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Criminal Law: Defendant's Rights

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CRIMINAL LAW: DEFENDANT'S RIGHTS

INTRODUCTION

American courts embrace an adversarial system. In order for this system to thrive, plaintiffs and defendants alike must have competent attorneys who advocate the respective sides of an issue. The need for competent counsel is greatest when the state sets the adversarial process in motion against a citizen. The United States Constitution affords criminal defendants various protections, but the Sixth Amendment[1] provides the critical right to assistance of counsel.[2]

This survey features cases addressing right to counsel issues[3] that the Tenth Circuit decided between September, 1996 and August, 1997. Part I provides an historical backdrop of the right to counsel and its evolution. Part II analyzes Tenth Circuit decisions that probe the adequacy of appointed counsel. Additionally, it compares analytical approaches of other circuit courts. Part III considers the corollary of the right to counsel, the right to self-representation, and the burden it places on trial courts.

I. THE HISTORY AND EVOLUTION OF THE RIGHT TO ASSISTANCE OF COUNSEL

The Sixth Amendment of the United States Constitution provides criminal defendants with a series of critical rights.[4] These include the right to a speedy trial, impartial jury, proper venue, and information about the crime with which the defendant was charged. In addition, the defendant has the right to confront witnesses, and "to have the Assistance

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1. U.S. CONST. amend. VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

2. The Fourteenth Amendment's Due Process Clause extends the right to counsel to state proceedings. *See infra* discussion Part I, note 13, and text accompanying note 26.

3. Right to counsel issues arise in several settings. The focus of this survey article is the right to counsel beyond the arrest and interrogation phase. Many right to counsel decisions, however, consider the constitutionality of inculpatory statements made by a defendant in custody who does not have counsel present and has not waived his right to counsel. *See* Massiah v. United States, 377 U.S. 201, 206 (1964). Although the Sixth Amendment's right to counsel guarantee is recognized in custodial interrogation situations, discussion of it is beyond the scope of this survey. Many custodial Sixth Amendment issues were, however, addressed by the federal circuit courts. *See, e.g.*, Bey v. Morton, 124 F.3d 524 (3d Cir. 1997).

4. U.S. CONST. amend. VI.

of Counsel for his defence."[5] Courtroom complexity and the high risks for defendants in criminal prosecutions justify these protections.[6]

The practical reasons for having the right to counsel are best demonstrated by the dramatic facts that characterize the cases. A review of *Powell v. Alabama*,[7] the Supreme Court's landmark right to counsel case, exemplifies the typical circumstances. In *Powell*, a posse of white men and a deputy sheriff arrested "the Scottsboro boys," a group of black teenagers, in a small Alabama town.[8] The boys were riding in an open train car when they began fighting with some white youths.[9] During the fight, the boys threw the white youths from the train, and two white women who remained in the train car accused the black teenagers of rape.[10] In a state proceeding, an all white jury sentenced eight of the illiterate and out-of-state [11] Scottsboro boys to death.[12] While limiting its holding to the facts of the case, the Supreme Court determined that the Fourteenth Amendment's Due Process Clause[13] entitled the indigent black youth to appointment of counsel.[14] Their ignorance, coupled with the fact that the defendants faced capital punishment, justified the requirement of counsel.[15] Justice Frankfurter wrote:

> Not only must there be a court free from coercion, but the accused must be furnished with the means of presenting his defense. For this the assistance of counsel is essential . . . . Especially is this true in a capital case. The more heinous the charge the more important the safeguards which the experience of centuries has shown to be essential to the ascertainment of even fallible truth.[16]

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5. *Id.* For the history of assistance of counsel under English rule, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.1, at 3 (1984). *See also* Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 39-42 (1991).

6. *See* FELIX FRANKFURTER, *The Scottsboro Case*, *in* FELIX FRANKFURTER ON THE SUPREME COURT: EXTRA JUDICIAL ESSAY ON THE COURT AND THE CONSTITUTION 280-85 (Philip B. Kurland ed., Harvard Univ. Press 1970), *reprinted in* KWANDO MBIASSI KINSHASA, THE MAN FROM SCOTTSBORO: CLARENCE NORRIS AND THE INFAMOUS 1931 ALABAMA RAPE TRIAL IN HIS OWN WORDS 188-91 app. C (1997) [hereinafter FELIX FRANKFURTER ON THE SUPREME COURT].

7. 287 U.S. 45 (1932).

8. *Powell*, 287 U.S. at 51; *see* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: THE ORDEAL OF 400 AMERICANS WRONGLY CONVICTED OF CRIMES PUNISHABLE BY DEATH 116 (1992).

9. *Powell*, 287 U.S. at 50-51.

10. *Id.* at 51. Facts later emerged to show that the rape allegations were fabricated. RADELET ET AL., *supra* note 8, at 118.

11. RADELET ET AL., *supra* note 8, at 118.

12. *Powell*, 287 U.S. at 52.

13. U.S. CONST. amend. XIV, § 1. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." *Id.*

14. Powell, 287 U.S. at 71; *see* Gideon v. Wainwright, 372 U.S. 335 (1963) (discussing the Fourteenth Amendment's securing of the right to counsel in state proceedings).

15. *Powell*, 287 U.S. at 71; *see also* FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 6, at 189-90. The Court has consistently focused on the degree and severity of punishment when making inquiries into constitutional infirmities. *See, e.g.*, Burger v. Kemp, 483 U.S. 776, 785 (1987).

16. FELIX FRANKFURTER ON THE SUPREME COURT, *supra* note 6, at 189-90.

Soon after the Supreme Court decided that the right to counsel attached to the right to a fair trial in a state proceeding,[17] the Court turned its attention to the right to counsel in the federal context.[18] Examining *Johnson v. Zerbst*[19] and its Sixth Amendment implications, the Court stated that the right to assistance of counsel is an "essential barrier against . . . [the] deprivation of human rights."[20] In *Zerbst*, a South Carolina court tried two men who were accused of "possessing and uttering counterfeit money."[21] Counsel represented both men during preliminary hearings, but neither was able to hire counsel for the trial.[22] The men never requested appointment of counsel from the trial judge; although the defendants inquired about appointed representation and were told that South Carolina only appointed counsel for capital crimes.[23] Both men were tried without counsel in what the Supreme Court characterized as an "intricate, complex, and mysterious" legal process.[24] *Zerbst* extended the right to appointed counsel to all defendants charged with federal crimes in which incarceration might result from conviction.[25]

Following *Zerbst*, the Court expanded the right to counsel to its current standard, which extends it to all "critical stages"[26] in a criminal prosecution. The Court determined that critical stages includes pretrial proceedings, and the trial itself.[27] The Court, however, has not extended the right to some post-conviction proceedings.[28]

Although the Court in *Powell* firmly established the right to assistance of counsel, the question remained as to the *kind* of assistance that must be provided. While *Powell* hinted at the idea of competent counsel

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17. *Powell*, 287 U.S. at 71.

