CASE NOTE

CRIMINAL LAW—Prejudiced by the Prejudice Prong: Proposing a New Standard for Ineffective Assistance of Counsel in Wyoming after *Osborne v. State*, 2012 WY 123, 285 P.3d 248 (Wyo. 2012)

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"[T]here is no right more essential than the right to the assistance of counsel."[1]

INTRODUCTION

The Sixth Amendment to the United States Constitution guarantees the accused the right to assistance of counsel in all criminal prosecutions.[2] The purpose of the right to counsel is to ensure criminal defendants receive a fair trial.[3] Unfortunately, that essential right appears to be mere dicta when it comes to the judicial system's treatment of ineffective assistance of counsel claims.[4]

In 2012, the Wyoming Supreme Court evaluated whether a Sheridan resident was denied his Sixth Amendment right to assistance of counsel at his murder trial. In *Osborne v. State*, Shawn Osborne appealed his first degree murder conviction, arguing that his trial counsel was ineffective.[5] The Wyoming Supreme Court used the oft-cited standard found in *Strickland v. Washington* to evaluate the claim.[6] Under *Strickland,* the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense.[7] The

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[1] Lakeside v. Oregon, 435 U.S. 333, 341 (1978).

[2] U.S. CONST. amend. VI.

[3] *See, e.g.*, Lockhart v. Fretwell, 506 U.S. 364, 368 (1993); Nix v. Whiteside, 475 U.S. 157, 178 (1986); Daniel Dinger, *Successive Interviews and Successful Prosecutions: The Interplay of the Sixth Amendment Right to Counsel and the Dual Sovereignty Doctrine in a Post-Cobb World*, 40 TEX. TECH L. REV. 917, 921 (2008).

[4] David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 22–23 (1973) ("I have often been told that if my court were to reverse every case in which there was inadequate counsel, we would have to send back half the convictions in my jurisdiction.").

[5] 2012 WY 123, ¶ 18, 285 P.3d 248, 252 (Wyo. 2012).

[6] 466 U.S. 668, 687 (1984).

[7] *Id.*

Wyoming Supreme Court held that Osborne did not satisfy the prejudice prong of the *Strickland* standard because he failed to show there was a reasonable probability that counsel's deficient performance affected the outcome of the case.[8]

The *Strickland* standard, as applied by the Wyoming Supreme Court in *Osborne*, fails to protect the Sixth Amendment right to counsel and should be changed.[9] Wyoming should adopt a new standard for three reasons. First, the prejudice prong of the *Strickland* standard is arbitrary; it is nearly impossible to prove that but for counsel's deficient performance, the outcome of the case would have been different.[10] Second, the reasoning behind the United States Supreme Court's adoption of the *Strickland* standard is flawed.[11] Finally, a standard that considers counsel's representation in a case as a whole and provides flexibility within the prejudice prong will better ensure a defendant's right to counsel under the Sixth Amendment.[12]

BACKGROUND

Historical Development of Effective Assistance of Counsel

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have *the Assistance of Counsel for his defence*."[13] The vague language in the Sixth Amendment's right to counsel clause led the United States Supreme Court to interpret the clause in several cases.[14] In 1932, the Supreme Court held that, in capital cases, the Due Process Clause requires courts to appoint counsel for indigent defendants.[15] The appointment requirement for all criminal defendants did not apply to state courts until 1963.[16] In *Gideon v. Wainwright,* the Court extended the right to appointed counsel to all indigent criminal defendants in the states.[17] Regarding the quality of appointed counsel, the Supreme Court has held that the right to counsel is

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[8] *Osborne*, ¶ 26, 285 P.3d at 253.

[9] *See infra* notes 106–77 and accompanying text.

[10] *See infra* notes 115–26 and accompanying text; *see Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

[11] *See infra* notes 127–52 and accompanying text.

[12] *See infra* notes 153–77 and accompanying text.

[13] U.S. CONST. amend. VI (emphasis added).

[14] *See infra* notes 15–68 and accompanying text.

[15] Powell v. Alabama, 287 U.S. 45, 71 (1932).

[16] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[17] *Id.* at 342–44. The Court has only extended the right to counsel when the potential penalty of the crime is incarceration. Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972).

the right to *effective* assistance of counsel.[18] This right extends to all criminal defendants, not just to defendants with appointed counsel.[19]

Strickland v. Washington

In *Strickland v. Washington,* the United States Supreme Court developed a two-prong test for analyzing ineffective assistance of counsel claims.[20] First, the defendant must show that counsel's performance was deficient.[21] Second, the defendant must show that the deficient performance prejudiced the defense.[22]

The first prong of the test evaluates whether counsel's performance was deficient under an objective standard of reasonableness "under prevailing professional norms."[23] The Court did not expressly define "prevailing professional norms," but instead addressed the basic duties of counsel and suggested that lower courts look to the ABA Standards for guidance.[24] Counsel's basic duties include: a duty of loyalty, a duty to advocate, a duty to consult with the defendant, a duty to keep the defendant informed, and a duty to use his skill to provide the defendant with a fair trial.[25] In evaluating the reasonableness of counsel's representation, a court will look not only at these basic duties but also at counsel's performance "considering all the circumstances."[26] The United States Supreme Court also stated that in a court's evaluation of counsel's representation, the court must give deference to counsel and presume that counsel has represented his client effectively.[27]

Showing that counsel made errors in representation does not, in and of itself, mean representation was ineffective.[28] Rather, the errors must have an "adverse effect on the defense."[29] In order to satisfy the prejudice prong, the defendant

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[18] McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

[19] Cuyler v. Sullivan, 446 U.S. 335, 344–45 (1980).

[20] 466 U.S. 668, 687 (1984).

[21] *Id.* ("This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.").

[22] *Id.* ("This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.").

[23] *Id.* at 688–89.

[24] *Id.* The Court suggests looking to ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function").

[25] *Id.* at 688.

[26] *Id.*

[27] *Id.* at 689–90. The Court reasons that this strong presumption that counsel's conduct is reasonable is important because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence." *Id.* at 689.

[28] *Id.* at 693.

[29] *Id.*

must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."[30]

The United States Supreme Court found that failure to inform the defendant about negative immigration consequences met the *Strickland* standard for ineffectiveness.[31] The Court also found ineffective assistance where counsel had failed to discover defendant's prior convictions.[32] Comparatively, counsel's failure to present mitigating evidence during the sentencing phase was not enough for the United States Supreme Court to find ineffective assistance.[33] The Court also held that counsel did not need express consent from defendant about counsel's strategy for conceding guilt in a capital trial.[34]

Reasoning Behind the Strickland *Standard*

The United States Supreme Court offered a number of reasons for adopting the Strickland standard. First, the Court stated that the purpose behind ineffective assistance of counsel claims is "not to improve the quality of legal representations, although that is a goal of considerable importance to the legal system.[35] The purpose is simply to ensure that criminal defendants receive a fair trial."[36] Second, the Court voiced concern over the effect that ineffective assistance claims will have on the judicial system.[37] Efficiency of the judicial system and having "too many"

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[30] *Id.* at 694.

[31] Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010) ("Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.").

[32] Rompilla v. Beard, 545 U.S. 374 (2005) ("[T]he failure to examine Rompilla's prior conviction file fell below the level of reasonable performance [because] [c]ounsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions.").

[33] Schriro v. Landrigan, 550 U.S. 465, 475 (2007).

[34] Florida v. Nixon, 543 U.S. 175, 189–90 (2004).

[35] Strickland v. Washington, 466 U.S. 668, 689 (1984).

[36] *Id.* at 689.

