A Coherent Approach to Ineffective Assistance of Counsel Claims

The United States Supreme Court has held that the effective assistance of counsel is a fundamental right of criminal defendants. Although the Court has identified cases in which effective assistance of counsel was or was not provided, it has yet to promulgate a coherent set of principles by which the lower courts can assess ineffective assistance claims in a rational and uniform manner. Consequently, attempts by the lower courts to define their own standards have resulted in confusion and controversy. The lower courts have had particular difficulty with ineffective assistance claims based on the incompetency of counsel.

The courts of appeals[1] have differed as to the extent to which a criminal defendant alleging ineffective assistance by incompetent counsel must demonstrate that the incompetence prejudiced his case before it will be considered a denial of the right to counsel. The primary source of this confusion has been the mistaken perception that Supreme Court precedent precludes requiring a showing of prejudice to establish an ineffective assistance claim. This perception conflicts with the justifiable sense of many courts that some ineffective assistance claims should be subjected to heightened standards.

This Comment will suggest an interpretation of Supreme Court precedent that provides an analytical framework for imposing a burden of showing prejudice only in those cases where the burden is justified. Part I will review the Supreme Court's development of the right to counsel and the attempts of the lower courts to devise standards for resolving those issues left open by the Supreme Court. Part II will analyze the case law, and will suggest an alternative approach for treating ineffective assistance claims.

1. This Comment reviews only the federal law of ineffective assistance of counsel claims. However, the sixth amendment right to effective assistance of counsel also applies to the states. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Furthermore, many ineffective assistance claims are ultimately resolved in federal courts on petitions for writs of habeas corpus, and the standards applied in such cases are generally the same as those applied on direct appeal. *Compare, e.g.,* Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc) (collateral appeal of state court conviction), *cert. denied*, 440 U.S. 974 (1979), *with* United States v. Altamirano, 633 F.2d 147 (9th Cir. 1980) (direct appeal of federal conviction applying *Cooper* standard), *cert. denied*, 454 U.S. 839 (1981).

I
CURRENT LAW OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

A. Supreme Court Precedent

The modern development of the right to counsel began with the landmark case *Powell v. Alabama*.[2] The Supreme Court held that the due process clause of the fourteenth amendment[3] guaranteed the assistance of counsel to criminal defendants, at least in capital cases.[4] Eventually, the right was extended to all cases involving imprisonment.[5]

While *Powell* did not make entirely clear the exact nature of the constitutional guarantee,[6] it did speak of "effective and substantial" aid.[7] Later, the Court began to refer to the right to counsel as the right to effective assistance of counsel,[8] and indicated that the state may violate the right by appointing an attorney too late for adequate prepara-

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2. 287 U.S. 45 (1932).

3. *Powell*, which involved a state criminal proceeding, held that the right to counsel arose out of due process. *Id.* at 68-69. Six years later, in Johnson v. Zerbst, 304 U.S. 458 (1938), the Court held that the right to counsel in federal prosecutions was based on the sixth amendment. *Id.* at 462-63. Finally, in Gideon v. Wainwright, 372 U.S. 335 (1963), the Court held that the right to counsel in both state and federal trials is granted by the sixth amendment. *Id.* at 342. For a fuller discussion of the different standard of protection applied to rights indirectly protected through due process as opposed to those directly granted under the sixth amendment, see United States v. Decoster, 624 F.2d 196, 231 n.28 (D.C. Cir. 1979) (MacKinnon, C.J., concurring) (en banc); *cf.* Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 VAL. U.L. REV. 509 (1976) (comparing rights granted under fourteenth amendment due process clause with the sixth amendment right to counsel).

4. Powell v. Alabama, 287 U.S. 45, 71 (1932). Prior to *Powell*, the sixth amendment was interpreted as granting only the right to retain counsel. *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 27-44 (1955). In *Powell*, the Court also held that a defendant has a right to more than the mere presence of an attorney; the government's obligation to appoint counsel for indigent defendants "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." 287 U.S. at 71.

5. Argersinger v. Hamlin, 407 U.S. 25 (1972). The Court has recently given notice that it has reached the outward limits of this expansion by holding that "involving imprisonment" means only those cases actually resulting in imprisonment. Scott v. Illinois, 440 U.S. 367, 374 (1979). The retreat represented by *Scott*, a five to four decision, has been criticized as unsound. *See, e.g.*, Project, *Ninth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1978-1979*, 68 GEO. L.J. 279, 488-89 (1979). For a discussion of the implications of *Scott*, see Herman & Thompson, Scott v. Illinois *and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71 (1979).

6. *See, e.g.*, Mitchell v. United States, 259 F.2d 787, 789-90 (D.C. Cir.) (interpreting *Powell* as requiring review of timeliness of appointment rather than skill of counsel), *cert. denied*, 358 U.S. 850 (1958).

7. Powell v. Alabama, 287 U.S. 45, 53 (1932). *See* Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 818-19 (1976) (characterizing *Powell* as recognizing that "the sixth amendment demands more than placing a warm body with a legal pedigree next to an indigent defendant").

