
CHAPTER 7

Ensuring Effective Counsel

“Jeffery Leonard, a 20-year old African American, was tried and sentenced to death in Kentucky under the name James Slaughter. His real name was contained in the prosecution’s file and in four different places in the trial court record. But the lawyer did not investigate and, as a result, never learned his client’s name or that he was brain damaged and suffered through a horrific childhood. When challenged about his representation, the lawyer testified that he had tried six capital cases and headed an organized crime unit for a New York prosecutor’s office. Neither statement was true. The lawyer was later indicted for perjury. The charges were dismissed in exchange for him resigning from the bar. The Court of Appeals, still referring to Leonard by the inaccurate name, concluded that the lawyer’s performance was deficient because his failure to investigate his client’s background ‘resulted from inattention, not reasoned strategic judgment.’ Nevertheless, it upheld the death sentence based upon its conclusion that the outcome would not have been different even if the lawyer had known his client’s name and presented evidence of his brain damage, childhood abuse and other mitigating factors.”¹

¹ Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right*, 11 J.L. SOC’Y 1, 22-23 (2010) (internal citations omitted).

The lack of adequate counsel to represent capital defendants is likely the gravest of the problems that render the death penalty, as currently administered, arbitrary, unfair and fraught with serious error – including the real possibility of executing an innocent person or one who is categorically ineligible for capital punishment. A defendant tried without adequate counsel is far more likely to be charged with and convicted of a capital crime and to receive a death sentence. Indeed, as capital litigator and Yale law professor Stephen Bright has observed, the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused.²

...the quality of capital defense counsel seems to be the most important factor in predicting who is sentenced to die – far more important than the nature of the crime or the character of the accused.

The lack of adequate counsel is a one-two punch: Having substandard counsel is more likely to result in a client receiving a death sentence and also result in an inadequate trial record from failures to investigate and to preserve error. An attorney's errors, unless they rise to the level of ineffectiveness set forth by *Strickland v. Washington* (discussed below), not only adversely affect the client at trial and sentencing, but also vastly reduce the scope of appellate review, decreasing the possibility that errors will be corrected later.³ Furthermore, because there is no constitutional right to counsel after the first state appeal, even in capital cases, some states do not appoint counsel for post-conviction or habeas corpus review, further insulating trial errors from correction. And in those states that do appoint counsel during collateral proceedings, counsel is often under-resourced and too poorly compensated to effectively handle the extraordinary responsibility of post-conviction representation.

Key actors on the national and state levels have recently recognized the acute problems with counsel in capital cases. The Innocence Protection Act, which encourages training and resources for capital defense lawyers and provides for increased DNA testing, became law in October 2004 as part of the Justice for All Act. President George W. Bush, in his 2005 State of the Union address, declared that capital cases must be handled more carefully and that more resources should be directed to correcting the problem of inadequate defense lawyers.

² See Stephen B. Bright, *Turning Celebrated Principles into Reality*, THE CHAMPION 6 (2003); see also SOUTHERN CENTER FOR HUMAN RIGHTS, "IF YOU CANNOT AFFORD A LAWYER . . .": A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM (2003), at <http://www.deathpenaltyinfo.org/jan.%202003.%20report.pdf>.

³ *Strickland v. Washington*, 466 U.S. 668 (1984). In 2013, the Supreme Court held that if a defendant did not have a meaningful opportunity to raise on direct appeal a claim of ineffective assistance of trial counsel, it constitutes good cause to excuse the petitioner's procedural default in federal habeas proceedings. See generally *Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).

