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A Caribbean Fantasy - The Case of the Juror Who Misbehaved and the Attorney Who Let Him Get Away with It: Violation of Sixth Amendment Rights to an Impartial Jury and Effective Assistance of Counsel in Government of the Virgin Islands v. Weatherwax

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A CARIBBEAN FANTASY? THE CASE OF THE JUROR WHO MISBEHAVED AND THE ATTORNEY WHO LET HIM GET AWAY WITH IT: VIOLATION OF SIXTH AMENDMENT RIGHTS TO AN IMPARTIAL JURY AND EFFECTIVE ASSISTANCE OF COUNSEL IN GOVERNMENT OF THE VIRGIN ISLANDS v. WEATHERWAX

I. INTRODUCTION

The Sixth Amendment of the United States Constitution accords all criminal defendants a right to the assistance of counsel for their defense.\(^1\)

1. U.S. CONST. amend. VI. The Sixth Amendment to the United States Constitution provides in pertinent part that: "In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense." \(\text{Id.}\) The Sixth Amendment also accords the accused the right to an "impartial jury." \(\text{Id.; see United States v. MacCulloch, 40 M.J. 236, 238 (C.M.A. 1994) (recognizing that Sixth Amendment right to counsel exists in military regardless of indigence). But see Rauter v. United States, 871 F.2d 693, 695 (7th Cir. 1989) (dictum) (holding no constitutional right to counsel in civil proceeding exists); United States v. Barnes, 662 F.2d 777, 780 (D.C. Cir. 1980) (holding that Sixth Amendment does not apply when proceedings are civil in nature).}\)

Sixth Amendment rights are fundamental to this country's criminal justice process. \(\text{See Faretta v. California, 422 U.S. 806, 818 (1975) (commenting that Sixth Amendment rights "are basic to an adversary system of criminal justice"). Because these rights are fundamental, they have been incorporated into the Due Process Clause of the Fourteenth Amendment. See id. (noting inclusion of Sixth Amendment rights in "due process of law"). Thus, the right to effective assistance of counsel arises out of the Due Process Clause. Lissa Griffin, \(\text{The Right to Effective Assistance of Appellate Counsel, 97 W. Va. L. Rev. 1, 2 (1994). See generally Martin C. Calhoun, Note, How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 Geo. L.J. 413, 428 (1988) ("By adopting the amorphous 'reasonable attorney' standard and adding language about the wide range of effective assistance and the strong presumption favoring attorney competence, the \[United States Supreme\] Court has given lower courts the power—without giving them adequate guidance—to interpret the all-important right to effective assistance of counsel.").\)\)

But see, Richard Klein, \(\text{The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel, 13 Hastings Const. L.Q. 625 (1986) (discussing insufficiency of standards by which to evaluate ineffectiveness of counsel and indicating that current standards do not guarantee effectiveness of counsel).}\)

Moreover, because the right to counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty," it follows that counsel retained pursuant to the Sixth Amendment must also render effective assistance to the advantage of the criminal defendant. \(\text{Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938) (maintaining right to counsel applicable}\)
When counsel fails to render effective legal assistance to a criminal defendant and the jury subsequently finds the defendant guilty, the defendant will oftentimes submit a writ of habeas corpus, claiming ineffective assistance of counsel.\(^2\) The courts must then determine whether counsel's representation was deficient pursuant to the two-part test outlined by the United States Supreme Court in *Strickland v. Washington*.

\(^2\) See, e.g., Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425, 1427 (3d Cir.) (considering writ of habeas corpus filed by convicted defendant after defense counsel failed to bring to attention of court question of jury impartiality), *cert. denied*, 117 S. Ct. 538 (1996); *see also* *Griffin*, supra note 1, at 2 (indicating Sixth Amendment right to effective counsel is assured through right of habeas corpus); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. Chi. L. Rev. 679, 680 (1990) (commenting that Sixth Amendment right to effective counsel is enforced through federal habeas corpus).

There are countless circuit court cases in which a convicted defendant filed a petition for habeas corpus, claiming ineffective assistance of counsel. *See, e.g.*, *Chateloin v. Singletary*, 89 F.3d 749, 753 (11th Cir. 1996) (affirming denial of habeas corpus because lower court's decision whether counsel effectively waived right to twelve-person jury in exchange for State's agreement to not seek death penalty was not clear); *Tillett v. Freeman*, 868 F.2d 106, 107-08 (3d Cir. 1989) (holding that claim of ineffective assistance of counsel was not cognizable in federal habeas corpus petition because basis for conviction for filing false sales tax returns did not arise under Constitution or laws of United States); United States v. *Dubray*, 727 F.2d 771, 772 (8th Cir. 1984) (per curiam) (holding defendant's claims of ineffective assistance of counsel by reason of alleged failure to interview and call witnesses would not be addressed on appeal for voluntary manslaughter because appellant did not present claims to district court).

\(^3\) 466 U.S. 668, 687-96 (1984). To establish constitutional ineffectiveness of trial counsel in violation of the Sixth Amendment right, the defendant must prove: (1) that he or she did not receive reasonably effective assistance, considering all the circumstances, and then (2) that there is a "reasonable probability that the result of the proceeding would have been different" had the defendant received competent assistance. *Id.* at 688, 694; *see* *Griffin*, supra note 1, at 2 (discussing fundamental nature of Sixth Amendment rights and *Strickland* test's role in preserving such rights); *Calhoun*, supra note 1, at 428 ("By adopting the amorphous 'reasonable attorney' standard and adding language about the wide range of effective assistance and the strong presumption favoring attorney competence, the [Supreme] Court has given lower courts the power—without giving them adequate guidance—to interpret the all-important right to effective assistance of counsel . . . ."); Sonia Y. Lee, Comment, *OC's PD's Feeling the Squeeze—The Right to
land, the criminal defendant must overcome a difficult burden of proof. If a court determines that an attorney rendered ineffective assistance to a client pursuant to *Strickland*, the accused attorney may rebut this determination by maintaining that he or she made a strategic decision. The basis for a strategic decision, however, must be legitimate and within the best professional judgment of the attorney.


4. See *Strickland*, 466 U.S. at 689-90 (discussing high standard of two-part test which criminal defendant must meet to prove counsel rendered ineffective assistance).

5. *Id.* It is arguable that a strategic choice by counsel that deprives a defendant of his or her constitutional right to testify, absent a knowing waiver by the defendant, constitutes ineffective assistance of counsel. Wright v. Estelle, 572 F.2d 1071, 1082 (5th Cir. 1978) (en banc) (Godbold, J., dissenting). Nonetheless, "even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland*, 466 U.S. at 689-90 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983)); see also Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 334 n.64 (noting that Justice O'Connor, in *Strickland*, cited Professor Goodpaster's article "only for the proposition that 'even the best criminal defense attorneys would not defend a particular client in the same way.'" (quoting *Strickland*, 466 U.S. at 689 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 343 (1983)))); Richard C. Dieter, *Note, Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 804-06 (1990) (discussing different approaches taken by attorney when discussing what pleas to enter when death penalty is ultimate punishment); Matthew D. Forsgren, *Note, The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 78 MINN. L. REV. 1219, 1227 (1994) (recognizing that defense attorneys differ on strategic issues and styles of advocacy). Arguably, however, permissible trial strategy can never include the failure to conduct a reasonably substantial investigation into a defendant's one plausible line of defense. *See Ewing v. Williams*, 596 F.2d 391, 399 (9th Cir. 1979) (Ely, J., dissenting) (stating that "complete lack of preparation and investigation [cannot] be deemed to be a 'tactical decision' made by the attorney"); Wood v. Zahradnick, 430 F. Supp. 107, 112 (E.D. Va. 1977) (observing where defenses based upon mental condition were only plausible lines of defense, the court was able to "envision no tactical reason why these defenses were not explored").

6. *Strickland*, 466 U.S. at 680. "Because advocacy is an art and not a science . . . [and] requires deference to counsel's informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment." *Id.* at 681 (citing *Strickland*, 693 F.2d at 1254); see also Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 113 (1986) (stating that *Strickland* Court appropriately recognized that overturning convictions is ineffective way to guarantee effective assistance). But 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, 92-95 (1995) (stating that Supreme Court's adoption of *Strickland* test has undermined right to counsel of indigent defendants recognized in *Gideon v. Wainwright*); 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, 122 (1992) (asserting that Supreme Court furnished vague guidelines by which to evaluate effectiveness of
Courts are generally reluctant to find that an attorney rendered ineffective assistance. Thus, many accord a great deal of deference to decisions made by counsel during the course of the trial. Unfortunately, this misplaced and generous deference often excuses questionable conduct that would otherwise have been ineffective but for the capacious Strickland discretion requirement.

7. For a discussion of a court’s reluctance to find that an attorney rendered ineffective assistance, see supra note 6 and infra notes 8-9.

8. Compare Williams v. Maggio, 679 F.2d 381, 392-93 (5th Cir. Unit A 1982) (holding that defense counsel was not ineffective for failure to call certain character witnesses and failure to request limiting instructions on aggravating circumstances that were considered by jury), Cox v. Wyrick, 642 F.2d 222, 226-27 (8th Cir. 1981) (holding that counsel’s failure to object to admission of mug shot of defendant for identification purposes did not amount to ineffective assistance of counsel), and United States v. Decoster, 624 F.2d 196, 210-11 (D.C. Cir. 1976) (en banc) (determining that counsel did not render ineffective assistance when he made tactical decision to waive opening statement), with Baty v. Balkcom, 661 F.2d 391, 395 & n.8 (5th Cir. 1981) (finding that grossly inadequate preparation of counsel constituted ineffective assistance of counsel in violation of Sixth Amendment).

9. See Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (stating strong presumption exists “that counsel’s performance falls within ‘wide range of professional assistance’” and defendant bears burden of proving that counsel’s representation was unreasonable under prevailing professional norms and that challenged action was not sound strategy (quoting Strickland, 466 U.S. at 689)); Michel v. Louisiana, 350 U.S. 91, 100-01 (1955) (maintaining that attorney performance is properly measured in terms of reasonableness under prevailing professional norms); United States v. Chambers, 944 F.2d 1253, 1272 (6th Cir. 1991) (stating that “[e]ffective assistance is presumed and the court will not question matters which involve trial strategy”); see also United States v. Boyles, 57 F.3d 535, 551 (7th Cir. 1995) (recognizing that court will not second-guess trial tactic decisions that are reasonably based); Tomlin v. Myers, 30 F.3d 1235, 1244 (9th Cir. 1994) (George, J., dissenting) (“While we may disagree with counsel’s tactics, such tactics do not fall outside of the wide ambit of reasonable representation merely because their wisdom is subject to second-guessing.”); Griffin v. Wainwright, 760 F.2d 1505, 1514 (11th Cir. 1985) (stating that tactical decision “will almost never be overruled on habeas corpus”); Perron v. Perrin, 742 F.2d 669, 673 (1st Cir. 1984) (emphasizing that judicial scrutiny of counsel’s performance must be highly deferential and court shall not second-guess tactical decisions made by counsel); United States v. Greer, 737 F.2d 673, 676 (7th Cir. 1984) (“[W]e are not free to second guess legitimate tactical decisions, rather, we examine only those blunders not classifiable as attorneys’ tactics and determine whether they amount to grossly unprofessional conduct.”); United States v. Bad Cob, 560 F.2d 877, 881 (8th Cir. 1977) (commenting that attorney’s professional judgment regarding tactical decisions should not be second-guessed by hindsight (citing McQueen v. Swenson, 498 F.2d 207, 216 (8th Cir. 1974))); United States v. Moore, 529 F.2d 355, 357 (D.C. Cir. 1976) (considering second-guessing strategic and tactical decisions made by counsel and that inadequate preparation by counsel constitutes ineffective assistance); United States v. Hager, 505 F.2d 737, 739 (8th Cir. 1974) (stating that “the exercise of a defense attorney’s professional judgment should not be second-guessed by hindsight” (quoting McQueen, 498 F.2d at 216)).
In *Government of the Virgin Islands v. Weatherwax*, the United States Court of Appeals for the Third Circuit confronted the issue of ineffective assistance of counsel. In its analysis the court applied the two-part test established in *Strickland*, and gave a great deal of deference to counsel's actions when considering the defense attorney's strategic decision. Ultimately, in a 2-1 decision the *Weatherwax* court held that although the defense attorney rendered ineffective assistance under the *Strickland* test, the attorney did in fact make a strategic decision with regard to the disclosure of possible jury prejudice, thereby rendering his legal assistance effective. Nevertheless, the Third Circuit's determination that the attorney in *Weatherwax* made a strategic decision is questionable because the court failed to fully consider both Supreme Court precedent and the *ABA Model Rules of Professional Conduct* when evaluating counsel's decision not to call the trial court's attention to a prejudiced juror.

This Note examines the reasoning of the Third Circuit in *Weatherwax*. Specifically, it discusses a criminal defendant's Sixth Amendment right to a fair trial, including the right to an impartial, unprejudiced jury and to the effective assistance of counsel. Part II considers the precedent value of *Strickland v. Washington*, a landmark Supreme Court case that established a two-part test for determining whether an attorney renders ineffective, and thus, unconstitutional assistance. Additionally, Part II examines the pre-*Strickland* approaches of other federal courts regarding a criminal defendant's Sixth Amendment rights. Part III of this Note recounts the facts and procedural history of *Weatherwax*. Part IV discusses the majority's rationale for holding that the defense attorney ren-

11. Id.
12. See id. at 1431 (stating that 'evaluation of reasonableness must begin with 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance'" (quoting *Strickland*, 466 U.S. at 688-89)).
13. Id. For a discussion of Judge Stapleton's majority decision in *Weatherwax*, see infra notes 78-107 and accompanying text.
14. For a detailed discussion of United States Supreme Court precedent, see infra notes 38-51 and accompanying text. For a discussion of the *ABA Model Rules of Professional Conduct*, see infra notes 36, 52 and accompanying text.
15. For a detailed discussion of the reasoning of *Weatherwax*, see infra notes 78-107 and accompanying text.
16. For a discussion of the Sixth Amendment rights to a fair trial, an impartial jury and effective assistance of counsel, see supra note 1 and infra notes 61-67 and accompanying text.
18. For a full discussion of *Strickland* and the two-part test outlined by the Supreme Court, see infra notes 38-46 and accompanying text.
19. For a discussion of other circuit courts' approaches to the issues of ineffective assistance of counsel, see infra notes 28-37 and accompanying text.
20. For a discussion of the facts and procedural history of *Weatherwax*, see infra notes 68-77 and accompanying text.
dered effective assistance and the dissent's disapproval of the holding.21 Part IV also provides a critical analysis of the Third Circuit's decision in Weatherwax, suggesting that the court inappropriately disregarded several professional standards which bind an attorney when representing a client.22 Moreover, Part IV suggests that the Weatherwax court misapplied the Strickland test.23 Finally, Part V of this Note illuminates the possible ramifications of Weatherwax, including its possible effect on future judicial decisions involving the Sixth Amendment issues of ineffective assistance of counsel and prejudiced juries.24

II. BACKGROUND

The Strickland test, which guides a court in determining whether an attorney rendered effective assistance, has proven to be a landmark decision as predicted by the United States Supreme Court.25 Despite the precedential value of the Strickland standard, however, the professional standards that bind criminal defense attorneys in representing a client and an attorney's duty to fully consult with his or her client regarding the course of a trial remain integral in deciding a claim of ineffective assistance of counsel.26 Hand-in-hand with the Sixth Amendment right to ef

21. For a discussion of the Third Circuit's holding in Weatherwax and the rationale underlying its decision, see infra notes 78-107 and accompanying text. For a discussion of Judge Lewis's dissenting opinion in Weatherwax, see infra notes 108-18 and accompanying text.

22. For a critical analysis of the Third Circuit's holding in Weatherwax, see infra notes 119-56 and accompanying text.

23. For a discussion of the Third Circuit's misapplication of the Strickland discretion requirement, see infra notes 120-24 and accompanying text.

24. For a discussion of the impact of the Weatherwax decision on future court decisions, see infra notes 157-59.


26. For a discussion of the professional standards that bind attorneys when representing clients, see infra notes 52-60 and accompanying text.
effective assistance of counsel is the Sixth Amendment right to an impartial jury. Because juries form the cornerstone of a trial and are the gatekeepers to a defendant's fate, issues of jury prejudice are often closely followed by claims of ineffective assistance of counsel.27

A. The Stars that Guide

Although it was not the first court to consider the ineffectiveness of counsel, the United States Court of Appeals for the Eleventh Circuit confronted the issue in United States v. Long.28 The immediate ancestor of the Strickland decision, Long held that a court must exercise discretion in evaluating counsel's strategic decisions when considering an ineffectiveness claim against the decision-making attorney.29 In Long, the defendant alleged that the prosecutor made prejudicial statements to which defense counsel failed to object.30 In order to determine if the prosecutor had in fact made prejudicial statements, the court considered whether the prosecutor's statements, when taken as a whole in the context of the entire case, prejudicially impacted the defendant's substantive rights.31 In doing so, however, the Long court failed to define the defendant's burden of proof for establishing ineffective assistance of counsel.32

27. For a discussion of the right to an impartial jury and the problem of juror misconduct, see infra notes 61-67 and accompanying text.

28. 674 F.2d 848 (11th Cir. 1982).

29. Id. at 855. The defendants in Long were convicted in the United States District Court for the Northern District of Alabama for violating drug laws. Id. at 850. One of the defendants charged that the prosecutor made three false and prejudicial statements about the defendants. Id. at 855. Defense counsel, however, did not draw the court's attention to these statements at the time they were made. Id. Subsequently, the defendant alleged that he had received ineffective assistance from his attorney. Id. On appeal, the Eleventh Circuit held that there was no Sixth Amendment violation. Id.

30. Id. The court also considered whether the defense counsel's failure to call alibi witnesses denied the defendant effective assistance of counsel. Id.

31. Id.; see also United States v. Carroll, 678 F.2d 1208, 1210 (4th Cir. 1982) (granting new trial on basis of prejudicial statements made by prosecutor in closing arguments, inferring that defendant lied to defense counsel); United States v. Corona, 551 F.2d 1386, 1388 (5th Cir. 1977) (holding that prosecutor who made improper comments prejudiced substantial rights of defendant). But see United States v. Ferrera, 746 F.2d 908, 911 (1st Cir. 1984) (finding that prosecutor who argued evidence not presented during trial in closing arguments did not prejudice defendant's rights even though evidence was adverse to defendant); Morrison v. Duckworth, 550 F. Supp. 533, 536-38 (N.D. Ind. 1982) (determining that prosecutor's closing remarks regarding absent witness were rendered harmless by overwhelming evidence presented even though remarks were shocking and reprehensible).

