The Burger Court Opinion Writing Database

Strickland v. Washington

466 U.S. 668 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 14, 1984

82-1554 - Strickland, Supt. v. Washington

Dear Sandra:

I join. I see no need to remand. I may have a thought or two later on, but you may show me as joining.

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 13, 1984

'84 MAR 13 P2:13

Re: Strickland v. Washington, No. 82-1554

Dear Sandra:

I agree with most of the legal analysis in your careful and scholarly opinion, but I still agree with the view that prevailed at Conference that we should vacate and remand rather than reverse outright. I am therefore troubled by Part V of your opinion.

Applying the "performance" component, you write that "the record shows that respondent's counsel made a strategic choice" not to investigate potentially mitigating circumstances. Op. at 28. I certainly agree that this might have been the case, but I am not sure we are free to make such a factual finding for ourselves. The District Court found: "It is evident that in the instant case, Mr. Tunkey's judgment was affected by the evidence of Washington's guilt and his desire to plead guilty. Mr. Tunkey candidly admitted that once the multiple confessions were given, he had a feeling that nothing could be done to save Washington and that this feeling was behind his failure to do an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings." App. to Pet. for Cert. A282.

As I read this passage, it suggests at least a strong possibility that Tunkey's decision was not the product of a strategy, but rather of a sense of hopelessness. I do not consider it "reasonable" for counsel in a death case to make decisions based on a feeling of hopelessness and frustration. Indeed, it seems to me that the worse the client's plight, the more important it is that his lawyer acts professionally and

not on the basis of emotion. It is true that there are other passages in the District Court's opinion indicating that Tunkey did act on the basis of strategy. That opinion is, however, ambiguous and the courts below did not, of course, have before them the standards we are announcing in this case. I think it is hazardous for us to try to apply the new standards to a cold record and determine for ourselves the real basis for Tunkey's decisions. Instead, I believe we should remand for application of the new standards to the facts of this case.

As to the "prejudice" component of the ineffective assistance standards, the District Court's findings cannot be used to justify a reversal because, as the Court of Appeals explained, the District Court did not employ the Agurs standard in analyzing prejudice and it improperly relied on Judge Fuller's testimony. Accordingly, your opinion engages in its own assessment of the facts, and concludes that none of the evidence Tunkey could have adduced rose to the level of "extreme emotional disturbance." Whether any such evidence could have satisfied the statutory mitigating factor is, however, a question of Florida law we are not competent to resolve.

Moreover, even if that factor would not have been satisfied, the Constitution requires that all non-statutory mitigating factors must be considered as well. The extreme pressure on Washington that he claims resulted from his inability to support his family, although perhaps not amounting to "extreme emotional distress" under Florida law, could well meet the test of "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)). The sentencing judge had no explanation for Washington's extraordinary conduct before him, nor was there any testimony from persons who knew the defendant before his crime spree and who could explain what kind of

person he was. All the sentencing judge had, as a result of Tunkey's decision not to investigate further, was Washington's "apology." The fact that the sentencing judge had virtually no information concerning Washington the man creates, in my judgment, a reasonable doubt about the outcome that would not otherwise exist--or, to paraphrase your opinion, undermines my confidence in the outcome.

Although it seems unlikely that the evidence will ultimately suffice to satisfy the standards laid out in your opinion, I am not so convinced of that fact that I think we should make the necessary findings of fact ourselves on a cold record, especially in the context of a death case. I am also convinced that a remand for application of the new standard to the facts by the appropriate factfinder would better indicate to the lower courts that in addressing these claims they should employ the care and thoroughness that your opinion demands.

Sincerely,

W.J.B.,Jr.

Justice O'Connor
Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: MAR 28 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March ——, 1984]

JUSTICE BRENNAN, concurring in part and dissenting in part.

I join fully in the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (BRENNAN, J., dissenting), I would vacate respondent's death sentence and remand the case for further proceedings.

I

The Court's judgment leaves standing another in an increasing number of capital sentences purportedly imposed in compliance with the procedural standards developed in cases beginning with *Gregg* v. *Georgia*, *supra*. Earlier this Term, I reiterated my view that these procedural requirements have, not suprisingly, proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. *Pulley* v. *Harris*, —— U. S. ——, —— (BRENNAN, J., dissenting).[1]

[1]The inherent difficulty in imposing the ultimate sanction consistent with the rule of law, see *Furman* v. *Georgia*, 408 U. S. 238, 274–277 (1972) (BRENNAN, J., concurring); *McGautha* v. *California*, 402 U. S. 183, 248–312 (1970) (BRENNAN, J., dissenting), is confirmed by the extraordi-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 9, 1984

Re: Strickland v. Washington, No. 82-1554

Dear Sandra:

I have, of course, joined your opinion in the above. One point in Thurgood's dissent has, however, given me pause. As you know, he takes your opinion to task for directing lower courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Opinion, at 19 (emphasis added). Particularly in view of Thurgood's comments on this point, it seems possible that the statements in your opinion that he identifies could be misunderstood.

It seems to me that you could do much to clarify the matter by simply disclaiming any intention to impose on the defendant any higher burden of proof than normally attends a claim of constitutional error and by adding a phrase describing the holding in Michel v. Louisiana, on which you rely. Just prior to the citation to that case on page 19 of your opinion, could you not add to the preceding sentence the phrase, "that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy,' Michel, at 101"?