8. *See, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); Reece v. Georgia, 350 U.S. 85, 90 (1955); Glasser v. United States, 315 U.S. 60, 76 (1942).

tion,[9] or by preventing him from giving closing argument,[10] from eliciting testimony from the defendant by direct examination,[11] or from meeting with the defendant.[12] The Court also held that the right to effective assistance may be denied if defense counsel had a conflict of interest engendered by representation of codefendants.[13] And, while the Court has required that an attorney give advice that is "within the range of competence demanded of attorneys in criminal cases,"[14] the Court has declined to define the phrase, preferring to leave the question to the "good sense and discretion of the trial courts."[15] Thus, although the court has identified specific situations which constitute ineffective assistance, it has yet to provide a set of general principles for assessing ineffective assistance claims.[16]

The Court has also left unclear the importance of prejudice in deciding ineffective assistance of counsel claims. One of the Court's first statements about the role of prejudice was made in *Glasser v. United States*,[17] where joint representation of codefendants caused a conflict of interest. After holding that the conflict had led to errors at trial that diminished the effectiveness of one defendant's representation, the Court found that no further inquiry was necessary, stating that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[18]

The *Glasser* court distinguished between the defendant who had shown prejudice and the one who had not, and held that only the former had been denied effective assistance of counsel.[19] Nonetheless, the case has been widely cited as precluding any consideration of prejudice.[20] In *Holloway v. Arkansas*, the Court itself interpreted *Glasser* as requiring that prejudice be presumed in a conflict of interest case.[21]

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9. Chambers v. Maroney, 399 U.S. 42 (1970).

10. Herring v. New York, 422 U.S. 853 (1975).

11. Ferguson v. Georgia, 365 U.S. 570 (1961).

12. Geders v. United States, 425 U.S. 80 (1976).

13. *See, e.g.*, Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Glasser v. United States, 315 U.S. 60 (1942).

14. McMann v. Richardson, 397 U.S. 759, 771 (1970).

15. *Id.*

16. *See* Maryland v. Marzullo, 435 U.S. 1011 (1978) (White, J., dissenting from denial of certiorari) (arguing that the Court should have taken the opportunity to define a standard).

17. 315 U.S. 60 (1942).

18. *Id.* at 76.

19. *Id.* at 76-77.

20. *See, e.g.*, Austin v. Erickson, 477 F.2d 620, 624 (8th Cir. 1973); United States v. Gougis, 374 F.2d 758, 761 (7th Cir. 1967); Note, *Criminal Codefendants and the Sixth Amendment: The Case for Separate Counsel*, 58 GEO. L.J. 369, 387 (1969).

21. Holloway v. Arkansas, 435 U.S. 475, 482 (1978).

Similarly, *Holloway v. Arkansas* is often cited for its remark that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic."[22] This is interpreted as requiring reversal regardless of any consideration of prejudice. Yet the Court qualified this language, stating that it "presupposes that the joint representation, over his express objections, prejudiced the accused in some degree."[23]

Again, the Court is cited in *Cuyler v. Sullivan*[24] for the proposition that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."[25] However, the Court went on to acknowledge that a defendant might have to show that his legal assistance had been adversely affected.[26]

Two years later, in *United States v. Morrison*,[27] the Court expressly equated adverse effect with prejudice, stating that "some adverse effect . . . or . . . other prejudice to the defense" must be shown.[28] The Third Circuit had held that state interference, caused by drug agents disparaging the defendant's counsel, had violated defendant Morrison's right to counsel.[29] The Supreme Court reversed, holding that state interference alone was not enough to amount to ineffective assistance. The defendant was also required to show that the interference had some adverse effect on the attorney's performance, or in some other way prejudiced Morrison's defense.[30]

B. Circuit Court Treatment of Ineffective Assistance Claims

In the absence of clear Supreme Court guidance, the circuit courts' treatment of ineffective assistance claims has engendered much confusion and controversy. In the words of one commentator, the issue

> has thrown the courts into turmoil. The United States Supreme Court has eschewed its responsibility to the lower courts to fashion a constitutional standard . . . . The federal courts of appeal differ on the proper standard to apply and some state courts ignore federal law. Lower courts implore their superiors for guidance, and individual judges viciously criticize their colleagues. Despite constant appellate review and examination by commentators, the answers to basic questions are still

22. *Id.* at 488.
23. *Id.* at 489.
24. 446 U.S. 335 (1980).
25. *Id.* at 349-50.
26. *Id.* at 350.
27. 449 U.S. 361 (1981).
28. *Id.* at 365.
29. United States v. Morrison, 602 F.2d 529, 533 (3d Cir. 1979), *rev'd*, 449 U.S. 361 (1981).
30. *Morrison*, 449 U.S. at 365.

unsettled.[31]

Additional analytical confusion has grown out of the prevalent view that Supreme Court precedent precludes any requirement to show prejudice in those specific ineffective assistance claims it has addressed. Although this perception is demonstrably incorrect,[32] it has led the lower courts to develop an unsound analytical framework for distinguishing ineffective assistance claims in which a showing of prejudice may be required from those that the Supreme Court has considered.