32. Long, 674 F.2d at 855. For a discussion of the facts, holding and precedential value of Long, see supra notes 28-31. This author has concluded that, in retrospect, the Eleventh Circuit's reluctance to second-guess counsel's strategic or tactical decisions helped pave the way for the Strickland decision, which also afforded counsel a broad range of decision-making powers. In effect, the Long decision laid the groundwork for the prejudice prong, which is the second prong of the Strickland test. See Strickland v. Washington, 466 U.S. 668, 689-90 (1984) (stat-
One year after the Long decision, in Jones v. Barnes, the Supreme Court reiterated that a criminal defendant has the ultimate authority to make certain fundamental decisions regarding the course of his or her defense, including whether to enter a guilty plea or whether to testify on his or her own behalf. The Jones Court noted, however, that the accused does not have a constitutional right to insist that counsel advance every nonfrivolous argument that he or she wants raised. In addition, the Jones Court refused to "second-guess tactical decisions of counsel in deciding whether to call certain witnesses." Long, 674 F.2d at 855 (citing United States v. Hughes, 635 F.2d 449, 453 (5th Cir. 1981) (stating that "[a] defense counsel's trial strategy, which would include his asking or refraining from asking certain questions of witnesses, does not reach constitutional proportions"); see also United States v. Samuels, 59 F.3d 526, 529 (5th Cir. 1995) (holding that defendant was not denied effective assistance of counsel at sentencing when counsel failed to object to pre-sentence investigation report's finding that defendant smuggled crack rather than cocaine into country); Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980) ("[C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers."); United States v. Johnson, 615 F.2d 1125, 1127 (5th Cir. 1980) (finding that defense counsel satisfied duty to interview potential witnesses and conduct examination of factual circumstances); Buckelew v. United States, 575 F.2d 515, 521 (5th Cir. 1978) (determining that defense counsel's failure to call certain witnesses is not sufficient grounds for Sixth Amendment claim).

Likewise, the ABA Standards for Criminal Justice indicate that the accused must be permitted to make some decisions regarding the course of his or her defense after thorough consultation with counsel. ABA STANDARDS FOR CRIMINAL JUSTICE Standard 4-5.2(a) (3d ed. 1993) [hereinafter CRIMINAL JUSTICE STANDARDS]. Such decisions include what pleas should be entered, whether to accept a plea agreement, whether to waive a jury trial, whether to testify on his or her own behalf and whether to appeal. Id. at Standard 4-5.2(a)(i)-(v).

35. Jones, 463 U.S. at 754. Specifically, the Supreme Court in Jones held that a criminal defendant has a constitutional right under the Due Process and Equal Protection Clauses to an appeal, but he or she does not have a constitutional right to insist that appellate counsel advance every nonfrivolous argument that the defendant suggests. Id. at 756. Thus, although Jones confronted the issue of ineffectiveness of appellate counsel rather than trial counsel, the same "right to counsel" rationale is applicable to each. See Griffin, supra note 1, at 2-6 (discussing appro
Court explained that counsel may make nonfundamental decisions on the basis of counsel's professional judgment only after ample consultation with the client. Thus, Long and Jones failed to establish a discrete federal standard by which courts could evaluate a defendant's claim of ineffective assistance of counsel.

The federal courts were finally offered some guidance in their evaluation of a claim for ineffective assistance of counsel when the Supreme Court articulated a two-part test in Strickland v. Washington. In Strickland, Griffin noted, however, that:

[A] finding of ineffectiveness of trial counsel has a substantially greater impact on finality than does a finding of ineffectiveness of appellate counsel because of the greater factual complexity of trial ineffectiveness claims, the more extensive procedures required to resolve those claims, and the drastic remedy—reversal of a criminal conviction—required for ineffectiveness of trial counsel but not for ineffectiveness of appellate counsel.

Id. at 4.

36. Jones, 463 U.S. at 753 n.6. The Jones Court quoted the 1982 edition of the ABA Model Rules of Professional Conduct. Id. (citing ABA Model Rules of Professional Conduct Rule 1.2(a) (Final Draft 1982)). It should be noted that the 1995 edition of Rule 1.2(a) of the ABA Model Rules of Professional Conduct is identical to the 1982 edition cited by the Supreme Court in Jones in 1983. The rule states in pertinent part that:

[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued . . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.


37. Jones, 463 U.S. at 754.

38. 466 U.S. 668, 687-94 (1984). The respondent in Strickland pleaded guilty in a Florida trial court to three capital murder charges. Id. at 672. Except for a string of burglaries, the respondent had no significant prior criminal record. Id. He stated that his inability to support his family caused him a great deal of stress, which triggered his crime spree. Id. The judge responded that he had "a great deal of respect for people who are willing to step forward and admit their responsibility."' Id. (citation omitted).

In preparing for the sentencing hearing, defense counsel failed to seek a presentence report because it would have included the respondent's criminal history, thus undermining the claim of no significant prior criminal record. Id. at 673. Defense counsel also failed to obtain a psychiatric examination and character witnesses. Id. The trial judge, finding no mitigating and only aggravating circumstances, sentenced the respondent to death on all murder counts. Id. at 674.

The Florida Supreme Court affirmed the trial court's sentence and affirmed its denial of the respondent's complaint claiming ineffective assistance of counsel. Id. at 675, 677-78. The respondent then filed a petition for habeas corpus in federal district court. Id. at 678. The district court denied relief, but the court of appeals reversed, holding that the Sixth Amendment accords criminal defendants "a right to 'counsel . . . rendering reasonably effective assistance given the totality of the circumstances.'" Id. 678-80 (quoting Washington v. Strickland, 693 F.2d 1243, 1250 (Former 5th Cir. Unit B 1982), rev'd, 466 U.S. 668 (1984)). The United
the Court evaluated a defendant's claim that counsel failed to provide the defendant with effective assistance at the criminal trial. To establish constitutional ineffectiveness of trial counsel under the two-part Strickland analysis, a defendant must first prove that "counsel's performance was deficient." Second, the defendant must demonstrate that counsel's "def-

States Supreme Court reversed the court of appeals, however, and re-affirmed the district court decision denying habeas relief. Id. at 670.

Today, the Strickland test is the sole standard by which a court evaluates whether an attorney has rendered effective assistance, and every court that applies the Strickland test grants a great deal of deference to an attorney when evaluating decisions made during trial. In addition, Strickland has been cited extensively by each circuit court and the Supreme Court. For a further discussion of the wide application of the Strickland test, see supra note 25 and accompanying text.

39. Strickland, 466 U.S. at 698-701. For a general discussion of the Sixth Amendment right to counsel, see Lee, supra note 3, at 1899-1901 (discussing defendant's right to effective assistance of trial counsel).

Prior to the Supreme Court's holding in Strickland, and prior to the establishment of a test to determine whether counsel rendered ineffective assistance, the Eleventh Circuit confronted the issue of ineffective assistance of counsel. See United States v. Long, 674 F.2d 848 (11th Cir. 1982) (stating that counsel is given deference by court over strategic decisions). The Long court held that defense counsel rendered effective assistance. Id. at 855. Further, Long recognized the broad discretion with which a court is to consider counsel's strategic decisions. Id. For a further discussion of Long, see supra note 29 and accompanying text.

To determine whether the prosecutor's statements during trial were prejudicial, the court considered if the prosecutor's statements, taken as a whole in the context of the entire case, prejudicially affected the substantial rights of the defendant. Id.; see also United States v. Corona, 551 F.2d 1386, 1388 (5th Cir. 1977) (holding that substantial rights of defendant were grossly prejudiced because of prosecutor misstatements); United States v. Rodriguez, 503 F.2d 1370, 1371 (5th Cir. 1974) (holding that substantial rights of defendant were not prejudiced by prosecutor's prejudicial closing argument and that closing argument constituted harmless error only). But see Berger v. United States, 295 U.S. 78, 88 (1935) (denying reversal of conviction where no prejudice to substantial rights of indicted conspirator occurred); United States v. Rhoden, 453 F.2d 598, 600 (5th Cir. 1972) (holding that prosecutor's alleged improper argument was harmless, where prejudicial effect was slight and evidence of guilt was overwhelming). The court further held that defense counsel's failure to call alibi witnesses did not deny the defendant effective assistance of counsel. Long, 674 F.2d at 855. The court refused to "second-guess tactical decisions of counsel in deciding whether to call certain witnesses." Id. (citation omitted); see also United States v. Johnson, 615 F.2d 1125, 1127 (5th Cir. 1980) (recognizing presumption that counsel's decisions are reasonable and in best interest of client and refusing to second-guess counsel's tactical decisions). The reluctance of the Eleventh Circuit to second-guess strategic or tactical decisions made by counsel helped pave the way for the Strickland decision, as the broad discretion given by the court to counsel's strategic or tactical decisions was a major point discussed by the Strickland Court. See Strickland, 466 U.S. at 687-96 (establishing test for ineffective assistance of counsel and stating that court shall exercise broad discretion in considering strategic decisions made by counsel).

40. Strickland, 466 U.S. at 687. By the time Strickland was decided, each of the federal courts of appeals had held that the proper standard for attorney performance was that of "reasonably effective assistance," and that "judicial scrutiny of counsel's performance must be highly deferential." Id. at 689. For a further discussion of Strickland and the standard of attorney performance that is considered
cient performance prejudiced the defense."41 Pursuant to *Strickland*, therefore, a defendant must make both showings in order to prove that the punishment received "resulted from a breakdown in the adversary process that renders the result unreliable."42

Furthermore, the *Strickland* Court asserted that a defendant dissatisfied with the quality of counsel's assistance must show that his or her counsel's representation fell below an objective standard of reasonableness.43 When assessing a claim of ineffective assistance of counsel, see infra notes 43-46 and accompanying text.

41. *Strickland*, 466 U.S. at 687. The Court stated that in order to establish the second prong, the dissatisfied party must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* Consequently, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691; cf. United States v. Morrison, 449 U.S. 361, 364-65 (1981) (deciding decisions where convictions were overturned for prejudicial circumstances in case).

The *Strickland* Court also noted that in order to establish prejudice, the defendant must prove that "but for the deficient performance of counsel, there is a reasonable probability that the result of the proceeding would have been different." *Griffin*, supra note 1, at 2 (citing *Strickland*, 466 U.S. at 687). The *Strickland* Court defined "reasonable probability" as a "‘probability sufficient to undermine confidence in the outcome.’" *Jeffries & Stuntz*, supra note 2, at 684 (quoting *Strickland*, 466 U.S. at 694); see Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 318 (1991) (discussing "reasonable probability" standard for determining constitutional violations of defendant's right to effective assistance of counsel); Jeffrey B. Keck, *Criminal Procedure: Trial and Appeal*, 39 Sw. L.J. 495, 498 n.20 (1985) (discussing majority opinion in *Strickland*); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 108 n.111 (1988) (discussing right to counsel and tests used to enforce right); see also WAYNE R. LAFAVE & JEROLD H. ISRAEL, *Criminal Procedure § 26.6, at 67* (Supp. 1989) (stating probability that counsel's actions undermined confidence in outcome must exist in establishing ineffectiveness of counsel claim). Notably, the Supreme Court maintained that "the principles . . . stated [in the opinion] do not establish mechanical rules." *Strickland*, 466 U.S. at 696.

42. *Strickland*, 466 U.S. at 687. Although the Court discussed the performance component of an ineffectiveness claim before discussing the prejudice component, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. Thus, a court does not need to determine whether counsel's performance was inadequate before considering the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* "The object of an ineffectiveness claim is not to grade counsel's performance." *Id.*

43. *Id.* at 687-91. Following the ruling that the standard by which to assess counsel ineffectiveness is that of objective reasonableness, the Court stated that more specific guidelines are inappropriate. *Id.* at 688. Justice O'Connor stated:

The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

*Id.* (citations omitted).
The burden of proving ineffective assistance of counsel under the Strickland standard is therefore extremely difficult, because there is a strong presumption that an attorney's strategic decisions fall within reasonable professional norms. Thus, the Supreme Court in Strickland maintained that judicial scrutiny of counsel's performance must be highly deferential. In other words, a court must presume that in rendering assistance,

Courts have emphasized that "counsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers." Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980); see also Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979) (per curiam) (stating attorneys must conduct substantial investigation which includes "an independent examination of the facts, circumstances, pleadings, and laws involved"), aff'd, 445 U.S. 263 (1980); United States v. Moore, 554 F.2d 1086, 1092-93 (D.C. Cir. 1976) (explaining that counsel must make both factual and legal investigations).

Compare Williams v. Maggio, 679 F.2d 381, 392-93 (5th Cir. 1982) (determining that defense counsel was not ineffective for failing to call certain character witnesses and request limiting instructions on statutory aggravating circumstances that were considered by jury), Cox v. Wyrick, 642 F.2d 222, 226-27 (8th Cir. 1981) (holding that counsel’s failure to object to admission of mug shot of defendant for identification purposes did not amount to ineffective assistance of counsel), and United States v. Decoster, 624 F.2d 196, 210-11 (D.C. Cir. 1976) (determining that counsel did not render ineffective assistance when counsel made tactical decision to waive opening statement), with Baty v. Balkcom, 661 F.2d 391, 395 n.8 (5th Cir. 1981) (stating that inadequate preparation of counsel, while it constituted ineffective assistance of counsel in immediate case, does not always constitute Sixth Amendment violation).

The Supreme Court established that reasonably effective assistance, considering all of the surrounding circumstances, is the proper standard by which to judge attorney performance. Strickland, 466 U.S. at 687-91. Relevant factors used to determine "reasonableness" include: (1) the attorney's experience; (2) the inconsistency of pursued and abandoned lines of defense; and (3) the potential for prejudice from taking an abandoned line of defense. See Griffin, supra note 1, at 9 (citing Washington v. Strickland, 693 F.2d 1243, 1256-57 n.23 (Former 5th Cir. 1982)).

44. Strickland, 466 U.S. at 687-91. Because an evaluation of an attorney's performance is difficult, the court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Id. Thus, the defendant must overcome the presumption that counsel's course of action, under the circumstances governing at the time the decision was made, was "sound trial strategy." Id. at 689; see State v. Yarber, 656 N.E.2d 1322, 1325 (Ohio App. 1995) (holding that accused is denied effective assistance of counsel where defense counsel's strategy is so outside "realm of legitimate trial strategy... [as to make ordinary trial counsel] 'scuff' at hearing it"); cf. Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (stating that strong presumptions exist "that counsel's performance falls within the 'wide range of professional assistance'"; that defendant bears burden of proving not only that counsel's representation was unreasonable under prevailing professional norms but also that challenged action was not sound strategy (quoting Strickland, 466 U.S. at 689)); Michel v. Louisiana, 350 U.S. 91, 100-01 (1955) (maintaining that attorney performance is properly measured in terms of reasonableness under prevailing professional norms); United States v. Chambers, 944 F.2d 1253, 1272 (6th Cir. 1991) (stating that "[e]ffective assistance is presumed and the court will not question matters which involve trial strategy" (citation omitted)).

45. Strickland, 466 U.S. at 688-89. A fair assessment of attorney performance requires that every effort be made to eliminate the "distorting effects of hindsight,
counsel's conduct fell within the wide range of reasonable professional assistance.

Following the Strickland decision, the Supreme Court confronted the issue of decisions made by counsel that are contrary to reasonable professional judgment in Batson v. Kentucky. Specifically, the Batson Court confronted the issue of racial partisanship in jury selection and rejected the notion that it is reasonable for an attorney to assume that jurors are likely to sympathize with a criminal defendant based simply on the fact that both the jurors and the defendant are African-American. The Supreme Court recognized that a person's "competence to serve as a juror ultimately depends on an assessment of individual qualifications and ability impartially to consider evidence presented at trial." Moreover, the Court ex-

to reconstruct the circumstances of counsel's challenged conduct and to evaluate the conduct from counsel's perspective at the time." Id. at 689.

46. Id. The Strickland Court stated: "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission was unreasonable." Id.; see Engle v. Isaac, 456 U.S. 107, 133-34 (1982) (stating that "every trial presents a myriad of possible claims" and that court grants discretion to counsel who may have overlooked or chosen to omit an argument while pursuing other avenues of defense). In fairly assessing an attorney's performance, the Strickland Court noted that courts must make a conscious effort to "eliminate the distorting effects of hindsight," to reconstruct the challenging circumstances counsel faced and to evaluate counsel's conduct "from the perspective of counsel at the time he made the decision." Strickland, 466 U.S. at 689. Furthermore, the Strickland Court stated that "countless ways" exist "to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Id. For a discussion of the deference the Third Circuit gave Attorney Michael Joseph in holding strategic his decision not to conduct a voir dire on his client's allegedly prejudiced jury, see infra notes 88-96.

48. Id. at 97. In Batson, the defendant petitioner was an African-American male. Id. at 82. A Kentucky trial judge conducted a voir dire examination on the jury and excused certain jurors for cause. Id. The prosecutor then used his preemptory challenges to strike all four African-Americans from the jury, leaving an all-white jury. Id. Defense counsel objected to the all-white jury on the ground that the prosecutor's removal of the African-American jurors violated the defendant's Sixth and Fourteenth Amendment rights, which grant the accused a right to a jury drawn from a cross section of the community. Id. The Supreme Court in Batson reaffirmed the Strauder v. West Virginia principle, stating: "[T]he State denies [an African-American] defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." Id. at 85 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

49. Id. (emphasis added). The Court further stated: Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure. "The very idea of a jury is a body . . . composed of the peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds."

Id. at 86 (quoting Strauder, 100 U.S. at 308).
explicitly stated that a person's race is simply not related in any way to his or her fitness as a juror.\textsuperscript{50} Today, \textit{Batson} continues to serve as a hallmark case, standing for the proposition that attorneys and judges are prohibited from basing decisions regarding jurors on race.\textsuperscript{51}

B. The Standards that Bind

Professional standards provide the courts with guidance when evaluating the performance of counsel. More importantly, professional standards obligate an attorney to exercise reasonable professional judgment at all times, to zealously represent the client, to keep the client well-informed about the case, and to consult with the client regarding fundamental decisions, both preceding and during the course of trial.\textsuperscript{52} Similarly, and in

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\item[	extsuperscript{50}] \textit{Id.} Unfortunately, "the principle of constitutional color blindness historically has been either nonexistent or elusive." \textsc{Donald E. Lively et al., Constitutional Law: Cases, History, and Dialogues} 57 (1996).

\item[	extsuperscript{51}] \textit{Batson}, 476 U.S. at 86. Noting that "racial exclusion in this official forum compounds the racial insult inherent in judging a citizen by the color of his or her skin," the Court in \textit{Edmonson v. Leesville Concrete Co.}, 111 S. Ct. 2077 (1991), extended the \textit{Batson} principle to civil trials. \textit{Id.} at 2080. Thus, not only has \textit{Batson} been repeatedly relied upon by the Supreme Court, the circuit courts and several state courts, but also the Third Circuit clearly relies on the \textit{Batson} precedent. \textit{See generally} Purkett v. Elerm, 115 S. Ct. 1769 (1995) (holding that using preemptory strike on African-American juror on basis of his unkempt hair, mustache and beard was race-neutral; also discussing \textit{Batson} argument raised by preempted juror); McCrory v. Henderson, 82 F.3d 1243, 1246 (2d Cir. 1996) (discussing \textit{Batson} in consideration of claim of racial partisanship); Riley v. Taylor, 62 F.3d 86, 88 (3d Cir. 1995) (same); Walker v. Vaughn, 53 F.3d 609, 610 (3d Cir. 1995) (same); Simmons v. Beyer, 44 F.3d 1160, 1165 (3d Cir. 1995) (same); United States v. Lewis, 40 F.3d 1325, 1341 (1st Cir. 1994) (same).


In addition to the ABA professional standards, it has been argued that an attorney's duty to his or her client arises out of the principle of agency. Brinkley v. Farmers Elevator Mut. Ins. Co., 485 F.2d 1283, 1286 (10th Cir. 1973) (holding that attorney had duty to client because both parties consented to formation of attorney-client relationship); \textit{Restatement (Second) of Agency} § 1 cmt. e (1958). The United States District Court for the Northern District of Illinois held that an attorney-client relationship is one of agency, to which general rules of agency apply. \textit{Brinkley}, 485 F.2d at 1286. \textit{But see Westinghouse Elec. Corp. v. Kerr-McGee Corp.}, 580 F.2d 1311, 1317 (7th Cir. 1978) ("\textit{The} attorney is held to obligations to the client which go far beyond those of an agent and beyond the principles of agency.").