In a dramatic statement in his May 2005 State of the Judiciary Address, Louisiana Supreme Court Chief Justice Pascal F. Calogero, Jr. spoke about his court’s recent finding that the state’s indigent defense system was “terribly flawed.”⁴ He urged the legislature to remedy the situation, saying that until it makes adequate funds available, “upon motion of the defendants [in capital cases], the trial judge may halt the prosecution ... until adequate funds become available to provide for these indigent defendants’ constitutionally protected right to counsel.”⁵ Justice Calogero concluded that the “opinion does not unfairly put the courts in the position of siding with the defense [but] ... simply recognized the fact that the courts, as guardians of a fair and equitable process, must not let the state take a person’s liberty without due process.”⁶ Louisiana implemented indigent defense reform in 2007 through the Louisiana Public Defender Act, which centralized the supervision of indigent defense into a single Louisiana Public Defender Board.⁷ Pursuant to its mandate under the new law, the Board promulgated “mandatory statewide public defender standards and guidelines” for the representation of individuals facing the death penalty in the state.⁸

On April 8, 2008, the U.S. Senate Judiciary Committee’s Subcommittee on the Constitution held a hearing on “The Adequacy of Representation in Capital Cases.”⁹ Michael Greco, former President of the American Bar Association (ABA), testified that death penalty jurisdictions have “generally ignored. . . key elements” required to achieve justice in capital cases, such as lawyers with specialized training and experience in death penalty cases, fair compensation for those lawyers and funding for defense lawyers to engage necessary investigators and experts.¹⁰ Judge Carolyn Engel Termin of the Court of Common Pleas of the First Judicial District of Pennsylvania echoed this sentiment, stating that as a sitting judge, “nothing is worse than presiding over a penalty phase of a death case in which you are watching a lawyer do a bad job.”¹¹ Solicitor General Donald Verrilli, who was then Chair of the Supreme Court practice group at Jenner & Block, emphasized the unique character of the penalty phase in a capital case and the need for “a heightened degree of reliability.”¹²

⁴ Pascal F. Calogero, Jr., Chief Justice, Supreme Court of Louisiana, 2005 State of the Judiciary Address to the Joint Session of the House and Senate Louisiana Legislature (May 3, 2005).

⁵ *Id.*

⁶ *Id.*

⁷ LA. REV. STAT. ANN. § 15:148 (2007).

⁸ *See generally* LA. ADMIN. CODE tit. 22:XV, § 9 (2010) (Capital Defense Guidelines).

⁹ *See The Adequacy of Representation in Capital Cases: Hearing Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 110th Cong. (2008), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_senate_hearings&docid=f:45332.pdf.

¹⁰ *Id.* at 4.

¹¹ *Id.* at 8.

¹² *Id.* at 11, 14.

Founder and Executive Director of the Equal Justice Initiative, Bryan Stevenson, lamented the “incredibly wealth-sensitive” nature of our justice system and pointed to Alabama, Oklahoma, Texas, Mississippi, Florida, Virginia and Georgia as jurisdictions with “hundreds of death row prisoners whose lawyers had their compensation capped at rates that made effective assistance impossible.”¹³ Stevenson concluded by noting that “none of our work to make the death penalty fair on race issues, on access issues, on resource issues can be achieved until we deal with bad lawyering.”¹⁴

Death penalty litigation is a highly specialized, legally complex field, a “minefield for the unwary,” in the words of the ABA Criminal Justice Section.¹⁵ Adequate preparation requires not only a grasp of rapidly changing substantive and procedural doctrine, but also labor-intensive and time-consuming factual investigation. Capital defense attorneys, from the trial stage through post-conviction review and clemency, should be well-trained, experienced, and adequately compensated, and should have sufficient time and resources to perform competently when representing clients who are facing the possibility of execution. Instead, study after study documents a national crisis in the quality of counsel in death penalty cases, and calls for reform have been met with little success.¹⁶

Many states assign only a single lawyer to represent a capital defendant, require minimal or no experience or expertise, do not provide or require training, do not screen out lawyers with serious disciplinary records, fail to monitor performance of counsel, inadequately compensate counsel and refuse to provide funds for crucial investigators, experts and other essential resources. Unsurprisingly, few attorneys are willing to take on capital cases, and those who do are often “thoroughly incapable of mounting an effective defense during either the guilt or punishment phases of the capital case.”¹⁷