I will be modifying my concurrence to account for some of the points made in Thurgood's dissent and will try to have that accomplished by the end of the week in the hope that you may bring the decision down on Monday.

Sincerely,

W.J.B.,Jr.

Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1984

No. 82-1554

Strickland v. Washington

Dear Sandra,

Thank you for consideration of my suggestion.

Sincerely,

Justice O'Connor

Substantial revisions throughout

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: MAY 10 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., PETITIONERS *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

JUSTICE BRENNAN, concurring in part and dissenting in part.

I join the Court's opinion but dissent from its judgment. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would vacate respondent's death sentence and remand the case for further proceedings.[1]

[1] The Court's judgment leaves standing another in an increasing number of capital sentences purportedly imposed in compliance with the procedural standards developed in cases beginning with *Gregg* v. *Georgia*, 428 U. S. 153 (1976). Earlier this Term, I reiterated my view that these procedural requirements have proven unequal to the task of eliminating the irrationality that necessarily attends decisions by juries, trial judges, and appellate courts whether to take or spare human life. *Pulley* v. *Harris*, —— U. S. ——, —— (1984) (BRENNAN, J., dissenting). The inherent difficulty in imposing the ultimate sanction consistent with the rule of law, see *Furman* v. *Georgia*, 408 U. S. 238, 274–277 (1972) (BRENNAN, J., concurring); *McGautha* v. *California*, 402 U. S. 183, 248–312 (1970) (BRENNAN, J., dissenting), is confirmed by the extraordinary pressure put on our own deliberations in recent months by the growing number of applications to stay executions. See *Wainwright* v. *Adams*, —— U. S. ——, —— (1984) (MARSHALL, J., dissenting) (stating that "haste and confusion surrounding . . . decision [to vacate stay] is itself degrading to our role as judges"); *Autry* v. *McKaskle*, —— U. S. ——, —— (1984) (MARSHALL, J., dissent-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 22, 1984

Re: 82-1554 - Strickland v. Washington

Dear Sandra,

Join me, please.

Sincerely yours,

Justice O'Connor

Copies to the Conference

cpm

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: MAY 3 - 1984

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., PETITIONER *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

JUSTICE MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970). The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance.[1] Today, for the first time, this Court attempts to synthesize and clarify those standards. Some of the majority's efforts are helpful. However, in its zeal to survey comprehensively this field of doctrine, the majority makes many generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

[1] See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After *United States* v. *Decoster*, 93 Harv. L. Rev. 752, 756–758 (1980); Note, Effective Assistance of Counsel: the Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1379, 1385–1386, 1398–1400, 1407–1409 (1983).

STYLISTIC CHANGES THROUGHOUT.

pp. 1-6, 8-11

To: The Chief Justice
Justice Brennan
Justice White
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Marshall**

Circulated: _____

Recirculated: MAY 8 - 1984

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., PETITIONER *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

JUSTICE MARSHALL, dissenting.

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[1] See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After *United States* v. *Decoster*, 93 Harv. L. Rev. 752, 756–758 (1980); Note, Effective Assistance of Counsel: the Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1379, 1385–1386, 1398–1400, 1407–1409 (1983).

SUPREME COURT OF THE UNITED STATES

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL., PETITIONERS *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 14, 1984]

JUSTICE MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson*, 397 U. S. 759, 771, n. 14 (1970). The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance.[1] Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

[1] See Note, Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After *United States* v. *Decoster*, 93 Harv. L. Rev. 752, 756–758 (1980); Note, Effective Assistance of Counsel: the Sixth Amendment and the Fair Trial Guarantee, 50 U. Chi. L. Rev. 1380, 1386–1387, 1399–1401, 1408–1410 (1983).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 26, 1984

Re: No. 82-1554 - Strickland v. Washington

Dear Sandra:

Please join me.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1984

Re: No. 82-1554 Strickland v. Washington

Dear Sandra:

Please join me. I think that without Section V, in which you apply the standards developed in the earlier part of the opinion to the facts of this case, the opinion is somewhat abstract and might mean a number of things to a number of people. I think the lower courts will get a far better idea of what the opinion means if we ourselves apply it to the facts of this case. Therefore, I hope you decide to retain Section V.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 22, 1984

Re: 82-1554 - Strickland v. Washington

Dear Sandra:

As I have told you, I think you have written an excellent opinion. The only reason I have not joined you is that I am still inclined to believe that we should adhere to the position taken by the majority at conference and remand for application of the standard set forth in your opinion. Whichever disposition the majority favors, I would hope your opinion could be unanimous.

Respectfully,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

SUPREME COURT
JUSTICE

'84 MAR 28 A9:44

March 28, 1984

Re: 82-1554 - Strickland v. Washington

Dear Sandra:

Please join me.

Respectfully,

Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: 13

Recirculated:

3/13/84

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a ten-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnapping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first degree murder and

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

March 13, 1984

No. 82-1554 Strickland v. Washington

RECEIVED
SUPREME COURT
JUSTICE

'84 MAR 14 A9:46

Dear Bill,

Thank you for your quick response in this case. Part V of the draft was included because it seems to me to be not only possible but helpful to apply the standards announced in the opinion to the facts of the case.