18. *Id.*; *see* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 429-30 (1996).

19. 304 U.S. 458 (1938).

20. *Zerbst*, 304 U.S. at 462.

21. *Id.* at 459.

22. *Id.* at 460.

23. *Id.*

24. *Id.* at 463.

25. *Id.* at 468. *But cf.* Betts v. Brady, 316 U.S. 455, 462 (1942) (denying petitioner's request for counsel in a state robbery proceeding), *overruled by* Gideon v. Wainright, 372 U.S. 335 (1963). The *Gideon* Court created a right to counsel for all state felony defendants. *Gideon*, 372 U.S. at 345; *see* Kirchmeier, *supra* note 18, at 430.

26. Kirchmeier, *supra* note 18, at 430. In another case, the Supreme Court extended the right to counsel to all misdemeanor defendants facing jail sentences. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972); *see also* Gilbert v. California, 388 U.S. 263, 267 (1967) (defining "critical stage" as that when the absence of counsel would impair a defendant's right to a fair trial). A defendant can, however, waive the right to counsel. *See infra* discussion Part III.

27. *See* Hamilton v. Alabama, 368 U.S. 52, 55 (1961) (holding that the right to counsel is violated when counsel is denied at an arraignment in a capital case).

28. *See* Ross v. Moffitt, 417 U.S. 600, 617-18 (1974) (denying the right to counsel in discretionary appeals, including petitions for certiorari to the state supreme court and the U.S. Supreme Court).

requirements, the Court articulated no such standard.[29] In a footnote, the Court merely announced that "the right to counsel is the right to the effective assistance of counsel."[30] Thus, circuit courts based the implied right to effective counsel on Supreme Court dicta.

The first standard commonly applied was that of "farce and mockery."[31] District of Columbia Circuit Judge Thurman Arnold introduced it by holding that ineffective assistance of counsel created due process infirmities "where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice."[32] Under the "farce and mockery" standard, counsel's threshold level of competency was low,[33] and the burden placed upon defendants was exceedingly high.[34] Defendants were required to demonstrate that the very nature of the proceeding lacked overall fairness.[35] The rationale for this test stemmed from the courts' fears that if attorneys were subjected to "a public inquiry into the[ir] professional competence,"[36] they would not "undertake as a public duty the defense of an accused."[37] Commentators and courts began a movement away from the "farce and mockery" standard because of the difficulties in uniformly administering it, and because of the undue burden the test placed upon defendants.[38] By 1983, all federal circuit courts had rejected the "farce and mockery" test.[39]

After rejecting the "farce and mockery" test, courts employed various analytical tools to determine whether a defendant's ineffective assistance of counsel was constitutionally infirm.[40] Most courts determined

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29. *Powell*, 287 U.S. at 71.

30. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); *see* Kirchmeier, *supra* note 18, at 435.

31. By 1970, all 11 circuit courts applied the "farce and mockery" test. *See* Kirchmeier, *supra* note 18, at 431 & n.31; Bruce A. Green, Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1052, 1055 (1980); *see also* J. Gregory Mermelstein, Note, *Ineffective Assistance of Counsel Claims: Toward a Uniform Framework for Review*, 50 MO. L. REV. 651, 656 (1985).

32. Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945).

33. *See* Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir. 1958).

34. *See* Green, *supra* note 31, at 1059.

35. *See, e.g.*, United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949) ("The proof of the efficiency of such assistance lies in the *character* of the resultant proceedings . . . .") (emphasis added).

36. *Mitchell*, 259 F.2d at 793.

37. *Id.*

38. Jennifer N. Foster, Note, Lockhart v. Fretwell: *Using Hindsight to Evaluate Prejudice in Claims of Ineffective Assistance of Counsel*, 72 N.C. L. REV. 1369, 1379-80 (1994).

39. The Second Circuit was the last to reject the "farce and mockery" test. *See* Trapnell v. United States, 725 F.2d 149, 154 (2d Cir. 1983); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973).

40. Foster, *supra* note 38, at 1380-82. For an account of the various tests used by the federal circuits prior to *Strickland*, see Richard P. Rhodes, Note, Strickland v. Washington: *Safeguard of the Capital Defendant's Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 121-35 (1992).

prejudice by using different variations of a harmless error test.[41] Some courts required the defendant to show that unreasonable performance was not harmless beyond a reasonable doubt.[42] The circuits split on where to place the burden in order to show harm or lack of harm.[43]

Finally, in *Strickland v. Washington*,[44] the Supreme Court presented the standard to determine the competency of counsel.[45] *Strickland* involved a defendant who received the death penalty.[46] Strickland claimed that his representation was ineffective because his counsel failed to request a psychiatric examination, and had not secured character witnesses.[47] The Court introduced a two-prong inquiry to determine whether a defendant's counsel was competent.[48] First, a defendant must show that her counsel's representation fell below an objective standard of reasonableness.[49] This prong considers the "countless ways [in which attorneys] provide effective assistance,"[50] and the "wide range of reasonable professional assistance."[51] Second, the defendant must demonstrate that a reasonable probability existed that the outcome of the proceedings would have been different, but for ineffective counsel.[52]

In most situations, the *Strickland* standard's second prong is the more difficult for a defendant to prove. The potential for a different outcome alone does not demonstrate ineffective assistance of counsel.[53] For the defendant to establish that she was prejudiced, the Supreme Court requires that the "counsel's deficient performance renders the result of the trial unreliable."[54] Moreover, a defendant must demonstrate he was "deprive[d] . . . of any substantive or procedural right to which the law entitles him."[55] The prejudice standard is a more difficult one to meet

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41. Robert J. Conflitti, Note, *A New Focus on Prejudice in Ineffective Assistance of Counsel Cases: The Assertion of Rights Standard*, 21 AM. CRIM. L. REV. 29, 37 (1983).

42. *Id.* The Supreme Court has articulated that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). The Fourth Circuit explained harmless error review in two recent decisions. *See* United States v. Mackey, 114 F.3d 470, 473-74 (4th Cir. 1997). *See also* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 798-800, 818-22 (1998); *cf. In re* Celotex Corp., 124 F.3d 619 (4th Cir. 1997).

43. Conflitti, *supra* note 41.

44. 466 U.S. 668 (1984).

46. *Strickland*, 466 U.S. at 698.

46. *Id.* at 675.

47. *Id.*

48. *Id.* at 687.

49. *Id.*

50. *Id.* at 689.

51. *Id.*

52. *Id.* at 687.

53. *See* Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

54. *Fretwell*, 506 U.S. at 371-72.