¹³ *Id.* at 6. Importantly, in 2004, Virginia created four offices staffed by lawyers specially trained in capital representation to handle death penalty trials in the Commonwealth. VA. CODE § 19.2-163.7 (2013). Prior to that year, Virginia had sought the death penalty against 166 defendants and 140 of those were sentenced to death – a death sentencing rate of almost 85 percent. See AMERICAN BAR ASSOCIATION, VIRGINIA DEATH PENALTY ASSESSMENT REPORT 142 (Aug. 2013), at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf. Since the creation of the capital defender offices, the death sentencing rate has been nearly cut in half and far fewer capital cases have been brought to trial in the first instance. *Id.*

¹⁴ *Id.*

¹⁵ AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION REPORT, reprinted in 40 AM. U. L. REV. 1, 69 (1990) (“ABA CRIMINAL JUSTICE SECTION REPORT”).

¹⁶ See generally THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009) (“JUSTICE DENIED”), at <http://www.constitutionproject.org/pdf/139.pdf>.

¹⁷ Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 398 (1995).

Courts have found that the vast majority of this attorney incompetence does not fall below the standard for ineffective counsel under *Strickland v. Washington*, which requires the defendant to show both that counsel’s performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence.¹⁸ Therefore, the client continues to pay for the attorney’s errors, sometimes with his or her life. The state, the families of victims,

Courts have found that the vast majority of this attorney incompetence does not fall below the standard for ineffective counsel under *Strickland v. Washington*...

and society as a whole pay the price as well. Litigation becomes increasingly protracted, complicated and costly, putting legitimate convictions at risk, subjecting the victims’ families to continuing

uncertainty and depriving society of the knowledge that the real perpetrator is behind bars. In short, the likelihood of error due to ineffective counsel precludes the assurance that the outcome is fair or reliable.

The Committee’s recommendations seek to improve this state of affairs in three overlapping ways. First, the Committee recommends the creation of central, independent authorities to appoint, monitor, train, and screen capital attorneys, and otherwise ensure the quality of capital representation – at all stages of litigation. Second, the Committee recommends that each jurisdiction adopt standards for the appointment of counsel by these authorities and, additionally, that each jurisdiction adopt standards ensuring adequate compensation of such counsel, as well as adequate funding for expert and investigative services. Third, the Committee recommends that in capital cases, the standard of review for ineffective assistance of counsel be replaced with a more exacting standard better keyed to the particular requisites of capital representation.

Recommendation 23. Every jurisdiction that imposes capital punishment should create an independent authority to screen, appoint, train and supervise lawyers to represent defendants charged with a capital crime. It should set minimum standards for these lawyers’ performance. An existing public defender system may comply if it implements the proper standards and procedures.

The recommendation to create an independent authority to screen, appoint, train and supervise lawyers to represent indigent defendants in capital cases is similar to recommendations made by the ABA, the National Legal Aid Defender Association

¹⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

(“NLADA”) and other groups.¹⁹ The recommendation is based on the recognition that each jurisdiction needs a formal, centralized and reasoned process for ensuring that every capital defendant receives competent counsel. Without such a process, as numerous studies have shown, competent representation becomes a matter of luck rather than a constitutional guarantee.

The recommendation provides two approaches to achieving this centralization. In jurisdictions with a public defender system or other centralized appointing authority, that authority may be fully adequate, either currently or by adding steps to ensure proper monitoring, training and other assistance. Such training and assistance should be available to all capital defense attorneys in the jurisdiction. In jurisdictions with no public defender system in place, such as most counties in Alabama, the recommendation calls for establishing a central appointing authority. It provides some flexibility in determining who appoints or sits on the central appointing authority. However, the independence of the authority and the authority’s freedom from judicial or prosecutorial conflicts are crucial to ensure that its members can act without undue influence and in a manner consistent with the highest professional standards.