Rule 1.1 of the ABA Model Rules of Professional Conduct states in full that "[a] lawyer shall provide competent representation to a client." Model Rules, supra note 86, at Rule 1.1. Moreover, "competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." \textit{Id.}

The ABA Model Code of Professional Responsibility outlines that "perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge." \textit{Id.} at cmt. 2. Moreover, "a lawyer should act with competence and proper care in representing clients." ABA Model Code of Professional Responsi-

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accord with the Sixth Amendment, the *ABA Model Rules of Professional Conduct* state that "[a] lawyer shall provide competent representation of a client" and shall act as a competent advisor to the client.53 The ABA

The Preliminary Statement of the *ABA Model Code of Professional Responsibility* indicates that it is designed to be adopted as an inspirational guide "and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules." *Model Code*, supra, at Preliminary Statement. The Preamble to the *ABA Model Code of Professional Responsibility* states:

Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. . . . [I]t is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.

*Id.*, supra, at pmbl. In contrast to the *ABA Model Code of Professional Responsibility*, the *ABA Model Rules of Professional Conduct* are "rules of reason." *Model Rules*, supra note 36, at Scope.

Rule 1.3 of the *ABA Model Rules of Professional Conduct* states: "A lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* at Rule 1.3. Similar to Rule 1.3, Canon seven of the *ABA Model Code of Professional Responsibility* states: "The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." *Model Code*, supra, at EC 7-4.

Rule 2.1 of the *ABA Model Rules of Professional Conduct* states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

*Model Rules*, supra note 36, at Rule 2.1. Similarly, ethical consideration 7-5 to Canon seven of the *ABA Model Code of Professional Responsibility* states that a lawyer acting as an advisor, "furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision." *Model Code*, supra, at EC 7-5.

Rule 1.4(a) of the *ABA Model Rules of Professional Conduct* states that the "guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." *Model Rules*, supra note 36, at Rule 1.4(a) cmt. 2. Comment 1 to Rule 1.4 attests that an attorney should ensure that his client has "sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be pursued." *Id.* at cmt. 1.

53. *Model Rules*, supra note 36, at Rules 1.1, 2.1. A lawyer is obligated to provide his client with an honest assessment of the client's situation and straightforward advice about which course of action to pursue. *Id.* at Rule 2.1 cmt. 1. Oftentimes, a client is averse to confront the unpleasant facts of his or her case and advised courses of action. *Id.* Comment 1 of Rule 1.3 states:

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's
Standards for Criminal Justice also reflect the underlying premise of the Sixth Amendment, which stands for the proposition that a criminal defendant enjoys a right to assistance of counsel for his or her defense. In general, counsel’s professional judgment outweighs and supersedes. Moreover, while defense counsel must consult with the client as to any strategic or tactical measures regarding his or her defense, counsel ultimately has the authority to make any such decisions after consultation with the client.

Both the applicable precedent and the rules of professional responsibility assert that the authority to make decisions regarding the defense’s conduct in a criminal case is divided between the criminal defendants themselves and their attorneys. While a criminal defendant has the authority to assert every advantage that might be realized for a client, the client is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.

54. See Criminal Justice Standards, supra note 34, at Standard 4-1.2 (“Counsel for the accused is an essential component of the administration of criminal justice.”).

55. Id. at Standard 4-3.6 cmt. The comment to Standard 4-3.6 of the ABA Standards for Criminal Justice indicates that the standards do not mandate that a lawyer is “obligated to take every step the cause demands.” Id. Rather, “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.” Id. at Standard 4-5.2(a).

56. Id. at Standard 4-5.2(b). The commentary states that “the power of decision in matters of trial strategy and tactics rests with the lawyer, after consultation with the client when consultation is, in the lawyer’s judgment, both feasible and appropriate.” Id. at cmt.

Notably, nowhere in the ABA Standards for Criminal Justice does it state what course of action a lawyer must take when his client expresses a concern about extra-record information in the possession of a juror. Id.

57. Jones v. Barnes, 463 U.S. 745, 751 (1983). The Supreme Court in Jones confronted the issue of whether it was within the defendant’s rights and authority to decide to waive a jury trial or to take an appeal. Id.

A New York state court convicted Barnes, nicknamed “Froggy,” of robbery and assault. Id. at 745. Froggy appealed and sought a new trial, asking his assigned counsel, Melinger, to raise various issues. Id. Melinger did not raise all of the issues that Froggy requested because he concluded that they either were not based on evidence contained in the record or they would not have aided Froggy in obtaining a new trial. Id. Froggy raised the neglected issues in his pro se brief. Id. The appellate court rejected each of his arguments, however, and affirmed the conviction. Id.

Froggy then brought a federal habeas corpus action, claiming that Melinger’s failure to assert every nonfrivolous argument that Froggy had requested violated his right to the effective assistance of counsel. Id. The United States Court of Appeals for the Second Circuit agreed and outlined a new per se rule requiring that appointed counsel for an indigent criminal defendant raise every nonfrivolous issue raised by the client. Id. at 749 (citing Jones v. Barnes, 665 F.2d 427, 443 (2d Cir. 1981)).

The Supreme Court then granted certiorari. Id. Chief Justice Burger wrote, “by promulgating a per se rule that the client must be allowed to decide what issues are to be pressed, the Court of Appeals seriously undermine[s] the ability of counsel to present the client’s case in accord with counsel’s professional evaluation.”
authority to make certain fundamental decisions regarding his or her constitutional rights, he or she does not have a constitutional right to insist that counsel advance every nonfrivolous argument.\textsuperscript{58} Counsel does bear the responsibility, however, of fully consulting with the client regarding nonfundamental decisions, and is required to exercise professional judgment when making such decisions.\textsuperscript{59} If counsel fails to consult with his or her client on either fundamental or nonfundamental decisions, makes

\textit{Id.} Moreover, Chief Justice Berger outlined that the imposition of a duty on appointed counsel “to raise every ‘colorable’ claim suggested by a client would deserve the very goal of vigorous and effective advocacy.” \textit{Id.} at 754.

The dissent responded that “[a]s in \textit{Faretta}, to force a lawyer’s decisions on a defendant ‘can only lead him to believe that the law contrives against him.’” \textit{Id.} at 762 (Brennan, J., dissenting) (citing \textit{Faretta v. California}, 422 U.S. 806, 834 (1975)).

\textsuperscript{58} Id. at 751. Fundamental decisions recognized by the \textit{Jones} court differ slightly from the ABA Model Rules of Professional Conduct. \textit{Id.} In \textit{Jones}, the court considered whether certain fundamental decisions are to be made by a criminal defendant, such as: whether to plead guilty; whether to waive the right to a jury trial; whether to testify on one’s own behalf; whether to take an appeal; or whether to waive the right to counsel. \textit{Id.}

Likewise, the ABA Standards for Criminal Justice indicate that the accused must be the party to make some decisions regarding the course of his or her defense, after thorough consultation with counsel. CRIMINAL JUSTICE STANDARDS, supra note 34, at Standard 4-5.2(a). Such decisions include: what pleas should be entered, whether to accept a plea agreement, whether to waive a jury trial, whether to testify on his or her own behalf and whether to appeal. \textit{Id.} at Standard 4-5.2(a)(i)-(v).

Thus, a criminal defendant has a constitutional right under the Due Process and Equal Protection Clauses to an appeal, but he or she does \textit{not} have a constitutional right to insist that his or her appellate counsel advance every nonfrivolous argument that he or she suggests. \textit{Jones}, 463 U.S. at 751.

\textsuperscript{59} Jones, 463 U.S. at 753 n.6. The \textit{Jones} Court cited the 1982 edition of the ABA Model Rules of Professional Conduct. \textit{Id.} (citing MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (Final Draft 1982)). The 1996 edition of Rule 1.2(a) of the ABA Model Rules of Professional Conduct is identical to the 1982 edition cited by the Supreme Court in \textit{Jones} in 1983. \textit{Id.} For the text of Rule 1.2(a), see supra note 36.

In other words, defense counsel bears the professional responsibility for the conduct of the case and makes strategic and tactical decisions after consultation with the defendant where feasible and appropriate. \textit{Jones}, 463 U.S. at 753 n.6. Rule 4-5.2(b) of the ABA Standards for Criminal Justice states:

Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

CRIMINAL JUSTICE STANDARDS, supra note 34, at Standard 4-5.2(b).

The comment to Rule 4-5.2(b) of the ABA Standards for Criminal Justice cross references Rule 1.2(a) of the ABA Model Rules of Professional Conduct. \textit{Id.} at n.1 (citing MODEL RULES, supra note 36, at Rule 1.2(a)). Rule 1.2(a) states:

A lawyer shall abide by a client’s decisions concerning the objectives of representation, subject to [other] paragraphs [of this rule] and shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify.

MODEL RULES, supra note 36, at Rule 1.2(a).
strategic or tactical decisions without the requisite consultation or makes decisions that are contrary to reasonable professional judgment, it is likely that he or she will confront an ineffective assistance claim by the client following a jury verdict. 60

C. The Right that Is

The requirement that a jury be fair and impartial is inherent in the Sixth Amendment right to a jury trial. 61 As a result, attorneys strive to select impartial jurors that will sympathize with their client. 62 Nevertheless and regardless of the vigilant efforts made by an attorney to select an

Significantly, many of the strategic and tactical decisions that must be made in the course of a criminal trial "do not allow, extended, if any, consultation." CRIMINAL JUSTICE STANDARDS, supra note 34, at Standard 4-5.2 cmt.

60. Jones, 463 U.S. at 753 (noting that disparity between defense counsel and his or her client in decisions made before or during trial on major decision may be substance of postconviction proceedings that question effectiveness of counsel's performance); see Stano v. Dugger, 921 F.2d 1125, 1142-43 (11th Cir. 1991) (holding that defendant made voluntary, informed choice to plead guilty despite advice of counsel); Via v. Superintendent, 643 F.2d 167, 175 (4th Cir. 1981) (holding that attorney who represented petitioner in criminal case was unprepared to try case and failed to afford petitioner "representation 'within range of competence demanded of attorneys in criminal cases'" (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970))).


62. Amy Singer, Six Rules For Picking A Successful Jury, in SEXUAL HARASSMENT LITIGATION: 1995 at 375, 377 (PLI Litig. & Admin. Practice Course Handbook Series No. 520, 1995). To dispel what often appears to be the mysterious way in which juries decide cases, many trial lawyers have developed—and still hold dear—several myths. Id. Many attorneys continue to subscribe to stereotypes even though "objective, observable variables are actually the least predictive of jury behavior and verdicts" and may "antagonize empaneled jurors who sense that . . . bias has shaped the selection." Id. Examples of such stereotypes include: accountants are stingy and should be kept on a case by an attorney who is defending against large claims, African-Americans are liberal and defense counsel should keep them off a jury when defending against large claims, or and if it is a wrongful death case, older women are overly sympathetic, especially where children are concerned. Id. Examples of stereotypes held by plaintiff's attorneys include: always pick the "little guy"; avoid businesswomen; pick someone who has been injured; stay away from a poor juror because they are incapable of thinking about the large sum of money necessary for an "adequate award"; and never pick accountants. Gordon L. Roberts & Timothy R. Hanson, JURY SELECTION, 8 UTAH B.J. 14, 16 (1995); see James W. McElhaney, Picking a Jury, 2 LITIG. 43 (1992) (discussing myths and stereotypes in jury voir dire). See generally id. at 43-44 (discussing and detailing history of stereotypes that exist in jury selection and study of how well lawyers pick juries and "strategies" employed when doing so).
impartial jury, the prevalence of media attention often makes obtaining a jury that has no outside knowledge of the case unrealistic. Thus, it is not surprising that the Supreme Court, in the interest of furthering the possibility of obtaining an impartial jury, has held that even if a juror is not completely ignorant of the facts and issues involved in a case, the juror must be able to set aside individual impressions and opinions and render a verdict based only on court-presented evidence.

According to statistics, demographics rarely determine verdicts or damage awards as much as discrimination based on age, race, religion, gender, political affiliation or profession—rarely and certainly not enough to necessitate a voir dire. Singer, supra, at 377. Nonetheless, litigators make their jury selections and conduct their voir dire using stereotypes; in doing so they may dismiss someone who would be very good for their side, who would push for an acquittal. Id. On the other hand, they may keep someone who could cause them great harm, such as an unfavorable verdict or conviction. Id.

Furthermore, "[b]eliefs are not contagious. People have them; you can't change them, nor will others 'catch' or become 'contaminated' by them. . . . 'value beliefs' are, in fact, the only consistent predictors of jury verdicts." Id. at 379. Thus, some commentators argue that it is advisable simply to rely on individual judgment and client's intuition. Roberts & Hanson, supra, at 16.

Ordinary citizens who have faith in the ideal of an impartial jury and litigators who spend countless hours preparing opening statements, cross-examinations and closing arguments with the belief that such dynamics impact a trial verdict, shudder at the thought that the selection of the jury is not only the most important part of the trial, but is verdict determinative as well. Roberts & Hanson, supra note 62,
Thus, extraneous influences on jurors and the consideration by a jury of extra-record information violates the Sixth Amendment guarantee of an impartial jury; the increased potential for a juror to have a preconceived notion as to the defendant's guilt or innocence, notwithstanding evidence presented at trial, becomes great in the face of such influences and information.\textsuperscript{65} Such extraneous influences include media and publicity coverage, as well as communication by a juror with a third party regarding a material issue in the case.\textsuperscript{66} Nevertheless, the duty of a juror when rendering a verdict is to consider only the evidence formally presented in court, despite the possibility that they may have received extra-record information during the course of a trial.\textsuperscript{67}

\textsuperscript{65} Government of the Virgin Islands v. Gereau, 523 F.2d 140, 150 (3d Cir. 1975). The Sixth Amendment guarantees the right to an impartial jury. \textit{Id.} If the jury considers evidence not introduced by the court, the jury's impartiality may be compromised. \textit{Id.} at 150-51.

Extra-record influences, including the media and other publicity, pose a threat to fairness. Walthall, \textit{supra} note 61, at 1012 n.28. In other words, extra-record information "evades the safeguards of the judicial process." \textit{Id.} (citing United States v. Resko, 3 F.3d 684, 690 (3d Cir. 1993) (prohibiting premature deliberations in criminal case); see also United States v. Simone, 14 F.3d 833, 840 (3d Cir. 1994) (noting that extraneous and extra-record information threatens occurrence of fair criminal proceeding).

\textsuperscript{66} Walthall, \textit{supra} note 61, at 1011 n.26 (citing Dennis Edwards, Jr., \textit{A Judge's Review of Juror Misconduct}, 27 How. L.J. 1519, 1522 (1984) (describing instances of juror misconduct and exposure to extra-record information)).

The conduct and deliberations of the jury should be without improper influences. \textit{Id.} at 1008 n.11; \textit{see} Remmer v. United States, 347 U.S. 227, 229-30 (1954) (holding that defendant was entitled to hearing to determine effect of remark made to juror); Drew v. Collins, 964 F.2d 411, 414 (5th Cir. 1992) (alleging jury misconduct occurred when juror considered parole law during capital sentencing deliberations); United States v. Tierney, 947 F.2d 854, 868 (8th Cir. 1991) (alleging juror misconduct occurred when juror slept and read magazines during trial); United States v. Anello, 765 F.2d 253, 258 (1st Cir. 1985) (alleging occurrence of juror misconduct when juror made remark to another juror before deliberations); United States v. Weiss, 752 F.2d 777, 783 (2d Cir. 1985) (alleging consideration of extra-record evidence during deliberations constituted juror misconduct); United States v. Largo, 346 F.2d 253, 254 (7th Cir. 1965) (alleging juror misconduct when jurors read article about defendant during ongoing trial).

\textsuperscript{67} Walthall, \textit{supra} note 63, at 1010-11 & n.24 (citing \textit{Edward J. Devitt & Charles B. Blackmar, Federal Jury Practice and Instructions} § 1.01 (3d ed. 1987)). \textit{See} Resko, 3 F.3d at 689 (citing examples of extra-jury misconduct); Gereau, 523 F.2d at 150 (listing types of extra-jury influences); see also United States v. Bass, 10 F.3d 256, 257-58 (5th Cir. 1993) (claiming jurors exposed to mid-trial media account of case); United States v. Ortiz-Arrigoitia, 996 F.2d 436, 443 (1st Cir. 1993) (holding defendants not entitled to mistrial for jury misconduct when juror discussed case with his daughter); United States v. Small, 891 F.2d 53, 54 (3d Cir. 1989) (finding defendant's conviction not seriously affected by fact that trial transcript containing prejudicial sidebar conference was mistakenly shown to jury during deliberations); Government of the Virgin Islands v. Dowling, 814 F.2d 134, 135 (3d Cir. 1987) (asserting jury exposure to extra-record information concerning facts of case and defendant's past criminal record amounted to error), \textit{aff'd sub nom.} Dowling v. United States, 493 U.S. 342 (1990); Doggett v. Yeager, 472 F.2d
III. FACTS

In Government of the Virgin Islands v. Weatherwax, William Weatherwax filed a petition for writ of habeas corpus for ineffective assistance of counsel, stemming from his March 1989 murder trial during which a juror allegedly became prejudiced. After several witnesses observed one of the jurors carrying a newspaper into the courtroom which contained an article about the trial, Weatherwax urged his attorney, Michael Joseph, to call the prejudice to the attention of the court, but Joseph failed to comply with his client's request.

Hazel was an African-American male and Weatherwax, the defendant, was Caucasian. Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425, 1428 (3d Cir.), cert. denied, 117 S. Ct. 538 (1996). The jury consisted of three Caucasian jurors. This was very unusual for a Virgin Islands jury because the vast majority of the population is African-American. Weatherwax's attorney, Michael Joseph, was delighted with the makeup of the jury and anticipated a better chance for a favorable defense verdict on the basis of shared juror-defendant race. Id. at 1430. For a discussion of the occurrence which threatened the loss of this "dream jury," see supra notes 14, 69 and accompanying text.


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292, 293 (3d Cir. 1973) (alleging juror misconduct because of likelihood that newspaper article about defendant's retraction of guilty plea seen by jurors).

69. Weatherwax, 77 F.3d at 1435. On the final day of the trial, a defense witness and members of Weatherwax's family observed one of the jurors carrying a St. Croix daily newspaper into the courtroom. Appellee's Petition for Rehearing, Ex. A, at 1, Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425, 1428 (3d Cir.), cert. denied, 117 S. Ct. 538 (1996). One witness, Charles Black, was subpoenaed by Joseph to attend Weatherwax's trial. Id. He was to serve as a character witness for Weatherwax who he had known him for several years. Id. He was also subpoenaed to assist in Weatherwax's defense as a ballistics expert. Id. Black stated that, on the final day of the trial, he observed a white male juror carrying a St. Croix newspaper, the St. Croix Avis, from the deliberation room into the courtroom. Id.; Appellee's Petition, Ex. B, at 1, Weatherwax (No. 95-7126) (second affidavit of C. Black).

