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Criminal Procedure: *Walker v. State* — Dooming Challenges to Appellate Counsel's Effectiveness

Introduction

The Oklahoma Court of Criminal Appeals ushered in significant changes in capital post-conviction procedure in *Walker v. State*.¹ One of several controversial issues involved in *Walker* is the court's departure, purportedly mandated² by recent amendments to Oklahoma's Uniform Post-Conviction Procedure Act,³ from the traditional test for effective assistance of appellate counsel.⁴

Although the United States Supreme Court has articulated a test for evaluating claims of ineffectiveness of trial counsel,⁵ it has yet to define appropriate standards for judging claims of ineffective assistance of appellate counsel. In the absence of direction from the United States Supreme Court, each circuit court of appeals has applied the same test regardless of whether the alleged ineffectiveness occurred at the trial or appellate level.⁶ The Oklahoma Court of Criminal Appeals, too, imitated the United States Supreme Court prior to its decision in *Walker*.⁷

This note examines the innovative *Walker* standard for judging claims of ineffectiveness of appellate counsel. Part I explores the constitutional bases for the right to competent counsel on appeal, as well as the historical standard for evaluating effectiveness. Part II relates the facts and holdings of *Walker* and studies the Oklahoma Court of Criminal Appeals' renouncement of precedent. Part III analyzes the significant effect the *Walker* decision will have on post-conviction petitioners' chances of prevailing on ineffectiveness claims. Finally, this note criticizes the Oklahoma Court of Criminal Appeals for abandoning the test announced by the United States Supreme Court.

1. 933 P.2d 327 (Okla. Crim. App. 1997).

2. *See id.* at 333 n.23 ("The dissent states that this Order 'effectively overturns the test this Court has used for ineffective assistance of counsel.' On the contrary, it is the Legislature which has modified the ineffective assistance of appellate counsel analysis that this Court has traditionally followed in capital post-conviction cases.").

3. 22 OKLA. STAT. § 1089 (Supp. 1995).

4. This note suggests that it is the Oklahoma Court of Criminal Appeals' *application* of its new test, not the test on its face, that represents a departure from precedent. *See infra* text accompanying notes 72-93.

5. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

6. *See Lissa Griffin, The Right to Effective Assistance of Appellate Counsel*, 97 W. VA. L. REV. 1, 20 (1994).

7. *See, e.g., Pickens v. State*, 910 P.2d 1063, 1069 (Okla. Crim. App. 1997).

I. Fundamental Principles

A. The Right to Effective Assistance of Appellate Counsel

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense."⁸ In *Johnson v. Zerbst*,⁹ the United States Supreme Court held that the Sixth Amendment guarantees the appointment of counsel for an indigent defendant in federal criminal prosecutions. Later, in *Gideon v. Wainwright*,¹⁰ the Court extended the guarantees provided in the Sixth Amendment's assistance of counsel clause to state criminal prosecutions through the Fourteenth Amendment.

Eventually, the Supreme Court recognized that the Constitution guarantees not merely the right to counsel, but also the right to effective assistance of counsel.¹¹ In *McMann v. Richardson*,¹² the Court noted that "if the right of counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel," and admonished that "judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."¹³ Unfortunately, not until 1984 did the Court shed light on what may constitute "proper standards."

In *Strickland v. Washington*,¹⁴ the United States Supreme Court introduced a two-pronged test for evaluating a defendant's claim that the right to the effective assistance of counsel at a criminal trial was denied. First, the defendant must show that the counsel's performance was deficient.¹⁵ Second, the defendant must show that the deficient performance prejudiced the defense.¹⁶ Under *Strickland*, a court need not analyze these prongs in any particular order.¹⁷ Thus, a court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.¹⁸

Regarding the deficiency prong, the *Strickland* Court held that the proper standard for attorney performance is that of reasonably effective assistance under prevailing professional norms.¹⁹ The Court delineated certain basic duties that an attorney owes a criminal defendant, such as loyalty and avoidance of conflicts of interest, but feared that establishing more exact guidelines for representation could detract the

8. U.S. CONST. amend. VI.

9. 304 U.S. 458, 463 (1938).