The lower courts have adopted a categorical approach that draws a fundamental distinction between incompetence claims, which the Supreme Court has never considered, and outside interference claims, in which Supreme Court decisions supposedly preclude a prejudice requirement.[33] The latter category includes cases of direct state interference, such as a judicial order preventing counsel from meeting with the defendant,[34] as well as indirect state interference, which usually involves late appointment of counsel[35] or creation of a conflict of interest by appointment of one attorney to represent multiple codefendants.[36]

Ineffective assistance of counsel claims based on incompetence, on the other hand, are categorized as being caused by problems intrinsic to the attorney. Incompetence claims involve allegations that the attorney himself made a mistake—that he failed to prepare adequately for trial,[37] to object to the introduction of evidence,[38] or to prepare or pres-

31. Tague, *The Attempt to Improve Criminal Defense Representation*, 15 AM. CRIM. L. REV. 109, 110-11 (1977).

32. *See infra* notes 62-65 and accompanying text.

33. *See, e.g.*, Washington v. Strickland, 673 F.2d 879, 901 (5th Cir.), *rev'd on reh'g en banc*, 693 F.2d 1243 (5th Cir. 1982); Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); United States v. Decoster, 624 F.2d 196, 202 (D.C. Cir. 1976) (en banc). *See also* Schwarzer, *Dealing With Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633, 640-41 (1980); Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289, 309 (1964) (defining two categories: extrinsic and intrinsic interference); Project, *Tenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1979-1980*, 69 GEO. L.J. 211, 420-29 (1979) (dividing claims into three categories: ineffective assistance, conflict of interest, and state interference with the attorney-client relationship).

34. *See, e.g.*, Herring v. New York, 422 U.S. 853 (1975).

35. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970).

36. *See, e.g.*, United States v. DeFalco, 644 F.2d 132, 135 (3d Cir. 1979) (elaborating additional burden to show prejudice in order to establish ineffective assistance based on incompetence in comparison with the burden required where basis of claim is conflict of interest); United States v. Decoster, 624 F.2d 196, 202 (D.C. Cir. 1976) (plurality opinion) (en banc) (distinguishing conflict of interest as separate category of ineffective assistance).

37. *See, e.g.*, Hall v. Sumner, 682 F.2d 786, 788 (9th Cir. 1982); United States v. Porterfield, 624 F.2d 122, 124 (10th Cir. 1980).

38. *See, e.g.*, United States v. Fontenot, 628 F.2d 921, 926 (5th Cir. 1980) (failure to assert absence of *Miranda* warnings), *cert. denied*, 452 U.S. 905 (1981); Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980) (failure to challenge admissibility of evidence).

ent an available defense.[39]

The courts use the incompetence category to justify requiring the defendant to show prejudice to his case. They require that he show both that his attorney acted with less skill than a reasonably competent attorney,[40] and that the attorney's conduct resulted in some prejudice to the defense.[41] Absent uniform controlling standards, inconsistencies have arisen both within and among the circuits as to how, or even whether, to require a showing of prejudice.

II
ANALYSIS

A. The Inadequacy of the Categorical Approach

The underlying cause of confusion and controversy over the proper role of prejudice in ineffective assistance of counsel claims is the inadequacy of the categorical approach. This approach lacks a convincing rationale that would indicate when to require a showing of prejudice. Further, the categorical approach is not only inadequate for

39. *See, e.g.*, United States v. Cooper, 580 F.2d 259, 263-64 (7th Cir. 1978) (waiver of insanity defense); Thomas v. Wyrick, 535 F.2d 407 (8th Cir.) (failure to explore defense), *cert. denied*, 429 U.S. 868 (1976); United States *ex rel.* Bradley v. McMann, 423 F.2d 656 (2d Cir. 1970) (failure to bolster alibi defense), *cert. denied*, 400 U.S. 994 (1971).

40. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (attorney's performance must be "within the range of competence demanded of attorneys in criminal cases"); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (counsel must exercise the skill, judgment, and diligence of a reasonably competent defense attorney), *cert. denied*, 445 U.S. 945 (1980); United States v. Fleming, 594 F.2d 598, 606 (7th Cir.) (performance must meet "minimum professional standard"), *cert. denied*, 442 U.S. 931 (1979); Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc) (same), *cert. denied*, 440 U.S. 974 (1979); United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir. 1978) (following *McMann* standard); Marzullo v. Maryland, 561 F.2d 540, 544 (4th Cir. 1977) (same), *cert. denied*, 435 U.S. 1011 (1978); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (assistance required is "counsel reasonably likely to render and rendering reasonably effective assistance"); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (en banc) (requiring "the exercise of the customary skill and knowledge which normally prevails at the time and place").