This so-called newspaper incident occurred on the third day of Weatherwax's trial when page three of the St. Croix Avis, purporting to highlight the defense testimony from the second day of trial, carried the headline, "Weatherwax: I Cocked Hammer and Took Aim." Id. (citing Charles Fisher, Weatherwax: I Cocked Hammer and Took Aim, St. Croix Avis, Mar. 9, 1989, at 3, 11); see also Weatherwax, 77 F.3d at 1427 n.1 (noting that newspaper article did not report extra-record information). The article first recalled the prosecution's "dramatic display" of a handgun allegedly used by Weatherwax in the murder of Hazel, and then reported follow-up questioning. Government of the Virgin Islands v. Weatherwax, 20 F.3d 572, 577 (3d Cir. 1994), rev'd, 77 F.3d 1425 (3d Cir.), cert. denied, 117 S. Ct. 538 (1996).

Black approached Joseph, informed Joseph of his observation and pointed out the juror in question. Appellee's Petition, Ex. A, at 1, Weatherwax (No. 95-7126) (affidavit of Black). According to Black, Joseph acknowledged the presence of the newspaper, but was apprehensive about bringing the presence of the newspaper to the court's attention. Id. Black's affidavit states that Joseph said that he would make a motion for a mistrial at that time, but he failed to do so. Id. Joseph did not file a motion for a mistrial the following day. Id.
On direct appeal from the United States District Court of the Virgin Islands, the Third Circuit affirmed Weatherwax's murder conviction.\(^{70}\) Weatherwax then filed a petition for habeas corpus, claiming ineffective

Sallie Lay, Weatherwax's sister, also attended the trial. \(\textit{Id.}\) Ex. C, at 1, \textit{Weatherwax} (No. 95-7126) (affidavit of S. Lay). She also saw the Caucasian male juror walk out of the jury deliberation room holding a newspaper. \(\textit{Id.}\) She reported her observation to the United States Marshall, but he did not take the newspaper from the juror, nor did he question the juror regarding his possession of the newspaper. \(\textit{Id.}\) According to Lay, Joseph said he would file a motion the next day, but "not to worry" because the juror was "the foreman of the jury, on our (Weatherwax's) side, not to bring any attention to it. It would only hurt Billy's case." \(\textit{Id.}\) She stated that she, her husband, Black, Weatherwax and John Miller all told Joseph to "file a motion" or "do something," but they did not pursue the issue after Joseph said he would file a motion for mistrial. \(\textit{Id.}\) Ex. D, at 1, \textit{Weatherwax} (No. 95-7126) (second affidavit of S. Lay).

Each person who observed the incident asked Weatherwax's defense attorney, Joseph, to file a motion for a mistrial. \(\textit{Id.}\) Ex. A, at 1, \textit{Weatherwax} (No. 95-7126) (affidavit of Black); \(\textit{Id.}\) Ex. D, at 1 (affidavit of S. Lay). William Lay, Danny Ray Leonard and John Leonard all made statements similar to Black's and Lay's, namely that they saw a Caucasian male juror carrying a newspaper from the deliberation room to the courtroom on the final day of the trial and that when they approached Joseph with the information, he stated that he would file a motion but failed to do so on both the day in question and on the following day. \(\textit{See generally}\) \(\textit{Id.}\) Ex. E, at 1, \textit{Weatherwax} (No. 95-7126) (affidavit of W. Lay) (indicating that juror was observed carrying newspaper and Joseph failed to file promised motion for mistrial); \(\textit{Id.}\) Ex. F, at 1 (affidavit of Leonard) (same); \(\textit{Id.}\) Ex. G, at 1 (second affidavit of Leonard) (same); \(\textit{Id.}\) Ex. H, at 1 (third affidavit of Leonard) (same); \(\textit{Id.}\) Ex. I, at 1 (affidavit of Miller) (same); \(\textit{Id.}\) Ex. J, at 1 (second affidavit of Miller) (same).

Joseph did not file the motion on the final day of trial, nor did he file it the next day. \textit{Appellee's Brief at 4, Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425 (3d Cir. 1996) (No. 95-7126). In fact, he never filed a motion of any kind despite Weatherwax's repeated requests that he do so. \(\textit{Id.}\) During the trial, the judge warned the jury "not to read or review any media accounts of the Weatherwax trial." \(\textit{Id.}\) The judge stressed the importance of reaching a decision based solely on the facts admitted into the evidence during trial. \(\textit{Id.}\) Specifically, the judge emphasized that the jury not be influenced by extraneous information. \(\textit{Id.}\) When the juror was observed leaving the jury room with a local newspaper, Weatherwax and his family members, among others, asked Joseph to "do something" about the juror's violation of the judge's admonitions. \(\textit{Id.}\) Joseph, however, did not follow Weatherwax's instructions to "bring the violation of the trial court's instruction to its attention and did not follow up on his commitment to his client that he would 'do something about it'.' \(\textit{Id.}\) In fact, even after the juror returned a verdict sentencing Weatherwax to several years in prison on two criminal counts, Joseph failed to bring the newspaper incident to the attention of the court. \(\textit{Id.}\) at 5.

Ultimately, the jury convicted Weatherwax of second degree murder and unlawful possession of a weapon. \(\textit{Id.}\) The trial court sentenced Weatherwax to 25 years in prison for second degree murder and five years for unlawful possession of a weapon. \(\textit{Id.}\) The jury acquitted him of first degree murder. \(\textit{Id.}\) Weatherwax is now serving time in an Oklahoma prison. \textit{Appellant's Brief at 3, Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425 (3d Cir. 1996) (No. 95-7126).}

\(^{70}\) Government of the Virgin Islands v. Weatherwax, 893 F.2d 1329 (3d Cir. 1989). The same court which affirmed the second degree murder conviction and unlawful weapon possession conviction decided the case that is the subject of this Note. \(\textit{Id.}\); \textit{cf. Weatherwax, 77 F.3d at 1425 (holding counsel did not render ineffective assistance).}
assistance of counsel in violation of his Sixth Amendment rights.\textsuperscript{71} The district court denied Weatherwax's motion without a hearing, and he appealed.\textsuperscript{72} In response, the Third Circuit found that Weatherwax was entitled to an evidentiary hearing on his claim for ineffective assistance of counsel.\textsuperscript{73}

\textsuperscript{71} Weatherwax, 1993 WL 835624, at *1. Weatherwax filed his petition pursuant to Title 28 U.S.C. § 2255, which provides: "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." \textit{Id.} (citing 28 U.S.C. § 2255 (1994)).

Weatherwax alleged that both his trial and appellate counsel failed to provide him with effective assistance. \textit{Weatherwax}, 1993 WL 835624, at *1. In his petition, Weatherwax contended that his attorney, Michael Joseph: (1) failed to respond to the Government's attack on the reputation for truthfulness of Weatherwax's son; (2) failed to obtain Hazel's FBI record as evidence of Hazel's reputation for violence; (3) failed to call the court's attention to juror misconduct when members of Weatherwax's family and Weatherwax himself told Joseph that a juror had entered the juryroom with a newspaper including an article about the trial and the family members and Weatherwax asked Joseph to "do something"; (4) failed to properly handle inappropriate conduct of the court clerk; and (5) failed to object to instances of the prosecutor's misconduct. \textit{Id.} at *1-3.

\textsuperscript{72} Weatherwax, 1993 WL 835624, at *1-3; \textit{Weatherwax}, 20 F.3d at 573. The district court characterized the newspaper as a "verbatim and dispassionate account of the testimony adduced at trial." \textit{Weatherwax}, 1993 WL 835624, at *2. Thus, the district court concluded that the reading of the testimony in a newspaper could not be prejudicial to the jury members, and, therefore, Joseph's decision not to bring the incident to the attention of the trial court was tactical and insufficient to support an ineffectiveness claim. \textit{Id.} The court of appeals vacated and remanded the case back to the district court. \textit{Weatherwax}, 20 F.3d at 573. Focusing on the ineffectiveness of counsel claim, the Third Circuit stated that "[b]ecause this allegation, if proven, would constitute grounds for habeas relief, assuming counsel did not have a strategic reason for failing to request \textit{voir dire}, we will vacate the order dismissing the writ and remand the matter to the district court to conduct an evidentiary hearing on this issue." \textit{Id.}

The Third Circuit indicated that if the district court found that a juror had brought a newspaper into the deliberation and attorney Joseph had known of the occurrence, then Weatherwax would have "made out a prima facie case of ineffective assistance of counsel under the \textit{Strickland} standard." \textit{Id.} at 580. The Third Circuit further indicated that if Weatherwax could have established a prima facie case, then the Government must be permitted to question Joseph in relation to his failure to conduct a \textit{voir dire} to establish that Joseph "proceeded on the basis of 'sound trial strategy.'" \textit{Id.} (quoting \textit{Strickland}, 466 U.S. 668, 689 (1984)). For a further discussion of \textit{Strickland}, see supra notes 38-46.

\textsuperscript{73} \textit{Strickland}, 466 U.S. at 574. The district court focused its consideration of the case on Weatherwax's claim that defense counsel failed to request a \textit{voir dire} to determine the impact of extraneous information on the jury, when one of the juror's brought a local newspaper into the deliberation room. \textit{Id.} The Third Circuit then vacated and remanded the case to the district court. \textit{Id.} In doing so, it remanded the matter so that the district court could conduct an evidentiary hearing on the issue. \textit{Id.} at 573. The court of appeals recognized that if the ineffectiveness of counsel allegations were proven, there would be grounds for habeas relief "assuming counsel did not have a strategic reason for failing to request \textit{voir dire}." \textit{Id.}
On remand from the Third Circuit, the district court determined that the performance of Weatherwax's attorney was defective, unreasonable and contrary to prevailing professional norms. The court issued the petition for habeas relief and ordered that the Government either retry

The Third Circuit fully discussed the newspaper article in the juror's possession and examined the possible impact it could have had on the verdict against Weatherwax. Id. at 574. The court ultimately concluded that Weatherwax's testimony argued against second degree murder and supported his self-defense testimony, while the newspaper article did neither. Id. at 577.

Thus, the Third Circuit disagreed with the district court's decision that the newspaper article was a "verbatim and dispassionate account of the testimony adduced at trial." Id. at 575. Rather, it recognized that the actual trial testimony varied significantly from the newspaper article. See id. (citing exact language from newspaper article and trial transcript). The appellate court concluded that the overall substance of the newspaper article created a markedly different version of Weatherwax's testimony. Weatherwax, 20 F.3d at 577. Although the difference in the actual testimony and the newspaper report was slight, it was significant enough that the jurors may have noticed. Id. Thus, the court concluded that damage was likely to have been inflicted on the juror's perception of the defense as a result of the article's account of Weatherwax's testimony. Id. The court stated, "[i]f the jurors . . . read the damaging article with its distorted reporting of Weatherwax's testimony, the likelihood of resulting taint to the fairness of the trial [would be] apparent" and Weatherwax would have been prejudiced by the partial jury. Id. at 580. In addition, in referring to the pro-prosecution slant given to the trial by the newspaper article, the court stated:

A reader of the article would reasonably conclude that, on the night of the shooting, [Weatherwax] had testified that he cocked the hammer and aimed the gun at Hazel as he walked toward Weatherwax. The last sentence quoted from Weatherwax's testimony conveys the impression that Weatherwax became confused, stopped his narrative, and questioned the import of the prosecution's question. A careful dissection of the article, however, demonstrates how this [newspaper] account skewed both the content and the chronology of the testimony.

Id. at 576.

Although the headline and article quoted Weatherwax as testifying, "I cocked the hammer and took aim," Weatherwax never made that statement. Id. As such, the newspaper's misuse of the tense of the word "cock" distorted the import of Weatherwax's statement. Id. at 576-77. He actually testified that he did not handle the gun on the night of the murder in his customary manner. Id. When asked by the prosecuting attorney how he usually fired the gun, Weatherwax replied "I cock the hammer and took aim." Id. at 576. Weatherwax did not testify to his handling of the weapon on the night of the shooting; rather, he "described his prior handling of the gun." Id.

Another harmful error in the newspaper's account of the trial testimony occurred in its description of a later exchange between the prosecutor and Weatherwax. Id. The prosecutor asked Weatherwax: "You didn't cock the hammer by accident, did you?" Id. The newspaper misrepresented Weatherwax's reply and reported: "I pointed the gun right at him . . . ." Id. In truth, Weatherwax did not answer the prosecutor's question with the reported response. Id. In fact, Weatherwax's reported answer was an excerpt from his direct examination narrative regarding the events of the evening in question and "did not arise in the context of cocking the hammer." Id. (emphasis added). Finally, the Third Circuit noted that the article "erroneously structured the order of the questioning." Id.

Weatherwax within seventy days from the date of the judgment or release him from incarceration.\textsuperscript{75} The Government appealed, and the Third Circuit reversed and remanded the district court order with instructions that Weatherwax's petition for habeas relief be denied.\textsuperscript{76}

\subsection*{ANALYSIS: \textit{GOVERNMENT OF THE VIRGIN ISLANDS v. WEATHERWAX}}

\subsection*{A. Narrative Analysis}

In \textit{Weatherwax}, the Third Circuit confronted a Sixth Amendment issue.\textsuperscript{77} Specifically, the court addressed a claim of ineffective assistance of counsel, resulting from a defense attorney's failure to investigate the possible impact on the jury of extra-record information regarding his or her instructions given to the district court on remand from the Third Circuit, see \textit{supra} note 72.

The district court considered whether: (1) Weatherwax's trial counsel, Michael Joseph, employed "sound trial strategy" when he failed to inform the court of his decision and failed to request a voir dire of a juror who was observed possessing a newspaper, despite the court's admonition to avoid reading newspaper articles concerning the trial and (2) whether this failure constituted ineffective assistance of counsel so as to warrant a new trial. \textit{Weatherwax}, 1995 WL 55114, at *1. The district court held that Joseph did not meet the burden of proving that his failure to conduct a voir dire was a strategic trial tactic. \textit{Id.} (quoting \textit{Strickland}, 466 U.S. at 689). On remand, the Government conceded that a juror had possessed a newspaper and that Joseph knew of the possession. \textit{Id.} Accordingly, it was determined that Weatherwax made out a prima facie case of ineffective assistance of counsel under \textit{Strickland} and that the burden therefore shifted to the Government to prove that although Joseph's assistance was defective and unreasonable under "prevailing professional norms," the decision not to conduct a voir dire of the jury was the basis of a "sound trial strategy" procured by defense attorney Joseph. \textit{Id.}

\textsuperscript{75} \textit{Weatherwax}, 1995 WL 55114, at *7. The district court found that when Joseph failed to request a voir dire of the jury, he failed to employ "sound trial strategy." \textit{Id.} (quoting \textit{Strickland}, 466 U.S. at 686). Thus, Weatherwax satisfied the first prong of the \textit{Strickland} test; that is, Weatherwax established that Joseph rendered defective assistance. \textit{Id.} Furthermore, the district court excused Weatherwax from having to prove the prejudice prong of \textit{Strickland}. \textit{Id.} Because a voir dire was not conducted, there existed no objective criteria upon which the court could determine prejudice. \textit{Id.} For a discussion of \textit{Strickland} and the standard established for evaluating effective assistance of counsel, see \textit{supra} notes 38-46 and accompanying text.

\textsuperscript{76} Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425 (3d Cir.), \textit{cert. denied}, 117 S. Ct. 538 (1996). Specifically, the court held that: (1) Attorney Joseph's decision not to move for a mistrial, or to bring to light the fact that a juror had been observed carrying a newspaper containing an article about the trial to the attention of the court, was a reasonable tactical decision; (2) the decision whether to bring the matter to the attention of the court was not a fundamental decision that the defendant had a right to make; (3) counsel had not failed to consult with Weatherwax before making the decision; and (4) a breach by counsel of a duty as an officer of the court to alert to the court to the juror's actions did not entitle petitioner to relief from conviction. \textit{Id.}

\textsuperscript{77} \textit{Id.} at 1426-27. For an explanation of the issues confronted by the Third Circuit, see \textit{infra} note 79. For a discussion of the facts and procedural history of \textit{Weatherwax}, see \textit{supra} notes 68-76 and accompanying text.
The Virgin Islands District Court held that Weatherwax's attorney, Michael Joseph, breached his professional duties to Weatherwax in two ways. First, Joseph failed to take steps necessary to secure a voir dire inquiry to determine if the newspaper in fact had prejudiced the jury. Second, Joseph failed to consult with or follow directions from Weatherwax regarding strategic matters. The Third Circuit disagreed with the district court's findings regarding an attorney's duty to consult with his or her client, and instead, conducted its analysis of the issue pursuant to the Strickland standard.

1. Considering Counsel's Strategic Decision

In its determination of whether Joseph rendered ineffective assistance of counsel to Weatherwax, the Third Circuit first considered the teachings set forth in Strickland. The Weatherwax court initially recognized that the

78 Weatherwax, 77 F.3d at 1425, 1431. The Third Circuit confronted the issue on appeal from the District Court of the Virgin Islands. Id. at 1426.

79. Id. at 1431. The lower court reasoned that Joseph breached his duty to Weatherwax because he failed to conduct a voir dire in response to the possibility of a prejudiced jury. Id. Because Joseph failed to notify the court of the newspaper incident, he deprived the court of the opportunity to ascertain the content of the juror's exposure. Id. at 1430.

The district court stated: "The rule ... as repeatedly stressed by our Court of Appeals, [is that] whenever the integrity of the jury's deliberations is jeopardized, the trial court 'is required to conduct a voir dire of the jury that would permit [it] to evaluate the potential prejudice to the defendant.'" Weatherwax, 1995 WL 55114, at *5 (quoting Government of the Virgin Islands v. Dowling, 814 F.2d 134, 138 (3d Cir. 1987), aff'd, 493 U.S. 342 (1990)) (second alteration in original), rev'd, 77 F.3d 1425 (3d Cir. 1996), cert. denied, 117 S. Ct. 538 (1996); see Dowling, 814 F.2d at 137-38, aff'd, 493 U.S. 342 (1990) (holding that declining to question jurors was not abuse of trial court's discretion, despite judge's receipt of note from juror that another juror had been exposed to extra-record information); see also Waldorf v. Shuta, 3 F.3d 705, 713 (3d Cir. 1993) (finding that jurors' own assessments of impartiality were not sufficient to insure that damages awarded were based on evidence introduced at trial and not on jury's exposure to extrajudicial information); United States v. Resko, 3 F.3d 684, 694 (3d Cir. 1993) (holding district court erred by refusing to conduct searching inquiry into potential prejudice from jury misconduct).

80. Weatherwax, 77 F.3d at 1431. The district court held that Joseph breached his duty as defense counsel for Weatherwax because Joseph did not heed the requests of Weatherwax or his family members to call the court's attention to the fact that one of the jurors was found leaving the deliberation room with a newspaper containing a transcript of Weatherwax's testimony. Id. at 1427, 1431.

For a discussion of the district court's decision and the reasoning therein, see supra note 68. For a discussion of the prejudicial newspaper article, see supra note 69.

81. Weatherwax, 77 F.3d at 1431. For a complete discussion of the Third Circuit's holding in Weatherwax, see supra notes 77-80, infra notes 82-107 and accompanying text. For a further discussion of Strickland, see supra notes 38-46 and accompanying text.

82. Weatherwax, 77 F.3d at 1431. Attorney Joseph explained to Weatherwax his strategy in selecting a jury. Id. at 1428. Joseph based his strategy: (1) on the fact that Weatherwax's case had created a racial charge in the Virgin Islands be-
performance inquiry considers whether counsel’s assistance was reasonable at the time counsel rendered performance, in light of all the surrounding circumstances. Because of the invariably unpredictable circumstances that occur during trial, however, the Weatherwax court carefully avoided adopting a single set of standards that would dictate attorney conduct regarding how best to represent a criminal defendant.

