Tennessee Law Review

Volume 84
Issue 4 *Summer 2017*

Article 6

2017

ON COMPETENCE: (RE)CONSIDERING APPROPRIATE LEGAL STANDARDS FOR EXAMINING SIXTH AMENDMENT CLAIMS RELATED TO CRIMINAL DEFENDANTS' MENTAL ILLNESS AND DISABILITY

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INTRODUCTION

At four feet, nine inches tall, defendant Timothy Parody appeared to one of the psychiatrists who evaluated him as "a little boy in grown up's clothes."[2] This impression, however, extended beyond his unusually small stature. Seventeen at the time of his evaluation, he presented with a number of health issues and signs that competency to stand trial or enter a plea would be an issue.[3] And while he could parrot, for example, what being on the sex offender registry was, he seemed to lack understanding.[4] As quoted in the opinion dissenting from the majority that affirmed the validity of his plea and sentence, he explained, "Sir, what I am trying to do is not get on the sex offender contract. So that way I can do what the Lord called me to do. . . ." From this statement and other evidence, it appears Parody likely did not understand the consequences of pleading guilty, a conclusion supported by the conflicting expert opinions regarding his understanding of the charges and proceedings against him.[5] He had been diagnosed with an organic brain disorder, unspecified psychosis, seizure disorder, and it was the psychiatrist's determination that he had an inability to care for or support himself.[6] It was determined that he was "extremely immature functioning."[7] And, while it might be possible for Parody to repeat the names and roles of the people in the courtroom, the psychiatrist opined that he could not "make an appropriate judgment in reference to the proceedings against him" and that he was "unable to comprehend the entire situation."[8]

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2. Brown v. Parody, 751 S.E.2d 793, 797 (Ga. 2013) (Benham, J., dissenting).
3. *Id.* at 798. (Benham, J., dissenting).
4. *Id.* at 797 (Benham, J., dissenting) ("Many of the questions consisted of conclusory statements, some containing legal terms of art, to which Parody was then asked if he understood. Most of Parody's responses were simply, 'Yes, ma' am.'").
5. *Id.* at 798. (Benham, J., dissenting).
6. *Id.* (Benham, J., dissenting).
7. *Id.* (Benham, J., dissenting).
8. *Id.* at 797 (Benham, J., dissenting).

At the time of his evaluation, which was prompted by the charges brought against him, Parody had the social capacity of a nine- or ten-year-old boy.[9] He reported that he still believed in Santa Claus and the Easter Bunny and claimed he had "magic dust" that some children gave to him on the school bus.[10] Although he was enrolled at Camden County High School, he was placed in a special education classroom under the supervision of several teachers.[11]
On January 13, 2011, without ever having had a hearing on the matter of his competency to stand trial or enter a guilty plea, Parody appeared before the Brunswick Judicial Circuit Superior Court[12] with his public defender to plead guilty but mentally ill.[13]

The trial judge, in possession of the psychiatric evaluations of the teenager who stood before her, asked Parody a series of yes or no questions without attempting to test whether he really understood what he was saying.[14] As the plea court and counsel asked a number of questions or made longer statements, often using terms of art, the Defendant responded almost unfalteringly with merely "yes" or "yes, ma'am."[15]

After finding that Parody understood the rights he was voluntarily waiving and the nature of the charges, accepting the plea, and pronouncing a sentence of thirty years with fifteen years to be served in prison, the plea court had one more question:

> THE COURT: Now, do you have anything you'd like to say to the Court?
> THE DEFENDANT: Well, not until I get out.
> THE COURT: Well, I just wanted to see if you had anything else you needed to say; okay?
> THE DEFENDANT: Yes, ma'am.

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9. *Id.* at 798 (Benham, J., dissenting).
10. *Id.* at 797 (Benham, J., dissenting).
11. *Id.* (Benham, J., dissenting).
12. The Superior Court Judge who accepted his plea has since resigned from the bench in order to resolve a Georgia Judicial Qualifications Commission investigation and has been the subject of a number of news stories expressing concern for her judgment. Robbie Brown, "Georgia Judge Accused of Misconduct Will Resign," N.Y. TIMES. Dec. 21, 2011, at A29 ("In November and December, the judicial commission brought formal complaints against Judge Williams, after receiving multiple complaints from lawyers. The commission accused her of giving special treatment to the relatives of her friends, allowing her personal lawyer to represent clients before her and behaving in a 'tyrannical' manner.").
13. *Parody*, 751 S.E.2d at 794.
14. *Id.* at 798 (Benham, J., dissenting).
15. *See id.* (Benham, J., dissenting).

> THE COURT: All right. And good luck to you; okay?
> THE DEFENDANT: But I do not like cold dinners.
> THE COURT: You don't like cold dinners.[16]

That concluded his guilty plea and sentencing. A *pro se* habeas petition on this case was filed alleging ineffective assistance of counsel, specifically claiming that the "plea attorney failed to investigate all mitigating factors in regard to [his] mental health condition and [his] competency to stand trial," and that petition was later granted. The State appealed and the Supreme Court of Georgia ultimately reversed the decision of the habeas court.[17] Its reasoning was that the habeas hearing had failed to show either evidence of innocence of the charges or that Parody would not have been found guilty after a trial.[18]

The dissenting opinion differed sharply in its description of the underlying facts and the legal standard in the case.[19] Instead, the Court focused on how the Parody's counsel should have requested a competency hearing. The failure to seek a hearing impacted the proceedings in the sense that Parody proceeded to a plea despite the fact that there had been no searching inquiry into whether he was capable of doing so:

> [T]he central issue . . . is not whether there is a reasonable probability that a less severe sentence would have been imposed in response to Parody's guilty plea but whether the plea would have been entered in the first place or, if entered, would have been accepted without a trial on the issue of his competency to enter the plea.[20]

This case and others like it highlight a significant gap in our Sixth Amendment jurisprudence: what appellate review is appropriate in non-capital cases in which mental disability exists, but where there has been no competency hearing?