41. *See, e.g.*, Washington v. Strickland, 693 F.2d 1243, 1263-64 (5th Cir. 1982) (en banc) (requiring that defendant first show ineffective assistance of counsel, then show that it caused "actual and substantial detriment to the course of his defense"); United States v. Sheehy, 670 F.2d 798, 799 (8th Cir. 1982) (Defendant must demonstrate he was materially prejudiced in his defense.); Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (errors must be prejudicial to constitute sixth amendment violation), *cert. denied*, 445 U.S. 945 (1980); United States v. Berkwitt, 619 F.2d 649, 659 (7th Cir. 1980) (noting petitioner's failure to support ineffective assistance claim "with any specific instance of prejudice"); United States v. Aulet, 618 F.2d 182, 188 (2d Cir. 1980) (requiring "actual, not possible, prejudice to the client"); Ewing v. Williams, 596 F.2d 391, 395-97 (9th Cir. 1979) (no relief unless defense has been prejudiced); Boyer v. Patton, 579 F.2d 284, 288-89 (3d Cir. 1978) (Incompetence must result in prejudice to defendant but may be found as a matter of law.); Marzullo v. Maryland, 561 F.2d 540, 546 (4th Cir. 1977) (ineffective assistance where counsel failed to protect defendant from prejudicial effect of admission of evidence), *cert. denied*, 435 U.S. 1011 (1978); United States v. Decoster, 624 F.2d 196, 208 & n.74 (D.C. Cir. 1976) (en banc) (Defendant must show "a likelihood that counsel's inadequacy affected the outcome of the trial.").

present purposes, but its use prevents the development of a more satisfactory approach.

1. Practical Drawbacks

The confusion and inconsistency within and among the circuits in their treatment of ineffective assistance claims seriously burdens the courts. As challenging the competence of counsel has become standard, the number of these claims has become staggering.[42] The lower court judge seeking to dispose of one of the most common items on the docket is often faced with a frustrating task in determining the rule to be applied, and with great uncertainty about whether the choice will withstand an appeal. The inconsistency also increases the likelihood that a particular appellate panel will find a different interpretation appropriate, and therefore encourages appeals. Even more significantly, from the standpoint of the criminal defendant, the application of inconsistent standards to ineffective assistance claims means that the right to effective assistance of counsel is not equally enjoyed by all.[43]

An additional consequence of inconsistent standards is that performance of counsel cannot be adequately policed so as to improve the quality of assistance rendered and reduce the number of ineffective assistance claims that are brought. The most effective guarantor of adequate attorney performance is the trial judge.[44] Yet confusion as to the definition of effective assistance leaves the standard by which attorney conduct should be scrutinized uncertain. Added to the natural reluctance of trial judges to interfere in the adversary process, this uncertainty hampers the judge's ability to call into question an attorney's performance and thereby prevent an ineffective assistance claim.[45]

2. Unsound Distinctions Between Categories

The major weakness of the categorical approach is that the primary distinctions that the courts draw between the categories are fallacious. One basis for distinction is the relative degree of state

42. Direct and indirect appeals based on ineffective assistance of counsel claims increase the workload of the courts. *See* Shapiro, *Federal Habeas Corpus: A Study in Massachussets*, 87 HARV. L. REV. 321, 333 (1973).

43. *See supra* note 40 and accompanying text.

44. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) ("[J]udges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."); United States *ex rel.* Darcy v. Handy, 203 F.2d 407, 427 (3d Cir.) (gross incompetence of counsel calls for action by trial judge), *cert. denied*, Maroney v. United States *ex rel.* Darcy, 346 U.S. 865 (1953). *See generally* Schwarzer, *supra* note 33.

45. *Cf.* United States v. Decoster, 624 F.2d 196, 289 n.126 (D.C. Cir. 1976) (Bazelon, J., dissenting) (en banc) (noting confusion surrounding definition of ineffective assistance).

involvement in causing the attorney's poor performance. This difference is used to justify requiring a defendant to show prejudice when the attorney's failings stem from his own weaknesses rather than from outside interference.[46]

Careful analysis reveals that many cases classed as incompetence claims cannot actually be distinguished, by the degree of state involvement, from others normally classed as outside interference claims. For example, late appointment of counsel is always considered to be outside interference, but appointment of incompetent counsel is not.[47] If a public defender failed to prepare adequately because his state-appointed workload left too little time, the claim will be treated as one of incompetence, and a showing of prejudice will generally be required.[48] But if he failed to prepare adequately because he was appointed too close to trial, the claim becomes one of outside interference, and a showing of prejudice will not be required.[49]

The weakness of distinguishing by the degree of state involvement is also evident as between conflict of interest cases and incompetence cases. The categorical approach generally places conflict of interest claims in the outside interference category, regardless of whether the attorney was state appointed or privately retained.[50] Consequently, the categorical approach imposes a greater burden to show prejudice where a defendant retains incompetent counsel than where he retains counsel who cannot represent him effectively because of a conflict of interest.

A different basis for distinguishing between the incompetence category and Supreme Court cases in the outside interference category was expressed in the Ninth Circuit decision, *Cooper v. Fitzharris*.[51] First, in the cases the Supreme Court had considered, counsel "was prevented from performing a critical function or otherwise impeded in

46. *See, e.g.*, Washington v. Strickland, 673 F.2d 879, 901 (5th Cir.), *rev'd on reh'g en banc*, 693 F.2d 1243 (5th Cir. 1982); Cooper v. Fitzharris, 586 F.2d 1325, 1331 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); United States v. Decoster, 624 F.2d 196, 203 (D.C. Cir. 1976) (plurality opinion) (en banc).