> The term 'fair trial' is often used, but not often defined. It is of broad scope. While we shall not undertake to give a formal definition of the term, yet it may not be amiss to mention, in part at least, its content . . . It means a trial before an impartial judge, an impartial jury, and in an atmosphere of judicial calm . . . Being impartial means being indifferent as between the parties . . . . It means that, while the judge may and should direct and control the proceedings, and may exercise his right to comment on the evidence, yet he may not extend his activities so far as to become in effect either an assisting prosecutor or a thirteenth juror.

Goldstein v. United States, 63 F.2d 609, 613 (8th Cir. 1933) (quoting Sunderland v. United States, 19 F.2d 202, 216 (8th Cir. 1927)).

[37] *Strickland*, 466 U.S. at 690.

ineffective assistance of counsel claims was a concern of the Court.[38] Third, the Court also worried about counsels' reaction to court scrutiny: "Intensive scrutiny of counsel and rigid requirements for acceptable assistance 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."[39] Finally, the Supreme Court validated the prejudice prong by looking again at the purpose of the Sixth Amendment.[40] The Court reasoned that the purpose of ensuring a fair trial is achieved so long as the outcome of the proceeding is not prejudiced by counsel's errors.[41]

In recent cases, the United States Supreme Court looked at counsel's obligations under "prevailing professional norms."[42] The Court held in *Porter v. McCollum* that "under prevailing professional norms . . . counsel had an obligation to conduct a thorough investigation of the defendant's background."[43] The United States Supreme Court has also held that counsel fell short of these professional norms when he did not expand the "investigation beyond the presentence investigation report and one set of records they obtained."[44]

Criticisms of the Strickland *Standard*

There have been a number of criticisms from courts and commentators regarding the effect and use of the *Strickland* standard.[45] In 1994, Supreme Court Justice Blackmun said, "[t]en years after the articulation of [the *Strickland*] standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'"[46] Blackmun argued that the *Strickland* standard had failed because defendants are not likely to be able to demonstrate that counsel was ineffective, "given the low standard for acceptable attorney conduct and the high showing of prejudice required under [the standard]."[47]

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[38] *Id.* ("The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.").

[39] *Id.*

[40] *Id.* at 691–92.

[41] *Id.*

[42] *See, e.g.*, Porter v. McCollum, 558 U.S. 30, 39 (2009); Wiggins v. Smith, 539 U.S. 510, 524–25 (2003).

[43] *Porter*, 558 U.S. at 39.

[44] *Wiggins*, 539 U.S. at 524–25.

[45] *See* Paul J. Kelly, Jr., *Are We Prepared to Offer Effective Assistance of Counsel?*, 45 ST. LOUIS U. L.J. 1089 (2001); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433 (1999); Patrick S. Metze, *Speaking Truth to Power of the Courts to Enforce the Right to Counsel at Trial*, 45 TEX. TECH L. REV. 163 (2012).

[46] McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting).

[47] *Id.*

In jurisdictions where the *Strickland* standard is used, members of the judiciary have expressed their concerns about the standard in dissenting and concurring opinions.[48] A Pennsylvania Superior Court judge wrote a dissenting opinion arguing for the adoption of a new standard: "The [S]ixth [A]mendment guarantee does *not* extend only to someone who should have been acquitted. It therefore does *not* require proof of prejudice. It says nothing about 'guilt' or 'prejudice'. What it does refer to, and guarantees, is 'assistance of counsel' . . . to innocent and guilty alike."[49] The judge stated that once a defendant proves his counsel was ineffective, the burden should shift to the State to prove beyond a reasonable doubt that the counsel's incompetence was a harmless error.[50] Under *Strickland,* the criminal defendant always has the burden to prove prejudice.[51] A Texas Criminal Court of Appeals' judge also found the prejudice prong erroneous: "[R]epresentation by an attorney whose performance is so deficient as to violate his own client's constitutional right . . . is exactly the kind of egregious failure that should undermine everyone's confidence in the verdict."[52]

Alternatives to Strickland

Some courts have moved toward standards that better ensure a defendant's right to counsel.[53] The Supreme Court of Hawaii has expressly rejected the *Strickland* standard in evaluating ineffective assistance of counsel claims, realizing that it is "unduly difficult for a defendant to meet."[54] In order to show ineffective assistance of counsel under the standard used in Hawaii, the claimant must show that there were "'specific errors or omissions . . . reflecting counsel's lack of skill, judgment or diligence,' and 'these errors or omissions resulted in either the withdrawal or substantial impairment of a potentially meritorious defense.'"[55] Like the *Strickland* standard, the Hawaiian test has two prongs. First, a claimant must show "specific errors or omissions."[56] This is similar to the deficiency prong of the *Strickland* standard.[57] Second, the claimant must show that "these errors

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[48] *See, e.g.*, Commonwealth v. Garvin, 485 A.2d 36, 49–50. (Pa. Super. 1984) (Brosky, J., dissenting); Derrick v. State, 773 S.W.2d 271, 280, 283 (Tex. Crim. App. 1989) (Teague, J., dissenting).

[49] *Garvin*, 485 A.2d at 49–50.

[50] *Id.*

[51] Strickland v. Washington, 466 U.S. 668, 687 (1984).

[52] JOHN M. BURKOFF & NANCY M. BURKOFF, INEFFECTIVE ASSISTANCE OF COUNSEL § 2:7 (2013) (citing Derrick v. State, 773 S.W.2d 271, 280, 283 (Tex. Crim. App. 1989) (Teague, J., dissenting)).

[53] *See infra* notes 54–68 and accompanying text.

[54] State v. Smith, 712 P.2d 496, 500 n.7 (Haw. 1986).

[55] *Id.* at 500 (quoting State v. Kahalewai, 501 P.2d 977, 980 (Haw. 1972)).

[56] *Id.*

[57] *Compare Smith*, 712 P.2d at 500 (requiring defendant to show "specific errors or omissions"), *with* Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring defendant to show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.").

resulted in either the withdrawal or substantial impairment of a potentially meritorious defense."[58] The requirement for a "potentially meritorious defense" is a lower bar than the requirement in *Strickland* where a claimant must prove the outcome of the case would have been different.[59]

The Supreme Court of Alaska made the prejudice prong less demanding by requiring only that the accused create a reasonable doubt that counsel's incompetence contributed to the outcome.[60] The requirements to meet this prejudice prong are less onerous than what is required under *Strickland*.[61]

The New York Court of Appeals also discarded the traditional prejudice component.[62] In New York, "'[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation,' a defendant's constitutional right to the effective assistance of counsel will have been met."[63] The Court of Appeals referred to it as a flexible approach and focused its attention on the phrase "meaningful representation."[64] Meaningful representation has a prejudice component, but rather than judging the counsel's influence on the outcome of the case, the Court of Appeals requires consideration of the "fairness of the process as a whole."[65] The court considered this to mean that "[a]s long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance."[66] The burden rests with the defendant to demonstrate the absence of a legitimate strategy.[67] Similar to *Strickland,* judicial scrutiny of counsel's performance must be highly deferential. [68]

Wyoming Law on Ineffective Assistance of Counsel

The Wyoming Constitution recognizes the right to counsel and states that "[i]n all criminal prosecutions the accused shall have the right to defend in person

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[58] *Smith*, 712 P.2d at 500.

[59] *Compare Smith*, 712 P.2d at 500 (requiring "substantial impairment of a potentially meritorious defense"), *with Strickland*, 466 U.S. at 691 (requiring a "reasonable probability that . . . the result of the proceedings would have been different").

[60] Risher v. State, 523 P.2d 421, 425 (Alaska 1974).

[61] *Id.*

[62] The Court of Appeals is the highest court in New York.

[63] People v. Henry, 744 N.E.2d 112, 113 (N.Y. 2000) (quoting People v. Baldi, 429 N.E.2d 400, 405 (N.Y. 1981)).