Many states award capital cases by contract or appointment, employing explicit or implicit incentives to these attorneys to keep their costs low and their hours on the case few. The

Many states award capital cases by contract or appointment, employing explicit or implicit incentives to these attorneys to keep their costs low and their hours on the case few.

attorneys may be chosen based on friendship with the judge, a desire not to “rock the boat,” their willingness to work cheaply, their presence in the halls of the courthouse or other

factors poorly correlated with zealous or even competent representation. Many of them have little knowledge of capital litigation or even criminal law in general. Many of them have little experience or skill in the courtroom. A disproportionate number of them have records of disciplinary action and even disbarment.²⁰ Even the best of these lawyers are placed in

¹⁹ See, e.g., JUSTICE DENIED, *supra* note 16.

²⁰ See, e.g., TEXAS CIVIL RIGHTS PROJECT, THE DEATH PENALTY IN TEXAS: DUE PROCESS AND EQUAL JUSTICE . . . OR RUSH TO EXECUTION? (THE SEVENTH ANNUAL REPORT ON THE STATE OF HUMAN RIGHTS IN TEXAS) (2000) (finding that fully a third of those recently executed were represented by lawyers who were later disbarred, suspended, or otherwise sanctioned). Similarly, a recent report on the death penalty in Kentucky revealed that of the “seventy-eight individuals sentenced to death in Kentucky since 1976, at least ten have been represented by attorneys who were later disbarred (twelve percent).” AMERICAN BAR ASSOCIATION, KENTUCKY DEATH PENALTY ASSESSMENT REPORT 207 (Dec. 2011), at http://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/final_ky_report.authcheckdam.pdf.

a situation in which most incentives are skewed toward doing a cursory job. Establishing independent appointing authorities to alleviate many of these problems is a crucial and central recommendation of this Committee.

Recommendation 24. Capital defense lawyers should be adequately and reasonably compensated, with due regard for taxpayers, and the defense should be provided with adequate and reasonable funding for experts and investigators at all stages of the proceeding, including post-conviction.

A major cause of inadequacy of capital representation is the lack of adequate compensation for those taking on demanding, time-consuming cases which, if done correctly, demand thousands of hours of preparation time. A capital case may take from 500 to 1,200 hours at the trial level alone, and an additional 700 to 1,000 hours for direct appeal of a death sentence, with hundreds of additional hours required at each successive stage.²¹ Assuming an hourly wage of \$100, the cost of attorney time in a typical capital case, excluding any additional services, would be about \$190,000. Many jurisdictions impose shockingly low maximum hourly rates or arbitrary fee caps for capital defense.²² Even the most dedicated lawyer will find it difficult to spend the time needed on a capital case under these conditions. As the NLADA notes, these rates impermissibly interfere with the Sixth Amendment right to counsel.²³ Moreover, courts often will not make funds available for reasonable expert, investigative, support or other expenses. Factual investigation, including witness interviews, document review and forensic (for example, DNA, blood or ballistics) testing, is a crucial component of adequate preparation for both the trial and sentencing phases of capital cases. In addition, the defense's frequent inability to hire experts on central issues in a case, such as forensics or mental health of the defendant, is another major obstacle to the fairness of the proceedings, particularly in light of far greater prosecutorial access to such resources. Attorneys should not be forced to choose whether to spend a severely limited pool of funds on their own fees or on experts and investigators.

Each jurisdiction should develop standards that avoid arbitrary ceilings or flat payment rates, and instead take into consideration the number of hours expended plus the effort, efficiency and skill of capital counsel.²⁴ The hourly rate should reflect the extraordinary responsibilities

²¹ Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 375 (1995).

²² See, for example, certain Ohio counties in which attorney compensation is capped at \$5,000 or \$6,000 despite the fact that attorneys can invest as many as 2,000 hours on a capital case. Kimball Perry, *Lawyer: More \$ for capital cases; Judge: No way*, CINCINNATI ENQUIRER, Jul. 1, 2012, at <http://www.cincinnati.com/article/20120701/NEWS0107/307010069/>.