Strickland v. Washington and *Hill v. Lockhart*, each in their own time and their own way, represented forward steps in protecting defendants from their attorneys' unreasonable error if that error

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16. *Id.* at 797 (Benham, J., dissenting).
17. *Id.*
18. *Id.* at 797–98. (Benham, J., dissenting).
19. *Id.* (Benham, J., dissenting).
20. *Id.* at 801. (Benham, J., dissenting).

negatively impacted the outcome of their criminal proceeding.[21] No special provisions were made in either test for the mentally ill or mentally disabled; the tests are broadly applicable.[22]

This Article addresses the questions of attorney error and client competency and examines the following issues: the origin and development of the legal tests for intellectual competency to stand trial or enter a plea and the tests for evaluating Sixth Amendment effective assistance of counsel claims; the range of state and federal approaches to circumstances when those two situations converge; and whether and how our legal tests should be shaped to best assess attorney error when the client likely has an intellectual disability or incompetence. When consideration of a defendant's mental illness or mental disability forms the basis of a Sixth Amendment claim, should the prejudice analysis be limited to whether, but for counsel's unreasonable errors, a competency hearing would have been held?

These questions address not only the need for counsel's identification of legal disability but also the need for a nuanced Sixth Amendment analysis under the circumstances. Without a legal finding of incompetency, a disabled prisoner can never prove prejudice under the *Strickland* and *Hill* standards as they are now routinely applied in many jurisdictions.[23]

Our deepening understanding of mental illness—and the extent to which mental illness and disability issues are entwined with questions of criminal justice—demands a more precise approach than many jurisdictions now employ. Lower courts' divergent decisions call out for the Supreme Court to clarify this issue to ensure that state courts across the country properly apply the *Strickland* prejudice analysis to better protect the most vulnerable defendants in our justice system.

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21. Hill v. Lockhart, 474 U.S. 52, 56 (1985) (test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant"); Strickland v. Washington, 466 U.S. 668, 685–86 (1984) (the Court has recognized "the right to the effective assistance of counsel").

22. *Strickland*, 466 U.S. at 686.

23. *Id.* (holding that the proper standard for attorney performance is "reasonably effective assistance").

I. THE HISTORY AND BACKGROUND OF THE EXISTING CONSTITUTIONAL ANALYSIS OF MENTAL COMPETENCY AND REASONABLY COMPETENT COUNSEL

The lines of cases pertaining to the right not to be tried while incompetent and to the right to effective assistance of counsel originated and have developed entirely independently. First of all, the protections from court proceedings beyond the intellectual ken of a criminal defendant have their roots in due process,[24] while the Sixth Amendment forms the basis for the right to counsel and to effective assistance of counsel.[25] The Sixth Amendment right to effective assistance of counsel is indispensable to an adversarial system of justice that defines a fair trial as one in which an accused's procedural rights are protected.[26]

A. Findings of Competence and Not Guilty by Reason of Insanity

In March of 1966, the Supreme Court announced in *Pate v. Robinson* that a defendant whose competence is in doubt cannot be deemed to have knowingly and voluntarily waived his right to a competency hearing.[27] When the competency of a defendant is reasonably in doubt, procedural due process requires that the trial court must provide the defendant with a hearing on the issue of competency.[28] Second, once a defendant's competence to stand trial

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24. Joe Hennell, *Mental Illness on Appeal and the Right to Assist Counsel*, 29 J. CONTEMP. HEALTH L. & POL'Y 350, 360 (2013) ("The right to competency at trial alone does not sufficiently protect the mentally ill from the criminal justice system. It is improper to rely solely on trial procedures to identify competency issues because the trial period presents a mere snapshot of the defendant's mental state.").

25. Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 418 (1988) ("Implicit in the general right to counsel is the right to effective assistance of counsel. This right was originally based on a fourteenth amendment due process analysis, which stressed the fairness of the adversarial process. However, the Supreme Court later recognized effective assistance of counsel as a separate right rooted in the Sixth Amendment.").

26. Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1288 (1986).

27. Pate v. Robinson, 383 U.S. 375, 384 (1966).

28. *Id.* at 385–87; *See also* Drope v. Missouri, 420 U.S. 162, 175–83 (1975) (The Supreme Court concluded that Petitioner's due process rights would not be adequately protected by remanding the case for a psychiatric examination to determine whether he was in fact competent to stand trial in 1969, but the State is free to retry him, assuming that at the time of such trial he is competent to be tried. Even when a defendant is competent at the commencement of his trial, a trial court

has been put in issue by information known to defendant's counsel, the resulting proceedings are necessarily dependent upon the results of the constitutionally required competency hearing.[29]

In *Pate*, the State insisted that "Robinson had deliberately waived the defense of his competence to stand trial by failing to demand a sanity hearing as provided by Illinois law."[30] However, the Court held "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."[31] The State court's failure in *Pate* to "make such inquiry into Robinson's competency thus deprived Robinson of his constitutional right to a fair trial."[32] "The Supreme Court of Illinois held that the evidence here was not sufficient to require a hearing in light of the mental alertness and understanding displayed in Robinson's 'colloquies' with the trial judge."[33] Still, the Supreme Court held that "this reasoning offers no justification for ignoring the uncontradicted testimony of Robinson's history of pronounced irrational behavior."[34] The Court also found that "[w]hile Robinson's demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue."[35]

Of course, lines of cases related to defendants being not guilty by reason of insanity are somewhat different from the right not to be tried while incompetent.[36] The Supreme Court, in *Dusky v. United States*, announced "it is not enough for the district judge to find that 'the defendant is oriented to time and place and has some recollection of events,' but that the 'test must be whether he has

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must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.).

29. David W. Beaudreau, *Due Process or "Some Process"? Restoring* Pate v. Robinson's *Guarantee of Adequate Competency Procedures*, 47 CAL. W. L. REV. 369, 381–82 (2011). ("The Court reasoned that the trial judge could not rely on his own observation of Robinson's demeanor in court 'to dispense with a hearing' to determine competency. Neither could the judge rely on a single psychiatric report that failed to give an opinion regarding the ultimate issue of competency. Hence, Robinson had been tried and convicted without adequate procedures to determine his competency. The 'adequate procedures' guaranteed by the Constitution consisted of the procedures needed to make a 'concurrent determination' of Robinson's competency to stand trial.").

30. 383 U.S. at 384.

31. *Id.*

32. *Id.* at 385.

33. *Id.*

34. *Id.* at 385–86.

35. *Id.* at 386.

36. *See* Dusky v. United States, 362 U.S. 402 (1960).

sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'"[37] The Court later expanded on this test, noting that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."[38]

The Court noted in *Dusky* that an insufficient record made determinations of competency difficult on appellate review without a prior competency hearing.[39] Specifically, it said:

> In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent.[40]

Years later, in *Drope v. Missouri*, the Supreme Court concluded that even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet

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37. *Dusky*, 362 U.S. at 402 (1960). *Dusky* and Drope v. Missouri, 420 U.S. 162, 171 (1975), set forth the Constitution's "mental competence" standard forbidding the trial of an individual lacking a rational and factual understanding of the proceedings and sufficient ability to consult with his lawyer with a reasonable degree of rational understanding.