55. *Id.* at 372.

than that of harmless error.[56] Some commentators prefer the harmless error analysis, with the burden placed on the state, rather than a prejudice analysis, with the burden placed on the defendant.[57] The fact-driven, retrospective[58] nature of the ineffective counsel inquiry may explain the differing outcomes of cases with similar facts. Although *Strickland* may not have expressly permitted hindsight examination, cases analyzing the prejudice prong have not limited the inquiry to events at the time of trial.[59] Justice Powell has even suggested that by evaluating with hindsight, *only* errors that undermine the accuracy of a trial's result should establish the prejudice prong.[60] Despite the hindsight debate, courts have not significantly refined the *Strickland* standard, which still serves as the foundation for the modern federal right to counsel.[61]

The Court, however, did note that situations exist where prejudice may be presumed.[62] For example, a defendant is legally presumed to have been prejudiced when he is actually or constructively denied the assistance of counsel.[63] Likewise, prejudice is also presumed when a defendant can show that her counsel's actual conflict of interest adversely affected her representation.[64]

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56. Harmless error is "any error, defect, irregularity or variance which does not affect substantial rights . . . ." FED. R. CRIM. P. 7(c); *see* William S. Geimer, *A Decade of* Strickland's *Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 137 (1995) (discussing the harmless error standard).

57. *See Strickland*, 466 U.S. at 711-12 (Marshall, J., dissenting); *see also* Geimer, *supra* note 56.

58. *See* Foster, *supra* note 38, at 1369. *But cf. Fretwell*, 506 U.S. at 377 (Stevens, J., dissenting) ("[U]nprincipled transformation of the standards governing ineffective-assistance claims, through the introduction of an element of hindsight . . . has no place in our Sixth Amendment jurisprudence."). For a discussion of the retrospective aspects of the *Strickland* standard, see Charles M. Kreamer, *Adjudicating the* Peart *Motion: A Proposed Standard to Protect the Right to Effective Assistance of Counsel Prospectively*, 39 LOY. L. REV. 635, 647-48 (1993).

59. In *Fretwell*, the Court employed a "rights requirement" analysis which may have permitted more flexibility in evaluating a defendant's rights. Foster, *supra* note 38, at 1393. *But cf. Fretwell*, 506 U.S. at 381-82 (Stevens, J., dissenting) (arguing that *Strickland* requires prejudice to be determined at the time of trial, rather than from the vantage point of hindsight).

60. Kimmelman v. Morrison, 477 U.S. 365, 395 (1986) (Powell, J., concurring).

61. *See infra* discussion Part II; *see also* James G. Fannon, *Criminal Procedure—Defendant's Rights*, 26 RUTGERS L.J. 1130, 1131-32 (1995). The *Strickland* standard is only required in federal courts. State courts may mimic the *Strickland* test or create their own standards for effective counsel. *See, e.g.*, Hawaii v. Silva, 864 P.2d 583, 593 (Haw. 1993) (replacing *Strickland's* second prong with a test of whether counsel's "errors or omissions resulted in . . . withdrawal or substantial impairment of a potentially meritorious defense"); New York v. Flores, 639 N.E.2d 19, 20 (N.Y. 1994) (rejecting *Strickland* and requiring that a defendant show that she was "deprived of a fair trial by less than meaningful representation").

62. *Strickland*, 466 U.S. at 692.

63. *Id.*

64. *Id.* The Supreme Court established the presumption of prejudice in conflict of interest situations in *Tumey v. Ohio*, 273 U.S. 510, 522 (1927). *See also* Holloway v. Arkansas, 435 U.S. 475, 489 (1978) (holding that prejudice is presumed when co-defendants are jointly represented over their timely objections to such representation).

In 1984, the same year that the Court decided *Strickland*, the Supreme Court reiterated the modern standard for the right to counsel in *United States v. Cronic*.[65] Cronic was sentenced to twenty-five years in prison on numerous counts of fraud.[66] He and two associates had been involved in a check-kiting scheme of approximately ten million dollars.[67] The defendant declared himself indigent after his hired counsel withdrew from the case, whereupon the court appointed a young real estate attorney with no actual trial experience.[68] Justice Stevens, writing for eight members of the Court, rejected the argument of the lower court inferring a Sixth Amendment violation from the five factors it enumerated.[69] Instead, he emphasized that a defendant must show *how* identified errors by counsel resulted in an unreliable conviction.[70] In *Cronic*, the Court focused heavily on the likely outcome of the proceeding.[71]

The substance of right to counsel jurisprudence cannot be completely understood without an understanding of its procedural underpinnings. Writs of habeas corpus[72] bring most of the right to counsel cases into the federal system.[73] The function of the habeas corpus writ is to release an individual from unlawful imprisonment by the government.[74] A defendant initiates an independent proceeding in which she states that she is being unlawfully deprived of her liberty.[75] The writ of habeas corpus permits prisoners to challenge a state conviction on constitutional grounds.[76] In the right to counsel context, defendants appeal state court convictions to the federal courts based on a denial of the Sixth Amendment rights guaranteed by the Constitution. Although the body of habeas corpus law is extensive enough to warrant volumes of independent discussion,[77] in the context of this discussion, it provides defendants with a mechanism for collateral attack.[78]

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65. 466 U.S. 648, 653-55 (1984).

67. *Cronic*, 466 U.S. at 650-52.

67. *Id.*

68. *Id.* at 652.

69. *Id.* at 658.

70. *Id.* at 659 n.26.

71. *Id.* at 655. The order of analysis in *Cronic* may explain the lower courts' propensity to examine the second *Strickland* prong, prejudice, before examining the reasonable representation prong.

72. Habeas corpus is Latin for "you have the body." BLACK'S LAW DICTIONARY 709 (6th ed. 1990).

73. *See infra* discussion Part II and accompanying notes.

74. *See* Allen v. McCurry, 449 U.S. 90, 98 n.12 (1980).

75. *See* Fay v. Noia, 372 U.S. 391, 397-98 (1963).

76. *Id.*

77. For an in depth look at habeas corpus law and ineffective assistance of counsel from the defense perspective, see Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986).

78. *See* Berger, *supra* note 77.