10. 372 U.S. 335, 342 (1963).

11. See *Reece v. Georgia*, 350 U.S. 85, 90 (1955).

12. 397 U.S. 759 (1970).

13. *Id.* at 771.

14. 466 U.S. 668 (1984).

15. See *id.* at 687.

16. See *id.*

17. See *id.* at 696.

18. See *id.*

19. See *id.* at 687.

attorney from his overriding responsibility to advocate vigorously the defendant's cause.²⁰ Under *Strickland*, judicial scrutiny of an attorney's performance must be highly deferential.²¹ Courts evaluating attorney effectiveness must indulge a strong presumption that the attorney's conduct falls within the broad range of reasonable professional assistance.²²

A showing by a criminal defendant that the attorney's performance was deficient will not in itself warrant setting aside the lower court's judgment.²³ It is imperative that the defendant also demonstrate that the attorney's error prejudiced the defense. Clarifying the notion of prejudice, the *Strickland* Court noted that the defendant must do more than show that the error had some conceivable effect on the outcome of the proceeding.²⁴ Rather, the defendant must demonstrate a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different.²⁵

The *Strickland* decision ended longstanding judicial confusion as to the standards by which to measure attorney performance. Significantly, the *Strickland* Court aimed its two-pronged test toward attorney performance at the trial level. While the United States Supreme Court has stated that there is no constitutional right to appeal,²⁶ it has held that where a state has created a right to appeal, the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendments guarantee the right to counsel on appeal.²⁷ In *Evitts v. Lucey*,²⁸ decided the year after *Strickland*, the Court recognized that a first appeal as of right does not accord with due process of law if the appellant does not have the effective assistance of counsel.

B. The Oklahoma Court of Criminal Appeals' Treatment of Ineffective Assistance of Appellate Counsel Claims Prior to Walker v. State

For many years following the Supreme Court's decision in *Strickland v. Washington*, the Oklahoma Court of Criminal Appeals employed the two-pronged test in evaluating claims of ineffective assistance of appellate counsel. In *Sellers v. State*,²⁹ the court noted that both trial and appellate counsels' performance must meet the standard set forth in *Strickland*. *Spears v. State*³⁰ illustrates the straightforward manner in which the court typically applied the two-pronged test: "To determine if the performance of appellate counsel constituted the denial of reasonably competent assistance of counsel under prevailing professional norms, this

20. *See id.* at 688-89.

21. *See id.* at 689.

22. *See id.*

23. *See id.* at 691.

24. *See id.* at 693.

25. *See id.* at 694.

26. *See Jones v. Barnes*, 463 U.S. 745, 751 (1983).

27. *See Douglas v. California*, 372 U.S. 353, 356 (1963).

28. 469 U.S. 387, 396 (1985).

29. 889 P.2d 895, 898 (Okla. Crim. App. 1995).

30. 924 P.2d 778 (Okla. Crim. App. 1996).

Court reviews the record to determine if appellate counsel's performance was deficient and whether the deficient performance prejudiced the defendant."³¹

Spears was just another decision in a steady line of cases applying the *Strickland* test to ineffectiveness of appellate counsel claims.³² The Oklahoma Court of Criminal Appeals decided *Spears* in September 1996.³³ A mere three months later, the court abruptly and radically departed from that precedent in *Walker v. State*.