38. *Drope*, 420 U.S. at 171; *see also*, Justine A. Dunlap, *What's Competence Got to Do With It: The Right Not to be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495, 498–99 (1997) ("An incompetent defendant may not be tried and convicted in a criminal proceeding. This rule is grounded in common law and constitutional principles as set out by the United States Supreme Court in *Dusky v. United States*. The test enunciated in that case was whether the defendant has 'sufficient present ability' to consult with her lawyer with a 'reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings' against her. The absence of either of these factors renders a defendant incompetent and, accordingly, unavailable for trial." (quoting Dusky v. United States, 362 U.S. 402, 402 (1960))).

39. 362 U.S. at 402.

40. *Id.*

the standards of competence to stand trial.[41] That opinion set forth the Constitution's "mental competence" standard forbidding the trial of an individual lacking a rational and factual understanding of the proceedings and sufficient ability to consult with his lawyer with a reasonable degree of rational understanding.

Dusky, taken together with the Supreme Court's subsequent decisions in *Pate* and *Drope* (among others), formed the backdrop of competency law when the Court outlined the Sixth Amendment standards for ineffective assistance of counsel.[42] However, since 1966, this procedure has not expanded to address more nuanced understanding of mental illness and expanding court dockets; thus, it should therefore be re-examined.

B. Strickland v. Washington *and Sixth Amendment Challenges*

When assessing claims about the ineffectiveness of counsel, courts must apply the two-prong analysis provided by this Court in *Strickland v. Washington*.[43] The first prong of the *Strickland* standard requires that counsel's performance be deficient by falling below an "objective standard of reasonableness," while the second prong requires that counsel's deficient performance prejudice the defendant.[44] To satisfy the prejudice requirement, a defendant must prove that but for counsel's deficiencies there would have been a different outcome, and both prongs of the test must be met for trial counsel to be found constitutionally ineffective.[45]

In *Hill v. Lockhart*, decided only a few months after *Strickland*, this Court established the test for defendants challenging representation during guilty pleas.[46] While the first prong is

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41. 420 U.S. at 175–83.

42. Elizabeth Gable & Tyler Green, *Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years after Strickland*, 17 GEO. J. LEGAL ETHICS 755, 756–58 (2004). ("The Supreme Court has created a standard to protect the Sixth Amendment right to assistance of counsel, which has been interpreted to mean the right to effective assistance of counsel. Counsel must be an effective advocate of the client's position and not merely someone trained as a lawyer seated at the same table.").

43. 466 U.S. at 669.

44. *Id.*

45. *Id.* at 687; *see also id.* at 695 ("The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.").

46. *Hill*, 474 U.S. at 58.

identical to the *Strickland* test,[47] the second prong of the *Hill* test requires a showing that, but for counsel's deficient representation, there is a reasonable probability that they would have not pleaded guilty and insisted upon going to trial.[48] This determination on whether counsel's error "prejudiced" the defendant by causing him to plead guilty rather than go to trial depends on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, depends in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Justice Thurgood Marshall very famously warned in his dissent in *Strickland* that the Court's new Sixth Amendment test would fail to root out ineffective assistance of counsel in cases involving vulnerable defendants.[49] And indeed, that has come to pass in many ways. *Strickland*'s critics are plentiful, whether related to capital or non-capital cases. One concern is that counsel's explanation that an error was "strategic" can cover decisions that prejudiced their client's case. Other concerns are that the second prong of the test—related to prejudice—can overshadow attorney error; that plays out in many appellate courts as an inquiry into the evidence of guilt and appellate opinions in which that concern outweighs evaluation of attorney performance.

These basic tests still apply to the thousands of cases raising Sixth Amendment claims since the 1980's[50], even though the *Strickland* analysis has been criticized, challenged, and further clarified.[51]

C. Changing Tests for Changing Times?

The fields of psychology and psychiatry—as well as our collective understanding of mental health and mental disability—have made

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47. *Id.* at 52.

48. *Id.*

49. 406 U.S. at 707.

50. JOHN M. BURKOFF & HOPE L. HUDSON, INEFFECTIVE ASSISTANCE OF COUNSEL 1–3 (1994) ([*Strickland* claims are] "one of the most—if not the most—common appeal grounds asserted by convicted criminal defendants as appellants.").

51. *See generally*, William E. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995); Richard Klein, *The Emperor Gideon has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONSTIT. L.Q. 625 (1986).

vast strides over the past thirty years.[52] Laws and policies protecting mentally ill defendants, however, have progressed at a slower pace.

The most recent Bureau of Justice Statistics survey, conducted in 2006, found that nearly half of inmates in the United States had some form of mental illness, and nearly a quarter of inmates with mental illness had served three or more prior incarcerations.[53] Statistics even suggest that the estimated number of mentally ill individuals in our justice system quadrupled from 2000 to 2006.[54] Recent news articles from 2014 report that number of incarcerated mentally ill individuals has increased to 60 percent.[55] This evolution and the pervasive mental health issues in prisons demands a more nuanced Sixth Amendment analysis for individuals who potentially qualify as incompetent defendants.

The Supreme Court's case law addressing mental illness and competency has continued to evolve since *Strickland* and *Hill* were first decided. For example, in 1985, the Supreme Court held that indigent criminal defendants have a right to an independent competency evaluation.[56] Later, in 1996, the Court clarified that that the proper burden of proof in such cases is preponderance of evidence because a clear and convincing evidence standard violated due process.[57] Executing the mentally ill was held to be unconstitutional in 2002[58]; and in 2008, the Court held that judges may account for "mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so . . . ."[59]

And yet, these two lines of cases—Sixth Amendment challenges and competency evaluations—have not yet found a way to

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52. Lori A. Marschke, *Proving Deliberate Indifference: Next to Impossible for Mentally Ill Inmates*, 39 VAL. U. L. REV. 487, 493 (2004) ("Mental illness is highly prevalent among prison inmates. The rate of mental illness among prison inmates is three times higher than the general population.") (footnote omitted); *see* Joanmarie I. Davoli, *Physically Present, Yet Mentally Absent*, 48 U. LOUISVILLE L. REV. 313, 318–19 (2009).

53. DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STAT., SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES. 1–2, 8 (2006).