II. THE RIGHT TO COMPETENT COUNSEL IN THE TENTH CIRCUIT

A. *Tenth Circuit Decisions*

1. *Nickel v. Hannigan*[79]

a. *Facts*

Defendant Nickel lived in a household of disadvantaged individuals who exchanged labor in a custodial service for lodging.[80] After an argument with his employer/landlord, Nickel went to the law office of Boyer, who had previously represented him in various matters.[81] While in Boyer's office, Nickel confessed to killing Wanda Kuhlman, another household member.[82] Boyer instructed Nickel to bring his landlord back to the office so that they could further discuss the confession.[83] When Nickel left his office, Boyer telephoned the police and reported that Nickel had possibly committed homicide.[84] Boyer instructed Nickel to go to the police station, where he confessed to the murder.[85]

At trial, Nickel's appointed counsel failed to renew objections to Boyer's testimony on the grounds that the testimony violated the attorney-client privilege.[86] Likewise, he made no attempts to challenge Nickel's statements or Nickel's confession to the police.[87] A Kansas jury convicted Nickel of first-degree murder.[88] The Kansas Supreme Court affirmed his conviction.[89] After a review in state habeas corpus proceedings, Nickel brought a federal habeas action which the district court dismissed, upon finding that Nickel had not received ineffective counsel.[90]

b. *Decision*

The Tenth Circuit affirmed the district court's decision.[91] The court applied the two-part *Strickland* test.[92] It dispensed with the reasonableness of representation prong by assuming, without actually deciding, that this first prong was satisfied.[93] Thus, the court essentially focused on the

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79. 97 F.3d 403 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1112 (1997).
80. *Nickel*, 97 F.3d at 405.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* Prior to Boyer's phone call, the police were unaware of Kuhlman's death. *Id.*
85. *Id.*
86. *Id.* at 406.
87. *Id.*
88. *Id.* at 407.
89. *Id.* at 406.
90. *Id.* at 407.
91. *Id.* at 411.
92. *Id.* at 408.
93. *Id.*

second prong of the test—whether the deficient performance by counsel had prejudiced the defendant.[94] Because Nickel had provided information to the police and to one other individual after speaking with Boyer, the court reasoned that evidence of his confession would have been available notwithstanding his counsel's ability to exclude Boyer's testimony at trial.[95] The court also noted that while Boyer may have breached Nickel's attorney-client privilege, Boyer was not the defendant's appointed counsel, and therefore no responsibility to effectively counsel the defendant had attached to Boyer.[96]

Adopting the Ninth Circuit's reasoning,[97] the court also rejected the argument that evidence derived from a breach of the attorney-client privilege required exclusion under a "fruits of the poisonous tree" doctrine.[98] The court did not apply exclusionary remedies for breaches of evidentiary rules as it could have for breaches of search and seizure, or other constitutionally-based rules. For this reason, Nickel's confession to the police was not "suppressible."[99] The court also rejected the argument that his statements to the police were involuntary, and in violation of the Fourteenth Amendment's Due Process Clause, based on Nickel's history of mental problems.[100] The independent evidence, albeit a product of Boyer's breach, was sufficient to satisfy the second element of the *Strickland* test.[101]

2. *Houchin v. Zavaras*[102]

a. *Facts*

A Colorado jury convicted Houchin on two counts of first-degree murder.[103] At the time of the murders, Houchin had been living in the basement apartment of his in-laws.[104] Linda, his wife, told Houchin that she wanted a divorce.[105] The next day, while she and her mother were out, Houchin shot his father-in-law twice with a single-action revolver.[106]

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94. *Id.*
95. *Id.* at 409.
96. *Id.*
97. *See* United States v. Marashi, 913 F.2d 724, 729 (9th Cir. 1990).
98. *Marashi*, 913 F.2d at 729. "[N]o court has ever applied [the fruits of the poisonous tree] theory to any evidentiary privilege and . . . we have indicated we would not be the first to do so." *Id.* at 731 n.11. The "fruit of the poisonous tree," or derivative evidence doctrine, was introduced in *Wong Sun v. United States*, 371 U.S. 471, 485-86 (1963). An exclusionary rule for evidence in criminal proceedings, the doctrine focuses on the link between evidence procured and the initial illegality of a police tactic. *See* United States v. Ceccolini, 435 U.S. 268 (1978).
99. *Nickel*, 97 F.3d at 409.
100. *Id.* at 411.
101. *Id.*
102. 107 F.3d 1465 (10th Cir. 1997).
103. *Houchin*, 107 F.3d at 1467.
104. *Id.*
105. *Id.*
106. *Id.*

Houchin was shot once in the struggle.[107] He proceeded to the basement apartment to change his shirt and pick up a rifle, with which he shot his father-in-law at close range.[108] When his wife and mother-in-law returned, Houchin shot his mother-in-law while struggling with his wife.[109] The defendant was found the next day, asleep in his truck near his father's home.[110] A subsequent blood alcohol test showed his blood alcohol level to be .232.[111]

The public defender's office represented Houchin until his father retained private counsel for him.[112] During Houchin's trial, his counsel failed to present a theory of his case, failed to submit instructions concerning mens rea,[113] and did not visit or prepare Houchin for trial.[114] In fact, one of Houchin's attorneys was intoxicated while conducting cross-examination.[115] Following his convictions, Houchin filed a petition for habeas corpus relief in federal court, which denied the motion.[116]

b. *Decision*

The Tenth Circuit affirmed the district court's decision, deriving its legal analysis from both *Cronic* and *Strickland*. Under *Cronic*, the court determined that the "adversarial testing envisioned by the Sixth Amendment occurred."[117] Compared to other cases that clearly established the breach of an attorney's duty of loyalty,[118] Houchin's attorneys had not clearly abandoned him, or conveyed to the jury that they believed he was guilty.[119] The court then focused on the first element of the *Strickland* test, which is virtually identical to that in *Cronic*, and found that the attorneys had provided assistance falling below objective standards of adequacy.[120]

Turning to the prejudice prong of the *Strickland* test, the court concluded that "overwhelming evidence" of Houchin's intent to commit

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* The legal limit for blood alcohol content in Colorado is 0.10. COLO. REV. STAT. § 42-4-1301(2)(a) (1997).

112. *Id.* His father retained a Massachusetts attorney who secured local counsel. *Id.*

113. *Id.* at 1470. Houchin asserted that if a proper *mens rea* instruction had been given, he would have received a charge of murder in the second-degree, which carries a shorter prison term and more favorable parole considerations. *Id.*

114. *Id.*

115. *Id.* at 1471.

117. *Id.* at 1467 (describing Houchin's state proceedings).

117. *Id.*

118. The court cited instances in which defense counsel had "effectively joined the state to obtain a death penalty" as examples of a counsel's complete abandonment. *Id.* (citing Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1988)).

119. *Id.* at 1471.

120. *Id.*

murder negated any possibility of a different outcome, regardless of the unprofessional conduct of the attorneys.[121] Thus, based on the absence of prejudice to Houchin, the court found no reversible error.[122]

3. *Williamson v. Ward*[123]

a. *Facts*

In 1982, Williamson allegedly murdered Debra Sue Carter after sexually assaulting her.[124] Carter had worked at the Coachlight Club, which Williamson frequently visited.[125] According to a witness, Carter had been working there on the night of the murder.[126] Before his trial for the Carter murder, Williamson had spent time in jail for an unrelated charge.[127] An inmate of Williamson testified at the murder trial that while in jail, she had heard Williamson confess to the Carter murder in his sleep.[128]

Before trial for the unrelated charge, state psychiatrists had diagnosed Williamson as mentally incompetent to stand trial, and placed him in a state psychiatric hospital.[129] Before the murder trial, the trial court appointed Ward, a sole practitioner, as counsel.[130] Ward had moved for, and was appointed, assistant counsel; however, he withdrew three weeks later due to a conflict.[131]

At the murder trial, Ward did not attempt an insanity defense, nor did he investigate the possibility that Williamson was incompetent to stand trial for the murders.[132] Ward also failed to investigate tapes containing a confession by a third party, to which the prosecution had objected.[133] As a consequence, the jury never heard evidence of a third party confession.[134]

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121. *Id.* at 1472.