47. *See supra* notes 33-39 and accompanying text. *But see* United States v. King, 664 F.2d 1171, 1172-73 (10th Cir. 1981) (applying same standard to late appointment and incompetency cases).

48. *See* Cooper v. Fitzharris, 551 F.2d 1162, 1163 n.1 (9th Cir. 1977), *overruled on other grounds on reh'g en banc*, 586 F.2d 1325 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979).

49. *See* Wolfs v. Britton, 509 F.2d 304 (8th Cir. 1975) (late appointment raises presumption of prejudice); Stokes v. Peyton, 437 F.2d 131, 136-37 (4th Cir. 1970) (late appointment of counsel constitutes prima facie case of denial of effective assistance).

50. *Compare* Wilson v. Morris, 699 F.2d 926 (7th Cir. 1983) (state appointed counsel found to have conflict of interest), *with* Baty v. Balkcom, 661 F.2d 391 (5th Cir.) (retained counsel found to have conflict of interest), *cert. denied*, 456 U.S. 1011 (1982).

51. 586 F.2d 1325 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979). The petitioner had relied on various Supreme Court state interference and conflict of interest cases, which he argued had not required a showing of prejudice. *Id.* at 1328.

the advocacy of appellant's cause," while in the incompetency claim in *Cooper*, counsel was "present and acting freely on his behalf."[52] Second, the court found that in the Supreme Court cases, "the evil lies in what the attorney does not do, and is either not readily apparent on the record or occurs at a time when no record is made," while in Cooper the claim of incompetence was based on specific errors that occurred during the course of the trial.[53]

The court held that these distinctions justified a requirement that the petitioner prove prejudice. In *Cooper* the impact of the alleged errors could "be evaluated from [the] record with reasonable certainty." On the other hand, proof of prejudice in the outside interference cases would require "unguided speculation" because of the lack of a record of specific acts of attorney misconduct.[54]

As the *Cooper* dissent pointed out,[55] the majority's distinctions are not realistic. Errors that occur off the record or that consist of failures to act are not unique to outside interference claims. Incompetencc claims nearly always allege failure to perform a defense function. Many concern an attorney's omissions at trial[56] or errors prior to trial when no record is made.[57] In addition, in each Supreme Court case that the *Cooper* majority attempted to distinguish, a specific error at trial had been alleged.[58] This further weakens the majority's distinction based on the existence of a record of errors. Moreover, in a subsequent incompetence claim, based on allegations of pretrial omissions by the attorney, the court imposed a requirement that the defendant show prejudice despite the absence of a record of specific misconduct.[59]

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52. *Id.* at 1332.

53. *Id.*

54. *Id.*

55. *Id.* at 1334 (Hufstedtler, J., dissenting).

56. *See, e.g.*, United States v. Miller, 643 F.2d 713, 714 (10th Cir. 1981) (failure to call witness); United States v. Fontentot, 628 F.2d 921, 926 (5th Cir. 1980) (failure to urge supression of evidence), *cert. denied*, 452 U.S. 905 (1981); Lovett v. Florida, 627 F.2d 706, 708-09 (5th Cir. 1980) (failure to challenge admissibility of evidence and enlist handwriting analyst); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978) (en banc) (failure to urge supression of evidence), *cert. denied*, 440 U.S. 974 (1979); Thomas v. Wyrick, 535 F.2d 407 (8th Cir.) (failure to explore defense), *cert. denied*, 429 U.S. 868 (1976); United States *ex rel.* Bradley v. McMann, 423 F.2d 656, 657-58 (2d Cir. 1970) (failure to bolster alibi defense), *cert. denied*, 400 U.S. 994 (1971).

57. *See, e.g.*, Plant v. Wyrick, 636 F.2d 188, 189 (8th Cir. 1980) (per curiam) (failure to interview potential witnesses); Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980) (failure to interview and subpoena witnesses).

58. *See, e.g.*, Holloway v. Arkansas, 435 U.S. 475, 490 (1978) ("[A] conflict may also prevent an attorney from challenging the admission of evidence."); Geders v. United States, 425 U.S. 80, 86 (1976) (counsel prevented from meeting with client, hampering ability to cross-examine); Herring v. New York, 422 U.S. 853, 858 (1975) (counsel denied opportunity to give closing argument, hampering presentation of case); Glasser v. United States, 315 U.S. 60, 75 (1942) (counsel failed to object to introduction of evidence specifically found, from the record, to be damaging).

59. Ewing v. Williams, 596 F.2d 391, 394 (9th Cir. 1979).

In addition to distinguishing between outside interference and incompetence claims, courts have expressed special concerns about incompetence claims. These concerns, however, do not justify placing a special burden on the defendant claiming incompetence. For example, courts have argued that incompetence may be feigned while outside interference cannot be. Judges fear that an attorney with a losing case might feign incompetence in order to secure a basis for an appeal.[60] This argument is unrealistic. An attorney with a case so weak as to be worth forfeiting would not be eager to sacrifice his reputation in order to present the same case again at a new trial. Such circumstances are much more likely to lead to a plea bargain.