54. *U.S.: Number of Mentally Ill in Prisons Quadrupled: Prisons Ill Equipped to Cope*, Human Rights Watch (Sept. 6, 2006), http:// www.hrw.org/news/2006/09/05/us-number-mentally-ill-prisons-quadrupled.

55. Nicholas Kristof, "Inside a Mental Hospital Called Jail," N.Y. TIMES, Feb 8, 2014.

56. *See* Ake v. Oklahoma, 470 U.S. 68 (1985).

57. *See* Cooper v. Oklahoma, *517 U.S. 348 (1996).*

58. *See* Atkins v. Virginia, 536 U.S. 304 (2002).

59. Indiana v. Edwards, 554 U.S. 164, 177–78 (2008) (noting that capacity to stand trial is not equivalent to the capacity to represent oneself).

meaningfully intertwine.[60] Several different approaches have emerged in the state and federal courts across the country, but the Supreme Court has not yet taken up a case that specifically addresses whether and how the *Strickland* standard should be tailored to circumstances where a defense attorney has unreasonably not sought a hearing on her client's competency.[61]

II. SOME STATE APPELLATE COURTS OFFER NUANCED APPROACHES TO THIS ISSUE, WHILE OTHER APPELLATE OPINIONS HIGHLIGHT THE NEED FOR NEW POLICIES OR DIRECTION FROM THE SUPREME COURT.

The circumstance of mentally ill and mentally disabled defendants pleading guilty to criminal charges is by no means unique.[62] And the specific issue addressed by this Article—the proper prejudice standard for an arguably incompetent defendant whose counsel did not request a competency hearing—has percolated into state and federal appellate courts.

Many states, while not requiring an explicit finding of incompetence, still require a showing that the outcome of the proceedings would have been different "but for" counsel's unreasonable errors. The question, of course, is what a jurisdiction considers as the "proceedings" and what is considered "prejudice." In some states, this is interpreted to mean that the defendant would have otherwise been found to be incompetent to stand trial; in these states, the "proceedings" refers to the competency hearing. In other states, as in the Georgia case highlighted herein, this is interpreted to mean that the defendant would not have been found guilty of the underlying charges.[63]

A few different formulations for the prejudice analysis have emerged among jurisdictions that have specifically considered the issue. Among the various approaches of these courts, one commonality is that counsel's failure to move for a competency

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60. *See* Beaudreau, *supra* note 29, at 377.

61. Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 83–84 (2007) ("The debilitation ambiguity of an objective standard of reasonableness in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution . . . It is also a fact that the quality of representation available to ordinary defendants in different parts of the country varies significantly. Should the standard of performance mandated by the Sixth Amendment vary by locale? The majority offers no clues as to the proper responses to these questions.") (footnote omitted).

62. *See* Rigg, *supra* note 61, at 80.

63. *Parody*, 751 S.E.2d 793, 795.

hearing potentially meets at least one of the prongs for ineffective assistance of counsel under *Strickland*: it must have been unreasonable.[64] Some jurisdictions, however, have more carefully addressed the issue of competency by tailoring prejudice prong of the Sixth Amendment analysis to the unique circumstances of a defendant's incompetence.

A. Several Jurisdictions Require a Potentially Mentally Incompetent Defendant to Show Incompetence on the Record in Order to Establish Prejudice under Strickland.

Several jurisdictions require that the defendant make a showing of incompetence on the record in order to establish prejudice.[65] For example, a Texas court's analysis in *Ex parte LaHood* exposes errors that many state courts make while grappling with this constitutional issue and the confusion around proper remedial action.[66] The *LaHood* court found ample evidence that counsel performed deficiently by failing to request a competency exam; however, because it relied on the current record to support a finding of incompetence, the court found that counsel's error was not prejudicial.[67] This retroactive justification of competence appears to be an incorrect application of *Strickland* because the Texas court was able to discern that counsel performed deficiently by not requesting a competency hearing, but nonetheless still found the defendant was not prejudiced (despite the incomplete record)[68]. Even more startling, the Texas court stated the accused's constitutional right to a competency hearing was not a factor in that court's analysis of prejudice.[69]

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64. *Strickland*, 466 U.S. at 686.

65. *See* State v. Dunkin, 807 N.W.2d 744, 756 (Neb. 2012) ("In order to demonstrate prejudice from counsel's failure to investigate competency and for failing to seek a competency hearing, the defendant must demonstrate that there is a reasonable probability that he or she was, in fact, incompetent and that the trial court would have found him or her incompetent had a competency hearing been conducted. The issue of prejudice in this case is necessarily bound up in the law of competency."); State v. Southerland, No. 06AP-11, 2007 WL 259249, at *2 (Ohio Ct. App. Jan. 30, 2007) ("[A]pplying the foregoing standards, we must determine whether, on the record before us, counsel made an error in failing to request a competency hearing and whether there is a reasonable probability that, but for this error, the result of the trial would have been different; that is, whether appellant would likely have been found to be incompetent to stand trial.").

66. *See* Ex parte LaHood, 401 S.W.3d 45, 49 (Tex. Crim. App. 2013).

67. 401 S.W.3d at 54.

68. *Id.* at 57.

69. *Id.* at 53.

Even when acknowledging deficiencies in the record, under this test, effective assistance of counsel can still be found by reviewing courts.[70] Several federal circuit courts have also considered this issue and have required a finding of incompetence on the record to establish prejudice. The policy underlying a finding of incompetency on the record is to ensure that criminal defendants receive adequate procedure, which includes the opportunity to present evidence and cross examine witnesses.[71] For instance, in *Hull v. Kyler*, the defendant had already been declared incompetent and several medical evaluations indicated that he remained incompetent, but his counsel failed to cross examine the only witness in his second competency hearing.[72] The Third Circuit utilized the robust record in this case to find that counsel's decisions caused a manifest prejudice to plaintiff that violated the policy enumerated above.[73] Yet, prejudice remains problematic when the record is not as robust or clear.[74]

This is evident because many cases considering this prejudice inquiry—based solely on an appellate record that is made without the requisite competency hearing transcript—do not find the prejudice prong satisfied because there was insufficient evidence of a different outcome, i.e., insufficient evidence that the defendant was incompetent.[75] The concern with this approach is that there can

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70. Manuel v. State, 535 N.E.2d 1159, 1160–61 (Ind. 1989) ("Manuel asserts that in light of his limited ability to communicate and unusual behavior at the time of the offense and the trial itself, trial counsel was ineffective for failing to move for a competency hearing. *It is impossible to discern from the record whether Manuel was truly unable to verbalize.* At trial, Manuel communicated by nodding and shaking his head to indicate affirmative and negative answers. Several times he stated, 'I don't know' or 'no.' He sometimes wrote answers, albeit not in complete sentences. . . . The record further establishes that Manuel had a car, license, gun and narcotics having a substantial value. This evidence bears on his competency and counsel's failure to raise the issue. *Manuel fails to rebut the presumption that counsel rendered adequate legal representation.*") (emphasis added).