122. *Id.* For a discussion of the harmless error test, the corollary to reversible error, see *supra* discussion Part I.

123. 110 F.3d 1508 (10th Cir. 1997).

124. *Williamson*, 110 F.3d at 1510.

125. *Id.* at 1511.

126. *Id.*

127. *Id.*

128. *Id.* at 1512 n.3. During the same period of incarceration, Holland, the woman who had allegedly heard Williamson's confession, claimed to hear another inmate confess to a different murder. *Id.* As in *Williamson*, she was granted leniency in her punishment. *Id.* Counsel never attempted to investigate the striking similarities between the two alleged dream confessions, or the motivations behind them. *Id.*

129. *Id.*

130. *Id.* at 1512.

131. *Id.*

132. *Id.* at 1518-21.

133. *Id.* at 1522.

134. *Id.*

Williamson was convicted of first-degree murder and sentenced to death by an Oklahoma state court.[135] After the state rejected his attempts to appeal,[136] Williamson brought a habeas corpus petition to the federal trial court that granted relief based on constitutional violations in the state proceedings.[137] The state appealed.[138]

b. *Decision*

The Tenth Circuit affirmed the district court's decision.[139] This case stands as the only right to counsel case during the survey period in which the court found that, under the *Strickland* analysis, the defendant was prejudiced by ineffective assistance of counsel.[140] Like its other decisions, the court applied *Strickland*, but its initial discussion centered on the first prong—whether counsel gave reasonable representation.[141] The court examined Ward's representation in light of *Kimmelman v. Morrison*,[142] which established a structure with which to evaluate a counsel's strategy.[143] While the court described a "wide range of professional assistance" as effective, it determined that because Ward had not pursued various defense strategies, his assistance fell below the level of acceptable representation.[144]

Relying on *Burger v. Kemp*,[145] the court established that because of the potential for capital punishment, stricter scrutiny was required of counsel's strategy.[146] Quoting its 1986 decision, the court stated that "in a capital case, counsel's duty to investigate all reasonable lines of defense is strictly observed."[147] The extensive discussion of Williamson's mental state revealed the court's concern with possible due process violations, if in fact Williamson was incompetent to stand trial.[148] Thus, the court's concern over potential constitutional infirmities, coupled with the penalty that Williamson faced, led to the decision that Ward's failure to further investigate Williamson's mental history rendered his counsel ineffective.[149]

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135. *Id.* at 1510.
136. *Id.*
137. *Id.*
137. *Id.*
138. *Id.* at 1523.
140. *Id.* at 1508.
141. *Id.* at 1514.
142. 477 U.S. 365, 374 (1986).
143. *Williamson*, 110 F.3d at 1514.
144. *Id.*
145. 483 U.S. 776, 785 (1987) ("Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case.").
146. *Williamson*, 110 F.3d at 1514.
147. Coleman v. Brown, 802 F.2d 1227, 1233 (10th Cir. 1986).
148. *Williamson*, 110 F.3d at 1517-18.
149. *Id.* at 1517. The bulk of the opinion discusses the "voluminous records" of Williamson's treatment history. *Id.* at 1514, 1515 & n.10, 1516-20.

In addition, Ward was not prepared to introduce the third party confession supporting the ineffective assistance claim.[150] Diverging from the pattern of analysis found in other cases decided this survey period, the court spent little time discussing the prejudice prong of *Strickland*.[151] Instead, it summarily concluded that failure to introduce a third party confession was enough to undermine the court's confidence in the conviction.[152]

Notably, the court did not criticize Ward alone for failure to provide Williamson with effective counsel.[153] It also blamed the state's appointment system under which "Ward was forced to operate."[154] Ward faced many challenges during the pretrial stages of Williamson's case,[155] in addition to the fact that he was a sole practitioner. For example, at one proceeding, Williamson became enraged and overturned counsel's table while threatening his co-defendant.[156] After his motion to withdraw as counsel was denied, Ward, who was blind, instructed his son to sit "behind him during the trial with instructions to bring [Williamson] to the ground if he made any sudden move toward [him]."[157] Furthermore, the court remarked that Ward received only the statutory maximum, $3200, for his work, which exceeded 155 hours.[158] Assistant counsel had not been appointed after his first assistant withdrew,[159] and Ward received no investigative assistance.[160]

4. *United States v. Gallegos*[161]

a. *Facts*

Gallegos was convicted of drug and money laundering offenses.[162] She appealed on several grounds,[163] including a claim of ineffective assistance of counsel, based on a conflict of interest on the part of her at-

150. *Id.* at 1512.

151. *See id.* at 1520-21. The court discussed prejudice in only one paragraph. *Id.*

152. *Id.* at 1522.

153. *Id.* ("[We] are not insensitive to the hardships imposed on appointed counsel who work with little or no compensation under difficult conditions.") (quoting Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990)).

154. *Id.*

155. *Id.*

156. *Id.* at 1512.

157. *Id.*

158. *Id.*

159. Congress has provided a defendant in a capital trial the appointment of two counsel. *See id.* at 1522 n.16; *see also* United States v. McCullah, 76 F.3d 1087, 1098 (10th Cir. 1996) ("[At least one of appointed counsel] shall be learned in the law applicable to capital cases.") (quoting 18 U.S.C. § 3005 (1995)).

160. Federal funds for expert and investigative services in federal capital cases are provided for by 21 U.S.C. § 848(q)(4) (1995). *See Williamson*, 110 F.3d at 1522 n.17.

161. 108 F.3d 1272 (10th Cir. 1997).

162. *Gallegos*, 108 F.3d at 1277.