²³ NATIONAL LEGAL AID DEFENDER ASSOCIATION, STANDARDS FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 47 (1987).

²⁴ *Id.*

and commitment required of counsel in death penalty cases.²⁵ Failure to provide adequate funding and resources is a failure of the system that forces even the most committed attorneys to provide inadequate assistance. Its consequences should fall not on the capital defendant, but on the government.

Attorneys should not be forced to choose whether to spend a severely limited pool of funds on their own fees or on experts and investigators.

Recommendation 25. Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case and possess adequate time and resources to prepare. Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the case was not affected by the attorney’s incompetence. There should be a strong presumption in favor of the attorney’s obligation to offer at least some mitigating evidence at the sentencing phase of a capital trial.

Providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing and execution of capital defendants. It is also a safeguard far too often ignored. All jurisdictions should adopt minimum standards for the provision of an adequate capital defense at every level of litigation. The most crucial stage of any capital case is trial (although pretrial appointment of counsel is critical to conducting immediate investigation of issues like intellectual disability and mitigation and helping to persuade prosecutors not to seek the death penalty where that decision has not yet been made). Qualified counsel at this stage would add immeasurably to the effort to keep the trial “the main event” in the capital process, and to streamline the post-trial appellate and post-conviction procedures. But even with improved representation at trial, the need for quality legal representation at post-trial stages will continue to be great, given the unacceptability of error, the rapid changes in the substantive law and the possibilities of newly discovered evidence at later stages.

The standards for qualified counsel will vary according to the requisites of the particular stage of proceedings. There is some flexibility as to which minimum standards a jurisdiction ought to adopt. However, minimum standards should, at the least, require two attorneys on each capital case. Jurisdictions should adopt the ABA or NLADA standards for appointment of counsel in capital cases. At the trial level, these include, among other requirements, that (a)

²⁵ *Id.*; ABA CRIMINAL JUSTICE SECTION REPORT, *supra* note 15.

the lead attorney has at least five years of criminal litigation experience, as well as experience as lead or co-counsel in at least one capital case; (b) co-counsel has at least three years of criminal litigation experience; (c) each counsel has significant experience in jury trials of serious felony cases; (d) each attorney has had recent training in death penalty litigation; and (e) each attorney has demonstrated commitment and proficiency. Similar standards should be met at the appellate and post-conviction stages, although at these stages the type of relevant prior experience will vary. The important thing is that at all stages, a set of stringent and uniform minimum standards should be adopted, implemented and enforced.²⁶

The current U.S. Supreme Court standard for ineffective assistance of counsel, *Strickland v. Washington*, often permits “effective but fatal counsel”

The adoption of a more stringent standard can be accomplished by each state, either legislatively or judicially, so long as the state court relies on state rather than federal law.²⁷ The current U.S. Supreme Court standard for

ineffective assistance of counsel, *Strickland v. Washington*, often permits “effective but fatal counsel” and requires the defendant to show both that counsel’s performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence.²⁸ Randall Coyne and Lyn Entzerth observe:

Myriad cases in which defendants have actually been executed confirm that *Strickland’s* minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences.²⁹

Strickland is a poorly conceived standard in all criminal cases. It is particularly unfortunate in capital cases for two reasons. First, the standard is inadequate simply because the

²⁶ In this regard, the ABA has published *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (2003) on the duties of the defense team at all stages of representation. The ABA’s 2008 *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases* covers the critical role of developing and presenting mitigation in capital cases.

²⁷ See, e.g., *State v. Davis*, 561 A.2d 1082, 1089 (N.J. 1989) (holding that competence in the capital context should be measured with reference to the special expertise required in capital cases).

²⁸ Randall Coyne & Lyn Entzerth, *Report Regarding Implementation of the American Bar Association’s Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 18 (1996).