[64] *Henry*, 744 N.E.2d at 113.

[65] *Id.* at 114.

[66] People v. Benevento, 697 N.E.2d 584, 587 (N.Y. 1998).

[67] People v. Taylor, 802 N.E.2d 1109, 1111 (N.Y. 2003).

[68] People v. Turner, 840 N.E.2d 123, 125 (N.Y. 2005).

and by counsel . . . ."[69] In 1985, Wyoming adopted the *Strickland* standard in *Munden v. State*.[70] Since, then, the Wyoming Supreme Court has applied the standard in numerous cases to determine claims of ineffective assistance of counsel.[71] The Wyoming Supreme Court, like the United States Supreme Court, gives considerable deference to counsel, presuming that counsel's performance was effective.[72] The Wyoming Supreme Court has held that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result."[73] Counsel error alone is not enough to set aside a judgment if the error had no effect on the outcome of the case.[74] Thus, "[a]n ineffectiveness claim may be disposed of solely on the ground of lack of sufficient prejudice."[75] The Wyoming Supreme Court's application of the prejudice prong is directly in line with *Strickland*'s application.[76]

In *Calene v. State,* the Wyoming Supreme Court established the procedure for appellate review of ineffective assistance claims.[77] Under *Calene*, a criminal defendant can bring an ineffective assistance claim on direct appeal to the Wyoming Supreme Court.[78] The Court will then remand the case to the trial court where defendant will be allowed an evidentiary hearing to present additional evidence regarding the ineffective counsel claim.[79] After the hearing, the district court will issue a decision.[80] If the district court does not find ineffective assistance, the defendant may appeal the claim back to the Wyoming Supreme Court.[81]

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[69] WYO. CONST. art. I, § 10.

[70] 698 P.2d 621, 623 (Wyo. 1985).

[71] *See, e.g.*, Jacobsen v. State, 2012 WY 105, ¶ 15, 281 P.3d 356, 359–60 (Wyo. 2012); Montez v. State, 2009 WY 17, ¶ 3, 201 P.3d 434, 436 (Wyo. 2009); Barkell v. State, 55 P.3d 1239, 1242 (Wyo. 2002); Dickeson v. State, 843 P.2d 606, 611–12 (Wyo. 1992); Frias v. State, 722 P.2d 135, 145 (Wyo. 1986).

[72] *Munden*, 698 P.2d at 623 (Wyo. 1985).

[73] *Id.*

[74] *Id.*

[75] Mickelson v. State, 2012 WY 137, ¶ 16, 287 P.3d 750, 755 (Wyo. 2012) (quoting Jenkins v. State, 2011 WY 141, ¶ 6, 262 P.3d 552, 555 (Wyo. 2011)).

[76] The Wyoming Supreme Court recognizes a narrow set of circumstances where prejudice is presumed. Prejudice will be presumed when there is a complete denial of counsel, where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and when counsel is appointed so close to trial that it amounts to ineffective assistance. Sincock v. State, 76 P.3d 323, 337 (Wyo. 2003).

[77] 846 P.2d 679 (Wyo. 1993); WYO. R. APP. P. § 21.

[78] *Calene*, 846 P.2d at 679; WYO. R. APP. P. § 21.

[79] *Calene*, 846 P.2d at 683. Additional evidence presented would include "testimony of the trial lawyer, the accused, and a requirement for the convicted defendant to demonstrate a viable factual basis which would support his claim regarding the claimed adverse quality of representation he was provided." *Id.*

[80] *Id.*

[81] *Id.*

The Wyoming Supreme Court has provided further guidance for evaluating ineffective assistance claims. The court held that counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.[82] The court also held that when the claim is based upon the failure to call an expert witness, the defendant must show an expert was available who would have testified consistently with his theory.[83] However, even if the defendant can show that counsel did not reasonably investigate or unreasonably failed to call an expert witness, a defendant still must show prejudice.[84]

PRINCIPAL CASE

Facts

In 2010, the State charged Shawn Osborne with first degree murder.[85] On January 15, 2010, Osborne confessed to a roommate that he had killed Gerald Bloom.[86] Osborne pled not guilty by reason of mental illness.[87] At trial, Osborne's counsel, a public defender, attempted to show that, due to Osborne's intoxication, he was unable to form the specific intent necessary to be convicted of first degree murder.[88] Osborne's counsel called witnesses and presented evidence to show that Osborne had been under the influence of alcohol and Adderall prior to killing Mr. Bloom, and that he had a history of being a heavy drinker.[89] The jury subsequently convicted Osborne of first degree murder and sentenced him to life in prison.[90]

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[82] Lopez v. State, 2004 WY 28, ¶ 29, 86 P.3d 851, 860 (Wyo. 2004).

[83] *Id.* at ¶ 30, 86 P.3d at 860.

[84] Osborne v. State, 2012 WY 123, ¶ 20, 285 P.3d 248, 252 (Wyo. 2012).

[85] *Id.* at ¶ 3, 285 P.3d at 249. The State charged Osborne under section 6-2-101(a) of the Wyoming Statutes. *Id.*

[86] *Id.*

[87] *Id.* at ¶ 6, 285 P.3d at 250. Osborne was subsequently evaluated twice at the Wyoming State Hospital. Physicians found he was mentally fit for trial pursuant to section 7-11-301 of the Wyoming Statutes, and he did not lack the capacity at the time of the killing to appreciate the wrongfulness of his conduct. *Id.*

[88] *Id.* at ¶ 11, 285 P.3d at 251. Self-induced intoxication of the defendant is not a defense to a criminal charge except to the extent that in any prosecution evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime. WYO. STAT. ANN. § 6-1-202(a) (2013).

[89] *Osborne*, ¶¶ 7, 11, 21, 285 P.3d at 250–53. Adderall is a central nervous system stimulant prescribed for the treatment of Attention Deficit Hyperactivity Disorder. Side effects of Adderall, including bipolar illness, aggressive behavior, and hostility have been reported. *See Medication Guide Adderall XR*, U.S. FOOD & DRUG ADMINISTRATION, http://www.fda.gov/downloads/Drugs/DrugSafety/ucm085819.pdf (last visited Nov. 17, 2013).

[90] *Osborne*, ¶ 16, 285 P.3d at 252.

Motion for a New Trial

After sentencing, Osborne filed a motion for a new trial and argued that his counsel was ineffective because his counsel had failed to seek expert testimony to explain substance abuse delirium to the jury.[91] The district court conducted a *Calene* hearing to evaluate the claim.[92] Osborne's new counsel presented testimony from trial counsel and from an expert on substance abuse delirium.[93] The district court concluded that "any deficient performance by trial counsel did not sufficiently prejudice Mr. Osborne's defense to warrant granting a new trial.[94] Since Osborne failed to meet the prejudice prong, the district court did not address whether counsel's actions constituted a deficiency under the *Strickland* standard.[95] The court sentenced Osborne to life in prison without the possibility of parole.[96] Osborne appealed to the Wyoming Supreme Court, asserting ineffective assistance of counsel due to his counsel's failure to adequately investigate and seek expert assistance.[97]

Majority Opinion

Chief Justice Kite wrote for the court affirming the district court's finding that trial counsel's performance did not sufficiently prejudice Osborne's defense to warrant a new trial.[98] The Wyoming Supreme Court evaluated Osborne's claim under *Strickland*.[99] In affirming Osborne's conviction, the court found that Osborne failed the prejudice prong of the *Strickland* standard because he failed to show that a reasonable probability existed that defense counsel's failure to investigate and provide an expert witness affected the outcome of the case.[100] The court stated: "The evidence against Mr. Osborne was overwhelming . . . . Even with such expert testimony, we conclude the probability in this case is that the jury would convict Mr. Osborne of first degree murder."[101]

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[91] *Id.* at ¶ 15, 285 P.3d at 251–52.