163. *Id.* at 1278. Five issues were raised on appeal. *Id.*

torney.[164] Gallegos was indicted with nine co-defendants, all allegedly involved in a "family-run organization [that] specialized in the sale and distribution of large amounts of marijuana and cocaine."[165] Her attorney, Blackburn, learned during trial that a potential witness in the case was a former client.[166] Blackburn notified the court that he was concerned about his ability to question the witness, Gutierrez, because of the possibility of violating the attorney-client privilege.[167] While Gutierrez could offer exculpatory information about Gallegos, he and Blackburn felt that he could only do so by incriminating himself.[168] Blackburn requested that the court sever Gallegos' trial from that of her co-defendants.[169] The prosecuting attorney also requested that the court appoint independent counsel for Gutierrez in order to resolve the conflict issues.[170]

The court denied the severance request, and did not appoint another attorney for Gutierrez.[171] The trial court stated that it did not matter whether "'Mr. Blackburn, F. Lee Bailey or Mr. Shapiro represent[ed] him.'"[172] It believed that Gutierrez would have asserted the Fifth Amendment "with or without the advice of Mr. Blackburn."[173] Gutierrez never testified on Gallegos' behalf.

b. *Decision*

The Tenth Circuit reversed the district court.[174] After discussing the normal procedural process for ineffective assistance of counsel claims,[175] the Tenth Circuit applied *Powell*[176] and *Strickland*[177] as the cornerstone cases of a defendant's right to effective assistance of counsel.[178] The court noted that effective assistance includes the right to "'representation that is free from conflicts of interest.'"[179] The court then compared Gallegos' situation with that of the defendants in *United States v. Cook*,[180] a strik-

164. *Id.*
165. *Id.* at 1275.
166. *Id.* at 1276.
167. *Id.* at 1276-77.
168. *Id.* at 1277.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
173. *Id.* at 1283.
175. *Id.* at 1279. The court noted that most ineffective assistance of counsel claims should be brought in collateral proceedings in order to develop a "record on the tactical reasons for trial counsel's decisions, the extent of trial counsel's alleged deficiencies, and the asserted prejudicial impact on the outcome of the trial." *Id.* at 1280.
176. Powell v. Alabama, 287 U.S. 45 (1932).
177. Strickland v. Washington, 466 U.S. 668 (1984).
178. *Gallegos*, 108 F.3d at 1280.
179. *Id.* (quoting United States v. Cook, 45 F.3d 388, 393 (10th Cir. 1995)).
180. 45 F.3d 388 (10th Cir. 1995).

ingly similar Tenth Circuit case in which defendants sought to retain separate counsel.[181]

Finally, the court considered whether Gallegos had waived her right to conflict-free counsel.[182] The court examined *Holloway v. Arkansas*,[183] and determined that it was the controlling precedent.[184] Following the reasoning of *Holloway*, the court reversed Gallegos' conviction based on the trial court's actions.[185] The court listed three measures that could cure conflict of interest situations, which the trial court had failed to administer: 1) appointing separate counsel; 2) taking steps to ascertain whether the risk of conflict was too remote to require separate counsel; and 3) determining whether both Gallegos and Gutierrez were willing to waive conflict-free counsel.[186]

B. *Other Circuits*

Other circuits apply the *Strickland* test, with the same variation in analytical approaches.[187] Depending on the facts and penalties, circuits may focus on the prejudice prong.[188] In other circuits, in the absence of a presumption of prejudice,[189] representation is presumed to have been reasonable.[190] When competency is an issue, however, other circuits examine the strategy employed by counsel.[191] They appear to pay particular attention to those cases in which a defendant is subject to a harsh penalty.[192] Additionally, as the Tenth Circuit in *Williamson v. Ward*,[193] other circuits consider the often difficult situation in which appointed counsel is placed.[194]

While the Tenth Circuit addressed only one case in which there was a presumption of prejudice,[195] other circuits applied *per se* ineffective

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181. *Gallegos*, 108 F.3d at 1281.

182. *Id.* at 1281-82.

183. 435 U.S. 475 (1978).

180. *Gallegos*, 108 F.3d at 1282.

185. *Id.*

186. *Id.*

187. *See, e.g.*, United States v. Morrison, 98 F.3d 619 (D.C. Cir. 1996); United States v. Woolley, 123 F.3d 627, 635 (7th Cir. 1997).

188. *See, e.g.*, Clabourne v. Lewis, 64 F.3d 1373, 1379 (9th Cir. 1995) (holding that the ineffective counsel claim failed "for lack of prejudice" without first analyzing whether the defendant's attorney's performance was deficient).

189. *See supra* discussion Part I, note 64, and accompanying text.

190. *See* United States v. Cooke, 110 F.3d 1288, 1299-1300 (7th Cir. 1997).

191. *Accord* Jones v. Page, 76 F.3d 831, 842-43 (7th Cir. 1996); Antwine v. Delo, 54 F.3d 1357, 1367-68 (8th Cir. 1995); *see also* Amaya-Ruiz v. Stewart, 121 F.3d 486, 493 (9th Cir. 1997) (discussing defense counsel's failure to secure all medical records, including prison medical records, to determine competency).

192. *See Amaya-Ruiz*, 121 F.3d at 494-96.

193. 110 F.3d 1508 (10th Cir. 1997).

194. Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990).

195. United States v. Gallegos, 108 F.3d 1272 (10th Cir. 1997).

assistance of counsel analysis,[196] or focused on situations in which conflicts of interest were an issue.[197] One circuit delineated three ways of applying *Strickland*,[198] yet still found that the defendant had failed to satisfy *Strickland's* prejudice prong.[199]

C. *Analysis*

Federal courts adhere strictly to *Strickland* when deciding right to effective counsel cases. The order of analysis of the test's two prongs, however, seems to depend on the facts of each case, and whether other constitutional infirmities are an issue. In all right to effective counsel cases, the Tenth Circuit placed different weight on the presumption that counsel's performance was reasonable.[200] Likewise, the penalties facing the defendant played a crucial role in the outcome.[201] In reality, the prejudice prong makes it clear that hindsight and the severity of the defendant's penalty determine whether the reviewing court will find ineffective assistance.[202] When *Strickland* was applied, the court appeared to use a balancing test rather than a two-prong test. This approach may provide more protection to defendants than the outcome-prejudice approach that has emerged.[203] Defendants may likewise enjoy more protection of their Sixth Amendment right to counsel in those situations in which a court finds actual or constructive denial of counsel, or where a conflict of interest can be shown.

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196. *See* Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997) (explaining the difference between ineffective assistance of counsel claims and constructive denial of counsel claims); *see also* Griffin v. United States, 109 F.3d 1217, 1219-20 (7th Cir. 1997) (finding a denial of counsel where a defendant's lawyer failed to prosecute a timely filed appeal).

197. Freund v. Butterworth, 117 F.3d 1543 (11th Cir. 1997); *see supra* note 64.

198. United States v. O'Neil, 118 F.3d 65 (2d Cir. 1997). The Second Circuit's three categories include: 1) *per se* violations of the Sixth Amendment, such as where an attorney is not licensed to practice law, or where she is implicated in the defendant's crime; 2) where a conflict of interest exists that tends to jeopardize the representation; and 3) situations in which ineffective assistance of counsel is unrelated to a conflict of interest, and the two-pronged *Strickland* test applies. *O'Neil*, 118 F.3d at 71.

199. *Id.* at 72-73.

200. *See, e.g.*, Williamson v. Ward, 110 F.3d at 1514. In *Nickel*, the court "assume[d] without deciding" that the defendant had received ineffective assistance of counsel. Nickel v. Hannigan, 97 F.3d 403, 408 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 1112 (1997).