It is helpful because it gives a concrete illustration of how the otherwise abstract principles articulated in the opinion apply to one particular set of facts. That is both useful to lower courts and common, though not mandatory, practice for this Court. It is possible to apply the principles in this case, as the opinion notes at page 27, because the standards announced in the opinion are close enough to those applied by the state courts and District Court that no errors of law can be said to have infected their factfinding and because their factfinding provides a complete record on which to assess adequacy of performance and prejudice. The performance and prejudice inquiries are mixed questions of law and fact, moreover, so we may answer them even though the lower factfinding courts have not applied precisely the standards articulated in the circulating opinion.

In particular, with respect to the performance inquiry, the opinion acknowledges that trial counsel's sense of hopelessness affected his judgment, but that hardly renders his performance unprofessional. If it did, any counsel who felt hopeless about a case would have to be disqualified. Surely overconfidence is no prerequisite to adequate performance. The question is not how counsel feels but what counsel does, and the record here makes clear that respondent's counsel made professional decisions.

With respect to the prejudice inquiry, application of the standards is likewise warranted. You suggest that it is a question of Florida law whether the statutory mitigating circumstance of extreme emotional disturbance could be found present on the proffered evidence; if that is so, the matter is foreclosed by the Florida courts' negative answer to that question in this case. In any event, respondent argues only that counsel failed to investigate nonstatutory mitigating circumstances. Concerning such circumstances, the circulating opinion acknowledges that, as you say, the affidavit evidence might well have counted in favor of respondent by portraying him as a basically good person. But given the overwhelming

aggravating circumstances, I believe there is no reasonable probability--unless any favorable evidence at all is enough to upset confidence in the result--that submission of this fairly weak affidavit evidence would have made any difference in the weighing of aggravating and mitigating circumstances by Judge Fuller. This conclusion, as the opinion points out, does not depend at all on Judge Fuller's testimony.

Naturally, if there are not five of us who are willing to apply the principles enunciated to the facts, I will revise the draft to provide for a remand.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Stylistic Changes Throughout

p. 28

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: _____

3/20/84

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a ten-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnapping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first degree murder and

pp. 19, 24-25, 29, 30

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: 5-7-84

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

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I

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 9, 1984

Re: Strickland v. Washington, No. 82-1554

Dear Bill,

I am happy to add your requested language on page 19 of my opinion.

Sincerely,

Sandra

Justice Brennan

p. 19

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: 5-10-84

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL. *v.* DAVID LEROY WASHINGTON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May ——, 1984]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a ten-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnapping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first degree murder and

HAB

Jackson

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 82-7003--Stanley v. Zant (capital case)

Petitioner was convicted of murder and sentenced to death. At his sentencing hearing, counsel did not call any character witnesses and presented no evidence. Petitioner filed this ineffectiveness claim, alleging death-sentence counsel's failure to investigate and failure to present character witnesses.

The state courts (after an extensive hearing), then the District Court (without a hearing), then the Court of Appeals rejected the claim, the last relying on the standards articulated by the en banc court in Strickland. Since petitioner did not call counsel to testify at the ineffectiveness hearing in state court, there was no evidence of the actual reasons for not presenting evidence at the sentencing. But the evidence that would have been given at sentencing by the several character witnesses that petitioner called to testify at the state habeas hearing--evidence reviewed in great detail by the Court of Appeals--consisted "of general statements by family members that the defendant was, at a point in time remote from the events in question, a 'good boy'" and was "cumulative of evidence presented during the guilt phase." Together with the presumption of reasonable strategic decisions, these characteristics were enough to imply that counsel's challenged conduct was reasonable.

In the petition for certiorari, petitioner challenges the ineffectiveness holding. He also claims that he did not adequately waive his right to counsel and his self-incrimination privilege under Miranda. He further claims that Godfrey v. Georgia was violated by an instruction on the heinousness aggravating circumstance, which the sentencing jury found to be present.

The latter two claims, raised and rejected below, are not certworthy, both being fact-specific and probably correctly

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-817--Wainwright v. Douglas (capital case)

Respondent was convicted of murder. His sentencing proceeding--the first in this county after Furman--took place less than two hours after the conviction. The State said that it had no new evidence to present. Counsel for respondent said that he had no evidence either.

A chambers conference was then held in which counsel complained of the shortness of time before sentencing. The trial judge suggested that counsel get respondent's mother to testify that respondent was a good boy if that were true, but counsel said that respondent had not been a good boy. The trial judge offered a continuance if counsel could assure him that witnesses could be obtained, but counsel said that he did not know what evidence was available. The trial judge asked about respondent's taking the stand, whereupon counsel said that he was concerned about respondent's criminal record coming out. Respondent himself was called in; after talking with counsel, he said that he did not want to take the stand. The sentencing hearing then went forward, with no evidence presented to the jury. After both sides' argument, however, the jury returned a recommendation of life. Ten weeks later the trial judge rejected that recommendation and imposed death.