The Third Circuit first looked to the holdings of other courts, many of which have held that the authority to make decisions regarding the course of defense at trial is split between counsel and the defendant. In light of these decisions, the Third Circuit considered the district court’s holding that Joseph breached his duty when he failed to fully consult with Weatherwax as to the decision not to inform the court of possible jury bias. Thus, the Third Circuit demonstrated a high degree of deference because Weatherwax was Caucasian and (2) on the facts surrounding the victim’s death and Weatherwax’s anticipated self-defense claim. Id.

83. Id. at 1431 (referring to Strickland v. Washington, 466 U.S. 668, 688-89 (1984)). For a thorough discussion of Strickland and the rationale therein, see supra notes 38-46 and accompanying text.

84. Weatherwax, 77 F.3d at 1431. Moreover, the Supreme Court has stated that “‘[n]y such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.’” Id. (quoting Strickland, 466 U.S. at 688-89). The Court found that prevailing norms of legal practice reflected in the ABA Standards for Criminal Justice and the comments of the Model Rules of Professional Conduct are strong indicators of what is acceptable and reasonable in the profession, but they do not discretely set forth rules to which counsel must abide. Id. No particular set of detailed rules for attorney conduct can adequately account for the varying circumstances faced by defense counsel during trial or the “range of legitimate decisions regarding how best to represent a criminal defendant.” Id. (quoting Strickland, 466 U.S. at 689).

While professional standards provide a great deal of useful guidance in evaluating counsel’s performance, the standards do not and cannot define the “boundary between constitutionally acceptable and constitutionally unacceptable performance.” Id.; see also id. at n.2 (citing Nix v. Whiteside, 475 U.S. 157, 165 (1986)) (noting breach of ethical standard does not automatically imply denial of constitutional guarantee under Sixth Amendment).

Strickland also recognized that the use of specific guidelines to define the effectiveness of counsel are not appropriate. Strickland, 466 U.S. at 688. For a discussion of the Strickland court’s assessment of reasonable representation of counsel see supra notes 43-46 and accompanying text.


86. Id. (citing Barnes, 463 U.S. at 754) (stating defense counsel does not have duty to raise every nonfrivolous argument requested by defendant); cf. Teague, 953 F.2d at 1531 (holding that right to testify is fundamental right of defendant that cannot be waived by attorney); Standards for Criminal Justice, supra note 36, at Standard 4-5.2 (stating that “strategic and tactical decisions should be made by defense counsel after consultation with the client”).

When analyzing this issue, the court in Weatherwax discussed the ABA Model Rules of Professional Conduct and the ABA Standards for Criminal Justice. Weatherwax, 77 F.3d at 1433-34. Basically, the court concluded that: (1) certain fundamental decisions are to be made by the client after consultation with counsel; (2)
in scrutinizing Joseph’s performance, as exemplified by its discussion of
the possibility that even if Joseph failed the Strickland
test, he was justified
in doing so because he made a strategic decision. 87

While the Third Circuit still maintained that fundamental decisions
must ultimately be made by the client, the court also concluded that Jo-
seph did not breach his duty as counsel by not informing the court of
possible jury prejudice as a result of the newspaper incident. 88 Rather, the
certain nonfundamental decisions are to be made by counsel after consultation
with the client; and (3) strategic or tactical decisions regarding the course of the
defense are to be made by counsel after consultation with the client if appropriate
and feasible. Id. Thus, an attorney making strategic or tactical decisions must
make them according to “reasonable professional judgment.” Id. For further dis-
cussion of the ABA Model Rules of Professional Conduct and the ABA Standards of
Criminal Justice, see supra notes 94, 96, 93-96, infra notes 131-53 and accompanying
text.

87. Weatherwax, 77 F.3d at 1431-32. The states also have an interest in not
restricting the range of attorney conduct acceptable under the Sixth Amend-
ment—narrowly defining the range of acceptable conduct would “intrude into the
state’s proper authority to define and apply the standards of professional conduct
applicable to those it admits to practice in its courts.” Id. at 1431 n.2 (quoting Nix,
475 U.S. at 165 n.10).

“[C]ounsel has a duty to make reasonable investigations or to make a reason-
able decision that makes particular investigations unnecessary.” Id. at 1432 (quot-
ing Strickland, 466 U.S. at 691). An attorney who makes a strategic decision on an
incomplete investigation of the surrounding circumstances is able to make such a
decision based on the incomplete investigation, as long as the choice to do so is
“reasonable precisely to the extent that reasonable professional judgments sup-
port the limitations on investigation.” Id. (quoting Strickland, 466 U.S. at 691). In
effect, attorney Joseph made his strategic decision not to move for a mistrial after a
“less than complete investigation.” Id; see Wainwright v. Sykes, 433 U.S. 72, 93
(1977) (Burger, C.J., concurring) (recognizing that defendant’s attorney is en-
trusted to “make on-the-spot decisions at virtually all stages of a criminal trial,” but
counsel cannot waive defendant’s fundamental, constitutionally dictated rights); Routly v. Singletary, 33 F.3d 1279, 1289 (11th Cir. 1994) (holding decision by
counsel not to move for mistrial was “deliberate tactical choice”), cert. denied, 115 S.
Ct. 2627 (1995); United States v. McGill, 11 F.3d 223, 226-27 (1st Cir. 1993) (main-
taining that listening to client in lieu of making reasonable decision under prevail-
ing professional norms may constitute incompetence); Meeks v. Bergen, 749 F.2d
322, 328 (6th Cir. 1984) (holding choice of which defense to assert is strategic
decision to be made by defense counsel); United States v. Long, 674 F.2d 848, 855
(11th Cir. 1982) (“This Court will not second-guess tactical decisions of counsel in
deciding whether to call certain witnesses.”); State v. Davis, 506 A.2d 86, 89-90
(Conn. 1986) (holding decision of which witnesses to call is commonly regarded as
tactical, strategic decision).

88. Weatherwax, 77 F.3d at 1435. The district court held “that Joseph was re-
quired to follow Weatherwax’s direct instruction to ‘do something,’ such as ‘file a
motion.’” Id. The Third Circuit, however, reversed and held that Joseph was not
required to follow Weatherwax’s requests with respect to the incident at issue. Id.
at 1438.

According to the Weatherwax court, the client makes such decisions because
they are fundamental to the course of the client’s fate. Id. at 1435. Some funda-
mental decisions relate directly to representation objectives, while other funda-
mental decisions are strategic decisions that “relate to the means employed by the
defense to obtain the primary object of the representation.” Id. The court noted
that some fundamental decisions, such as whether to take an appeal or whether to
court determined that Joseph made a strategic decision not to inform the trial court and that his decision did, in fact, concern the means utilized by defense counsel to reach his and Weatherwax’s mutual goal—acquittal of first degree murder.\textsuperscript{89} In this regard, the court stated that “a lawyer ‘is not required to . . . employ means simply because a client may wish that the lawyer do so.’”\textsuperscript{90} Accordingly, the Third Circuit indicated that whether to inform the court of the newspaper incident was not a fundamental decision left to the discretion and authority of Weatherwax.\textsuperscript{91} Thus, despite Weatherwax’s request that Joseph disclose the incident to the trial court, Joseph was not compelled to heed his request.\textsuperscript{92} As such, the court held

\textsuperscript{89}Id.\textsuperscript{90}Id. (quoting MODEL RULES, supra note 36, at Rule 1.2(a)). The Weatherwax court maintained that Joseph did not encroach upon on Weatherwax’s authority: “To make a fundamental personal decision comparable to decisions on whether to forego assistance of counsel, to waive a jury trial, or to testify in one’s own behalf. Instead, Joseph’s decision concerned whether he should object once he learned that a distorted newspaper account of the trial testimony may have made its way to the jury. It was clearly an important decision, but it was not one where respect for the individual’s autonomy requires us to disregard the desirability of having professional judgment exercised in the client’s best interest.”\textsuperscript{91}Id.\textsuperscript{92}Weatherwax, 77 F.3d at 1435. Joseph had only limited information with which to make his decision at the time he was confronted with having to decide whether to call the court’s attention to the newspaper incident. Id. at 1432. Joseph knew only that someone saw a juror with a newspaper containing a potentially damaging article. Id. Joseph also truly believed that he could not possibly obtain a jury that would be more favorable to Weatherwax. Id. The Third Circuit did not view Joseph’s decision as unreasonable, and therefore determined that his “decision not to inform the court was reasonable ‘under prevailing professional norms.’” Id. (quoting Strickland, 466 U.S. at 688). Furthermore, the court held
that Joseph acted within the scope of his authority in choosing to forego informing the trial court of the incident.\footnote{Id. at 1432. The Third Circuit, holding that Joseph acted within his authority when he failed to conduct a voir dire in order to determine the impact of the newspaper article on the jurors' states of mind, likened the incident at issue to witness selection, which is among the "non-fundamental decisions that counsel is entitled to make at trial." \textit{Id.} at 1434.}

Moreover, the Third Circuit recognized that Joseph made a strategic decision not to move for a mistrial "after less than complete investigation," and after having failed to conduct a voir dire into the impact of extra-record information on the jury.\footnote{Id. at 1432. Joseph decided that the better course of action was to keep the jury unaltered, without inquiring into the effect of the newspaper article on the jurors' states of mind. \textit{Id.}} Regardless, the \textit{Weatherwax} court sympa-

that the decision not to inform the trial court of the possible jury prejudice is "the exclusive province of the lawyer," and because Joseph had a rational basis in making the decision, the district court did not have the authority to "second-guess counsel's judgment call." \textit{Id.} at 1436 (quoting \textit{Criminal Justice Standards, supra note 34, at Standard § 4-502(b)}).

The crux of the Third Circuit's analysis focused on a balance between the consequences that would result from Joseph informing the trial court of the incident and those that would result from him not informing the court. \textit{Id.} The court analogized Joseph's decision not to draw attention to the possibility of jury prejudice, to a strategic choice not to object to the admission of inadmissible hearsay evidence by the prosecution. \textit{Id.} "In both situations, the consequence of a failure to object is that the jury will (or in \textit{Weatherwax}'s case might) learn information untested by the adversarial process that it would not otherwise have learned," and in both situations, the defense attorney is able to prevent the jury from learning such information. \textit{Id.} Instead, the court noted that defense counsel may decide when it is "strategically advantageous" not to object, and that "in neither instance is the defendant's right to a jury trial implicated." \textit{Id.}

\footnote{Id. at 1432. The Third Circuit, holding that Joseph acted within his authority when he failed to conduct a voir dire in order to determine the impact of the newspaper article on the jurors' states of mind, likened the incident at issue to witness selection, which is among the "non-fundamental decisions that counsel is entitled to make at trial." \textit{Id.} at 1434.}

\footnote{Id. at 1432. Joseph decided that the better course of action was to keep the jury unaltered, without inquiring into the effect of the newspaper article on the jurors' states of mind. \textit{Id.}}

Generally, in each "case where the trial court learns that a member or members of the jury may have received extra-record information with a potential for substantial prejudice, the trial court must determine whether the members of the jury have been prejudiced." \textit{Id.} at 1432 n.3 (quoting Government of the Virgin Islands v. Dowling, 814 F.2d 134, 139 (3d Cir. 1987), \textit{aff'd sub nom. Dowling v. United States}, 493 U.S. 342 (1990)). Joseph, however, deliberately did not bring the possibility of prejudice to the trial court's attention; his decision not to investigate the possibility of juror prejudice was, in itself, a strategic decision. \textit{Id.} at 1432. If Joseph had conducted an investigation into the newspaper incident, he would have inevitably brought the incident to the court's attention. \textit{Id.} Furthermore, if Joseph had brought the newspaper article to the trial court's attention, the court would have been obligated to conduct a voir dire and would have had full discretion to excuse some of the jurors or declare a mistrial. \textit{Id.} at n.3. Essentially, if the court had notice of juror misconduct, then Joseph would have been forced to relinquish some control over whether the jury would remain. \textit{Id.} at 1432.

Furthermore, to have declared a mistrial would have brought more publicity to the trial, and the chances of obtaining impartial jurors a second time would have been next to impossible. \textit{See id.} at 1428 (referring to Joseph's jury selection and trial strategy). For further discussion on the difficulty of obtaining an impartial jury, see \textit{supra} notes 61-67 and accompanying text.

Almost all trial lawyers agree as to the difficulty of getting an impartial jury. Emily M. DeFalla, \textit{Note, Voir Dire for California's Civil Trials: Applying the Williams Standard}, 99 HASTINGS L.J. 517, 517 (1988); \textit{see also} Alfredo Garcia, \textit{Clash of the Titans: The Difficult Reconciliation of a Fair Trial and a Free Press in Modern American
thized with Joseph’s fear that if he called the trial court’s attention to the newspaper incident, he would have risked a mistrial. In doing so, the court maintained that Joseph made a decision that any other competent litigator would have made under similar circumstances.

Society, 32 SANTA CLARA L. REV. 1107, 1109-10 (1992) (stating that media influence on jurors and problem of extraneous information existed over 100 years ago during Aaron Burr’s murder trial); Note, Beyond Batson: Eliminating Gender-Based Preemptory Challenges, 105 HARV. L. REV. 1920, 1930 (1992) (stating that preemptory challenges based on gender do not materially advance conceptions of jury impartiality); Karen A. Cusenbary, Note, Constitutional Law—Voir Dire—A Trial Court’s Refusal to Question Prospective Jurors About the Specific Contents of Pretrial Publicity Which They Had Read or Heard Did Not Violate Defendant’s Sixth Amendment Right to an Impartial Jury, or Fourteenth Amendment Right to Due Process, 23 ST. MARY’S L.J. 541, 543 (1991) (discussing right to impartial jury and procedure of assuring constitutional rights as addressed in Mu’min v. Virginia, 500 U.S. 415 (1991)). The trial lawyers’ concerns are not only with regard to common knowledge about the case, but also include the opinions and attitudes that jurors bring into the courtroom. Walthall, supra note 61, at 1109.

95. Weatherwax, 77 F.3d at 1432 n.3. In Weatherwax, the court sided with Joseph and maintained that “the decision not to inform the court was reasonable ‘under prevailing professional norms.’” Id. at 1432 (quoting Strickland, 466 U.S. at 688).

Joseph made the decision that it was preferable for Weatherwax to be tried by the current jury consisting of three Caucasian jurors (one possibly biased from the newspaper article), rather than by a new jury, which would almost definitely consist of all African-American jurors. Id. at 1432 n.4.

Joseph acknowledged that the facts of Weatherwax were not in dispute; thus, the advantage of the defense would lie only in the jury that would hear and interpret the facts. Id. As such, the piece of evidence that Joseph most wanted to impress upon the jury was Weatherwax’s perception of what happened to him on the night of the shooting. Id.

With this in mind, Joseph carefully considered the strategy he would use in selecting a jury. Id. His first strategy was based on two facts. First, that because Weatherwax was Caucasian and a “Continental,” who killed an African-American male that was a native of the Virgin Islands, the “case had created a racially charged atmosphere in the Virgin Islands.” Id. Second, Weatherwax intended to claim self-defense. Id. In light of these facts, Joseph decided to select a jury based on sympathy, that is, he intended to select a jury consisting of as many “Continentsals” as possible, because he believed that the “Continentsals” would identify with, and hence sympathize with, Weatherwax. Id.

The second objective of Joseph’s sympathy-based trial strategy was to persuade the jury to convict Weatherwax on a lesser offense in the event that the jury did not fully acquit him on the basis of the self-defense claim. Id. Considering that Joseph’s trial strategy was sympathy-based, according to the Third Circuit, Joseph was understandably “ecstatic” when the empaneled jurors consisted of three “Continentsals.” Id. (noting it was largest number of “Continentsals” that Joseph had ever seen on Virgin Islands jury).

96. Id. at 1432 & n.4. The Supreme Court has yet to assert that “ineffective assistance of counsel occurs whenever an attorney exercises his or her professional judgment based on the belief that such aversions and affinities may influence a jury’s verdict.” Id.

Lawyers sometimes have empirical data to rely upon when selecting a jury, but more often than not, lawyers make trial strategy judgments based primarily on probabilities. Id. Frequently, the probabilities they utilize are only “based on an assessment of human nature rooted in the lawyer’s own personal experience.” Id.
2. Ample Consultation

The Third Circuit also recognized that Joseph responded affirmatively to the requests of Weatherwax and his family to "file a motion" or "do something" in response to the "newspaper incident." Accordingly, the court determined that Joseph gave ample consideration to both Weatherwax and his family's suggestions.

The Weatherwax court cites several cases and articles indicating the correlation between juror/defendant race and the effect it has on acquittals. Id. (citing Georgia v. McCollum, 505 U.S. 42, 61 (1992) (Thomas, J., concurring) ("[C]onscious and unconscious prejudice persists in our society and . . . may influence some juries."); id. at 68 (O'Connor, J., dissenting) ("[C]onscious and unconscious racism can affect the way white jurors perceive minority defendants and the facts presented at their trials, perhaps determining the verdict of guilt or innocence."); McCleskey v. Kemp, 481 U.S. 279, 287 (1987) (discussing study indicating that African-American defendants who kill Caucasian victims have greatest incidence of receiving death penalty); see Jeffrey S. Brand, The Supreme Court, Equal Protection and Jury Selection: Denying that Race Still Matters, 1994 Wis. L. Rev. 511, 628 n.584 (noting studies show likelihood of acquittal by juror is correlated to race of juror and of defendant); Sheri Lynn Johnson, Black Innocence and the White Jury, 83 Mich L. Rev. 1611, 1616-43 (1985) (discussing research indicating determination of guilt influenced by jurors' racial bias); Nancy J. King, Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions, 92 Mich. L. Rev. 63, 80-99 (1993) (discussing studies that indicate race influences jury decisions)).

Id. at 1435. Specifically, the court stated that "Weatherwax had an ample opportunity to convey the information available to him and to share his own appraisal of the situation." Id. at 1436.

Id. at 1437. For clarification purposes, it is important to note that neither the family members nor Weatherwax complained that Joseph failed to give ample consideration to their concerns. Id. at 1436. They complained only that Joseph committed to "do something" and never did. Id. (noting family complained of Joseph's failure to "file a motion").

According to the Third Circuit, not only did Joseph listen attentively to Weatherwax and his family regarding their concerns about the possibility of jury prejudice and possible courses of action in response to the incident, but the interchange between Weatherwax and Joseph in the courthouse on the morning of the last day of the trial was an adequate attorney-client consultation. Id. Joseph's consultation with Weatherwax on the last day of the trial "cannot fairly . . . be described as a failure to consult." Id. In assessing the adequacy of Joseph's consultation with Weatherwax, the court considered the fact that the newspaper incident arose suddenly on the last day of the trial as the jury was getting ready to deliberate. Id. "[T]his interchange, while brief, was far from perfunctory." Id. In her affidavit, Sallie Lay indicated that the interchange on the last morning of the trial lasted long enough for several family members, including Weatherwax, to offer suggestions as to how to deal with the newspaper incident. Id. For a further discussion of what Weatherwax and his family thought Joseph should do in response to the newspaper incident, see supra note 69 and accompany text.