[92] *Id.*

[93] *Id.* at ¶ 16, 285 P.3d at 252.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at ¶ 18, 285 P.3d at 252.

[98] *Id.* at ¶ 26, 285 P.3d at 253.

[99] *Id.* at ¶ 19, 285 P.3d at 252.

[100] *Id.* at ¶ 26–27, 285 P.3d at 253; Harlow v. State, 2005 WY 12, ¶ 6, 105 P.3d 1049, 1058 (Wyo. 2005) ("'Reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

[101] *Osborne*, ¶ 26, 285 P.3d at 253.

Concurring Opinion

Justice Voigt wrote a special concurrence to express his objections to the *Strickland* standard: "The problem is that, while it is often relatively easy to prove defense counsel's deficient performance, it is practically impossible to prove prejudice because it is practically impossible to prove that the outcome would have been different had the jury been allowed to hear certain evidence."[102] Justice Voigt also pointed out that proving the outcome would have been different is even more difficult under the Wyoming system because the system does not allow a defendant to ask the jury about its deliberations.[103] Justice Voigt determined that the counsel's deficiency in this case was "glaring," and implied that the evidence might have not been as "overwhelming" had counsel provided the jury with contrary evidence.[104] Justice Voigt disagreed with the standard by emphasizing the importance of one's right to counsel: "The point I wish to make is that where defense counsel's performance has been shown to be so ineffective as to deprive the defendant of that counsel assured him by the Sixth Amendment, we cannot rely upon the adversarial process as having produced a just trial."[105]

ANALYSIS

Justice Voigt correctly concluded that the *Strickland* standard does not effectively protect a defendant's Sixth Amendment right to counsel.[106] Wyoming should adopt a new standard similar to the New York Court of Appeals' standard.[107] New York's standard focuses on the *quality* of counsel, incorporates the prejudice prong by looking at whether the process as a whole was fair, and better achieves a fair trial.[108] This test hones in on counsel's performance by considering the totality of the circumstances rather than inferring whether or not counsel's deficient performance affected the outcome of the case, as is required by *Strickland*.[109]

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[102] *Id.* at ¶ 28, 285 P.3d at 253 (citation omitted).

[103] *Id.* at ¶ 28, 285 P.3d at 253–54.

[104] *Id.* at ¶ 30, 285 P.3d at 254.

[105] *Id.* at ¶ 31, 285 P.3d at 254 ("I concur in the result reached by the majority because that result is mandated by precedent.").

[106] *See supra* note 102–105 and accompanying text.

[107] *See supra* notes 62–68 and accompanying text.

[108] People v. Benevento, 697 N.E.2d 584, 588 (N.Y. 1998).

[109] *See supra* notes 62–68 and accompanying text. The Supreme Court of Wyoming has used the totality of the circumstances test in its analysis of criminal procedure issues. *See, e.g.*, Flood v. State, 2007 WY 167, ¶ 22, 169 P.3d 538, 545 (Wyo. 2007) ("In determining whether the officer had reasonable suspicion under the Fourth Amendment, we look to the totality of the circumstances and how those circumstances developed during the officer's encounter with the occupants of the vehicle."); Rohda v. State, 2006 WY 120, ¶ 5, 142 P.3d 1155, 1158–59 (Wyo. 2006) ("The judicial officer who is presented with an application for a search warrant supported by an affidavit applies a 'totality of circumstances' analysis in making an independent judgment whether probable cause

Strickland considered the totality of the circumstances only in the application of the deficiency prong.[110] With this standard, the deficient performance prong is still required, but the prejudice prong is more workable.[111] The New York Court of Appeals' standard relates more closely to the objective of achieving a fair trial than *Strickland*, or the standards used in other states, and is more feasible for defendants to meet.

There are three reasons why this standard should be adopted in Wyoming. First, the prejudice prong of the *Strickland* test is an arbitrary standard; it is nearly impossible to prove that the outcome of the case would have been different but for counsel's deficient performance.[112] Second, the reasoning behind the United States Supreme Court's adoption of the *Strickland* standard is flawed.[113] Finally, the new standard will better ensure a defendant's right to counsel under the Sixth Amendment.[114]

The Prejudice Prong is an Arbitrary Standard

Justice Voigt argued in the *Osborne* concurrence that it is practically impossible to show that the jury would have decided the case differently had they heard certain evidence.[115] The prejudice prong asks the reviewing judge to speculate as to what the jury would have decided had the evidence been introduced.[116] What would they have decided if certain evidence was presented by counsel? Would they have found the defendant guilty if a certain witness testified? A judge cannot be sure of the answers.[117] Given that all jury deliberations are sacrosanct, a judge can never determine with reliability if and how the result would be different.[118]

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exists for the issuance of the warrant."); State v. Evans, 944 P.2d 1120, 1125 (Wyo. 1997) ("State has burden of proving by a preponderance of the evidence under totality of the circumstances, that a confession, admission, or statement was given voluntarily.").

[110] Strickland v. Washington, 466 U.S. 668, 688 (1984).

[111] *Id.*

[112] *See infra* notes 115–26 and accompanying text.

[113] *See infra* notes 127–52 and accompanying text.

[114] *See infra* notes 153–77 and accompanying text.

[115] Osborne v. State, 2012 WY 123, ¶ 28, 285 P.3d 248, 253–54 (Voigt, J., concurring).

[116] *See* Marcus Procter Henderson, *Truly Ineffective Assistance: A Comparison of Ineffective Assistance of Counsel in the United States of American and the United Kingdom*, 13 IND. INT'L & COMP. L. REV. 317, 331 (2002) ("[T]he prejudice prong of the Strickland test often makes it impossible to conclude whether there was a reasonable probability that the outcome of the proceeding would have been different.").

[117] Strickland v. Washington, 466 U.S. 668, 710 (1984) (Marshall, J., dissenting) ("On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how . . . evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer.").

[118] Craig B. Wills, *Juror Misconduct: Balancing the Need for Secret Deliberations with the Right to a Fair & Impartial Trial*, 72-MAY FLA. B.J. 20 (1998) ("Secret deliberations by citizen jurors without public review and criticism has been one of the hallmarks of the American justice system. The courts

He can only make a subjective guess as to how the case would have turned out. In effect, a judge gets to conclude how a case would play out if certain evidence were admitted or if counsel did not make certain errors.[119] In part, jurors evaluate credibility; they use it to decide what evidence to believe.[120] Credibility is established through the trial and the steps both parties take. A judge should not get to decide how credible the evidence *might* be.[121] "The ultimate determination of the credibility or truthfulness of a witness is not 'a fact in issue,' but a matter to be generally determined solely by the jury."[122]

Wyoming statistics also reflect the assertion that the *Strickland* standard is difficult to prove.[123] The Wyoming Supreme Court considered sixty-six ineffective assistance cases in the last ten years, and in only eight of these cases did the Wyoming Supreme Court find ineffective assistance.[124] Of the fifty-eight cases where the *Strickland* standard was not met, twenty-five cases held that only the prejudice prong was not met.[125] In fifteen of the sixty-six ineffective assistance cases, the Court held that both the deficiency and prejudice prong failed.[126]

The Reasoning behind the Strickland *Standard is Flawed*

Wyoming should adopt a new standard because the *Strickland* standard is flawed in numerous ways. In *Strickland,* the United States Supreme Court dismissed any purpose for the test other than ensuring a fair trial; it explicitly

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repeatedly have expressed the principle that post-trial juror interviews rarely should be granted and the sanctity of the jury process, as well as the privacy rights of the jurors, should be closely guarded and protected.").