The District Court dismissed the eventual federal ineffectiveness habeas petition as "clearly ... insubstantial." The Eleventh Circuit reversed. It found ineffectiveness in the brevity of counsel's discussions with respondent concerning sentencing and in counsel's stressing of respondent's bad history to the trial judge; further, since all but one of respondent's prior convictions were uncounseled, there was mitigating evidence to present. Under either the Decoster outcome test or its own substantial disadvantage test, the Court of Appeals concluded, there was sufficient prejudice to warrant ordering a new sentencing. Judge Roney dissented, arguing

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-995--Douglas v. Wainwright (capital case)

See No. 83-817 (also held for Strickland) for the basic facts. A few additional facts are necessary. The murder victim in this case was the lover of petitioner's wife. Before the killing, petitioner forced his wife and the victim to perform sexual acts. Petitioner's wife testified against petitioner at trial, and when she testified about the events leading up to the murder, the trial judge, over petitioner's objection, cleared the courtroom of all but the press and members of the families of petitioner, the victim, and the witness.

In his federal habeas petition, petitioner challenged this partial closing of trial. The Court of Appeals held it lawful, relying in part on the presence of the press. Petitioner also alleged that it was unlawful for the trial judge (the sentencer) to rely on prior invalid convictions revealed in the presentence report. The Court of Appeals held that the trial judge did not so rely. Petitioner further alleged ineffectiveness of counsel, a claim the Court of Appeals agreed with. See No. 83-817. Petitioner finally alleged that the Florida provision for judges' setting aside jury recommendations of life is unconstitutional.

The first issue, which goes to the underlying conviction, makes the case worth holding for Waller v. Georgia, where the Court will clarify the scope of Sixth Amendment rights to an open trial. The trial judge did not make specific findings. A GVR in light of Waller may be called for, but a new assessment should be made once Waller is decided.

The other issues go only to the sentence, so they need not be considered if the petition is denied in No. 83-817, thus letting stand the order of a new sentencing. Since I think the petition in No. 83-817 should be GVRed in light of Strickland, the presentence-report and judge-override issues

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May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-871--Foster v. Lankford

Respondent was convicted of sex crimes against his stepdaughter. After exhausting state remedies on his claim of ineffectiveness of counsel, respondent obtained federal habeas relief on this claim from the District Court. The Fourth Circuit affirmed.

The Court of Appeals thought that counsel was ineffective in not asking questions on voir dire after the trial judge concluded his questioning, since such questions, if focused on respondent's prior criminal history and subsequent transformation into a respected and well-known member of the community (he had run for sheriff), might have revealed otherwise unrevealed prejudices of jurors. The court also thought it ineffective not to call any character witnesses (among them, a Congressman), a course counsel had decided on because he thought the character evidence would do little good given that the crime was committed at home. The court concluded that, since the case was a credibility contest between respondent and the stepdaughter he was charged with sexually abusing, the fact that the alleged incidents occurred at home did not, as counsel thought, make the character witnesses unimportant. Finally, the Court of Appeals stated that counsel's failure to ask for instructions on the elements of the crime was ineffective. The court thought it was incompetent for counsel to think that to ask for such instructions would undercut the claim that no wrong at all had been done: there was a significant argument to be made, by way of instructions if not by way of closing argument, that the element of force was not established beyond a reasonable doubt. The court therefore concluded that counsel was not within the range of competence demanded of attorneys in criminal cases.

The Court of Appeals applied the old McMann standard, which Strickland elaborates. And the court carefully analyzed the entire defense and concluded that there was

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Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-1072--Solem v. Lufkins

Respondent is a life-term prisoner. While in prison he was charged with voluntary manslaughter, largely on the basis of an inculpatory statement he signed in prison. The State introduced respondent's statement at trial. Counsel objected to its introduction, which was accomplished through the sheriff who had taken it, but this objection--on voluntariness grounds--was overruled before counsel could even cross-examine the sheriff. Another state agent testified about the circumstances in which the statement was signed. Thus, the voluntariness evidence was taken, and the trial judge's voluntariness ruling was made, in front of the jury. Additional evidence of the charged crime consisted chiefly of the testimony of several witnesses who had, with respondent, been drinking heavily at the time of the incident (respondent allegedly struck the victim on the head after a night-long drinking party).

After conviction and appeal, respondent brought a federal habeas action, alleging a violation of Jackson v. Denno, 378 U.S. 368 (1964), in the trial judge's failure to provide a voluntariness hearing out of the presence of the jury and in the trial judge's ruling the statement voluntary before counsel could cross-examine the State's witnesses or present his own evidence. The District Court agreed, and the Court of Appeals affirmed this conclusion. Respondent also alleged ineffectiveness of counsel. Again the District Court and Court of Appeals agreed. Both concluded, applying a standard of reasonable competence plus material prejudice, that counsel was ineffective in not insisting on the voluntariness hearing to which respondent was entitled (as clearly laid out in State law), in his failure to sequester the State's purported eyewitnesses (whose testimony, of course, was easily attackable since they were all drunk when they witnessed the crime), and in his bolstering of another State witness on cross-examination. A new trial was necessary because the various errors of counsel--most

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Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-1287--Strickland v. King (capital case)

Respondent was convicted, on strong circumstantial evidence, of first degree murder, arson, robbery, and involuntary sexual battery. (The victim was a 68-year-old woman.) He was sentenced to death, and his convictions and death sentence were affirmed on appeal. Relief was denied in state collateral proceedings, which included a hearing, and then on federal habeas.