²⁹ *Id.*

consequences of attorney error at trial are so great in a capital case, and the opportunities for error so vast. Second, the standard, inadequate as it is in measuring the competence of attorneys at trial, has proven especially poorly suited for measuring competence in the punishment phase of a capital case.

The requirement that the capital defendant prove not only the ineffectiveness of counsel, but that this ineffectiveness prejudiced the outcome of the proceeding, is extremely hard to satisfy when the question is whether the defendant would have been sentenced to death had counsel done a better job. In case after case, attorneys who failed to present any mitigation evidence at all, or who presented a bare minimum of such evidence, were found to have satisfied *Strickland*.³⁰ Yet mitigation evidence is an absolutely essential part of the punishment phase of a death penalty case.³¹ As capital litigation expert Welsh White has observed, “the failure to present mitigation evidence is a virtual invitation to impose the death penalty.”³² The proper development of mitigating evidence involves a complete construction of the defendant’s social history, including all significant relationships and events. This duty cannot be satisfied merely by interviewing the defendant. Moreover, the utility of offering mitigation evidence cannot be determined in advance of a thorough investigation. Indeed, White asserts that every capital attorney he interviewed agreed that “developing the defendant’s social history will always lead to some mitigating evidence that can be effectively presented at the penalty phase.”³³ There may be the rare case in which an attorney makes an informed decision not to put on any mitigation evidence, but such a scenario is highly unlikely. Therefore, there should be a strong presumption in favor of the attorney’s duty to put on some mitigation evidence.

³⁰ See, e.g., *Funchess v. Wainwright*, 772 F.2d 683 (11th Cir. 1985); see *Neal v. Puckett*, 239 F.3d 683 (5th Cir. 2001) (finding that trial counsel for a death row inmate with intellectual disability was ineffective for failing to present mitigation evidence and that the failure was prejudicial, but that the court would nevertheless defer to the state supreme court’s interpretation of *Strickland* and uphold the sentence of death); see also *Holland v. Tucker*, 854 F.Supp.2d 1229 (S.D. Fla. Apr. 3, 2012) (denying a death row inmate’s ineffective assistance of trial counsel claim despite the fact that Holland’s first attorney was removed from the case after being sent to a mental health facility and his second attorney, a friend of the first, conceded the inmate’s guilt in closing arguments, and instead, granting habeas relief on the grounds that Holland had been improperly denied the right to represent himself).

³¹ See *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

³² Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 341 (1993); see generally Russell Stetler & W. Bradley Wendel, *The ABA Guidelines and the Norms of Capital Defense Representation*, 51 HOF. L. REV. 635 (2013) (discussing the critical role of capital defense counsel at various stages before and throughout capital case proceedings and arguing “that courts interpreting the Sixth Amendment’s guarantee of effective assistance of counsel should look to what competent lawyers *ought* to do rather than what some lawyers appointed to represent capital defendants actually do.”).

³³ *Id.* at 342.

The harshness of *Strickland's* prejudice prong means that capital defendants whose representation was deemed by a court to be ineffective will nevertheless be executed unless they can meet the onerous standard of demonstrating a reasonable probability that, if not for attorney incompetence, they would not have been sentenced to death. Given the unpredictability of a jury's decision whether to exercise mercy in light of a particular set of facts, and given the fact that the attorney's very failure to investigate deprives the jury of crucial information, the *Strickland* standard rarely can be met.

Instead of perpetuating this unfair standard, the burden should be shifted to the state. After a finding of attorney ineffectiveness, if the state cannot show that competent counsel would not have affected the outcome of the case, the sentence ought to be reversed and the defendant re-sentenced. State appellate courts' review of the proportionality of a death sentence, in which the court compares the evidence and outcomes to cases in which the death penalty was imposed to cases in which it could have been sought or imposed but was not, may also help to alleviate the disproportionate effect of inadequate counsel.