Another concern courts express is that there simply may not be enough competent attorneys available to provide one for every criminal defendant. However, higher admission standards, better academic preparation, more effective continuing education for the bar, and better funding for the beleaguered public defender offices are more practical, effective, and equitable means of solving the problem than the sacrifice of constitutional rights. Furthermore, even if the most practical means lie outside the court's power, the court has a duty to signal that implementation of those means is necessary. By continuing to allow the confusion in this area to obscure the problem, the courts are prolonging and exacerbating it.

3. Unjustified Burden Placed on Incompetence Claimants

What drives the lower courts to use the categorical approach is their sense that incompetence claims should be subjected to particular scrutiny, combined with their perception that Supreme Court precedent precludes them from requiring that the defendant show prejudice. While, as this Comment will show, there is a rational justification for subjecting incompetence claimants to the burden of showing prejudice,[61] the categorical approach provides an inadequate rationale for imposing the burden.

The categorical approach narrowly focuses attention on the specific alleged errors by the attorney in incompetence claims. It requires a showing that those errors affected the outcome of the trial, while no similar showing is required in cases of outside interference. For example, a defendant claiming that his counsel was incompetent because he waived closing argument in order to put money into his parking meter would be required to show what effect the argument would have had.

60. United States v. Altamirano, 633 F.2d 147, 151-52 (9th Cir. 1980), *cert. denied*, 454 U.S. 839 (1981). *See also* Comment, *Ineffective Counsel's Last Act—Appeal?: An Ethical Dilemma of Conflicting Interests*, 1979 ARIZ. ST. L.J. 595, 598-601.

61. *See infra* notes 68-80 and accompanying text.

In contrast, the defendant claiming the state prevented his counsel from giving closing argument need only show that the argument was not given. Proponents of the categorical approach have failed to justify such disparate treatment.

An error will have the same effect whether caused by incompetence or by outside interference. Failure to give a closing argument, to call a witness, or to present a defense will not prejudice the defendant's case more if caused by outside interference than if caused by the attorney's incompetence. In fact, where incompetence causes the failure, the likelihood of prejudicial effect will if anything be greater, since the incompetent attorney is presumably unaware of the error and unable to compensate for it.

B. Misinterpretation of Supreme Court Precedent

Much of the confusion in the treatment of ineffective assistance claims arises out of the misinterpretation of Supreme Court precedent as precluding consideration of prejudice. Though the Court has stated that ineffective assistance may never be harmless,[62] its decisions do not go so far as to establish that prejudice may not be considered in determining whether a defendant has in fact been denied effective assistance.[63]

The Supreme Court has never sanctioned the lower courts' use of the categorical approach as a basis for imposing an additional burden to show prejudice in incompetence claims. In *Glasser v. United States*,[64] the court implied that the Court's treatment of ineffective assistance claims would turn more on the degree of effectiveness of the attorney's performance than on the source of any impairment. Although *Glasser* involved a conflict of interest, the Court noted that "[i]rrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness."[65]

Finally, the Court clearly stated in *United States v. Morrison* that the defendant must show he has suffered prejudice. *Morrison* has been interpreted as an indication of a new willingness to require a showing

62. Cuyler v. Sullivan, 446 U.S. 335, 349 (1980) (Multiple representation is never harmless error.); Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (reversal automatic when defendant deprived of the presence and assistance of his attorney); Gideon v. Wainright, 372 U.S. 335, 344 (1963) (fair trial may not be assured without assistance of counsel); Glasser v. United States, 315 U.S. 60, 76 (1942) (right to the assistance of counsel too fundamental to allow for calculations of prejudice resulting from denial).

63. *See supra* notes 17-30 and accompanying text.

64. 315 U.S. 60 (1942).

65. *Id.* at 75.

of prejudice in ineffective assistance of counsel cases.[66] In reality, prejudice has always been required, but Morrison's was the first claim the court had considered in which prejudice was not alleged or readily presumable. The Court therefore signaled its absence and denied the defendant's claim.

C. Proposal: The Net Diminution Approach

This Section proposes a "net diminution" analysis for ineffective assistance of counsel claims. It defines prejudice as a net diminution of the quality of the attorney's performance. When the prejudice—that is, the net reduction in attorney effectiveness—reaches an impermissible level, it constitutes ineffective assistance of counsel. Whether the defendant will be required to demonstrate that he has been prejudiced will be determined in each case according to the nature of the interests that are promoted at the expense of the quality of the defendant's representation.

1. Application of the Net Diminution Approach

The application of this approach essentially involves a balancing of benefits against detriments stemming from the attorney's actions of which the defendant complains. When an alleged error compromises the defendant's interests, this compromise will constitute prejudice, unless sufficiently offset by benefits to the defendant's representation gained through the alleged error. Thus, where the attorney makes a tactical decision to sacrifice some of the defendant's interests in order to promote more crucial ones, no prejudice would be found. On the other hand, where the sacrifice is made in order to promote interests adverse to the defendant, prejudice will be presumed.