The Eleventh Circuit, however, ordered the writ granted on the ground that respondent's now-deceased public defender had been ineffective at sentencing, although the Court of Appeals concluded that counsel had been effective at trial. The ineffectiveness conclusion rested on the Court of Appeals' determination, applying the standards announced by the en banc court in Washington v. Strickland, that counsel had (1) failed to present some available character evidence (although he did present some character evidence, and although he requested a one-day continuance, which the trial judge denied) and (2) given a weak closing argument, effectively "separating" himself from his client by emphasizing the horror of the crime and the fact that he had not tried a murder case before. The Court of Appeals drew no express conclusion about the prejudice to respondent's sentencing worked by either of these asserted deficiencies.

From the Court of Appeals' opinion it seems reasonably likely that the court interpreted the standard it purported to follow in a manner considerably more favorable to respondent than the standards set forth in Strickland. In particular, the Court of Appeals apparently made virtually no finding of prejudice, and the court's analysis of the presentation of mitigating character evidence is much more categorical and rigid (as could be suggested is proper by the en banc court's opinion in Washington v. Strickland) than the performance analysis set forth in Strickland. I think it reasonably possible that reconsideration in light

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Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-5636--Stafford v. Oklahoma (capital case)

Petitioner challenged his conviction and death sentence on ineffectiveness grounds. The court below applied a "mockery of justice" test, noting that it had adopted a reasonable competence test in 1980 but had done so only prospectively. Nevertheless, it rejected each of petitioner's specifications of counsel error on grounds that make the ineffectiveness claim meritless under the reasonable competence plus prejudice test--some on factual grounds, some for lack of any demonstrated prejudice, some for lack of any indication of incompetence or nontactical judgment. Petitioner here challenges the "mockery of justice" standard as well as the court's refusal to order an evidentiary hearing on his ineffectiveness claim.

Since Strickland adopts a standard significantly different in form from the "mockery of justice" test, a GVR in light of Strickland seems in order, even though application of the Strickland standards on remand will almost certainly result in reentry of judgment against petitioner.

I will vote to GVR in light of Strickland.

Sandra

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May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-5826--Johnson v. McKaskle

Petitioner was convicted of aggravated robbery. On appeal, his counsel failed to raise several errors that counsel had objected to at trial. The state habeas court granted the writ on ineffective assistance grounds, concluding that the conviction would have been reversed if the specified issues had been raised on appeal; the court accordingly directed that a new appeal be held. The state appellate court reversed, giving no reasons.

This case concerns counsel's assistance on appeal, which raises quite different questions from those raised by assistance at trial: there is no constitutional right to an appeal, and the only cases in which this Court has considered claims concerning counsel on appeal are equal protection/due process cases, not Sixth Amendment cases. However it is viewed, petitioner's claim does not present an issue of any general importance. Moreover, until the Court addresses the question of what role counsel is constitutionally required to play on appeal, which it will do next Term in Kavanaugh v. Lucey, No. 83-1738, it would be misleading to GVR in light of Strickland.

I will vote to deny this petition.

Sandra

HAB

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May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-6090--Berryhill v. Francis (capital case)

Petitioner was convicted of felony murder and armed robbery; he was sentenced to death on the murder charge. He is here on appeal from denial of state habeas. Petitioner asserts prejudicial pretrial publicity, a claim denied by the lower courts based on the discretion of the trial judge regarding change of venue and based on the adequacy of voir dire. Petitioner also asserts that he was prejudiced by the presence on his jury of a person irrevocably committed to imposing the death sentence, a claim rejected by the lower courts on the ground that the juror in question was not in fact irrevocably committed to imposing death, as indicated by his having said that he would follow the law and act on the basis of the evidence. Petitioner further asserts ineffective assistance of counsel, a claim rejected by the lower courts under the reasonableness standard of the Fifth Circuit. The basis for the ineffectiveness claim is counsel's failure to investigate and present mitigating evidence concerning petitioner's sniffing of glue and his consequent drug-induced psychosis, evidence that would have been relevant not only to the sentencing but to the insanity defense presented at trial. The State responds in detail with a demonstration of the reasonableness of counsel's actions: in summary, counsel conducted an ample investigation into the psychosis line of defense and decided reasonably not to pursue it.

The claims other than ineffectiveness raise no certworthy issue, especially after Patton v. Yount. With respect to the ineffectiveness claim, the courts below applied a standard of reasonableness similar to that articulated in Strickland. There is no reason to GVR.

I will vote to deny this petition.

Sandra

HHB

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May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-6125--Stafford v. Oklahoma (capital case)

Petitioner, who is also the petitioner in No. 83-5636 (concerning another murder), was convicted of murder and sentenced to death. On appeal, petitioner alleged ineffective assistance of counsel based on several asserted errors: counsel's failure to follow proper procedures for asking for a change of venue; counsel's failure to move to suppress certain testimony; counsel's failure to file a comprehensive new-trial motion; counsel's failure to present mitigating evidence or to challenge certain instructions given at the sentencing phase of petitioner's trial; counsel's conflict of interest created by the fact that counsel had exchanged his services for the publication rights to petitioner's life story. The state court rejected the claim of ineffectiveness, holding, inter alia, that petitioner was not entitled to a change of venue, that petitioner had not shown that any mitigating evidence not introduced at trial was available to be introduced in the sentencing proceeding, and that there was no evidence of an actual conflict of interest or of an adverse effect on representation.

The court's opinion would not be worthy of review but for one fact. The court applied a "farce and mockery" test rather than a "reasonable competence" test. For that reason, a GVR in light of Strickland seems in order, as it does in No. 83-5636, although there can be little doubt about the outcome on remand.