The Third Circuit discussed the purposes served by the requirement that an attorney consult with his or her client concerning issues on which counsel has the "final word." Id. In considering the purposes of attorney-client consultation, the court concluded that there was no threat to the accomplishment of any of the consultation objectives. Id. First, the consultation requirement assures that the client has the opportunity to assist in his own defense. Id. Second, the requirement also assures that the attorney will consider the client's desires and views as to the best course of defense. Id. Third, the court recognized that the consultation requirement promotes and maintains the attorney-client relationship. Id. Finally,
Additionally, the Third Circuit in *Weatherwax* determined that Joseph acted reasonably in not disclosing to Weatherwax his final decision not to inform the court.\(^{99}\) In short, the Third Circuit found that there was not an opportunity for meaningful consultation with Weatherwax after Joseph had made his decision not to pursue the newspaper incident.\(^{100}\) The court also noted that even if there was a fair opportunity for Joseph to further consult with Weatherwax, Joseph could not reasonably have been expected to anticipate anything being accomplished by doing so.\(^{101}\) Therefore, the court maintained that it is reasonable for an attorney not\(^{102}\) if necessary, the consultation requirement affords the client the opportunity to seek other representation if he or she is unhappy with the course of legal representation with the current attorney. *Id.* at 1436-37.\(^{99}\)

The court recognized that "[w]hile an attorney's education and experience give him superior knowledge of generalized technical information, '[t]he client possesses superior knowledge of another sort—knowledge of the facts and circumstances of his case." *Id.* (quoting Stano v. Dugger, 921 F.2d 1125, 1146 n.33 (11th Cir. 1991)); see also Mark Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. Pa. L. Rev. 41, 100 (1979); cf. Strickland, 466 U.S. at 691 (noting that counsel's decision not to investigate matter must be evaluated in light of information that defendant might have supplied counsel).

The Third Circuit maintained that an attorney may not know his client's views and desires if no consultation takes place. *Weatherwax*, 77 F.3d at 1436-37. The court concluded that, "nothing about the length or character of the conference would appear to have strained the attorney-client relationship between Joseph and Weatherwax." *Id.* Generally, if a client discovers through consultation with his attorney that the attorney intends to pursue a strategy contrary to that desired by the client, the client may deem it damaging enough to his defense to seek alternate representation. *Id.* at 1437.

99. *Weatherwax*, 77 F.3d at 1437. Joseph assured Weatherwax and Weatherwax's family members that he would "file a motion," but allegedly failed to communicate to Weatherwax that he chose not to file a motion. *Id.* at 1436-37. The district court found that Joseph deliberately misled Weatherwax when he said he would "do something." *Id.* at 1437 n.6. The Third Circuit further noted:

Whether Joseph made his final decision before or after the conclusion of the conference, the district court was not at liberty to overturn Weatherwax's conviction without making a finding, based on record evidence, that without Joseph's assurances about filing a motion, an objection would have been raised and the course of events altered. *Id.*

100. *Id.* at 1437. Weatherwax did not contend that he would have sought different counsel had he known of Joseph's final decision. *Id.*

101. *Id.* Even assuming Weatherwax would have wanted to change representation of counsel if he had been informed of Joseph's decision, the district court did not find that Weatherwax actually would have sought to change representation, nor did the district court find that the trial court would have permitted a continuance and change of representation on the last day of trial. *Id.* In justifying Joseph's decision and his subsequent failure to inform Weatherwax of his decision, the Third Circuit held that, in light of the surrounding circumstances, Joseph did not reasonably believe that Weatherwax would seriously consider a change in representation, nor did he believe that the court would have permitted a change in representation on the last day of trial. *Id.* Not only would a continuance have burdened the jury, but new counsel may have pursued the same strategy as Joseph. *Id.* at 1437-38.
to communicate his or her final decision to the client when they have previously exchanged views on the issue.\textsuperscript{102}

3. \textit{The Officer Fulfills His Duty}

In \textit{Weatherwax}, the Third Circuit next addressed whether Joseph's decision not to bring the newspaper incident to the court's attention was a breach of his duty as an officer of the court.\textsuperscript{103} The court reiterated its previous explanation and determined that "Joseph acted as he did solely for the purpose of serving what he believed to be the best interests of his client and in a manner consistent with his other obligations to his client."\textsuperscript{104}

Moreover, the \textit{Weatherwax} court noted that even if Joseph did have a duty as an officer of the court to inform the trial court of the newspaper incident, the alleged breach of that duty did not require a reversal of \textit{Weatherwax}'s conviction for two reasons.\textsuperscript{105} First, even if Joseph breached his duty to the court, he still could have rendered \textit{Weatherwax} effective assistance.\textsuperscript{106} Second, the court emphasized the perverse ramifi-

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\item \textsuperscript{102} \textit{Id.} at 1438. The court rationalized this finding by likening the situation to one where decisions must be made in the heat of battle at a trial, when it is often "unreasonable to expect any consultation before the decision is made and implemented." \textit{Id.} at 1437. Moreover, "[t]he constitutional duty to consult regarding issues on which counsel has the last word requires only that counsel act reasonably in light of the circumstances and what is likely to be accomplished by a consultation." \textit{Id.}
\item \textsuperscript{103} \textit{Id.} at 1438. The Third Circuit ultimately held that any breach of a duty to the court committed by Joseph would not justify overturning \textit{Weatherwax}'s conviction. \textit{Id.}
\item The lower court reasoned that the trial judge's warnings to the jury that they should avoid reading articles about the trial and Joseph's duty, as a criminal defense attorney, to assure that the trial would be a reliable adversarial testing process, incited Joseph's duty to report to the trial court. \textit{Id.} (stating that counsel has "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process" (quoting \textit{Strickland}, 466 U.S. at 688 (1984))).
\item The Third Circuit, however, did not express a view on either of the reasons advanced by the district court. \textit{Id.} Notably, when the \textit{Weatherwax} family notified Joseph of the newspaper incident, they did not \textit{report} a violation of the judge's order that jurors avoid reading articles about the trial. \textit{Id.} at 1438 n.7. Thus, the court stated, that "Joseph’s view that there likely had been no violation of that order was not unreasonable. . . . The issue of whether Joseph had an ethical duty to the court to report the newspaper incident is, accordingly, a debatable one." \textit{Id.}
\item \textsuperscript{104} \textit{Id.} at 1438. If Joseph had requested that an investigation be made into the possibility of jury misconduct, court approval would have been required. \textit{Id.} at 1438 n.7. In Joseph's professional judgment, seeking court approval was inconsistent with his duty of loyalty to the client. \textit{Id.; see also Model Rules, supra} note 36, at Rule 1.6 (discussing attorney's duties to client).
\item \textsuperscript{105} \textit{Weatherwax}, 77 F.3d at 1438.
\item \textsuperscript{106} \textit{Id.} The court stated: "Assuming that Joseph did violate some ethical duty to the court that would warrant disciplinary sanctions against him, that breach would provide no justification for a remedy that would, in effect, impose a sanction upon the government." \textit{Id.} (emphasis omitted). The "remedy" alluded to would be to reverse \textit{Weatherwax}'s murder conviction on the basis of an alleged breach of Joseph's duty to the court. \textit{Id.} The court implied that when the "remedy" is bal-
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cation of overturning Weatherwax's conviction on the basis of Joseph's alleged breach of his duty to the court—future defense counsel would have an incentive to breach their duty as an officer of the court by committing this kind of reversible error, thereby giving the defendant an escape from a conviction.\textsuperscript{107}

4. \textit{The Dissent: The Ax that Grinds}

Judge Lewis's dissent in \textit{Weatherwax} focused on Joseph's decision not to bring the newspaper incident to the attention of the trial court.\textsuperscript{108} According to Judge Lewis, Joseph's decision should not have been so strongly inspired by the race of the jury.\textsuperscript{109} Specifically, Judge Lewis maintained that Joseph's decision was unreasonable in light of "prevailing professional norms," and moreover, that it was based on an underlying assumption explicitly rejected by the Supreme Court in \textit{Batson}.\textsuperscript{110} Fur-

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\bibitem{id} Id. Moreover, an alleged breach of a duty to the court by defense counsel does not alone justify overturning turning the defendant's murder conviction. \textit{Id.}

\bibitem{108} \textit{Id.} (Lewis, J., dissenting). Judge Lewis stated that "[a] naive assumption about race served as the sole basis for Joseph's 'strategic decision' to ignore the wishes of his client regarding the newspaper incident." \textit{Id.} (Lewis, J., dissenting). For a further discussion of the considerations taken into account by an attorney when selecting a jury, see supra note 62.

\bibitem{109} \textit{Weatherwax}, 77 F.3d at 1439 (Lewis, J., dissenting). Judge Lewis opined that the majority failed to adequately pursue the extent to which the "racially charged" nature of the case influenced Joseph's decision. \textit{Id.} (Lewis, J., dissenting). In Judge Lewis's opinion, the reasonableness of Joseph's strategic decision needed to be assessed in light of the assumptions that influenced his decision. \textit{Id.} (Lewis, J., dissenting).

Judge Lewis disagreed with the majority's holding that Joseph's decision stemmed from a belief that the jury was the "best that [Joseph] could hope for," and thus, was a strategic decision made in accordance with "prevailing professional norms." \textit{Id.} (Lewis, J., dissenting). The majority emphasized Joseph's alleged reasonable belief that the jury of three Caucasians was the best that Weatherwax, a Caucasian defendant, could hope for. \textit{Id.} (Lewis, J., dissenting). In making this decision, the majority concluded that Joseph's decision was "reasonable 'under prevailing professional norms.'" \textit{Id.} (Lewis, J., dissenting) (quoting majority opinion at 1432). Furthermore, the majority concluded that Joseph's decision was one that any other competent litigator in his situation would have made. \textit{Id.} (Lewis, J., dissenting).

\bibitem{110} \textit{Id.} at 1438 (Lewis, J., dissenting); \textit{see} \textit{Batson v. Kentucky}, 476 U.S. 79, 97 (1986) (prohibiting race dependent use of peremptory challenges).

Judge Lewis noted that the \textit{Weatherwax} case did not intend for the court to consider the reasonableness of trial strategies that are designed to appeal to the racial composition of the jury. \textit{Weatherwax}, 77 F.3d 1438 n.8 (Lewis, J., dissenting). Instead, Judge Lewis indicated that he would consider the issue of racial jury composition only to the extent necessary to adequately discuss:

\[\text{T}he\text{ issue of whether a strategic decision, grounded exclusively upon a lawyer's assumptions about the proclivities of jurors based solely on their race, can be considered professionally reasonable when the decision runs counter to the express wishes of his or her client and increases the likeli-\]

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thermore, Judge Lewis argued that it was illogical for the majority to con-clude that Weatherwax would have benefited from the presence of the prejudiced juror simply because that juror was Caucasian."111

Judge Lewis’s dissent emphasized that all decisions made at any time during a trial could be considered strategic.112 Thus, simply labeling a decision "strategic" would not necessarily mean that the decision falls within the "wide range of . . . competent assistance."113 Furthermore, Judge Lewis contended that the majority's conclusion that Joseph's inaction was "reasonable 'under prevailing professional'" norms was a "leap," because the majority did not fully confront the issue of why Joseph felt the jury was favorable for Weatherwax.114 According to Judge Lewis, Joseph

hood that [the] client's constitutional right to an impartial jury will be violated.

Id. (Lewis, J., dissenting).

111. Weatherwax, 77 F.3d at 1439 (Lewis, J., dissenting). Concedingly, it makes little sense to argue that Weatherwax would have benefited from a possibly prejudiced juror simply because the juror was Caucasian. Id. (Lewis, J., dissenting).

112. Id. (Lewis, J., dissenting) (arguing most, if not all, decisions by counsel before, during and after trial may be considered strategic).

113. Id. (Lewis, J., dissenting) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). In other words, "not all strategic decisions are by definition professionally reasonable." Id. (Lewis, J., dissenting). Judge Lewis noted that in the first review of the case in 1994, the court observed that:

"[T]rial counsel's actions . . . would indicate that representation was deficient unless the district court determines he [Joseph] decided to forego voir dire because he thought the jury was favorable to his client." . . . I adhere to this statement insofar as it is premised upon the notion that strategic decisions by counsel, including those based upon a lawyer's belief that a jury is favorable to his client, are presumptively reasonable. In this case, however, the record developed on remand clearly demonstrates that Joseph's reliance upon the favorable make-up of the jury as an explanation for his inaction was unreasonable because it was motivated solely by an illegitimate race-based stereotype.

Id. at 1439 n.10 (Lewis, J., dissenting).

114. Id. at 1439 (Lewis, J., dissenting). Judge Lewis opined that Joseph's assumptions regarding racial partisanship of Caucasian jurors were unfortunate and unreasonable. Id. at 1441 (Lewis, J., dissenting). Moreover, such assumptions should never "form the basis of a professionally reasonable strategic decision in light of the interests that weighed in favor of bringing the matter to the court's attention." Id. (Lewis, J., dissenting).

Judge Lewis questioned the majority's holding that Joseph reasonably feared the consequences of bringing the newspaper incident to trial court's attention. Id. at 1439 n.9 (Lewis, J., dissenting). A mistrial or the dismissal of a juror would have required a finding by the trial court that the newspaper article was: (1) read by one or more jurors; (2) that the contents of the newspaper negatively prejudiced Weatherwax; and (3) that a juror who read the article was actually influenced by its prejudicial nature. Id. (Lewis, J., dissenting); see Government of the Virgin Islands v. Weatherwax, 20 F.3d 572, 578 (3d Cir. 1994) (discussing Government of the Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987), aff'd sub nom. Dowling v. United States, 493 U.S. 372 (1990)); rev'd, 77 F.3d 1425, 1436 (3d Cir.), cert. denied, 117 S. Ct. 588 (1996)). There were no findings of these effects by either the district court or by the Third Circuit majority. Weatherwax, 77 F.3d at 1439 n.9 (Lewis, J., dissenting).
To illustrate the point that the majority's logic in deeming Joseph's decision to be "strategic" was unfounded, Judge Lewis utilized a hypothetical in which the hypothetical attorney made a decision not to call a witness on the basis of his race. *Id.* at 1439-40 (Lewis, J., dissenting). Judge Lewis's hypothetical considered a defendant in a similar situation as Weatherwax, under a slightly different courtroom scenario. *Id.* at 1439 (Lewis, J., dissenting). The hypothetical defendant, John Doe, an African-American male, shot a Caucasian man, claimed that the killing was in self-defense and was tried in front of an all white jury. *Id.* (Lewis, J., dissenting). Doe requested that an eyewitness of the crime, an African-American male, be called to testify, but Doe's attorney failed to comply with the request. *Id.* at 1440 (Lewis, J., dissenting). Doe appealed, claiming ineffective assistance of counsel and alleging that "his lawyer was incompetent based upon his decision not to introduce the eyewitness testimony of the black man, whom Doe felt . . . could have aided in his defense." *Id.* (Lewis, J., dissenting). Doe's attorney claimed that he, in effect, exercised his authority to make a strategic decision; "that he chose not to call this individual[, the African-American eyewitness,] as a witness because he made a professional judgment and concluded that the witness's testimony would have had no impact upon the jury." *Id.* (Lewis, J., dissenting). Lewis's dissent pointed out that the Weatherwax record indicated that for Joseph's decision not to bring the newspaper incident to the trial court's attention was similar to the logic of Doe's attorney in deciding not to call an African-American eyewitness. *Id.* (Lewis, J., dissenting).

Supposing that the hypothetical attorney failed to call the witness because he felt that the testimony of an African-American man on behalf of an African-American defendant "would carry no weight in the minds of an all-white jury," Judge Lewis concluded, "[s]urely the majority would not conclude" that an attorney "employed a reasonable strategy by allowing . . . outmoded racial stereotyping to influence whether or not to call a witness." *Id.* (Lewis, J., dissenting). Judge Lewis also stated that, "[u]nder the majority's logic, the lawyer's explanation that the witness was not called because the testimony would have been ineffectual would, standing alone, constitute a sufficient basis upon which to conclude that Doe's counsel acted "reasonably 'under prevailing professional norms.'" *Id.* (Lewis, J., dissenting) (quoting majority opinion at 1433, which favorably cites United States v. Long, 674 F.2d 848, 855 (11th Cir. 1982) (holding counsel's failure to call alibi witness did not constitute ineffective assistance and that "court will not second guess tactical decisions of counsel in deciding whether to call certain witnesses"); see United States v. Boyles, 57 F.3d 535, 551 (7th Cir. 1995) (recognizing that court will not second-guess trial tactic decisions that are reasonably based); Tomlin v. Myers, 30 F.3d 1235, 1244 (9th Cir. 1994) (stating that "[w]hile we may disagree with counsel's tactics, such tactics do not fall outside the wide ambit of reasonable representation merely because their wisdom is subject to second-guessing"); Griffin v. Wainwright, 760 F.2d 1505, 1514 (11th Cir. 1985) (stating that tactical decision "will almost never be overturned on habeas corpus"), vacated, 476 U.S. 1112 (1986); Perron v. Perrin, 742 F.2d 669, 673 (1st Cir. 1984) (emphasizing that judicial scrutiny of counsel's performance must be highly deferential and court shall not second-guess tactical decisions made by counsel); United States ex rel. Huckstead v. Greer, 737 F.2d 673, 676 (7th Cir. 1984) (stating that "we are not free to second guess legitimate tactical decisions, rather, we examine only those blunders not classifiable as attorneys' tactics and determine whether they amount to grossly unprofessional conduct"); United States v. Bad Cob, 560 F.2d 877, 881 (8th Cir. 1977) (holding that attorney's professional judgment regarding tactical decisions should not be second-guessed by hindsight); United States v. Moore, 529 F.2d 355, 357 (D.C. Cir. 1976) (abjuring second-guessing strategic and tactical decisions made by counsel, but holding that inadequate preparation by counsel constitutes ineffective assistance); United States v. Hager, 505 F.2d 737, 739 (8th Cir. 1974) (stating that "the exercise of a defense attorney's professional judgment should not be second-guessed by hindsight").
undoubtedly disregarded Weatherwax's request that he "do something" about the newspaper incident because he felt that the Caucasian jurors would sympathize with his Caucasian client.\textsuperscript{115} Furthermore, Judge Lewis implied that Joseph's assumptions regarding racial relationships between Caucasian jurors and Caucasian defendants were so deep-seated that Joseph jeopardized Weatherwax's constitutional right to an impartial jury.\textsuperscript{116} As such, Judge Lewis concluded that the "only professionally responsible and reasonable choice for Joseph was to inform the trial court of what had occurred."\textsuperscript{117} Consequently, Judge Lewis maintained that making decisions on the basis of race should not be considered "strategic decisionmaking"; rather race should not be regarded as a crucial factor in decisionmaking and it is wholly adverse to the Supreme Court's holding in \textit{Batson}.\textsuperscript{118}

\textbf{B. Critical Analysis}

In concluding that Joseph rendered effective assistance to Weatherwax, the Third Circuit not only disregarded the \textit{Batson} decision and misapplied the discretion requirement formulated in \textit{Strickland}, it also

\textsuperscript{115} \textit{Weatherwax}, 77 F.3d at 1441 (Lewis, J., dissenting). Joseph's decision was entirely motivated by race. \textit{Id.} Joseph stated that "Continents," or Caucasians, are "retirees who are viewed as conservative and anti-crime." \textit{Id.; see also Brief for Appellant at 8 n.4, Government of the Virgin Islands v. Weatherwax, 77 F.3d 1425 (3d Cir. 1996) (No. 95-7126).} In effect, this statement reveals that Joseph concluded that the three Caucasian jurors would favor Weatherwax for no reason other than their shared race. \textit{Weatherwax}, 77 F.3d at 1441 (Lewis, J., dissenting). Dismayed by Joseph's decision and its justification, Judge Lewis rhetorically asked: "Why else would persons who are 'conservative and anti-crime' identify with an individual charged with first degree murder and illegal possession of a firearm?" \textit{Id.} (Lewis, J., dissenting).