71. Hull v. Kyler, 190 F.3d 88, 111 (3d Cir. 1999).

72. *Id.*

73. *Id.* at 111–12; *see* Williamson v. Ward, 110 F.3d 1508, 1518 (10th Cir. 1997).

74. *See* Felde v. Butler, 817 F.2d 281, 282 (5th Cir. 1987) (the court relied on defendant's closing statement and testimony to demonstrate his full understanding of proceedings against him); Matheney v. Anderson, 377 F.3d 740, 747–49 (7th Cir. 2004) (the record showed conflicting statements regarding defendant's mental illness, but the court did not find prejudice); Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989) (remanded to the District Court for an evidentiary hearing as petitioner alleged that counsel failed to obtain a psychological evaluation in existence).

75. *See* State v. Baker, 837 N.W.2d 91, 97–98 (Neb. 2013); People v. Jenks, 69 A.D.3d 1120, 1121 (N.Y. App. Div. 2010); McReynolds v. State, No. C7-01-348, 2001

obviously be no finding of incompetence on the record if an attorney does not move to have the issue decided in a competency proceeding and captured on the record for review in the first place.

In many cases where the record did not show that the defendant was incompetent or had the disposition to be held incompetent, the second prong of the *Strickland* test failed.[76] The same is true in cases where counsel may have been aware of the defendant's incompetence, but for a reason unknown, chose not to build the record showing possible incompetence on part of the defendant.[77] Counsel's discretion in trial strategy helps to shield counsel from ineffective assistance claims later.[78]

B. Several Jurisdictions Presume Prejudice Where A Potentially Incompetent Defendant Never Received A Hearing On The Matter Of Her Competency To Stand Trial Or Enter A Guilty Plea.

There are two related approaches, however, that appear suited to the unique issues raised by the intersection of *Strickland* and *Drope/Dusky* claims. These employ realistic expectations of what may be shown on the record of a case that has not included a competency hearing and tailors the relief to the error itself. There are two subgroups of jurisdictions with this approach: one presumes prejudice if a competency hearing was not held, and one looks to the request (or lack thereof) of a competency hearing as the "outcome" relevant to the "proceedings." However, each addresses the

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WL 856397 at *4 (Minn. Ct. App. 2001); People v. Villeneuve, No. 183498, 1996 WL 33348847, at *2 (Mich. Ct. App. 1996) ("There is nothing in the record, other than some passing references to his possible memory loss, to show that defendant was less than reasonably competent. Counsel reserved his right to request a competency hearing and declined to ask for one. Because counsel refrained from requesting such a hearing, there was probably no basis for seeking one.").

76. *See* Ridgley v. State, 227 P.3d 925, 931–32 (Idaho 2010) (noting the record did not include anything suggesting that an evaluation at the time would have shown incompetency as defendant only provided his own affidavit and an evaluation performed nine months after the plea was entered).

77. *See* Dillon v. State, 75 So.3d 1045, 1051–52 (Miss. App. 2010) (burden placed on district court to determine whether a competency hearing should have been conducted).

78. *See* Kelley v. State, 277 P.3d 447, 2012 WL 1970058, at *2–3 (Kan. Ct. App. 2012) (failure to request second competency hearing was not ineffective assistance of counsel as evidentiary hearing showed depth of defendant's understanding; Brewer v. State, 1987 WL 11113 at *3 (Tenn. Crim. App. 1987) (the court upheld counsel's determination not to hold a hearing despite conflicting medical reports regarding competency).

particular challenges related to the important and fact-specific analysis required in competency hearings. [79]

Some jurisdictions grant relief where, but for counsel's unreasonable errors, a competency hearing would have been held. While Florida courts require a likelihood of a finding of incompetency, the state's appellate courts do not require a definitive showing of incompetency before finding a Sixth Amendment violation.[80] In *Coker v. State*, the prejudice prong was satisfied because the defendant provided evidence at his habeas hearing through doctor's testimony that, in his opinion, the defendant *could* have been found incompetent.[81]

Several other jurisdictions, however, presume prejudice where a defendant has not received a competency hearing. There is a precedent for presuming prejudice in some cases of ineffective assistance of counsel or in cases of a conflict of interest.[82] A complete breakdown of the adversarial process warrants a finding of ineffective assistance of counsel without a finding of prejudice.[83] As the Supreme Court has noted, "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable."[84] Though this standard is rarely applied and somewhat disfavored (though not overruled), it is analogous to cases where the *Strickland* and *Hill* tests for prejudice simply do not fit the facts—cases in which a competency hearing would have been appropriate but was never pursued.[85]

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79. *Norma Schrock*, Defense Counsel's Role in Determining Competency to Stand Trial, 9 GEO. J. LEGAL ETHICS 639, 640 (1990).

80. *See, e.g.*, Coker v. State, 978 So.2d 809, 810 (Fla. Dist. Ct. App. 2008) (remanding for competency hearing due to finding: (1) deficient performance because counsel had notice of competency issue and (2) prejudice because defendant could have been adjudicated incompetent if a competency hearing had been held).

81. *Id.*; *see also* State v. Kayhart, 2008 WL 5194447, at *3 (N.J. Super. Ct. App. Div. 2008) (explaining that "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, does not require proof that defendant was incompetent to stand trial. Rather, as [the court] reasoned, the inquiry must be whether, at the time of trial, there was sufficient objective evidence of mental disorder to place defense counsel on notice that a competency evaluation was warranted.").

82. *See* State v. Balsewicz, 2000 WL 665689, at *4 (Wis. Ct. App. 2000) (counsel's deficiency was prejudicial because it denied defendant a hearing to which he was constitutionally entitled).

83. United States v. Cronic, 466 U.S. 648, 659 (1984).

84. *Id.*

85. *See, e.g.*, Cuyler v. Sullivan, 466 U.S. 335, 356–57 (1980) (Likewise, where the defendant can show a conflict of interest, prejudice is presumed.).