[119] *Id.*

[120] *E.g.*, Simmons v. State, 687 P.2d 255, 258 (Wyo. 1984); Montez v. State, 527 P.2d 1330, 1332 (Wyo. 1974).

[121] Wilson v. Corestaff Services L.P., 900 N.Y.S.2d 639, 642 (N.Y. Sup. Ct. 2010) ("[C]redibility is a matter solely for the jury."); *see* John B. Meixner, *Liar, Liar, Jury's the Trier? The Future of Neuroscience-Based Credibility Assessment in the Court*, 106 NW. U. L. REV. 1451 (2012).

[122] *Simmons*, 687 P.2d at 258; *Montez*, 527 P.2d at 1332.

[123] *See* Munoz v. State, 2013 WY 94, ¶ 16, 308 P.3d 829, 834 (Wyo. 2013) ("What is striking is . . . although we recognize the right to a fair trial, we almost never find that a trial was unfair—no matter what happened!").

[124] *See* Appendix. It is important to note that the sixty-six cases discussed in this analysis are only the cases appealed by defendants after the *Calene* hearing at the trial court level.

[125] *See, e.g.*, Osborne v. State, 2012 WY 123, ¶ 26, 285 P.3d 248, 253 (Wyo. 2012); Jenkins v. State, 2011 WY 141, ¶ 1, 262 P.3d 552, 554 (Wyo. 2011); Baker v. State, 2010 WY 6, ¶ 42, 223 P.3d 542, 558 (Wyo. 2010); Floyd v. State, 2006 WY 135, ¶ 16, 144 P.3d 1233, 1239 (Wyo. 2006); May v. State, 62 P.3d 574, 586 (Wyo. 2003).

[126] *See, e.g.*, Peterson v. State, 2012 WY 17, ¶ 25, 270 P.3d 648, 655 (Wyo. 2012); Carter v. State, 2010 WY 136, ¶ 24, 241 P.3d 476, 489 (Wyo. 2010); Cross v. State, 2009 WY 154, ¶ 10, 221 P.3d 972, 975 (Wyo. 2009); Wease v. State, 2007 WY 176, ¶ 61, 170 P.3d 94, 116 (Wyo. 2007); Duke v. State, 2004 WY 120, ¶ 81, 99 P.3d 928, 952 (Wyo. 2004).

stated that the goal is not to improve the quality of legal representations.[127] The logic of this statement seems misguided. The purpose might not be to directly improve the quality of legal representation, but a defendant cannot rely on his constitutional right to counsel without an attorney of sufficient quality to actually provide an effective defense and a fair trial.[128] Defendants should be afforded more than merely non-prejudicial assistance. "A fair trial is an adversarial trial."[129] An adversarial system requires counsel to advocate for their client. If the quality of counsel suffers, so will the level of advocacy.

The United States Supreme Court also based its decision in *Strickland* on preventing an excess of ineffective assistance claims and assuring efficiency of the judicial system.[130] The Court believed that ineffective assistance of counsel appeals would burden the judicial system.[131] Efficiency appeared at the forefront of the *Strickland* court's analysis, while the true purpose of the *Strickland* standard, to evaluate claims of ineffective assistance, is put on the back burner.[132] However, the concern for "too many court cases" does not outweigh the defendant's Sixth Amendment right.

Where there is an essential constitutional right, the importance of ensuring that right far outweighs the concern of "opening the floodgates to litigation."[133] The Constitution, the supreme law of the land, noticeably trumps this overused policy consideration.[134] "Although there are judicial efficiency and cost concern . . . what courts should always keep in mind as their paramount concern is the constitutional demand that criminal trials be fair."[135]

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[127] *See supra* notes 35–36 and accompanying text.

[128] 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, 1275 n.90 (1986) ("[T]he adversary system is a necessary ingredient in a fair trial; a fair trial is an adversarial trial." (quoting Martin P. Golding, *On the Adversary System and Justice*, PHIL. L. 98, 116 (R. Bronaugh ed. 1978))).

[129] *Id.*

[130] *See supra* notes 37–38 and accompanying text.

[131] *See* BURKOFF & BURKOFF, *supra* note 52, at § 1:6 (2012).

[132] *See* Gary Goodpaster, *The Adversary System, Advocacy and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 67 (1986) (suggesting that *Strickland*'s primary purpose is to "help reviewing courts deal efficiently with these claims rather than seriously consider the potential injustice caused by incompetent trial counsel").

[133] Timothy M. Riselvato, *Claims of Ineffective Assistance of Counsel: The Clash of the Federal and New York State Constitutions*, 26 TOURO L. REV. 1195, 1210 (2011) ("The Supreme Court in Strickland appears to have been operating under a fear of opening the proverbial floodgates of ineffective assistance of counsel claims. The Court has no doubt satisfied its agenda in that regard, because the Strickland standard is plainly more burdensome and will defeat a larger amount of claims.").

[134] U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").

[135] Nathan Oswald, *In Defense of Fairness: Protecting the Adversarial Process When a Pro Se Criminal Defendant is Removed from the Courtroom*, 41 U. TOL. L. REV. 735, 736 (2010).

Also, the United States Supreme Court justified its highly deferential standard of review when scrutinizing counsel's performance by emphasizing the importance of the attorney-client relationship, the independence of defense counsel's decisions, and defense counsel's commitment to representing defendants.[136] The amount of deference allotted to counsel in these ineffective assistance claims is erroneous.[137] It is permissible for a court to presume that counsel performed effectively until the defendant proves otherwise, but *Strickland*'s emphasis on the high level of deference and the strong presumption signals to courts that there are rare cases in which they should second-guess counsel's conduct in representing a client.[138] An attorney's job is to be an advocate for the client.[139] It seems reasonable to require that advocates should be able to justify their conduct and strategy to the court if the defendant shows that counsel made errors.[140]

The Supreme Court's reasoning that the purpose of the Sixth Amendment is satisfied so long as the outcome is not prejudiced by counsel's errors is erroneous.[141] As previously discussed, the stated goal of the *Strickland* standard is to ensure a fair trial.[142] However, a fair trial is not necessarily achieved merely because a defendant would have been convicted despite counsel's blatant errors. The prejudice prong impermissibly excludes instances of counsel's gross malpractice.[143] The cases where counsel's performance was clearly deficient, yet the

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[136] *See supra* note 39 and accompanying text.

[137] *See infra* note 138 and accompanying text.

[138] Whitney Crawley, *Raising the Bar: How Rompilla v. Beard Represents the Court's Increasing Efforts to Impose Stricter Standards for Defense Lawyering in Capital Cases*, 34 PEPP. L. REV. 1139, 1140 (2007) ("Yet our courts have taken a passive stance . . . giving broad deference to attorney decisions, and attributing errors and omissions to sound trial strategy. This passivity allows questionable attorney conduct to go undeterred, thus perpetuating poor quality legal representation.").

[139] *See, e.g.*, WYO. RULES OF PROF'L CONDUCT pmbl. ¶ 2.

[140] Richard Klein had this to say on the subject:

> Courts do not follow a 'highly deferential' standard of review when evaluating the work of other professions. Nor is there a 'strong presumption' that the professional acted reasonably. The standard is 'reasonable professional competence' for malpractice suits against physicians and surgeons, accountants, and architects. Certainly the harm and loss of liberty resulting to a defendant because of an incompetent attorney may be far greater than the damage done to a client of a negligent accountant or architect.

Richard Klein, *The Emperor Gideon has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 640–41 (1986) (disagreeing with high deference).

[141] *See supra* note 41 and accompanying text.

[142] *See supra* note 40 and accompanying text.