By defining prejudice in this way, this approach suggests a rational basis for distinguishing between those cases where prejudice may be presumed and those where the defendant should be required to demonstrate that the effectiveness of his defense has been reduced. This distinction is made according to the nature of the interests promoted at the expense of the defendant's interests. If the defendant's interests are sacrificed in favor of interests adverse to his, such as those of the state or, in certain cases, of codefendants, it may be readily presumed that

66. *See, e.g.*, Washington v. Strickland, 673 F.2d 879, 900 (5th Cir.) (interpreting *Morrison* as allowing certain violations of the right to counsel to be considered harmless error), *rev'd on reh'g en banc*, 693 F.2d 1243 (5th Cir. 1982); United States v. Payne, 641 F.2d 866, 868 (10th Cir. 1981) (expressing doubt as to continuing viability of Tenth Circuit's no-prejudice rule in light of *Morrison*); Project, *Eleventh Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1980-81*, 70 GEO. L.J. 365, 663-64 (1981) (noting that *Morrison* may indicate Court's willingness to require prejudice in an ineffective assistance of counsel claim).

the net effectiveness of the defendant's representation has been diminished. Therefore, where the attorney fails to promote the defendant's interest because the court or some other arm of the state prevents him from doing so, or because he represents multiple defendants with clearly adverse interests, it should be presumed that the defendant whose interests have been sacrificed has received no compensating benefit, and he has thus been prejudiced.

On the other hand, it is reasonable to presume that an attorney not subjected to outside interference is working to further his client's interests. For example, if an attorney sacrifices the defendant's interests in one way, as by failing to call an alibi witness, but does so in order to promote the same defendant's interests in another way, as by pursuing a claim of insanity, it is not readily apparent that the effectiveness of the defendant's representation has been diminished overall.[67] It is therefore appropriate that the defendant overcome the presumption that the attorney's efforts were in his interest by showing that the advantages of the attorney's course of action were outweighed by the disadvantages,[68] which would constitute a showing of prejudice. Similarly, where the attorney represents multiple codefendants, the interests of the codefendants are not always clearly adverse. Thus, where the codefendants' interests are not clearly adverse, a defendant claiming a conflict of interest due to multiple representation should properly be required to demonstrate that an actual conflict prejudiced his defense.

This presumption that the attorney is working in the defendant's best interests is thus a sound basis on which to impose the additional showing of prejudice. The requirement that he demonstrate prejudice is further justified because the defense counsel should be allowed a margin of error. The sixth amendment does not guarantee perfect assistance of counsel. Since attorneys must continually balance some interests of the defendant against others, often under tight money and time constraints, and often under the pressures of trial, some margin of error must be allowed.[69] This margin is especially important inasmuch

67. Cooper v. Fitzharris, 586 F.2d 1325, 1340 n.16 (9th Cir. 1978) (Hufstedtler, J., dissenting) (en banc) ("Claims of incompetent counsel are distinguishable from other kinds of error, because incompetence claims turn on the reasons for an attorney's failure to present a defense."), *cert. denied*, 440 U.S. 974 (1979).

68. Hinkle v. Scurr, 677 F.2d 667, 671 (8th Cir.) (appellant has failed to rebut presumption of competence), *cert. denied*, 103 S. Ct. 456 (1982); United States v. Blue Thunder, 604 F.2d 550, 554 (8th Cir.) ("In reviewing . . . we are mindful of the presumption that the defendant received effective representation."), *cert. denied*, 444 U.S. 902 (1979).

69. Courts have repeatedly held that the sixth amendment does not guarantee error-free representation. *See* Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir.) (trial errors alone not sufficient to find violations of sixth amendment), *cert. denied*, 445 U.S. 945 (1980); United States v. Blue Thunder, 604 F.2d 550, 555 (8th Cir.) (even when hindsight reveals mistake, counsel not necessarily

as assessing an incompetence claim will often involve viewing the reasonableness of an attorney's tactical balancing decisions with the benefit of hindsight.[70]

2. Comparison with Categorical Approach

Instead of forcing cases into formalistic categories, the net diminution approach interprets Supreme Court precedent as necessitating a case by case approach for the imposition of a burden of showing prejudice. The result is that some cases are treated differently under the net diminution approach than under the categorical approach. The incompetence category of cases will still tend to require a showing of prejudice under the net diminution approach. While the categorical approach requires the showing because the attorney's incompetence was intrinsic rather than due to outside interference, the net diminution approach requires it because the defendant's interests were not sacrificed in favor of interests adverse to his.

The distinction in approaches is more apparent in cases involving outside interference. Under the categorical approach, the fact of outside interference negates any requirement that prejudice be demonstrated. Under the net diminution approach, however, prejudice must be shown when the outside interference comes from a party whose interests were not adverse to the defendant's. Prejudice is still presumed where a party with adverse interests interferes with the defendant's representation.