201. *See supra* Part II.A.3. While none of the cases mention *Powell v. Alabama*, its progeny seem to focus on the potential penalty and inequities, such as indigency or incompetency, that affect the defendant. *See, e.g.*, Powell v. Alabama, 287 U.S. 45 (1932).

202. *See* Foster, *supra* note 38, at 1370, 1393-95. *But cf.* Houchin v. Zavaras, 107 F.3d 1465, 1471 (10th Cir. 1997) ("We refrain from using hindsight to second-guess counsel's tactical decisions.") (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

203. *See* Berger, *supra* note 77, at 99 ("[T]he court has linked a disfavored right with an unloved remedy [habeas corpus] and not enhanced the status of either.").

III. THE RIGHT TO SELF-REPRESENTATION: OPPOSITE SIDES OF THE SIXTH AMENDMENT COIN[204]

A. *Background*

The right to self-representation is deeply rooted in the philosophy of self-determination.[205] The Supreme Court announced the right to waive the assistance of counsel in *Johnson v. Zerbst*.[206] In order for a defendant to forego her right to counsel, this waiver must be "knowing and intelligent."[207] The Supreme Court has placed a heavy burden on trial courts to prove that the "knowing and intelligent" standard is met.[208] Just how heavy this burden is was clarified in *Von Moltke v. Gillies*.[209] Von Moltke, a former German countess was charged with conspiracy to violate the Espionage Act.[210] Although the Court found that she was an "intelligent, mentally acute woman,"[211] it concluded that she did not comprehend her legal rights, and therefore could not make a knowing and intelligent waiver.[212] Notably, the Court analogized her situation to that of the Scottsboro boys in *Powell v. Alabama*.[213] Like those boys, Mrs. Von Moltke was a victim of public hostility, because at the time of her conviction, the United States was at war with Germany.[214]

In creating a strong presumption against waiver in cases like *Von Moltke*, the Court essentially requires a judge to "investigate as long and as thoroughly as the circumstances of the case before him demand."[215] When a defendant elects to proceed *pro se*, trial judges must ensure that the defendant is aware of the dangers inherent in her choice.[216] Factors such as the defendant's age and history must be considered, in addition to the defendant's knowledge of, and ability to follow, technical trial

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204. United States v. Purnett, 910 F.2d 51, 54 (2d Cir. 1990) ("The right to self-representation and the assistance of counsel are separate rights depicted on the opposite sides of the same Sixth Amendment coin.").

205. Randall B. Bateman, *Federal and State Perspectives on a Criminal Defendant's Right to Self-Representation*, 20 J. CONTEMP. L. 77, 81 (1994).

206. 304 U.S. 458 (1938).

207. Faretta v. California, 422 U.S. 806, 835 (1975). In *Zerbst*, the original test required competent and intelligent waiver. *See Zerbst*, 304 U.S. at 469. For a discussion of the difference, if any, between the two standards, see Bateman, *supra* note 205, at 90 n.61.

208. *See* Von Moltke v. Gillies, 332 U.S. 708 (1948).

209. *Von Moltke*, 332 U.S. at 709-21.

210. *Id.* at 709.

211. *Id.* at 720.

212. *Id.*

213. *Id.*

214. *Id.* at 720-21.

215. *Id.* at 723.

216. For a comprehensive examination of waiver standards, see Jennifer Elizabeth Parker, *Constitutional Law—*United States v. Goldberg*: The Third Circuit's Nontraditional Approach to Waiver of the Sixth Amendment Right to Counsel*, 41 VILL. L. REV. 1173, 1189 (1996).

rules, before a trial judge can assume a "knowing and intelligent waiver" has occurred.[217]

Forfeiture of counsel may be considered analogous to waiver of counsel. The Supreme Court, however, has failed to recognize any analytical distinction between the two. It has, in similar circumstances, held that a defendant can forfeit constitutional rights based on conduct.[218] Some circuit courts recognize the difference between voluntary and involuntary relinquishment of counsel[219] and apply different analytical standards and categorizations to waiver and forfeiture concepts.[220] The Tenth Circuit, however, has not specifically addressed the difference between waiver and forfeiture. It has found that a defendant's "stubborn failure" to hire counsel after several urgings by the court to do so constitute a "knowing and intelligent" waiver.[221] The Tenth Circuit employs a high standard of "knowing and intelligent" waiver, thereby imposing a heavy burden on the trial court to insure that a defendant understands the ramifications of waiver of counsel.

B. United States v. Taylor[222]

1. Facts

A federal jury convicted defendant Taylor of possession with intent to distribute cocaine base, and possession of a firearm by a convicted felon.[223] The court appointed Wells to represent Taylor, but Wells later moved to withdraw on the grounds that the defendant intended to represent himself.[224] This motion was denied, and Wells was instructed "to serve in a stand-by advisory capacity."[225] Taylor, however, did not utilize Wells's guidance, although the trial court strongly encouraged him to do so.[226] During his trial, Taylor made no opening statement, but did cross-

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217. *Id.* at 1190-91.

218. *See* Illinois v. Allen, 397 U.S. 337, 345-56 (1970) (holding that a defendant's misbehavior in the courtroom caused him to forfeit his right to be present at trial).

219. *See* Parker, *supra* note 216, at 1196-1211.

220. The Third Circuit broke waiver down into three categories: "waiver," "forfeiture," and "waiver by conduct." United States v. Goldberg, 67 F.3d 1092, 1099-2001 (3rd Cir. 1995). Each category received different analytical treatment. Parker, *supra* note 216, at 1207-08. In another case, the Eleventh Circuit held that the defendant *forfeited* his right to counsel due to his abusive and threatening behavior toward his attorney. United States v. McLeod, 53 F.3d 322 (11th Cir. 1995). The lower court had stated that the defendant had *waived* his right to counsel because of the poor treatment of his attorney. *McLeod*, 53 F.3d at 323.

221. United States v. Weninger, 624 F.2d 163, 167 (10th Cir. 1980).

222. 113 F.3d 1136 (10th Cir. 1997). Additionally, the Tenth Circuit decided other waiver of counsel cases that were not selected for publication.

223. *Taylor*, 113 F.3d at 1138.

224. *Id.*

224. *Id.*

226. *Id.* The court instructed Taylor:

> I do want to encourage you, however, to utilize Mr. Wells and get his guidance on matters that might not be familiar to you. It's very technical, it's not a simple matter, federal

examine some of the government's witnesses.[227] He allowed Wells to cross-examine one witness, and he permitted him to make objections to certain testimony, in addition to relying on some of Wells's advice.[228] Taylor, however, delivered his own closing statement.[229] After the jury found him guilty of the cocaine and firearm possession charges, the judge asked Taylor at his sentencing whether he wished to continue representing himself.[230] Taylor replied that it no longer mattered.[231] The judge commended him for his intelligence, and sentenced him to a total of seventy years.[232]

2. Decision

The Tenth Circuit reversed the decision of the district court, noting the "strong presumption against waiver."[233] Following the rationale of *Von Moltke*, the court focused on whether the judge made a thorough, comprehensive examination of Taylor's waiver.[234] The court found that the judge had warned Taylor of the complexities inherent in trial and criminal procedure.[235] Likewise, the judge had instructed him to use his appointed counsel.