[143] Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, 18 CRIM. JUST. 37, 38 (2003) ("In other words, where there was overwhelming proof of guilt at trial, malpractice will be excused if that malpractice involved such egregious behavior as sleeping, taking drugs, or drinking during trial, suffering through a psychotic break, or any number of disasters that have been so extensively reported by journalists and scholars alike.").

court determined the defendant to be overwhelmingly guilty, look nothing like a fair trial.[144] For example, in *Jacobsen v. State,* the Wyoming Supreme Court found that "the evidence against [defendant] was so overwhelming that she was not prejudiced by any ineffectiveness."[145] With a progressive judicial system like the one in the United States, it is inexcusable to allow an attorney to represent a client poorly and justify his errors by concluding that the jury would have convicted the client anyway.[146]

Critics have pointed out that "[m]any ineffective assistance problems are systemic problems: poor appointment systems, weak and underfinanced public defender and defense support systems, a weak defense bar, and undertrained attorneys . . . [E]ven skilled counsel may be made ineffective by a lack of time of time or money."[147] Merely masking the problem and allowing the quality of the system to remain poor is not a solution. The legal community must address these problems rather than settling for mediocre representation. These criticisms of the criminal justice system do not excuse deficient performance of counsel. A lack of resources is often a concern of our government. In Wyoming's budget request for the Office of the Public Defender for the 2007-2008 fiscal year, the agency noted that the "caseload continues to increase without a comparable increase in resources."[148] In 2004, the average caseload for an attorney was roughly 250 cases.[149] It sharply increased in 2005 to over 275 cases.[150] Despite the increase in caseloads, the number of cases finding ineffective assistance declined from two in

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[144] Osborne v. State, 2012 WY 123, ¶ 26, 285 P.3d 248, 253 (Wyo. 2012) ("The evidence against Mr. Osborne was overwhelming. Given the strength of that evidence, we simply are not persuaded that a reasonable probability exists that but for any failure on defense counsel's part to investigate and present expert evidence concerning substance abuse delirium, the outcome would have been different.").

[145] Jacobsen v. State, 2012 WY 105, ¶ 2, 281 P.3d 356, 357 (Wyo. 2012).

[146] ALFREDO GARCIA, THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE 30 (1992) ("Vigorous representation by effective counsel is central to the legitimacy . . . of the adversary system. Because the theory upon which the adversary system rests is that the 'truth' is 'best discovered by powerful statements on both sides of the question,' the Court has on numerous occasions underscored the importance of effective counsel in the criminal process." (citations omitted)).

[147] *See* BURKOFF & BURKOFF, *supra* note 52, at § 1:7 (2012) (citing Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 66, 75 (1986)). In *State v. Miller*, defendant, Terrence Miller, did not meet his substituted trial attorney until the morning of his suppression hearing and trial. Nevertheless, the New Jersey Superior Court, Appellate Division found that defendant was not denied effective assistance of counsel. 18 A.3d 1054, 1056 (N.J. Super. Ct. App. Div. 2011).

[148] *State of Wyoming Biennium Budget Request*: *Office of the Public Defender*, DEP'T OF ADMIN. & INFO. BUDGET DIV., (2007–2008), http://ai.state.wy.us/budget/pdf/0708BudgetRequest/008.pdf (last visited Nov. 17, 2013).

[149] *Id.*

[150] *Id.*

2004 to zero in 2005. Another impeding budget concern in Wyoming is the cost of expert services. The amount of funds requested for expert services in 2007-2008 was $228,388.[151] Given that witnesses in complex felony cases can cost anywhere from $20,000 to $60,000 or more per case, the available funds may be exhausted all too quickly.[152] Though asking the legislature for additional resources could help with the problem, it would be a better, and more permanent, solution to combat the quality concern by motivating defense attorneys through a more stringent judicial standard.

A Better Standard

Wyoming should adopt a standard that considers counsel's representation in a case as a whole, rather than the *Strickland* standard's use of an outcome-determinative prejudice prong. The New York Court of Appeals' standard focuses on whether, in looking at the totality of the circumstances, counsel provided *meaningful representation* to a defendant.[153] Its flexibility makes the test more feasible to apply than the *Strickland* standard, yet it still incorporates a prejudice component that requires more than mere counsel error to show ineffective assistance.[154] More importantly it focuses on "fairness of the process," which better achieves the Sixth Amendment's purpose.[155] "The safeguards provided under the Constitution must be applied in all cases to be effective and, for that reason, 'our legal system is concerned as much with integrity of the judicial process as with the issue of guilt or innocence.'"[156] Flexibility is especially important to ineffective assistance claims because what constitutes effective assistance "cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation."[157]

The meaningful representation standard allows the court to look at the whole picture. It does not allow a court to dismiss error simply because of "overwhelming" evidence against the defendant.[158] The New York Court of

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[151] *Id.*

[152] *Id.* ("To defend a death penalty case at the trial level requires a minimum of $100,000 to $250,000—depending upon the complexity of the case, the need for expert witnesses, and the issues in the case.").

[153] *See supra* notes 64–68 and accompanying text.

[154] *Id.*

[155] People v. Henry, 744 N.E.2d 112, 114 (N.Y. 2000).

[156] People v. Benevento, 697 N.E.2d 584, 588 (N.Y. 1998) (quoting People v. Donovan, 193 N.E.2d 628, 631 (N.Y. 1963)).

[157] People v. Baldi, 429 N.E.2d 400, 404 (N.Y. 1981) (citation omitted).

[158] *See* Osborne v. State, 2012 WY 123, ¶ 26, 285 P.3d 248, 253 (Wyo. 2012) ("The evidence against Mr. Osborne was overwhelming."); Jacobsen v. State, 2012 WY 105, ¶ 2, 281 P.3d 356. 357 (Wyo. 2012) ("[T]he evidence against her was so overwhelming.").

Appeals has held that "[i]n delineating what is meaningful, however, it would be unwise and possibly misleading to create a grid or carve in stone a standard by which to measure effectiveness."[159] The meaningful representation approach takes into consideration the variation in trial strategies among attorneys.[160] "[A]dvocacy is meaningful if it reflects a competent grasp of the facts, the law, and [ ] procedure supported by appropriate authority and argument."[161] It does not require "perfect representation" and does not alter the presumption that counsel performed effectively.[162] However, the high deference given to counsel should not be adopted.[163] An intermediate level of deference is enough to ensure that counsel has the freedom to represent their client as they see fit without enduring too much scrutiny.[164] Too much deference will influence the court excessively by inhibiting them from critically comparing counsel's strategies to what is reasonably accepted in practice.[165]

However, adoption of a new standard is not enough to change how ineffective assistance claims are viewed in the eyes of the court.[166] "Meaningful representation" is flexible, and with flexibility comes variation in the application of the law. The attitude among courts has to change. Courts need to approach

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[159] People v. Stultz, 810 N.E.2d 883, 888 (N.Y. 2004).

[160] *Id.* ("Just as defense attorneys enjoy a wide latitude in defending clients at the trial level, appellate lawyers vary in style and approach. A lengthy brief may be a virtue in some instances but not in others. Some arguments properly emphasize two or three cogent issues while others may raise a multiplicity of claims.").

[161] *Id.*

[162] People v. Henry, 744 N.E.2d 112, 113 (N.Y. 2000) ("The Constitution guarantees a defendant a fair trial, not a perfect one.").

[163] Kelly Green, *There's Less in This Than Meets the Eye: Why Wiggins Doesn't Fix Strickland and What the Court Should Do Instead,* 29 VT. L. REV. 647, 648 (2005) ("Strickland's high deference to counsel's strategic choices allows appellate courts to view egregious errors as trial tactics.").

[164] Christopher M. Pietruszkiewicz, *Discarded Deference: Judicial Independence: Independence in Informal Agency Guidance*, 74 TENN. L. REV. 1, 2 (2006) ("The amount of deference ranges from de novo review (no deference), to an intermediate level of deference based on persuasiveness, to a broad level of deference to the views of an agency as long as its interpretation is reasonable.").