3. Consistency with Supreme Court Precedent

The net diminution approach is consistent with Supreme Court precedent. Correctly understood, that precedent requires some prejudice or adverse effect on the attorney's performance to sustain an ineffective assistance claim. This is true whether prejudice may be presumed from the circumstances—as where the effectiveness of the attorney's performance has been sacrificed in favor of interests adverse to those of the defendant—or whether the prejudice must be shown to exist—as in incompetence claims where the attorney is presumed to have been acting in the defendant's interest.

Thus, in cases where the interference with counsel's performance

incompetent), *cert. denied*, 445 U.S. 902 (1979); Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc) (normal human error by trial counsel does not establish violation of sixth amendment), *cert. denied*, 440 U.S. 974 (1979).

70. Courts are well aware that counsel must continually make such decisions and are reluctant to declare a decision incompetent from the vantage point of hindsight. *See, e.g.*, Nevels v. Parratt, 596 F.2d 344, 347 (8th Cir.) (counsel's trial judgment should not be second guessed), *cert. denied*, 444 U.S. 859 (1979); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (court will not second guess basic trial strategy), *cert. denied*, 441 U.S. 911 (1979).

has come from a party seeking to promote interests adverse to those of the defendant, the Court has presumed prejudice. For example, in *Geders v. United States*,[71] the Court specifically stated that where the state sought to prevent tampering with the defendant's testimony at the expense of the defendant's interest in conferring with counsel during an overnight recess, the state had "impinged upon his right to the assistance of counsel."[72] The Court reached the same conclusion where the state sought to conserve time or money by denying the defendant's right to present closing argument,[73] or by expediting trial through the late appointment of counsel.[74]

On the other hand, in cases where it was not so clear that adverse interests were competing with the defendant's representation, the Court held that the defendant must prove that he was prejudiced. In *Cuyler v. Sullivan*,[75] a recent multiple representation case, the Court held that, "[a]bsent special circumstances . . . trial courts may assume . . . that multiple representation entails no conflict . . . ."[76] Unless a defendant was denied an opportunity to show that potential conflicts threaten his right to a fair trial, "a reviewing court cannot presume that the *possibility* for conflict has resulted in ineffective assistance of counsel."[77]

Similarly, in *Weatherford v. Bursey*,[78] the Court required a showing of prejudice where alleged outside interference was caused by a party who did not have interests adverse to those of the defendant. The case was brought under title 42, section 1983 of the United States Code on the basis that the state had denied the defendant's right to the effective assistance of counsel. Weatherford, an undercover informer who had commited a crime with the defendant, later attended meetings between the defendant and his attorney.[79] The Court rejected the defendant's argument that Weatherford was a part of the prosecution. The

71. 425 U.S. 80 (1976).

72. *Id.* at 91.

73. Herring v. New York, 422 U.S. 853, 863 (1975) (state's interest in expediting proceedings should not outweigh defendant's interest in presenting case).

74. Chambers v. Maroney, 399 U.S. 42, 54 (1970) (late appointment could cause ineffective assistance where some effect found on attorney's performance); Avery v. Alabama, 308 U.S. 444, 450 (1940) (late appointment may result in ineffectiveness where it prevents counsel from performing full duty intelligently and well).

75. 446 U.S. 335 (1980).

76. *Id.* at 346-47.

77. *Id.* at 348 (emphasis added). In *Cuyler*, the Court confirmed its abandonment of what seemed like a categorical approach, which required a presumption of prejudice in multiple representation cases. For example, in Glasser v. United States, 315 U.S. 60, 71 (1942), the Court seemed to suggest that prejudice might be inferred from multiple representation alone, citing an inherent likelihood of conflicting interests. Later, in Holloway v. Arkansas, 435 U.S. 475, 489 (1978), the Court required that an actual conflict be shown for prejudice to be presumed.

78. 429 U.S. 545 (1977).

79. *Id.* at 547-49.

Court reasoned that Weatherford had been invited to attend the meetings for Bursey's benefit, attended them solely to protect his undercover status, and did not share any of the information thus obtained with the prosecution. The Court held that there had been no interference and no denial of the right to counsel.[80]

As these cases show, the net diminution approach meshes with the Supreme Court precedent in the area of ineffective assistance of counsel. The approach's consistency with Supreme Court precedent, as well as its more meaningful justification for distinctions among cases, argues for adoption of the net diminution approach and rejection of the categorical approach.

CONCLUSION

Without clear Supreme Court guidance, the lower courts have been unable to develop a consistent, adequate treatment of ineffective assistance of counsel claims. In applying inconsistent standards, the courts draw distinctions between categories of claims that are not justified by inherent differences in the claims themselves. The problem is exacerbated by inconsistencies within and among the circuits as to the standard to be applied.

The net dimmution approach is a much-needed solution to the current problem. It would be consistent with the consideration given to prejudice by the Supreme Court in the claims it has considered, and would not require the use of irrational devices in order to distinguish that precedent. The defendant would be required to demonstrate prejudice only where the burden is justified by the inherent nature of the claim. Thus, the net dimunution approach effectively serves to protect in all cases the defendant's interest in his sixth amendment right to counsel.

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80. *Id.* at 555-57.

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