In Indiana, counsel has also been found constitutionally ineffective when the court adopted *Strickland* to the specific issue of a competency hearing.[86] First, the court found that counsel had been put on notice that competency was issue.[87] In analyzing deficient performance, the court found:

> In this case, one report stated that Mast was not competent to stand trial and the other report could not make a determination one way or another. Ultimately, it was the responsibility of the trial counsel to ensure that the psychiatrists' reports were given to the court and a competency hearing was requested. Mast's trial counsel testified at the post-conviction hearing that he hesitated about Mast's competency but nevertheless, proceeded with a guilty plea without awaiting the results of the psychiatrists.[88]

This objectively unreasonable attorney conduct constituted deficient performance, and while the Indiana court also found counsel's errors prejudiced the defendant, Indiana uses a hybrid standard here—meshing the competency hearing requirement with the reasonable probability of a different outcome standard.[89]

The Wisconsin approach employs rationale and engagement with both Due Process and Right to Counsel cases absent from many state court opinions.[90] When counsel in *State v. Balsewicz* unreasonably failed to request a competency hearing, though the defendant's potential incompetency issues were known to counsel, the defendant was denied a hearing to which he was constitutionally entitled in order to assess his competency to enter a plea.[91] The "outcome," therefore, was the denial of a due process right—certainly prejudicial to the defendant.

As a result, the court ultimately held that "counsel was deficient for failing to object to the trial court's finding, and counsel's deficiency was prejudicial because it, in combination with the trial court's action, resulted in denying Balsewicz the hearing to which he was entitled."[92] The "outcome," therefore was the denial of a due process right—certainly prejudicial to the defendant.

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86. Mast v. State, 914 N.E.2d 851, 856 (Ind. Ct. App. 2009).
87. *Id.*
88. *Id.* at 857.
89. *Id.*
90. *See, e.g., Lahood*, 401 S.W.3d 45.
91. *State v. Balsewicz*, 2000 WL 665689, at *4 (Wis. Ct. App. May 23, 2000).
92. *Id.*

Though this survey is by no means inclusive of every state and federal case raising potential ineffectiveness claims for counsel's failure to request a competency hearing, appellate decisions from a number of jurisdictions demonstrate a number of disturbing trends.

III. A MULTI-LAYERED PROBLEM: DUE PROCESS AND RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In the intervening thirty years since the Supreme Court announced its decision in *Strickland*, our collective understanding of mental illness and mental disability has deepened.[93] So too has our information related to the number of criminal defendants whose charges are related to their disability,[94] and who nevertheless compose a disproportionately high percentage of the United States prison population.[95] It therefore presents a constitutional difficulty when the legal tests represent thinking that is outdated at best and inapplicable at worst. A defendant who is likely mentally incompetent can hardly be expected to prove his own incompetence.[96] This is especially problematic where that same defendant must prove his own incompetence *and* his attorney's ineffectiveness. That is, however, what the law requires in the State of Georgia and in other jurisdictions.[97]

International law on this issue has also evolved somewhat, albeit at a more rapid pace. As Michael Perlin points out:

> Although there were prior cases decided in the United States and in Europe that, retrospectively, had been litigated from a human rights perspective, the characterization of disability rights—especially the rights of persons with mental

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93. *See, e.g.*, Debra Denno, *The Myth of the Double Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493 (2015).

94. *See* Theodore Y. Blumoff, *Forward: The Brain Sciences and Criminal Law Norms*, 62 MERCER L. REV. 705 (2011) ("Bringing [brain sciences] data into the discussion will require us to take into account more fully than we do now the limitations that many among us are condemned to suffer. This addition to our conversation should conduce to greater compassion in criminal law, which is, and will always be, good for us as a polity.").

95. *See* TERRY A. KUPERS, PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT (1999).

96. Richard L. Gabriel, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1288 (1986).

97. *See, e.g, Brown v. Parody*, 751 S.E.2d 793.

> disabilities—was not discussed in a global public, political, or legal debate until the early 1990s.[98]

Since mental health issues arrived on the world's stage, one of the more important global developments has been the 2009 ratification of the United Nations Convention on the Rights of Persons with Mental Disabilities (CRPD).[99] Commentators still regard this convention "as having finally empowered the 'world's largest minority' to claim their rights, and to participate in international and national affairs on an equal basis with others who have achieved specific treaty recognition and protection."[100]

As the Supreme Court noted in *Roper v. Simmons*, which found the execution of juveniles unconstitutional, it was proper to "acknowledge the overwhelming *weight of international opinion* against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime." [101] The Court recognized that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[102] With this in mind, it is apparent that the foreign and domestic understanding and legal treatment of mental illness and competency have drastically evolved over the last three decades, and because international law standards have now incorporated the nuances and medical understandings of modern-day mental health, it may be instructive to the United States.

As they now stand, most legal tests employed by appellate courts examining claims of ineffective assistance of counsel related to circumstances where a criminal defendant is mentally incompetent—or arguably incompetent—create a "lose-lose" situation for those defendants.

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98. Michael L. Perlin, *A Change Is Gonna Come: The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 N. ILL. U. L. REV. 483, 483 (2009).

99. U.N. GAOR, 61st Sess., 76th plen. mtg. at 2–4, U.N. Doc. A/RES/61/PV.106 (Jan. 24, 2007).

100. Perlin, *supra* note 98, at 489–90 (footnotes omitted); *see also* Michael L. Perlin, "*Yonder Stands Your Orphan with His Gun: The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*," 46 Tex. Tech L. Rev. 301, 306 (2013); Michael L. Perlin & Valerie McClain, "*Where Souls Are Forgotten: Cultural Competencies, Forensic Evaluations, and International Human Rights*," 15 PSYCHOL. PUB. POL'Y & L. 257, 270–71 (2009).

101. Roper v. Simmons, 543 U.S. 551, 578 (2005).

102. *Id.*

In many states and federal circuits, courts interpret *Strickland*'s examination of counsel's performance and its impact on the "outcome of the [proceedings]"[103] to address the outcome of a plea or trial on matters of guilt or innocence.[104] The matter, as illustrated by a number of cases described herein, however, has no bearing on matters of guilt or innocence: if a defendant is not competent to stand trial or enter a plea, the law provides for him an entirely different process and remedy.

Even tests that focus on whether a defendant is actually competent are ill-fit for the *Strickland* standard as now applied by most states and federal appellate courts. By applying a prejudice analysis that requires a potentially incompetent defendant to make a showing of incompetence on the record, appellate courts must, years later, make competency determinations based on an incomplete record created by counsel's failure to request a competency hearing. If no record was made, it is highly unlikely that prejudice can be found from the existing record.[105] Unless the jurisdiction considers that a defendant has been harmed by the lack of a competency hearing itself, an appeal will naturally fail the *Strickland* test.