Despite these findings, the Tenth Circuit ruled that the court had not ensured that Taylor's waiver was "knowing and intelligent."[236] In reaching this conclusion, the court noted that Taylor was never advised of the dangers of self-representation.[237] Additionally, the trial judge never ascertained Taylor's reasons for wanting to proceed *pro se*,[238] and failed to determine whether he actually understood the consequences of his decision to do so.[239] The court compared Taylor's situation to that of a similar Tenth Circuit case, *United States v. Willie*.[240] In *Willie*, the defendant asserted that he would not accept help from his court appointed attorney,

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> criminal procedure, and I want to make sure that this trial is fair to you . . . . So [Wells is] there as a resource to you, and I do encourage you to use him as much as you can in order to facilitate the trial.

Id.

227. *Id.* at 1139.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* For each drug charge, he received 360 months in prison, and for the possession of a firearm charge, he received 120 months. *Id.* The sentences were to run concurrently. *Id.*

233. *Id.* at 1140 (quoting United States v. Padilla, 819 F.2d 952, 956 (10th Cir. 1987)). The facts in *Padilla* are strikingly similar to those in *Taylor*. *See Padilla*, 819 F.2d at 954-56.

234. *Taylor*, 113 F.3d at 1140. In *Von Moltke*, the Supreme Court required that waiver be made "after proper advice and with full understanding of the consequences." Von Moltke v. Gillies, 332 U.S. 708, 719 (1948).

235. *Taylor*, 113 F.3d at 1141.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. 941 F.2d 1384 (10th Cir. 1991).

and "unequivocally assert[ed] his right to self-representation."[241] The Tenth Circuit found additional support for concluding that Taylor had not waived his right to counsel in that his representation was hybrid.[242]

As a final step, the court subjected the case to harmless error review.[243] The court concluded that because a fair trial is so dependent on the right to counsel, violation of that right was not harmless error.[244]

C. *Other Circuits*

In *United States v. Schmidt*,[245] the Second Circuit, like the Tenth Circuit, examined the trial court's efforts to ensure that a defendant's waiver was knowing and intelligent.[246] The Seventh Circuit, in *Hall v. Washington*,[247] questioned whether a "hint in [the] record"[248] could constitute waiver. Defendant Hall faced the death penalty.[249] In an earlier proceeding, he had been uncooperative with counsel, but the court did not find that this hint of misconduct constituted his waiver of effective assistance of counsel.[250]

Two Ninth Circuit opinions focused on procedural issues ancillary to waiver of counsel. In *United States v. Stocks*,[251] the court discussed the procedural stages during which the right to counsel attached to determine if waiver was an issue.[252] In 1992, Stocks pled guilty to possession of an illegal firearm,[253] and drug charges. He was placed on probation.[254] The court considered whether waiver could apply to a modification of his

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241. *Willie*, 941 F.3d at 1390.

242. *Taylor*, 113 F.3d at 1143. Although a thorough discussion of hybrid representation is beyond the scope of this survey, the concept presents an interesting challenge in waiver of counsel situations. Hybrid representation occurs when both a defendant and her attorney conduct the trial. In this situation, the waiver of assistance of counsel is ineffective. *See* Metcalf v. Mississippi, 629 So. 2d 558, 562-65 (Miss. 1993); Fannon, *supra* note 61, at 1139-40. A related type of representation occurs when the court appoints advisory standby counsel. *See* McKaskle v. Wiggins, 465 U.S. 168 (1984); J. David MacCartney, Jr. & Lisa A. MacVittie, *Twenty-First Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1990-1991*, 80 GEO. L.J. 1341, 1353-54 (1992).

243. Fannon, *supra* note 61, at 1135.

244. *Taylor*, 113 F.3d at 1144; *see* United States v. Allen, 895 F.2d 1577, 1579-80 (10th Cir. 1990) (interpreting Penson v. Ohio, 488 U.S. 75 (1988).

244. 105 F.3d 82 (2d Cir.), *cert. denied*, 118 S. Ct. 130 (1997).

246. *Schmidt*, 105 F.3d at 87.

246. 106 F.3d 742 (7th Cir.), *cert. denied*, 118 S. Ct. 264 (1997).

248. *Hall*, 106 F.3d at 751.

249. *Id.* at 744.

250. *Id.* at 751.

251. 104 F.3d 308 (9th Cir.), *cert. denied*, 118 S. Ct. 259 (1997).

252. *Stocks*, 104 F.3d at 312-13 (holding that waiver could not apply because the right to counsel did not extend to probation hearings).

253. *Id.* at 309. Stocks had a sawed-off shotgun in his possession. *Id.*

254. *Id.*

probation,[255] or whether a right to counsel attached based on the stage and nature of the proceeding.[256]

D. *Analysis*

Courts require a full investigation into waiver of counsel. Not only must a judge inquire about the voluntariness of such waiver, she must uncover the reasons for the defendant to proceed *pro se*. For complete assurance, a judge should clearly explain the potential perils of self-representation. A *pro se* defendant's partial reliance on appointed counsel will not defeat a failure to waive counsel claim. The waiver must be accompanied by strong evidence of a defendant's knowing and unequivocal desire to proceed *pro se*.

The Tenth Circuit, as well as other federal circuit courts, will need to focus on the distinctions that can be drawn between types of waiver. Likewise, standards for forfeiture should be articulated. With the recent public focus on the Theodore Kaczynski proceedings and his attempts to waive his right to counsel,[257] courts will likely continue to grapple with the fallout questions which link competency with the ability to waive a constitutional right.

CONCLUSION

In right to counsel cases, the Tenth Circuit has acted consistent with Supreme Court precedent. Like other circuits, it applies the *Strickland* standard from the inevitable hindsight approach. Unlike approaches utilized in other circuits, the Tenth Circuit seems to sympathize with defendants with outstanding circumstances. This does not, however, represent a departure from Supreme Court guidance. The Supreme Court's own approach to the factually intense circumstances of cases like *Powell v. Alabama* and *Von Moltke v. Gillies* justifies a lower court's ad hoc analysis of right to counsel issues.

The Tenth Circuit has yet to offer an innovative analytical approach in waiver of counsel scenarios. Like the Supreme Court, it has not articulated any differences between waiver and forfeiture. The Tenth Circuit did, however, require arguably higher standards for a "knowing and intelligent" waiver of counsel than those of other circuits.

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255. *Id.* at 313.

256. *Id.*

257. Court Order, United States v. Kaczynski, No. CR-S-96-259GEB, 1998 WL 15068, at *1 (E.D. Cal. Jan. 9, 1998).