I will vote to GVR in light of Strickland.

Sandra

HAB

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May 15, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-6413--Burger v. Zant (capital case)

Petitioner was convicted of murder and sentenced to death. After reversal of his initial sentence, he was resentenced to death. On federal habeas the District Court granted the writ on the basis of the Court of Appeals decision that was reversed in Zant v. Stephens, 103 S. Ct. 2733 (1983); in the process, the court rejected petitioner's ineffectiveness claim. The Court of Appeals reversed on the basis of this Court's intervening decision in Zant. With respect to the ineffectiveness claim, the Court of Appeals majority simply relied on the District Court's opinion. Judge Johnson dissented on the ineffectiveness claim.

In this petition, petitioner makes two ineffectiveness claims, one claim based on Godfrey v. Georgia, 446 U.S. 420 (1980), and one claim based on Sandstrom. The latter two claims are fact-specific and were resolved correctly below: the Court of Appeals concluded that the "torture and depravity" aggravating circumstance could constitutionally support the death sentence where, as here, there was psychological torture inflicted by petitioner; and the court affirmed the conclusion of the District Court that the instructions in this case called only for a permissive inference and hence did not violate Sandstrom. One of the ineffectiveness claims is a Cuyler v. Sullivan claim, but the District Court reasonably found that there was no actual conflict of interest affecting counsel's performance: the Cuyler claim is based almost exclusively on counsel's alleged failure to offer petitioner's testimony against his accomplice in exchange for a plea, but the District Court found that the prosecutor repeatedly refused to consider a plea bargain.

The remaining ineffectiveness claim concerns counsel's investigation and presentation of mitigating evidence

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May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554, and for United States v. Cronic, No. 82-660

No. 83-5088--Gilbert v. South Carolina (capital case)

Petitioner, sentenced to death, challenged the effectiveness of counsel who represented him and his co-defendant. A state habeas court applied the McMann standard, asking whether counsel's performance was "within the range of competence demanded of attorneys in criminal cases," and giving detail to that general standard by applying the principles from Coles v. Peyton, 389 F.2d 224, 226 (CA4 1968). After a hearing and analysis of the record, the court concluded that petitioner was adequately and effectively represented. The court also concluded that petitioner's counsel did not have an actual conflict of interest requiring reversal under Cuyler v. Sullivan, 446 U.S. 335 (1980). Petitioner challenges both conclusions.

The Cuyler claim is fact-specific: the court below reasonably concluded that there was no actual conflict in counsel's dual representation, which petitioner had fully consented to after being warned of the dangers by the trial judge. The non-conflict challenge to the trial court's ruling on counsel's ineffectiveness presents no certworthy question. The standards for judging ineffectiveness claims applied below are close to, and at least as favorable to petitioner as, those announced in Strickland, and the Cronic ruling is irrelevant to this type of ineffectiveness claim. There is no reason to GVR.

I will vote to deny this petition.

Sandra

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May 14, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554, and United States v. Cronic, No. 82-660

No. 83-5092--Gleaton v. Aiken (capital case)

This petition comes from the co-defendant of Gilbert, petitioner in No. 83-5088 (also held for Strickland and for Cronic). The claims in the two petitions are identical.

I will vote to deny this petition.

Sandra

HAB

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Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554, and for United States v. Cronic, No. 82-660

No. 83-5148--High v. Zant (capital case)

Petitioner challenged his counsel's assistance at his death sentencing. He also alleged that he could not be sentenced to death since he was 17 at the time of his crime. He alleged that counsel failed to investigate and present mitigating evidence. The state habeas court found that counsel in fact searched for witnesses. This finding was affirmed by the Georgia Supreme Court, which also held that certain of counsel's decisions challenged by petitioner were tactical and reasonable. The Georgia Supreme Court rejected the challenge to the death sentence based on petitioner's age, citing Eddings v. Oklahoma.

The age question, avoided in Eddings, is probably not best resolved in this case, because Georgia law defines 17 year olds as adults, in that only those under 17 are subject to juvenile-court jurisdiction. (All those over 13 have capacity to commit crimes, and juvenile-court jurisdiction, though exclusive for children under 17 generally, is merely concurrent when the crime is capital.) The Sixth Amendment claim is likewise meritless. The courts below applied the reasonably effective assistance standard for assessing attorney performance borrowed directly from the Fifth Circuit. That standard has not been modified by Strickland in any way favorable to the defendant, and hence Strickland does not require reconsideration of the decision below. Cronic has no bearing on the ineffectiveness claim.

I will vote to deny this petition.

Sandra

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Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554, and for United States v. Cronic, No. 82-660

No. 83-5432--Baldwin v. Maggio (capital case)

Petitioner was convicted of murder and sentenced to death. This petition comes from the Fifth Circuit's rejection of his Pulley claim and his ineffectiveness claim. Petitioner alleged that counsel was ineffective in not moving for a new trial when new evidence turned up as well as in not finding and presenting various character witnesses. The Court of Appeals, applying the standards articulated in its en banc decision in Washington v. Strickland, held that both claims were meritless because petitioner did not suffer "actual and substantial disadvantage to the course of his defense" from the challenged conduct of counsel.