\textsuperscript{116} \textit{Weatherwax}, 77 F.3d at 1441 (Lewis, J., dissenting).

\textsuperscript{117} \textit{Id.} (Lewis, J., dissenting). From Judge Lewis's vantage point, the majority sufficiently considered Weatherwax's request that Joseph "do something" about the newspaper incident and the possibility that a failure to inform the court of the incident could jeopardize Weatherwax's constitutional right to an impartial jury. \textit{Id.} (Lewis, J., dissenting). Thus, in light of these two considerations, Joseph should have called the court's attention to the newspaper incident. \textit{Id.} (Lewis, J., dissenting). Instead, the majority identified with Joseph despite the Supreme Court's holding in \textit{Batson} and concluded that Joseph acted professionally and within his authority by not informing the court of the possibility of jury prejudice. \textit{Id.} (Lewis, J., dissenting); see \textit{Batson v. Kentucky}, 476 U.S. 79, 87 (1986) ("A person's race simply 'is unrelated to his fitness as a juror.'" (quoting \textit{Thiel v. Southern Pac. Co.}, 328 U.S. 217, 227 (1946))). According to Judge Lewis's dissent, Joseph's assumption that the Caucasian jurors would sympathize with Weatherwax because of their shared race was undeserving of any weight given by the majority. \textit{Weatherwax}, 77 F.3d at 1441 (Lewis, J., dissenting).

\textsuperscript{118} \textit{Weatherwax}, 77 F.3d at 1440 (Lewis, J., dissenting); see also \textit{Batson}, 476 U.S. at 87 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice."). In light of the \textit{Batson} holding, basing trial decisions on race is "an odious form of racial reasoning disguised as a legitimate strategic judgment." \textit{Weatherwax}, 77 F.3d at 1440 (Lewis, J., dissenting).
overlooked Joseph's violation of several professional standards, including: the ABA Model Rules of Professional Conduct (Model Rules); the ABA Model Code of Professional Responsibility (Model Code); and the ABA Standards for Criminal Justice.¹¹⁹ The court's nonrecognition of Joseph's violations in Weatherwax impermissibly denied Weatherwax his constitutional rights to trial by an impartial jury and to effective assistance of defense counsel.

1. Expanding Strickland and Narrowing Batson

The Weatherwax majority erroneously applied the discretionary Strickland standard in two ways: (1) by failing to give ample consideration to the Model Rules and the Model Code and (2) by validating Joseph's inaction as a strategic decision, when in fact he made that decision on the basis of racial partisanship.¹²⁰ In doing so, the Third Circuit inadvertently misused the discretionary Strickland standard to excuse an action that was explicitly rejected by the Supreme Court in Batson.¹²¹

Holding that Joseph did in fact render effective legal assistance, the Weatherwax majority hid behind the curtain of strategic decision-making to excuse Joseph's dereliction of his duties.¹²² Furthermore, the Third Cir-

¹¹⁹. See Batson, 476 U.S. at 79 (rejecting reasonableness of assumption that African-American jurors are more likely to sympathize and favor African-American defendants solely on account of their shared race); Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (holding that court must exercise discretion when evaluating counsel's performance, but decision by counsel must be made according to prevailing professional norms). For a complete discussion of the professional rules and guidelines Joseph breached, see infra notes 131-56 and accompanying text.

¹²⁰. Weatherwax, 77 F.3d at 1438 (Lewis, J., dissenting). For a discussion of the professional rules and guidelines Joseph breached, see infra notes 131-56 and accompanying text.


For a discussion of the facts, holding, and precedential value of Strickland, see supra notes 38-46 and accompanying text.

¹²². Weatherwax, 77 F.3d at 1440 (Lewis, J., dissenting). Moreover, the Third Circuit seemed to overlook a lawyer's obligation to "maximize the likelihood that the client will prevail in litigation" by failing to secure an impartial jury. ROY D. SIMON, JR. & MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION: CASES
cuit overlooked the Supreme Court's decision in *Batson*, which explicitly rejected the notion that it is reasonable to assume African-American jurors will be partial to African-American defendants, merely on account of their shared race.\(^{123}\) Surely, the Supreme Court never intended to excuse racially-based decisions made by an attorney under the guise of strategic decision-making. Rather, the court reached an opposite conclusion in *Strickland*, where it held that a court should exercise a great deal of discretion when evaluating an attorney's performance.\(^{124}\)

Surprisingly, however, the Third Circuit validated Joseph's basis for inaction despite the *Batson* holding, which squarely denounced of racial partisanship as a valid basis for decision-making.\(^{125}\) Nonetheless, the Third Circuit granted Joseph's "strategic" decision an immense amount of discretion, despite the fact that he based his decision, one shrouded in racial prejudice, on an explicitly rejected premise.\(^{126}\) Moreover, while the *Strickland* test forces an allegedly wronged defendant to meet a heavy burden in establishing that his or her counsel rendered ineffective assistance, the burden is not so heavy as to pardon attorney decisions based on nothing other than racial partisanship.\(^{127}\)

The Supreme Court has stated that "[j]udicial scrutiny of counsel’s performance must be highly deferential" and emphasized that no hard and fast rules exist by which a court considering an ineffectiveness of

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\(^{123}\) *Weatherwax*, 77 F.3d at 1438 (Lewis, J., dissenting) (citing *Batson*, 476 U.S. at 79).

\(^{124}\) *Strickland*, 466 U.S. at 689; see also *Batson*, 476 U.S. at 79-80 (discussing premise that strategic decisions should not involve consideration of person's race).

\(^{125}\) *Weatherwax*, 77 F.3d at 1438 (Lewis, J., dissenting) (citing *Batson*, 476 U.S. at 79).

\(^{126}\) *Id.* at 1441 (Lewis, J., dissenting).

\(^{127}\) *Strickland*, 466 U.S. at 696. The *Strickland* Court recognized that the lower courts require the defendant to meet a heavier burden in establishing that counsel's substandard assistance prejudiced the outcome. *Id.* Specifically, some of the lower courts require a strict outcome-determinative test. *Id.* at 696-97. For a further discussion of the test established in *Strickland*, see supra notes 38-46 and accompanying text.
counsel claim can evaluate an attorney's performance. Pursuant to this premise, the Third Circuit relied heavily on the Supreme Court's holding that it is not within a federal court's jurisdiction to "establish rules of ethical conduct for lawyers practicing in the state courts" and also noted the Supreme Court's emphasis on the refusal to dictate how to behave in court "unless and until federal rights are violated." 129

128. Strickland, 466 U.S. at 688-89. The Supreme Court stated that an attorney's "basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance." Id. at 688. The Court noted that a set of hard and fast rules would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 689 (citing United States v. Decoster, 624 F.2d 196, 208 (D.C Cir. 1979) (refusing to establish rules appropriating discrete standards for proper attorney conduct)); see Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (following Decoster's refusal to adopt hard and fast rules and to remove counsel's decision-making independence); Weatherwax, 77 F.3d at 1431 (same); Beets v. Scott, 65 F.3d 1258, 1271 (5th Cir. 1995) (same), cert. denied sub nom. Beets v. Johnson, 116 S. Ct. 1547 (1996); Sims v. Livesay, 970 F.2d 1575, 1579 (6th Cir. 1992) (same); Campbell v. Kincheloe, 829 F.2d 1458, 1463 (9th Cir. 1986) (same); Sullivan v. Fairman, 819 F.2d 1382, 1390 (7th Cir. 1987) (same); United States ex rel. Smith v. Lane, 794 F.2d 287, 290-94 (7th Cir. 1986) (same).

129. Nix v. Whiteside, 475 U.S. 157, 176-77 (1986) (Brennan, J., concurring). Nix held that the Sixth Amendment right of a criminal defendant to assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony. Id. at 171. Chief Justice Burger stated:

[The United States Supreme Court] must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. Id. at 165. "[T]he Court cannot tell the States or the lawyers in the States how to behave in their courts." Id. at 177 (Brennan, J., concurring). Furthermore, "[i]t is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and this Court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights." Id. at 189-90 (Blackmun, J., concurring); see also Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296 (1989) (discussing attorney's obligation to represent indigent client); McCoy v. Court of Appeals of Wisconsin, District 1, 486 U.S. 429 (1988) (discussing ethical duty of attorney to raise issues on appeal which attorney felt lacked merit); Evans v. Jeff, 475 U.S. 717 (1986) (discussing ethical duty of attorney with regard to seeking legal fees); Polk County v. Dodson, 454 U.S. 312, 323 (1981) (stating public defender has no obligation to client to raise frivolous claims); Cuyler v. Sullivan, 446 U.S. 355 (1980) (discussing ethical obligation of attorney where conflict of interest exists); In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 160 (3d Cir. 1984) (stating that one inherent power of federal court is admission and discipline of attorneys practicing before it).

As a result of the Supreme Court's reluctance to get involved in ethical obligations and practices in the state courts, there are few federal decisions addressing the ethical duties of an attorney. See In re Meeker, 414 P.2d 862, 864 (N.M. 1966) ("The canons of professional ethics must be enforced by the Courts and must be respected by members of the Bar if we are to maintain public confidence in the integrity and impartiality of the administration of justice.").
This having been said, a court considering a Sixth Amendment claim is not left without guides to determine what is reasonable. Rather, prevailing norms of practice reflected in American Bar Association standards provide the necessary guidance as to what is reasonable. Thus, the Third Circuit in Weatherwax was well within its jurisdiction to consider the professional standards by which Joseph should have conducted himself as Weatherwax’s Sixth Amendment rights were endangered as a result of Joseph’s inaction.

2. Violation of Binding Professional Rules and the Risk of Fundamental Rights

In holding in favor of Joseph, the Third Circuit disregarded the premise advanced in Batson and misemployed the discretionary requirements laid out in Strickland. Moreover, the court also overlooked Joseph’s blatant violation of several professional standards, including the ABA Model Rules of Professional Conduct, the ABA Model Code of Professional Responsibility and the ABA Standards for Criminal Justice. The Third Circuit’s failure to con-

Pursuant to the federal courts’ constitutionally granted authority, the courts deal with the cases presented in the state courts when constitutional issues are violated. Accordingly, the vast majority of cases regarding attorney breaches of ethical duties are from the state courts. See generally In re Malone, 480 N.Y.S.2d 603 (App. Div. 1984) (holding that action of attorney instructing corrections officer to testify falsely under oath in order to protect officer from breaking “code of silence” among corrections officers warranted censure); In re Connelly, 240 N.Y.S.2d 126 (App. Div. 1963) (holding that publication of laudatory article on practice of city law firm in national magazine with acquiescence and aid of firm members violated Canon of Professional Ethics regarding advertising); Maritrans G.P., Inc. v. Pepper, Hamilton and Scheetz, 602 A.2d 241 (Pa. 1992) (maintaining that attorney’s representation of subsequent client whose interests were materially adverse to former client in substantially related matters was impermissible conflict of interest); American Dredging Co. v. City of Philadelphia, 389 A.2d 568 (Pa. 1978) (disqualifying attorney and law firm from representing general contractor in action against subcontractor when firm and attorney previously represented subcontractor); In re Bennett, 527 N.W.2d 691 (Wis. 1995) (holding that failure to communicate with client and failure to take appropriate steps to protect client’s interests warranted revocation of license to practice law); In re Ermert, 513 N.W.2d 618 (Wis. 1994) (establishing that attorney’s failure to file action for client and misrepresentation to client that action would be filed warranted 60-day suspension of license to practice law); In re Kinast, 508 N.W.2d 380 (Wis. 1993) (determining that failure to abide by client’s decision concerning objectives of representation warranted suspension of license for 60 days); In re Schwartz, 496 N.W.2d 605 (Wis. 1993) (holding that attorney’s failure to keep clients advised of significant developments in personal injury action and acting contrary to client’s explicit direction to seek settlement warranted 60-day suspension from practice of law); In re Lehmann, 494 N.W.2d 432 (Wis. 1993) (finding that one attorney’s failure to inform client about status of legal matter and to communicate with client warranted 60-day license suspension).

130. Strickland, 466 U.S. at 688. The Court indicated that the ABA Standards for Criminal Justice serves as a guide to determine what is reasonable. Id. (referring to CRIMINAL JUSTICE STANDARDS, supra note 34, at Standard 4-1.1 to 4-8.6).

131. Id. at 690-91 (holding that court must exercise discretion when evaluating counsel’s performance, but decision by counsel must be made according to prevailing professional norms); see also Batson v. Kentucky, 476 U.S. 79 (1986) (re-
consider these standards was in error as each rule violated by Joseph subsequently jeopardized Weatherwax's Sixth Amendment rights to effective assistance of counsel and to trial by an impartial tribunal. In other words, the relationship between professional standards and constitutional rights is a circular one—the evaluation of counsel's performance in light of the professional rules is necessary when a constitutional right may be violated. Likewise, when a constitutional right is violated, it is necessary to evaluate counsel's performance in light of professional standards. Therefore, in failing to consider Joseph's violation of several binding professional rules, the Third Circuit failed to properly consider Joseph's Sixth Amendment violations.

Rule 1.1 of the Model Rules provides that "[a] lawyer shall provide competent representation to a client," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Nevertheless, the Third Circuit overlooked Joseph's failure to render "competent representation" when he failed to notify the trial court of the possibility of jury prejudice. Clearly, "competent representation" encompasses notifying a trial court of such an occurrence, thereby preserving a client's constitutional right to a fair trial.

jecting stereotypical notion that African-American jurors are more likely to sympathize with African-American defendants solely on account of their shared race). For a complete discussion of the professional rules and guidelines Joseph breached, see infra notes 132-56 and accompanying text.

132. Strickland, 466 U.S. at 688-89. The Supreme Court stated that counsel's performance must be reasonable considering all the circumstances. Id. at 688. The circumstances that the Third Circuit recognized, however, did not include the jeopardized constitutional rights of Weatherwax. In light of the prevailing circumstance of risking his client's Sixth Amendment right to an impartial jury, Joseph's behavior and inaction clearly were opposite prevailing professional norms.

133. Model Rules, supra note 36, at Rules 1.1, 1.2, 1.3, 1.4(a)-(b), 2.1, 8.4(d) (discussing lawyer's responsibilities toward clients); Model Code, supra note 52, at Canons 5, 6, 7 (outlining lawyer's duty to exercise independent professional judgment, competently represent client and zealously represent client); Criminal Justice Standards, supra note 34, at Standards 4-1.1, 4-5.2(b) (providing standard of representation to which lawyers should adhere).

It should be noted that this author has recognized that for the most part, circuit courts do not hear cases regarding breach of the ABA Model Rules of Professional Conduct. In fact, such matters are generally reserved to the state courts. Nonetheless, because the ABA Model Rules of Professional Conduct are observed across the nation, there is no reason that a federal court should not observe the rules in the same manner as would a state court. For a discussion of the Model Rules 1.1, 1.3, 1.4, and 8.4(d), see infra notes 135-53 and accompanying text.

134. Model Rules, supra note 36, at Rule 1.1. Rule 1.1 states in full that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Id.


136. Weatherwax, 77 F.3d at 1437. "Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill
The Third Circuit also failed to consider Joseph's violation of Rule 1.3 of the Model Rules, which requires a lawyer to act with "reasonable diligence" in representing a client.\footnote{137} In applying this rule a court must consider that necessarily transcends any particular specialized knowledge." \textit{Id.} at Rule 1.1 cmt. Moreover, the Weatherwax court failed to recognize that if Joseph had exercised "legal knowledge," he would have considered the Supreme Court's decision in \textit{Batson}, rather than base his decision on a groundless presumption that the jury, even if prejudiced by extraneous information, would have favored his client. \textit{Id.} at Rule 1.1. Factors used to determine whether a lawyer employs the requisite knowledge and skill in a particular matter include the complexity and specialized nature of the subject matter, the lawyer's general experience and training in the field in question, the preparation and study the lawyer can give the matter, and whether it is feasible and appropriate to consult with a lawyer of particular competence in the field in question. \textit{Id.} at Rule 1.1 cmt.

Joseph should have seriously considered the risk posed to his client's fate by a tainted jury. \textit{Weatherwax}, 77 F.3d at 1428. Moreover, he should have considered the \textit{Batson} holding and had had the forethought to realize that the basis for his decision-making would be called into question following the outcome of the murder trial. \textit{See Batson}, 476 U.S. at 79 ("Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.").

Joseph was, and currently is a well-known criminal lawyer in the Virgin Islands, having been involved in numerous criminal trials prior to \textit{Weatherwax}. \textit{Weatherwax}, 77 F.3d at 1427. He did not indicate, however, that he had ever been presented with the untimely possibility of a tainted jury. Thus, he should have consulted with other, more experienced attorneys who may have dealt with the issue. For example, he could have consulted with the attorney involved in the \textit{Dowling} case who worked on the issue of jury prejudice. \textit{See Government of the Virgin Islands v. Dowling}, 814 F.2d 134 (3d Cir. 1987) (granting new trial as result of insufficient measures taken to determine jury prejudice).

Further, although the ABA Model Code of Professional Responsibility is not binding on lawyers and is simply a guide for proper behavior, the fact that Canon 6 mirrors Rule 1.1 of the ABA Model Rules of Professional Conduct is significant and, in effect, Joseph was bound by the principle expressed in Canon 6. \textit{Model Code, supra note 52, at Canon 6, EC 6-1 ("[A] lawyer should act with competence and proper care in representing clients."); see also Model Rules, supra note 36, at Rule 1.1 ("A lawyer shall provide competent representation to a client.")}.

The preliminary statement of the ABA Model Code of Professional Responsibility indicates that it is designed to be adopted as an inspirational guide "and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules." \textit{Model Code, supra note 52, at Preliminary Statement}. The preamble to the ABA Model Code of Professional Responsibility states:

Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. . . . [I]t is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct.

\textit{Id.} at pmbl. Thus, by breaching Rule 1.1 of the ABA Model Rules of Professional Conduct, Joseph breached Canon 6 of the ABA Model Code of Professional Responsibility—yet another violation that the Third Circuit overlooked.

sider the zeal with which an attorney represents a client; nevertheless, the Weatherwax record neither criticizes nor praises the zeal with which Joseph represented Weatherwax. Nonetheless, Joseph failed to represent Weatherwax with the zeal which other courts have required. In particular, Joseph failed to secure Weatherwax's Sixth Amendment right to be tried by an impartial jury, which is a clear indication of his failure to act with reasonable diligence, and thus a clear violation of Rule 1.3.

file reply brief); United States v. Boyce, 849 F.2d 833, 838 (3d Cir. 1988) (finding that defense counsel made serious commitment to represent best interests of client under Rule 1.3 but failed to file motion in favor of client); United States v. LaRouche Campaign, 689 F. Supp. 610 (D. Mass. 1987) (holding that counsel had good cause for filing motion to dismiss based on governmental misconduct with respect to events occurring after deadlines for filing of motions); Applegate v. Dobrovir, Oakes and Gebhardt, 628 F. Supp. 378, 388-89 (D.D.C. 1985) (holding that firm competently represented client under Rule 1.3); United States v. Kropf, 39 M.J. 107, 108 (C.M.A. 1994) (referring to comment to Rule 1.3 and holding that counsel is required to zealously represent client and to offer vigorous arguments in favor of client).