Take, again, the example of Timothy Parody. Although she testified that her meetings with Parody were brief and infrequent, plea counsel had seen her client enough to perceive significant concerning factors related to his competence and vulnerability: numerous physical disabilities; delusions about mythical creatures;[106] delusions about his own intellectual capacity;[107] extreme social immaturity;[108] and, most importantly, and in her own words, "that he sounded like he knew what he was talking about but may not in fact be able to."[109] Plea counsel for Mr. Parody had a duty to investigate his issues of competency of which she was aware and to request a competency hearing in order to advocate effectively on

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103. *Strickland*, 466 U.S. at 689.

104. *Parody*, 751 S.E.2d at 795.

105. 446 U.S. at 709 (Marshall, J., dissenting) ("I agree that counsel must be afforded "wide latitude" when making "tactical decisions" regarding trial strategy . . . but many aspects of the job of a criminal defense attorney are more amenable to judicial oversight").

106. *Id.* at 797 (Benham, J., dissenting).

107. *Id.* at 796.

108. *Id.* at 797 (Benham, J., dissenting).

109. *Id.* (Benham, J., dissenting).

his behalf. But because she did not request a hearing, the record on appeal was too incomplete for a grant of state habeas to stand.[110]

The dissenting opinion in *Parody* highlights both the majority's error and the limitations, under these circumstances, of reliance on *Strickland* and *Hill*. With regard to deficient performance, the dissenting opinion correctly found that the contradictions between Parody's three mental health evaluations "raise a flag that would have led a reasonable attorney to further investigate all mitigating factors relating to Parody's mental competency, to question the validity of Dr. Katzenmeyer's conclusions, and not to rely on that report as the final authority[.]"[111] Alternatively, "at the very least, a reasonable attorney would have argued this conflicting evidence to the judge for her consideration on the issue of Parody's mental competency to enter a plea."[112]

With regard to prejudice, the dissenting opinion in *Parody* framed the issue as "whether the plea would have been entered in the first place or, if entered, would have been accepted without a trial on the issue of his competency to enter the plea."[113] Plea counsel had suspicions about Parody's competency and had gathered conflicting mental health evaluations; yet, plea counsel failed to read them completely, credit the findings favorable to her client, investigate further, or request a competency hearing that Parody was entitled to under O.C.G.A. § 17-7-130:[114]

> The outcome that would likely have been different in this case is the conviction upon the acceptance of a guilty plea. The majority's conclusion that no better outcome could have been obtained ignores the fact that Parody has been convicted based upon a plea that was accepted without a legally sufficient hearing to determine mental competency to make the plea.[115]

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110. *Id.* at 799 (Benham, J., dissenting); *see also LaHood*, 401 S.W.3d at 52; *Mast*, 914 N.E.2d at 857; McMann v. Richardson, 397 U.S. 759, 759 (1970); Padilla v. Kentucky, 559 U.S. 356, 359 (2010); Wiggins v. Smith, 539 U.S. 510, 512 (2003).

111. *Parody*, 751 S.E.2d at 799 (Benham, J., dissenting).

112. *Id.* (Benham, J., dissenting); *see Martin v. Barrett*, 619 S.E.2d 656, 658 (Ga. 2005) (affirming the habeas court's finding that counsel's failure to investigate the defendant's mental competence was constitutionally deficient because it was the result of inattention and not reasoned strategy).

113. *Parody*, 751 S.E.2d at 801 (Benham, J., dissenting).

114. *Id.* (Benham, J., dissenting).

115. *Id.* at 802 (Benham, J., dissenting).

This illustrative case—involving appointed counsel who was not aware of a psychiatric evaluation finding her client to be incompetent and a trial court who allowed a mentally impaired teenager to enter a plea to a lengthy term of years without fully inquiring into his understanding of the proceedings—represents an appalling failure of the legal system. Tailoring the *Strickland* analysis to better address competency concerns will clarify existing discrepancy in the consideration of Sixth Amendment claims. But it will also serve another good by protecting one of our system's most vulnerable: an indigent teenager, a "little boy in grown up's clothes" who still believed in the Easter Bunny, and who, though facing serious charges, lacked the capacity to "make an appropriate judgment" or "understand the consequences" of the proceedings against him.[116]

If the right to a competency hearing means anything, then failure to request one when counsel has been put on notice of a potential mental illness or disability must be examined as a "proceeding" with a prejudiced "outcome" under the *Strickland* analysis.

IV. PROPOSED JUDICIAL SOLUTIONS

There may be a number of ways to address systemic failures through adequately funding indigent defense and training[117] and support for public defenders through studies and reduced caseloads.[118] These legislative or administrative solutions could be implemented immediately, and there are a number of factors justifying such changes beyond the predicament described in this Article.

In addition, there are a number of potential judicial solutions that may help clarify the appropriate analysis of the "harm" explored here. First, the Supreme Court should accept a case examining *Strickland* in the context of an arguably-incompetent defendant and

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116. *Id.* at 797, 800 (Benham, J., dissenting).

117. *See* ABA Defense Function Standard S. 4-3.1(a) (2015); *see also* Mary Sue Bacjus & Paul Marcus, *The Right to Counsel in Criminal Cases, a National Crisis*, 57 HASTINGS L.J. 1031 (2016); Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L.REV. 333 (2013); Adele Bernhard, Raising the Bar: Standards-Based Training, Supervision, and Evaluation, 75 MO. L. REV. 831 (2010).

118. Jennifer Laurin, *Data and Accountability in Indigent Defense*, 14 OHIO ST. J. CRIM. L. 373 (2017); Debra Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009).

announce that the Sixth Amendment right to counsel requires careful representation with respect to mental illness and disability. The weight of authority remains fixed in requiring the defendant to make a definitive showing of incompetence on the record. The more appropriate *Strickland* analysis, however, is taken by those jurisdictions that presume prejudice in the absence of a competency hearing or announce that the failure to request such a hearing is itself a showing that the defendant has been prejudiced.