Other cases challenging Louisiana's proportionality review were not held for Pulley, so there is no reason to GVR in light of Pulley. Nor is there reason to GVR in light of Strickland. The prejudice standard laid down in Strickland is comparable to, and certainly no more favorable to petitioner than, the standard applied below. Cronic has no bearing on this ineffectiveness claim.

I will vote to deny this petition.

Sandra

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Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554, and for United States v. Cronic, No. 82-660

No. 83-5500--Solomon v. Harris

Petitioner, convicted of noncapital murder, filed a habeas petition alleging ineffectiveness assistance as a result of his counsel's failure to investigate and failure to object to prejudicial inadmissible hearsay. The District Court denied the petition. The court, like the state courts when petitioner exhausted his ineffectiveness claim, found counsel reasonably competent and noted that no counsel could have overcome the overwhelming evidence. The Second Circuit affirmed, applying the "farce and mockery" standard.

The Second Circuit has now abandoned "farce and mockery," so there is no reason to take the case in order to reject that standard. In its opinion rejecting the "farce and mockery" standard, Trapnell v. United States, 725 F.2d 149 (1983), the court noted that it had applied both the reasonable competence and "farce and mockery" standards in every published opinion in the last three years and never found a difference. That may indicate that the court simply neglected to mention the reasonable competence standard here. Moreover, the District Court findings indicate no conceivable prejudice to petitioner from his counsel's actions.

Nevertheless, because the "farce and mockery" standard is significantly different in form from the standards announced in Strickland, a GVR in light of Strickland seems in order. Cronic has no bearing on this case.

I will vote to GVR in light of Strickland.

Sandra

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Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554, and for Koehler v. Engle, No. 83-1

No. 83-5716--Corn v. Zant (capital case)

Petitioner challenged his conviction and death sentence on two grounds: first, that the jury was given an instruction that violates Sandstrom; second, that counsel rendered ineffective assistance by failing to find and present certain mitigating evidence at petitioner's sentencing proceeding, especially evidence of a long history of mental problems. Petitioner's unsuccessful defense at trial was insanity, and psychiatric testimony was introduced there. At petitioner's sentencing, petitioner's mother testified for him, while his wife testified for the State.

Although the District Court granted petitioner's writ on a ground not raised in this petition, the Eleventh Circuit reversed the grant of the writ, in the process rejecting all 21 claims of error, including the two grounds raised here. The court concluded that the charge, read as a whole, did not have the impermissible burden-shifting effect condemned in Sandstrom. The court also concluded, applying the standards of the en banc Court of Appeals in Strickland, that counsel's conduct was based on professional strategic decisions and in any event did not actually and substantially prejudice petitioner's defense.

The Court of Appeals' reading of the instructions does not present a certworthy issue. The petition was held for Koehler v. Engle as well as for Strickland, but especially now that Koehler has been decided without opinion, the Sandstrom claim here is not certworthy.

As for the ineffectiveness claim, the analysis by the Court of Appeals is very brief, but the court applied standards no less favorable to petitioner than those articulated in Strickland, and there is no reason to think that the application was incorrect. In particular, it appears from the petition that some, though probably not

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May 21, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554, and for United States v. Cronic, No. 82-660

No. 83-5148--High v. Zant (capital case)

Petitioner challenged the effectiveness of his counsel's assistance at his death sentencing on the ground that his counsel did not adequately investigate or present mitigating character evidence. John suggests in his memo that counsel "made no effort to present mitigating evidence." That statement is contradicted by the findings of the two Georgia courts to consider petitioner's challenge.

The trial court made the following findings with respect to the assistance of trial counsel:

> "The Petitioner was represented at trial by John Ruffin, an attorney of over twenty years experience. Ruffin devoted a substantial part of his practice to criminal trial work and had previously represented other defendants in capital cases where the death penalty was sought. Mr. Ruffin was retained counsel and personally spent over fifty hours in preparation for trial. Additionally, Ruffin was assisted by two legal interns (law students) from the Southern Poverty Law Center. As a result of his efforts on Petition's [sic] behalf, Ruffin was able to successfully challenge the composition of the Grand Jury.
>
> "At the habeas hearing, Ruffin was subjected to rigorous examination by Bradley Stetler, current counsel for Petitioner, about his handling of the sentencing phase of the trial. Ruffin testified that he tried to produce some competent witnesses to testify in mitigation but was unable to uncover any despite the efforts of both he [sic] and his legal assistants. Additionally, the defendant, High[,] and his parents, who were actively supportive, were consulted and were unable to furnish help in this area. In regard to placing the parents themselves on the stand during mitigation evidence Ruffin testified he made a conscious decision not to do so as part of his trial strategy.

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May 21, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-5826--Johnson v. McKaskle

I do not think there is any special reason to hold this petition for decision in Kavanaugh v. Lucey, No. 83-1738, to be argued next Term. The merits of petitioner's claim turn on the specific facts of his case, not on the general legal questions presented in Kavanaugh--whether there is a Sixth Amendment right to effective assistance of appellate counsel (as opposed to a right limited to indigents based in equal protection/due process notions, see Douglas v. California, 372 U.S. 353 (1963)) and how any such right interacts with state-law procedural rules on the filing of appeals. A holding in Kavanaugh that there is no Sixth Amendment right to effective assistance of appellate counsel would seem to defeat petitioner's claim. On the other hand, if Kavanaugh rejects such a holding, I believe there is little chance that its particulars will illuminate the merits of petitioner's claim. Since petitioner has not yet filed a federal habeas claim and since the Fifth Circuit plainly recognizes claims of ineffective assistance of appellate counsel, see, e.g., Gray v. Lucas, 710 F.2d 1048, 1061-1062 (1983), I see no reason not to relegate petitioner to federal habeas relief on his claim.