138. See Weatherwax, 77 F.3d at 1425 (applying no consideration to the lack of zeal Joseph exhibited in representing Weatherwax).


[1]In its fullest sense, is the heart of the adversary process. Each attorney, as an advocate, acts for and seeks that which in his judgment is best for his client, within the bounds authoritatively established. The advocate does not decide what is just in this case—he would be usurping the function of the judge and jury—he acts for and seeks for his client that which he is entitled to under the law. He can do no less and properly represent [his] client.

Thode, supra, at 584.

140. Weatherwax, 77 F.3d at 1433-38; see Model Rules, supra note 36, at Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

Correspondingly, Joseph also violated Canon 7 of the ABA Model Code of Professional Responsibility which, in its ethical considerations, implicates Rule 1.3. The Model Code states: "The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail." Model Code, supra note 52, at Canon 7, EC 7-4. Moreover, a lawyer, as an advocate, has no duty to forebear from making every "proper argument in support of any legal point because he is not convinced of its inherent soundness." ABA Comm. on Professional Ethics and Grievances, Formal Op. 280 (1949). A lawyer's "personal belief in the soundness
In addition, when evaluating Joseph’s performance the Third Circuit failed to cite Joseph’s violation of Rule 1.4(a) of the Model Rules which obligates a lawyer to “keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.” Yet, Joseph failed to communicate with Weatherwax regarding his final decision. Despite the Third Circuit’s rationale justifying Joseph’s failure to properly inform Weatherwax, Joseph was not engaged in the heat of battle at trial, and therefore, Weatherwax was not outside the realm of easy communication.

Moreover, according to Rule 1.4(b) Joseph had a duty to explain to Weatherwax his final decision not to inform the court of the newspaper of his cause or of the authorities supporting it, is irrelevant” because the lawyer’s duty to zealously represent his client prevails. 

Incidentally, Canon 7 of the Model Code is also implicated in Rule 2.1 of the ABA Model Rules of Professional Conduct. See Model Rules, supra note 36, at Rule 2.1 (stating attorney “shall exercise independent professional judgment”). In full, Rule 2.1 states:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.

Model Rules, supra note 36, at Rule 2.1.

Similarly, the ethical consideration in Canon 7 states that a lawyer acting “as an advisor furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.” Model Code, supra note 52, at Canon 7, EC 7-5. The implication of Rule 2.1 and EC 7-5 is that Joseph had an ethical duty to inform Weatherwax of his final decision, regardless of Weatherwax’s anticipated response to the news. Joseph, as an advisor and an advocate, had a duty to inform Weatherwax and to zealously represent Weatherwax, by securing the right to an impartial jury. Model Rules, supra note 36, at Rule 1.4(a). For a discussion of the right to an impartial jury, see supra notes 61-67.

141. Model Rules, supra note 36, at Rule 1.4(a); see also Strickland, 466 U.S. at 688 (stating that out of counsel’s function as assistant to defendant arises duty “to consult with the defendant on important decisions and to keep the defendant informed of important developments”); United States v. Lopez, 4 F.3d 1455, 1465 (9th Cir. 1993) (Fletcher, J., concurring) (discussing necessity of open communication between attorney and client); Whitehouse v. United States District Court for the District of Rhode Island, 53 F.3d 1349, 1360-61 (1st Cir. 1995) (same); Arcuri v. Trump Taj Mahal Assoc., 154 F.R.D. 97 (D.N.J. 1994) (same); United States v. AT&T, 86 F.R.D. 603, 613 (D.D.C. 1979) (same).

142. Model Rules, supra note 36, at Rule 1.4(a); see id. at Rule 1.4 cmt. 2 (“The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.”). Apparently, Joseph should have fulfilled Weatherwax’s reasonable expectations for information regarding Joseph’s final decision. Id. Joseph owed Weatherwax a duty to inform him of the final decision because providing Weatherwax with such information was in Weatherwax’s best interest; that is, it was within Weatherwax’s best interest to procure an untainted jury in accordance with a defendant’s Sixth Amendment right. Id. Furthermore, Weatherwax certainly expected Joseph’s “character of representation” to sustain Weatherwax’s constitutional rights. Id.
incident so that Weatherwax could have made an "informed decision [ ] regarding [his] representation."143 Similarly, the ABA Standards for Criminal Justice indicate that Joseph, as a defense attorney, had the ultimate authority to make strategic decisions after consultation with Weatherwax.144 As such, and because Joseph had ample opportunity to consult with Weatherwax, Joseph violated these standards by failing to do so. It was certainly "appropriate" to apprise Weatherwax of the final decision, as Joseph had a duty to keep Weatherwax informed of the "progress of preparing the defense."145

In Weatherwax, the Third Circuit held that it was "unreasonable to expect . . . consultation before the decision is made and implemented . . . because the opportunity for meaningful consultation" between Joseph and Weatherwax did not exist; because they were in the "heat of battle," there was nothing for Weatherwax to gain by consultation with Joseph.146 On the contrary, however, Joseph had ample time to consult with Weatherwax and to inform him of the final decision. Furthermore, Joseph had a duty to do so. The majority speculates that the trial court would not have granted a continuance if it were informed of the incident per Weatherwax.

143. Id. at Rule 1.4(b). The comment to Rule 1.4 attests that an attorney should assure that his client has "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Id. at Rule 1.4 cmt. It is quite clear that the application of the comments is directly applicable in Weatherwax. Because Joseph failed to inform Weatherwax of his final decision not to notify the trial court about the newspaper incident, Weatherwax was denied the information that would have allowed him to make an informed decision regarding the means employed in securing an impartial jury.

144. Criminal Justice Standards, supra note 34, at Standard 4-5.2(b); see also Model Rules, supra note 36, at Rule 1.2(a), (c) (stating counsel has authority to make decisions concerning means of representation after ample consultation with client). The ABA Standards for Criminal Justice state that “[s]trategic and tactical decisions should be made by defense counsel after consultation with the client.” Criminal Justice Standards, supra note 34, at Standard 4-5.2(b). In addition, a lawyer is not obligated to take every action or step that the accused demands. Id. at Standard 4-3.6 cmt.

145. Criminal Justice Standards, supra note 34, at Standard 4-3.8(a) ("Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense."); see also id. at 4-3.8(b) ("Defense counsel should explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

wax's insistence.147 But, is an effort to protect a constitutional right grounds for stating that nothing would be gained by consultation?148

Joseph's inaction was also a breach of the standard set forth in Rule 8.4(d) of the Model Rules, which states that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."149 Certainly Joseph "engage[d] in conduct... prejudicial to the administration of justice" by knowingly allowing a possibly prejudiced jury to decide his client's fate.150 Thus, Joseph risked an equitable administra-

147. Government of the Virgin Islands v. Dowling, 814 F.2d 134, 135 (3d Cir. 1987) (holding that trial judge did not abuse discretion in declining to individually question jurors, but "trial court committed reversible error in failing to conduct a voir dire of the jury that would have permitted the court to evaluate the potential prejudice to the defendant"); see also United States v. Barber, 80 F.3d 964, 968 (4th Cir.) (discussing possibility that constitutional guarantee of fair trial required voir dire into racial prejudice involved in case), cert. denied, 117 S. Ct. 198 (1996); United States v. Desmarais, 531 F.2d 632, 633 (1st Cir. 1976) (stating that "the latitude and manner of voir dire examination is within the sound discretion of the... judge... subject to the essential demands of fairness" (citing United States v. Gassaway, 456 F.2d 624, 626 (5th Cir. 1972))); Wansley v. Slayton, 487 F.2d 90 (4th Cir. 1973) (holding defendant is entitled to voir dire where reasonable likelihood of prejudice is shown).

148. Moreover, the Supreme Court recognized that counsel is ultimately obligated to follow a client's decision, particularly where protection of a constitutional right is at issue. See Jones v. Barnes, 463 U.S. 745, 763 (1983) (Brennan, J., dissenting) ("The role of the defense lawyer should be above all to function as the instrument and defender of the client's autonomy and dignity in all phases of the criminal process."). In his dissent, Justice Brennan indicated that the defense lawyer's role is to carry out the final instructions of the client, even if the defense lawyer disagrees with the client's instructions. Id. at 764 (Brennan, J., dissenting). According to Justice Brennan, the defense lawyer should advise the client about how to maximize the chances of winning, but if the client disagrees with the lawyer's advice, the defense lawyer must follow the client's instructions. Id. (Brennan, J., dissenting).

149. Model Rules, supra note 36, at Rule 8.4(d); see Erickson v. Newmar Corp., 87 F.3d 298, 298 (9th Cir. 1996) (holding that defense counsel's hiring of plaintiff's metal expert to examine lock for another case without plaintiff's knowledge constituted misconduct prejudicial to administration of justice); In re Cordova-Gonzalez, 996 F.2d 1394 (1st Cir. 1993) (holding disbarment appropriate for attorney who engaged in conduct prejudicial to administration of justice, by obtaining client's release on bail through pledge of property that was not pledgor's to give); Kleiner v. First Nat'l Bank of Atlanta, 751 F.2d 1193 (11th Cir. 1985) (finding that defendant firm violated ABA Model Rules of Professional Conduct 8.4(d) when members rendered bad faith advice and wrote brief containing misleading portrayals of fact).

Likewise, Canon 5 of the ABA Model Code of Professional Responsibility obligated Joseph to exercise independent professional judgment on behalf of Weatherwax "within the bounds of the law, solely for the benefit" of Weatherwax and "free of compromising influences." Model Code, supra note 52, at Canon 5, EC 5-1; see also id. at EC 5-1 n.1 (citing Grievance Comm. v. Rattner, 203 A.2d 82, 84 (Conn. 1964) ("When a client engages the services of a lawyer... he is entitled to feel that... he has the undivided loyalty of the one upon whom he looks as his advocate and his champion.").

150. Model Rules, supra note 36, at Rule 8.4(d). The comments do not indicate that Rule 8.4(d) applies to the failure to secure an impartial jury in accord-
tion of justice on Weatherwax's behalf by failing to secure an impartial jury. Moreover, by basing his decision on racial partisanship, Joseph failed to "exercise independent professional judgment," and instead, was a dupe to the "compromising influence" of racial bias. Despite these compelling factors, however, the Third Circuit impermissibly failed to address rule 8.4(d) as it related to Joseph's unethical conduct and Weatherwax's Sixth Amendment rights.

Finally, the Third Circuit failed to address Joseph's breach of Rule 1.2 of the Model Rules, which governs the scope of an attorney's representation of a client and permits the attorney to make strategic and tactical decisions concerning the means of representation. While a client is permitted to make the decisions concerning the objectives of representation, an attorney is never permitted to make decisions concerning a client's constitu-

ance with a defendant's Sixth Amendment right, but it is clear that an attorney who knowingly permits a tainted jury to decide his client's fate has prejudiced an equitable administration of justice. See Levine v. United States District Court for Central District of California, 764 F.2d 590, 602 (9th Cir. 1985) (Sneed, J., concurring) (discussing prosecutor's role in securing defendant's right to impartial jury); United States v. McNeill, 728 F.2d 5, 8 (1st Cir. 1984) (discussing defense counsel's duty to raise possibility that prosecutorial misconduct risked defendant's right to trial before impartial jury). See generally United States v. Adamo, 742 F.2d 927, 936 (6th Cir. 1984) (rejecting affirmative duty of assistant United States attorney to disclose exculpatory evidence to grand jury which tends to negate guilt of accused).

Interestingly, Florida's variation of Rule 8.4(d) states:

[A lawyer shall not] engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.


Thus, it is reasonable to infer that a Florida court would find, pursuant to Rule 4.8.4(d) of the Florida Rules of Professional Conduct, that Joseph's decision based on racial partisanship was discriminatory and in violation of the rule. Id.; see also Florida Bar v. Flowers, 672 So. 2d 526 (Fla. 1996) (imposing 91-day suspension on attorney for violation of Florida Rules of Professional Conduct Rule 4-8.4(d) in which attorney failed to provide requested immigration assistance to client).

151. Model Rules, supra note 36, at Rule 1.2(a). Rule 1.2(a) states that "[a] lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraph[ ] (c) . . . and shall consult with the client as to the means by which they are to be pursued." Id. at Rule 1.2(a).

A client has the right to consult with his or her lawyer regarding the means to be used in pursuing the objectives of representation. Id. at Rule 1.2 cmt. The lawyer is not obligated to pursue certain objectives or employ certain means. Id. "In questions of means, the lawyer should assume responsibility for . . . legal tactical [decisions]." Id. Despite the above mentioned comments to Rule 1.2 of the ABA Model Rules of Professional Conduct, which simply guide an attorney's appropriate behavior, the rule, which is binding upon an attorney, states that "[a] lawyer may limit the objectives of the representation if the client consents after consultation." Id. at Rule 1.2(c) (emphasis added).
Initially, it may appear that Joseph acted within the authority provided by Rule 1.2, because the decision whether to call the trial court's attention to the newspaper incident was, in fact, a strategic decision concerning the means of representation. Upon closer examination, however, the subject matter of the decision implicates a constitutional right. Not only was the premise for Joseph's final decision groundless, as maintained in *Batson*, but his final decision jeopardized Weatherwax's Sixth Amendment right to a fair trial by an impartial and unbiased jury. Thus, the allowance of extraneous influences upon jurors and the consideration by a jury of extra-record information violated the Sixth Amendment guarantee of an impartial jury. Therefore, Jo-

152. *Id.* at Rule 1.2(a) ("The lawyer shall abide by the client's decision . . . as to a plea to be entered, whether to waive jury trial and whether the client will testify."). Rule 1.2(a) preserves the client's Fifth and Sixth Amendment rights by allowing full reign over decisions concerning his or her constitutional rights. See *Evans v. Jeff*, 475 U.S. 717, 755-56 (1986) (Brennan, J., dissenting) ("The decision whether to accept or reject the [settlement] offer is the plaintiff's alone, and the lawyer must abide by the plaintiff's decision."); *United States v. International Bd. of Teamsters*, 986 F.2d 15, 17 (2d Cir. 1993) (outlining that decision to settle case rests with client alone); *Benitez v. Collazo-Collazo*, 888 F.2d 930, 933 (1st Cir. 1989) (explaining that attorney acted inappropriately in making appeal over objection of client). But see *United States v. Martinez*, 883 F.2d 750, 754-55 (9th Cir. 1989) (holding that defense counsel did not violate Model Rule 1.2(a) because he made strategic decision not to put defendant on stand even though defendant wanted to testify), *vacated*, 928 F.2d 1470 (9th Cir. 1991).

153. See *Model Rules*, supra note 36, at Rule 1.2 cmt. ("In questions of means, the lawyer should assume responsibility for . . . legal tactical [decisions]."). Certain decisions relating to the conduct of the case are ultimately for the accused to make, and others are ultimately for counsel to make. *Criminal Justice Standards*, supra note 34, at Standard 4-5.2(a). The commentary to Standard 4-5.2(b) states that "the power of decision in matters of trial strategy and tactics rests with the lawyer, after consultation with the client when consultation is, in the lawyer's judgment, both feasible and appropriate." *Id.* at Standard 4-5.2 cmt.


155. *See Government of the Virgin Islands v. Gereau*, 523 F.2d 140, 150 (3d Cir. 1975) (listing "consideration by the jury of extra-record facts about the case" as incident of extraneous influence). The Sixth Amendment guarantees the right to an impartial jury. *Id.* If the jury considers evidence not introduced by the court, the jury's impartiality may be compromised. *Id.* at 150-51; see also *Walthall*, supra note 61, at 1012 ("[E]xtraneous jury influences pose more of a threat to an individual's right to an impartial jury than do intra-jury influences."). Extra-record influences, including media and publicity, pose a threat to fairness; specifically extra-record information, which "evades the safeguards of the judicial process." *Walthall*, supra note 61, at 1011 n.28 (citing United States v. Resko, 3 F.3d 684, 695 (3d Cir. 1993) (unwilling to assume prejudice because of premature deliberations in criminal case), *cert. denied*, 510 U.S. 1205 (1994)); see also, United States v. Simone, 14 F.3d. 833, 840 (3d Cir. 1994) (noting that extraneous and extra-record information threaten occurrence of fair criminal proceeding (citation omitted)).
seph’s endangerment of Weatherwax’s Sixth Amendment rights certainly constituted grounds for incompetence.\textsuperscript{156}

V. IMPACT

The majority opinion in \textit{Weatherwax} simply failed to focus on the Sixth Amendment rights at issue.\textsuperscript{157} In essence, Weatherwax was denied two constitutional guarantees; first, he was denied the right to be tried by an impartial jury; and second, he was denied the right to effective assistance of counsel.\textsuperscript{158} The Third Circuit justified its holding in this regard by impermissibly stretching \textit{Strickland} beyond its limits, thereby allowing Joseph to escape his professional responsibility. It did so even though Joseph based his strategic decision on a rejected premise, violated several professional rules and jeopardized his client’s constitutional rights in the process.\textsuperscript{159}

The broad holding of \textit{Weatherwax} is a significant threat to the Sixth Amendment rights of trial by an impartial jury and effective assistance of counsel. Moreover, the ample discretion the Third Circuit granted to Joseph’s decision may encourage future circuit courts to hear ineffective assistance of counsel claims with a similar “anything goes” attitude. Such an approach by the courts would constitute a threat to the constitutional rights of criminal defendants. It is disconcerting to contemplate that if future courts rely upon the court’s holding in \textit{Weatherwax}, the essence of \textit{Strickland} may be emasculated and racial partisanship may again become a significant facet of jury selection.

\textsuperscript{156} See United States v. Hughes, 635 F.2d 449, 452 (5th Cir. 1981) (“[A] defense counsel’s trial strategy, which would include his asking or refraining from asking certain questions of witnesses, does not reach constitutional proportions.”). \textit{See generally} United States v. Samuels, 59 F.3d 526, 529 (5th Cir. 1995) (holding that defendant was not denied effective assistance of counsel at sentencing when counsel failed to object to pre-sentence investigation report’s finding that defendant smuggled crack rather than cocaine into country); Lovett v. Florida, 627 F.2d 706, 708 (5th Cir. 1980) (“[C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers.”); United States v. Johnson, 615 F.2d 1125, 1127 (5th Cir. 1980) (holding that defense counsel satisfied duty to interview potential witnesses and conduct examination of factual circumstances); Bucklew v. United States, 575 F.2d 515, 521 (5th Cir. 1978) (holding that defense counsel’s failure to call certain witness is not sufficient grounds for Sixth Amendment claim).

\textsuperscript{157} For a discussion of the Third Circuit’s holding and rationale in \textit{Weatherwax}, see supra notes 77-107 and accompanying text.


\textsuperscript{159} \textit{See}, e.g., \textit{Batson}, 476 U.S. at 79 (stating that it is unreasonable to assume that African-American jurors are more likely to sympathize and favor African-American defendants because of their shared race); \textit{Weatherwax}, 77 F.3d at 1431-35 (citing \textit{Strickland} v. Washington, 466 U.S. 668, 687-91 (1984) (outlining requirements to prove ineffective assistance of counsel and recognizing effective assistance of counsel as fundamental constitutional right that must be protected)).
The legal community and prospective clients should remain hopeful, however, that future courts will properly consider professional rules and standards when evaluating an ineffective assistance of counsel claim. The violation of professional rules and standards may implicate the imperiling of constitutional rights and should therefore be accorded an important place in the courts' analyses.

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