africa, the Court noted, the law is "still in a state of uncertainty on this point."[234]

Scotland certainly is more forceful than the United States or Canada, perhaps, in its position that the manner in which counsel presents the defense should not be criticized.[235] Only where the accused has been *deprived of his defense* may it be found that a miscarriage of justice occurred.[236]

D. South Africa

South African Courts have not decided whether the right to counsel includes the right to effective assistance of counsel.[237] However, experts in South African law anticipate that courts would reach this finding given the appropriate case.[238]

The South African Bill of Rights provides the right to a fair trial, and other guarantees essential in an adversarial system, such as presumption of innocence and the right to remain silent.[239] While the form of trial is based on the adversarial system, there are significant inquisitorial-type procedures.[240] These include judicial interrogation at the plea stage, and the ability of the presiding officer in any trial concerning a "special offense" to question the accused who pleads not guilty, and draw unfavorable inferences

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[234]*Id.* [Reproduced in the Accompanying Notebook at Tab 31]

[235]*See id.* [Reproduced in the Accompanying Notebook at Tab 31]

[236]*See id.* [Reproduced in the Accompanying Notebook at Tab 31]

[237]*See* Criminal Procedure: A Worldwide Study 354 (Craig M. Bradley ed., 1999) [Reproduced in the Accompanying Notebook at Tab 4]; *Anderson v. HMA* 1996, SLT 155, 160 (law is still in a state of uncertainty) (citing *S v. Bennett* 1994 (1) SACR at 399) [Reproduced in the Accompanying Notebook at Tab 31].

[238]Criminal Procedure: A Worldwide Study 354 (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[239]*See* Rights and Constitutionalism: The New South African Legal Order 412 (Dawid van Wyk et al., eds 1994) (section 25(3)). [Reproduced in the Accompanying Notebook at Tab 7]

[240]*See id.* at 416. [Reproduced in the Accompanying Notebook at Tab 7]

from a failure to answer.[241]

The defendant's right to a fair trial includes "the right 'to have a legal practitioner assigned by the state and at state expense, if substantial justice would otherwise result, and to be informed of this right promptly.'"[242] Where the accused's right to legal representation is compromised, the proceedings have been set aside based on the idea that a failure of justice has occurred.[243]

Similar to other jurisdictions, South African Courts frown upon situations where counsel has a conflict of interest, such as where counsel represents two defendants whose defenses were mutually exclusive.[244] Such a situation would result in automatic vitiation of the proceedings.[245]

While the law is still in a state of uncertainty as to whether an accused may appeal based on ineffective assistance of counsel,[246] the Court in S v. Bennett[247] held that where an accused fails to take any steps to terminate his counsel's mandate at trial and also expressed no dissatisfaction with his counsel's conduct, he is not entitled to appeal on the ground that his counsel had been negligent.[248] Thus, the case suggests that in some situations, an accused would be able to appeal based on attorney incompetence.

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[241]*See id.* [Reproduced in the Accompanying Notebook at Tab 7]

[242]*Id.* at 415; Criminal Procedure: A WorldWide Study 353 (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[243]*See* Rights and Constitutionalism: The New South African Legal Order 412 (Dawid van Wyk et al., eds 1994) (citing *S v. Mkhize* 1978 (3) SA 1067 (T)). [Reproduced in the Accompanying Notebook at Tab 7]

[244]*See* Criminal Procedure: A Worldwide Study 354 (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]

[245]*See id.* [Reproduced in the Accompanying Notebook at Tab 4]

[246]*See Anderson v. HMA* 1996, SLT 155, 160 (citing *S v. Bennett* 1994 (1) SACR at 399). [Reproduced in the Accompanying Notebook at Tab 31]

[247]1994 (1) SACR at 399.

[248]*See* Criminal Procedure: A Worldwide Study 354 (Craig M. Bradley ed., 1999). [Reproduced in the Accompanying Notebook at Tab 4]