I will vote to deny this petition.

Sincerely,

Sandra

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May 21, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-1287--Strickland v. King (capital case)

I am not convinced, as the Court of Appeals was, that counsel's closing argument to the sentencing jury was unreasonable. An honest acknowledgment of the "cruel and evil" character of the crime as well as of counsel's own newness to the task of defending a capital-murder case--whether or not labeled "separating" counsel from his client--might well be a reasonable strategy to establish counsel's sincerity and effort to be straightforward with the jury. For that reason, the presumption of attorney professionalism means that counsel's closing argument must be deemed professional unless the defendant establishes that it was not in fact given for strategic reasons. See Strickland, at 19. The Court of Appeals required no such demonstration: it simply concluded, apparently relying on a rigid per se rule, that such "separating" was unreasonable. That is not in accord with the Strickland analysis.

In addition, I am not convinced that it was "strange," as John suggests, for counsel to tell the jury that respondent would be sentenced to life in prison. Although respondent was a prisoner at the time of his crime, this statement, according to petitioner, was made to rebut the State's argument that respondent would soon be back on the streets. See Pet. for Cert. 30 (citing R2031-2035). If that is so, it was perfectly reasonable. In any event, the Court of Appeals did not rely even in part on this statement.

The most important error of the Court of Appeals was its utter failure to undertake a prejudice inquiry. The court simply concluded that counsel's not having put on some available mitigating evidence plus the closing argument rendered his assistance ineffective. The court did not consider whether either of these asserted errors was

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Re: Case held for Strickland v. Washington, No. 82-1554

No. 83-817--Wainwright v. Douglas (capital case)

The Strickland analysis requires focusing on specific errors and inquiring into their unprofessional character and prejudicial effect. The Court of Appeals' upholding of respondent's claim of ineffectiveness does not rest on any omission of available mitigating evidence. Indeed, neither respondent nor the Court of Appeals has suggested any mitigating evidence that was not before the sentencing judge: the only mitigating evidence mentioned by the Court of Appeals is the fact that almost all of respondent's prior convictions were uncounseled, see App. to Pet. for Cert. 120, n. 40, but the Court of Appeals expressly found that this fact was brought to the attention to the sentencing judge, id., at 71-76. Thus, any failure to investigate mitigating evidence caused no prejudice and hence cannot support an ineffectiveness conclusion.

The same must be said about any deficiencies in counsel's preparation for the sentencing hearing or in his discussions with respondent concerning the possibility of respondent's testifying. Respondent has not suggested any reason to think any such deficiencies, even if unprofessional, were in any way prejudicial. At least insofar as the Court of Appeals' opinion indicates, respondent has not suggested that he would have testified and, more generally, has not identified any specific ways in which the sentencing proceeding would have been different, let alone more favorable to him, had counsel not been deficient in preparation and consultation as respondent alleges. Thus, any failure of preparation or consultation cannot support an ineffectiveness conclusion.

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May 21, 1984

Memorandum to the Conference

Re: Case held for Strickland v. Washington, No. 82-1554

No. 82-7003--Stanley v. Zant (capital case)

The Court of Appeals' analysis of petitioner's ineffectiveness claim is lengthy, careful, and elaborate. See 697 F.2d, at 958-970. Petitioner's claim was based on counsel's not having presented character evidence in mitigation at the sentencing hearing. The court first rejected the contention that counsel is required to present any arguably mitigating evidence that might exist. Id., at 959-962. The court then analyzed the case law in the Eleventh Circuit and laid out the standards that the en banc court had set forth in Washington v. Strickland. 697 F.2d, at 962-966. Applying those standards, the court noted briefly that the evidence suggested that petitioner's counsel "did in fact contemplate the possibility of a character witness defense at the sentencing stage and that he explored that possibility. While we do not know the extent of this inquiry, the transcript of the state habeas hearing confirmed that the attorney discussed the matter at least with Stanley and with Stanley's mother." Id., at 966. The court reasoned, however, that it need not determine whether this investigation satisfied the detailed investigation requirements of the en banc court in Strickland because "an investigation into character evidence would have revealed nothing more than general affirmations from family members and friends that Stanley had been, at a time remote from the events giving rise to the charge, a basically good and responsible child and young adult." Id., at 966-967. The court therefore found no ineffectiveness in counsel's not presenting either of the two types of mitigating character evidence that petitioner identified.

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May 21, 1984

Re: Cases Held for 82-1554 Strickland v. Washington

Memorandum to the Conference

With respect to the five cases held for Strickland on which John and I differ, I am circulating a supplemental memo for each explaining why I continue to disagree with John. My general approach to all of the hold memos was to ask whether the lower court in fact conducted an analysis of the ineffectiveness claim substantially identical to that called for by Strickland. If it did not--because it either expressly said it was applying or in fact did apply a significantly different analysis--then I have recommended a GVR. If it did apply essentially the analysis called for by Strickland, then I concluded there is no point in GVRing.

Sincerely,

Sandra