Alternatively (or additionally), adjustments should be made to the role of busy trial courts hearing thousands of cases per year—and the fact that those courts are the proper vessels of authority related to competency. Finally, courts can and should look to the precedent set by *Padilla v. Kentucky* in the different but analogous situation of immigration consequences. There, the Supreme Court took note of changes in court procedures, the identity of defendants appearing in criminal courtrooms, and remedies for attorney performance that is ineffective under the circumstances.[119]

A. The Supreme Court Should Announce the Specific Process Related to Determining Prejudice Under Strickland *in the Case of an Arguably Mentally Ill or Incompetent Defendant*

There is a way to incorporate legal issues of incompetency into the well-established *Strickland* analysis.[120] There are a number of national models discussed *supra*, but the Wisconsin example is perhaps the most compelling. For several reasons, the approach employed by the Wisconsin court in *Balsewicz* is more appropriately tailored to the legal concerns of prejudice that result from counsel's deficiencies in failing to request a competency hearing.[121]

In *Balsewicz*, the defendant alleged his counsel had been ineffective for failing to request a competency hearing.[122] While the trial court ordered a competency evaluation and properly asked counsel on the record whether the defense challenged the evaluation's findings, it committed reversible error by ultimately finding the defendant competent without conducting the required competency hearing.[123] The appellate court also explained that the trial court's colloquies with the defendant, which the state alleged

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119. *See Padilla*, 559 U.S. 356.
120. *See Balsewicz*, 2000 WL 665689.
121. *Id.* at *1.
122. *Id.*
123. *Id.* at *4.

demonstrated that the defendant was in fact competent, were not a sufficient substitute for a competency hearing.[124] As a result, the court ultimately held that "counsel was deficient for failing to object to the trial court's finding, and counsel's deficiency was prejudicial because it, in combination with the trial court's action, resulted in denying Balsewicz the hearing to which he was entitled . . . ."[125]

For several reasons, this approach—articulated by Wisconsin—is more appropriately tailored to the legal concerns of prejudice that result from counsel's deficiencies in failing to request a competency hearing. In fact, when the Supreme Court first decided *Strickland* and *Hill*, there was relatively little case law addressing competency, but the law that was in existence supports analysis akin to the Wisconsin standard.

The first case, *Dusky v. United States*, outlined the court's test for legal capacity, which focused on "whether [a defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether [a defendant] has a rational as well as factual understanding of the proceedings against him."[126] The Court noted in *Dusky* that an insufficient record made determinations of competency difficult on appellate review without a prior competency hearing.[127] Specifically, it said:

> In view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago, we reverse the judgment of the Court of Appeals affirming the judgment of conviction, and remand the case to the District Court for a new hearing to ascertain petitioner's present competency to stand trial, and for a new trial if petitioner is found competent.[128]

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124. *Id.*
125. *Id.*
126. 362 U.S. at 402.
127. *Id.*
128. *Id.* at 403.

B. Responsibility for Determining Competency Should Not Rest Solely With the Trial Judge, but Also With the Defense Counsel, and the Legal Tests for Challenging Attorney Performance Should Better Suit the Factual and Legal Circumstances of This Issue

Trial judges are no longer in a position to be the only gatekeepers related to a defendant's competency; court dockets are far too heavy to continue to rely solely on the rules of *Dusky v. United States* and *Pate v. Robinson*. Trial counsel, rather, is in the best position to identify signs and behaviors that should properly trigger a competency hearing. Because the current method of evaluating Sixth Amendment claims limits consideration of prejudice to the outcome—a plea or a guilty verdict—the existing tests are insufficient to protect the vulnerable from inept counsel when mental illness demands an intervening competency evaluation.

A plea colloquy is by nature insufficient to establish competence due to the subject matter of the proceeding, regardless of whether a defendant is capable of parroting yes or no responses to the trial court's questions. Even without concerns specific to a particular trial court's questions and ability to recognize competence, the burden to identify mental illness or mental incompetence should no longer rest primarily with the judge conducting a brief plea colloquy or motion hearing.

There is some precedent for extending counsel's scope of responsibilities under the Sixth Amendment to include areas in which there has been dramatic development and increased awareness of vulnerability. For example, under the Supreme Court's decision in *Padilla v. Kentucky*,[129] counsel now carries the obligation to advise non-citizen clients about the deportation risks associated with entering a guilty plea. In doing so, the Court gave great weight to the sweeping changes in both federal immigration law and social policy throughout the past decades, noting that the "landscape of federal immigration law has changed dramatically."[130] It also accorded evolving professional norms that urged competent advice around immigration consequences.[131]

Because changes in immigration law have "dramatically raised the stakes" related to a non-citizen's criminal conviction, the Sixth Amendment mandates that a non-citizen defendant be informed by his counsel—not just the trial court—about the deportation risks

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129. 559 U.S. 356, 356 (2010).
130. *Id.* at 360.
131. *Id.* at 367.

associated with a guilty plea.[132] Failure to adequately learn about and explain immigration consequences to a non-citizen defendant is grounds for reversal of a criminal conviction. And this change in application of the Sixth Amendment right to effective assistance of counsel has required attorneys nationwide to become familiar with policies and procedures that protect their non-citizen clients.

The dramatic change in social policy and legislation related to mental illness and competency is indistinguishable from the sweeping changes in immigration law so closely regarded in *Padilla*; there have always been professional norms to counsel effectively, but counsel for mentally disabled clients should be held to a careful—and carefully-tailored—Sixth Amendment standard. Similar to changes required by the *Padilla* decision, counsel representing mentally ill or disabled clients should receive training not only in how to detect but how to effectively counsel their clients with these issues. And failure to adequately counsel their clients—including seeking competency evaluations and hearings—should always be grounds for reversal of a criminal conviction.

CONCLUSION

In sum, a review of cases from jurisdictions that have considered this issue reveal that the *Strickland* analysis is awkward in the context of analyzing attorney competence in the area of client competence. Potentially incompetent defendants alleging that counsel rendered ineffective assistance of counsel by failing to request a competency hearing will not succeed under the current standards, and judges are ill-suited to the gate-keeper role historically reserved for them.

Without a competency hearing, plea or trial records will never be sufficient—under the existing tests—for appellate courts to address Sixth Amendment prejudice. Whether appellate courts adjust the relevant prejudice standards or the responsibility of trial counsel to seek competency evaluations, changes must be made in order to protect our judicial process and those defendants subject to it.

Now, thirty years after *Strickland*, it is time to extend and clarify this line of precedent within the context of the right to competency hearings. This is necessary in order to ensure that the requirement of effective assistance of counsel is met for individuals with disabilities and outlining the proper prejudice analysis where an allegedly incompetent defendant claims ineffective assistance of

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132. *Id.* at 356–57.

counsel for failure to request a competency hearing. Without this sort of clarity, American courts will continue to fail individuals with mental illness or disability.