[165] *See* Marcus Procter Henderson, *Truly Ineffective Assistance: A Comparison of Ineffective Assistance of Counsel in the United States of American and the United Kingdom*, 13 IND. INT'L & COMP. L. REV. 317, 334 (2002) ("Court's deference toward defense counsel reflects its goal of efficiency. However, that does not entitle the defendant to a 'dynamic, strong defense.' Rather, it only provides the defendant with 'minimally effective assistance of counsel.' As a result, valuing efficiency over justice neglects both the purpose and spirit of Gideon." (citations omitted)).

[166] *See* BURKOFF & BURKOFF, *supra* note 52, at § 1:3 (2012) ("There is an apparent disinclination on the part of judges to scrutinize too readily or intensively the conduct of defense counsel . . . for fear of the counterproductive effect such scrutiny might have on the attorney-client relationship required for the effective operation of our system.").

ineffective assistance claims as a protection of a constitutional right rather than an infringement on an attorney's freedom to choose their strategy in representing clients.[167]

In *Osborne,* defendant argued that counsel was ineffective because he failed to seek expert assistance to explain to the jury that substance abuse delirium would have prohibited the defendant from forming the specific intent necessary to support a first degree murder conviction.[168] The Wyoming Supreme Court based their decision of the ineffective assistance claim on the fact that there was "overwhelming evidence" against Osborne.[169] However, under New York's meaningful representation standard, it is possible that the Court could have found defendant's counsel ineffective. First, Osborne's counsel failed to present *expert* evidence, which could have been highly persuasive to the jury.[170] Second, Osborne's *only* viable defense at trial was his voluntary intoxication.[171] Without the expert evidence, it raises the question of whether counsel took the necessary steps to prove this defense. However, under New York's approach, the Court would take into consideration counsel's trial strategies and reasons for making these decisions during trial.[172] Counsel took considerable steps to prove that Mr. Osborne was severely intoxicated that evening.[173] The jury instruction, additionally, informed the jury that if his intoxicated condition left him unable to form the specific intent to kill with premeditated malice, they had to find him not guilty of first degree murder.[174] An expert testifying on the stand that substance abuse delirium would have prevented him from forming such intent could have convinced a jury to acquit.[175] Without an expert's assurance, the jury might have hesitated in concluding that Mr. Osborne's alcohol and drug use affected his ability to form the intent.

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[167] *Id.* § 1:5 ("[T]o a certain extent, the collegiality of the legal profession also inhibits courts from taking action which may be viewed as a condemnation of the trial judge's supervision.").

[168] *Osborne*, ¶ 23, 285 P.3d at 253.

[169] *Id.* at ¶ 26, 285 P.3d at 253.

[170] Neil Vidmar, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1125 (2001) ("Jurors often abidicate their fact-finding obligation and simply 'adopt' the expert's opinion . . . [B]ecause experts often deal with esoteric matters of great complexity, jurors frequently are incapable of critically evaluating the bases of an expert's testimony and too often give unquestioning deference to expert opinion." (citations omitted)).

[171] *Id.* at ¶ 18, 285 P.3d at 252 ("[Osborne] submits that substance abuse was clearly an issue from the beginning in this case and voluntary intoxication was his only viable defense at trial.").

[172] *See supra* note 157 and accompanying text.

[173] *Id.* at ¶¶ 21–22, 285 P.3d at 252–53.

[174] *Id.* at ¶ 14, 285 P.3d at 251.

[175] *See supra* note 91 and accompanying text.

Use of the New York standard would have made proving Osborne's ineffective assistance of counsel claim more reasonable. Under the *Strickland* standard, defendant must show that an expert witness would have affected the outcome of the case. Under the New York standard, defendant would need to show that he was not afforded "meaningful representation" because counsel failed to provide sufficient evidence to prove his only viable defense.[176] The New York standard asks that a reviewing court look to the totality of the circumstances.[177] A court would review Osborne's counsel's entire defense. The reviewing court would consider the steps counsel took, proving that Osborne was intoxicated that evening. The court would also consider the steps he did not take, proving through an expert that his intoxication would have affected his ability to form the required mens rea. Therefore, the New York standard provides a more accurate assessment of counsel's performance. Evaluating the ineffective assistance claim through the New York standard requires a court to determine the fairness of the process as a whole and more closely relates to *Strickland*'s Sixth Amendment purpose—to ensure a fair trial.

CONCLUSION

The right to counsel is an important component of the Sixth Amendment's guarantee of a fair trial.[178] "The right to counsel is not just about having a warm body, any warm body stand beside a criminal defendant . . . ."[179] The standard needs to be an effective way of ensuring this constitutional right. The current standard falters by dismissing the importance of the ineffective assistance claims in weighing efficiency and finality over the meaningful assistance of counsel. The standard needs to be changed in Wyoming because the prejudice prong of the *Strickland* test is an arbitrary standard that is unreasonable to meet, and the rationale behind the *Strickland* standard is flawed. A standard that considers counsel's representation as a whole better ensures a defendant's right to counsel under the Sixth Amendment. "For a court to be required to engage in speculation about how the trial might have gone if counsel had been an effective advocate is to minimize the importance of the Sixth Amendment right to counsel, and the adversary system itself will suffer."[180]

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[176] *See supra* notes 64–68 and accompanying text.

[177] *See supra* note 63 and accompanying text.

[178] *See supra* notes 1–2 and accompanying text.

[179] *See* BURKOFF & BURKOFF, *supra* note 52, at § 1:1 n.5 (2012) (citing Abbe Smith, *Carrying On in Criminal Court: When Criminal Defense is Not So Sexy and Other Grievances*, 1 CLINICAL L. REV. 723, 735 (1995)).

[180] Richard Klein, *The Emperor Gideon has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 641 (1986).

APPENDIX

Case	*Ineffective Counsel?*	*If not, which prong was not met?*
May v. State, 2003 WY 14, ¶44, 62 P.3d 574, 586 (Wyo. 2003).	No	Prejudice
Asch v. State, 2003 WY 18, ¶65, 62 P.3d 945, 965 (Wyo. 2003).	Yes	
Page v. State, 2003 WY 23, ¶15, 63 P.3d 904, 910 (Wyo. 2003).	Yes	
Robinson v. State, 2003 WY 32, ¶36, 64 P.3d 743 (Wyo. 2003).	No	Deficient Performance and Prejudice
Olsen v. State, 2003 WY 46, ¶88, 67 P.3d 536, 569 (Wyo. 2003).	No	Deficient Performance
Wilson v. State, 2003 WY 59, ¶11, 68 P.3d 1181, 1187-88 (Wyo. 2003).	No	Deficient Performance and Prejudice
DeShazer v. State, 2003 WY 98, ¶32, 74 P.3d 1240, 1253 (Wyo. 2003).	Yes	
Vlahos v. State, 2003 WY 103, ¶48, 75 P.3d 628, 639-40 (Wyo. 2003).	No	Deficient Performance and Prejudice
Sincock v. State, 2003 WY 115, ¶59, 76 P.3d 323, 342 (Wyo. 2003).	No	Prejudice
Daniels v. State, 2003 WY 132, ¶40, 78 P.3d 205, 218 (Wyo. 2003).	No	Prejudice
CLC v. State, 2004 WY 2, ¶12, 82 P.3d 1235, 1239 (Wyo. 2004).	No	Deficient Performance and Prejudice
Lopez v. State, 2004 WY 28, ¶2, 86 P.3d 851, 854 (Wyo. 2004).	Yes	
Brown v. State, 2004 WY 57, ¶33, 90 P.3d 98, 108 (Wyo. 2004).	No	Prejudice
Strickland v. State, 2004 WY 91, ¶52, 94 P.3d 1034, 1053 (Wyo. 2004).	No	Prejudice

Case	*Ineffective Counsel?*	*If not, which prong was not met?*
Ingersoll v. State, 2004 WY 102, ¶22, 96 P.3d 1046, 1052 (Wyo. 2004).	No	Deficient Performance
Duke v. State, 2004 WY 120, ¶81, 99 P.3d 928, 952 (Wyo. 2004).	No	Deficient Performance and Prejudice
Rutti v. State, 2004 WY 133, ¶32, 100 P.3d 394, 408 (Wyo. 2004).	No	Prejudice
Blakeman v. State, 2004 WY 139, ¶37, 100 P.3d 1229, 1238 (Wyo. 2004).	No	Deficient Performance
Barnes v. State, 2004 WY 146, ¶12, 100 P.3d 1256, 1260 (Wyo. 2004).	No	Prejudice
Leyva v. State, 2005 WY 22, ¶20, 106 P.3d 873, 879 (Wyo. 2005).	No	Deficient Performance
Siler v. State, 2005 WY 73, ¶39, 115 P.3d 14, 34 (Wyo. 2005).	No	Deficient Performance and Prejudice
Keats v. State, 2005 WY 81, ¶1, 115 P.3d 1110, 1112 (Wyo. 2005).	Yes	
Grissom v. State, 2005 WY 132, ¶17, 121 P.3d 127, 134 (Wyo. 2005).	No	Deficient Performance and Prejudice
Marshall v. State, 2005 WY 164, ¶11, 125 P.3d 269, 274 (Wyo. 2005).	No	Deficient Performance
Martinez v State, 2006 WY 20, ¶38, 128 P.3d 652, 667 (Wyo. 2006).	No	Deficient Performance and Prejudice
Reichert v. State, 2006 WY 62, ¶44-45, 134 P.3d 268, 280-81 (Wyo. 2006).	No	Deficient Performance and Prejudice
Barker v. State, 2006 WY 104, ¶59, 141 P.3d 106, 123 (Wyo. 2006).	No	Deficient Performance
Magallanes v. State, 2006 WY 119, ¶27, 142 P.3d 1147, 1155 (Wyo. 2006).	No	Deficient Performance
Floyd v. State, 2006 WY 135, ¶16, 144 P.3d 1233, 1239 (Wyo. 2006).	No	Prejudice

Case	*Ineffective Counsel?*	*If not, which prong was not met?*
Dettloff v. State, 2007 WY 29, ¶20, 152 P.3d 376, 383 (Wyo. 2007).	No	Deficient Performance
Poole v. State, 2007 WY 33, ¶10, 152 P.3d 412, 415 (Wyo. 2007).	No	Deficient Performance
Strandlien v. State, 2007 WY 66, ¶1, 156 P.3d 986, 988-89 (Wyo. 2007).	Yes	
Lessard v. State, 2007 WY 89, ¶32, 158 P.3d 698, 706 (Wyo. 2007).	No	Deficient Performance
Wease v. State, 2007 WY 176, ¶61, 170 P.3d 94, 116 (Wyo. 2007).	No	Deficient Performance and Prejudice
Rion v. State, 2007 WY 197, ¶3, 172 P.3d 734, 736 (Wyo. 2007).	No	Deficient Performance and Prejudice
Palmer v. State, 2008 WY 7, ¶24, 174 P.3d 1298, 1304 (Wyo. 2008).	No	Prejudice
Pendleton v. State, 2008 WY 36, ¶22, 180 P.3d 212, 219 (Wyo. 2008).	No	Prejudice
Guy v. State, 2008 WY 56, ¶36, 184 P.3d 687, 698 (Wyo. 2008).	No	Prejudice
Eaton v. State, 2008 WY 97, ¶184, 192 P.3d 36, 114 (Wyo. 2008).	No	Deficient Performance
Proffit v. State, 2008 WY 114, ¶49, 193 P.3d 228, 245 (Wyo. 2008).	Yes	
Montez v. State, 2009 WY 17, ¶28, 201 P.3d 434, 442 (Wyo. 2009).	No	Deficient Performance and Prejudice
Cross v. State, 2009 WY 154, ¶10, 221 P.3d 972, 975 (Wyo. 2009).	No	Deficient Performance and Prejudice
Baker v. State, 2010 WY 6, ¶42, 223 P.3d 542, 558 (Wyo. 2010).	No	Prejudice
Luftig v. State, 2010 WY 43, ¶31, 228 P.3d 857, 867 (Wyo. 2010).	No	Prejudice

Case	*Ineffective Counsel?*	*If not, which prong was not met?*
Jones v. State, 2010 WY 44, ¶21, 228 P.3d 867, 874 (Wyo. 2010).	No	Prejudice
Schrelbvogel v. State, 2010 WY 45, ¶50, 228 P.3d 874, 890 (Wyo. 2010).	No	Prejudice
Bloomer v. State, 2010 WY 88, ¶19, 233 P.3d 971, 976 (Wyo. 2010).	No	Prejudice
Rolle v. State, 2010 WY 100, ¶45, 236 P.3d 259, 276 (Wyo. 2010).	No	Deficient Performance
Carter v. State, 2010 WY 136, ¶24, 241 P.3d 476, 489 (Wyo. 2010).	No	Deficient Performance and Prejudice
Rodriguez v. State, 2010 WY 170, ¶19, 245 P.3d 818, 824 (Wyo. 2010).	No	Deficient Performance
Robison v. State, 2011 WY 4, ¶8, 246 P.3d 259, 263 (Wyo. 2011).	No	Deficient Performance
Sanchez v. State, 2011 WY 77, ¶49, 253 P.3d 136, 149 (Wyo. 2011).	No	Prejudice
Jenkins v. State, 2011 WY 141, ¶1, 262 P.3d 552, 554 (Wyo. 2011).	No	Prejudice
Ken v. State, 2011 WY 167, ¶3, 267 P.3d 567, 569 (Wyo. 2011).	Yes	
Brock v. State, 2012 WY 13, ¶22, 272 P.3d 933, 939 (Wyo. 2012).	No	Prejudice
Bear Cloud v. State, 2012 WY 16, ¶43, 275 P.3d 377, 395 (Wyo. 2012).	No	Prejudice
Peterson v. State, 2012 WY 17, ¶25, 270 P.3d 648, 655 (Wyo. 2012).	No	Deficient Performance and Prejudice
Snow v. State, 2012 WY 18, ¶17, 270 P.3d 656, 661 (Wyo. 2012).	No	Prejudice
Maier v. State, 2012 WY 50, ¶25, 273 P.3d 1084, 1092 (Wyo. 2012).	No	Deficient Performance

Case	*Ineffective Counsel?*	*If not, which prong was not met?*
Kramer v. State, 2012 WY 69, ¶15, 277 P.3d 88, 93 (Wyo. 2012).	No	Deficient Performance
Jacobsen v. State, 2012 WY 105, ¶2, 281 P.3d 356, 357 (Wyo. 2012).	No	Prejudice
Osborne v. State, 2012 WY 123, ¶26, 285 P.3d 248, 253 (Wyo. 2012).	No	Prejudice
Mersereau v. State, 2012 WY 125, ¶69, 286 P.3d 97, 122 (Wyo. 2012).	No	Deficient Performance
Mickelson v. State, 2012 WY 137, ¶27, 287 P.3d 750, 757 (Wyo. 2012).	No	Deficient Performance
Leonard v. State, 2012 WY 39, ¶13, 298 P.3d 170, 173 (Wyo. 2012).	No	Deficient Performance
Sen v. State, 2013 WY 47, ¶41, 301 P.3d 106, 122 (Wyo. 2013).	No	Prejudice