II. *Walker v. State*

A. *Facts of the Case*

A Tulsa County jury convicted Jack Dale Walker of first-degree murder and two counts of felony assault and sentenced him to death.³⁴ On appeal, the court of criminal appeals affirmed the convictions as well as the imposition of the death penalty.³⁵ In accordance with the 1995 amendments to the Uniform Post-Conviction Procedure Act (the Act),³⁶ Walker filed an application for post-conviction relief in the court of criminal appeals. In his application, Walker claimed he was entitled to relief on several grounds, including that he was denied his right to effective assistance of trial and appellate counsel.³⁷

Before addressing Walker's specific propositions, the court emphasized the narrow scope of review available on collateral appeal under the Act.³⁸ The Act provides, in pertinent part, that a defendant may only raise on post-conviction appeal those issues that "were not and could not have been raised on direct appeal" and that "support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent."³⁹ The court reiterated a notion it had expounded in previous cases⁴⁰ — that the Act was "neither designed

31. *Id.* at 780.

32. *See, e.g.,* Medlock v. State, 927 P.2d 1069 (Okla. Crim. App. 1996); Stiles v. State, 902 P.2d 1104 (Okla. Crim. App. 1995); Paxton v. State, 867 P.2d 1309 (Okla. Crim. App. 1993).

33. Interestingly, *Spears* and several other cases in which the Court of Criminal Appeals applied *Strickland* were decided after the 1995 amendments to the Uniform Post-Conviction Procedure Act, which the *Walker* court said mandated its departure from *Strickland*. *See infra* text accompanying note 68.

34. Walker went to his girlfriend's trailer home and stabbed to death his girlfriend and another man present. Walker told the police that he went to the trailer with the intention of either murdering his girlfriend or taking their baby from her.

35. *See* *Walker v. State*, 887 P.2d 301, 305 (Okla. Crim. App. 1994).

36. *See* 22 OKLA. STAT. § 1089(D)(1) (Supp. 1995) (stating that an application for post-conviction relief shall be filed in the Court of Criminal Appeals).

37. Walker's other claims — that Oklahoma's Post-Conviction Procedure Act is unconstitutional, that the jury was improperly instructed on a clear and convincing standard for determining competency, that the trial court failed to follow the statutorily mandated procedure to determine his competency, that the trial court erred in instructing the jury that the State had to prove all the material allegations beyond a reasonable doubt, that he was sentenced to death while incompetent, and that juror misconduct deprived him of a fair trial — are irrelevant to the purpose of this note.

38. *See* *Walker v. State*, 933 P.2d 327, 330 (Okla. Crim. App. 1997).

39. 22 OKLA. STAT. § 1089(C) (Supp. 1995).

40. *See, e.g.,* Fowler v. State, 896 P.2d 566, 569 (Okla. Crim. App., 1995).

nor intended to provide applicants another direct appeal.⁴¹ Rather, according to the court, the legislative intent behind the Act was to "honor and preserve the legal principle of finality of judgment."⁴² With this legislative intent in mind, the court denied each of Walker's claims for relief.⁴³

B. Decision of the Case

1. Ineffectiveness of Trial Counsel

Walker's ineffective assistance of trial counsel claim provides a good illustration of the narrow scope of review allowed on post-conviction appeal under the Act. The Act provides "a claim of ineffective assistance of trial counsel which requires fact finding outside the direct appeal record" as an example of an issue that could not have been properly raised.⁴⁴ The court, paraphrasing this provision in prohibitive terms, stated that it "may not review Walker's post-conviction claims of ineffective assistance of trial counsel if the facts generating those claims were available to Walker's direct appeal attorney and thus either were or could have been used in his direct appeal."⁴⁵

Walker claimed that his trial attorney was ineffective for several reasons. Walker alleged, for instance, that his trial attorney failed to prepare adequately for trial, failed to seat a fair and impartial jury, and failed to present available evidence at Walker's competency hearing.⁴⁶ Walker attempted to substantiate these claims by introducing medical records and affidavits from himself and his trial attorney. The court found that notwithstanding the fact that these documents were not physically present in Walker's direct appeal record, the facts contained within them were available to his direct appeal attorney, and could therefore have been argued on direct appeal.⁴⁷ In other words, the court refused to consider Walker's claims of ineffectiveness of trial counsel because evaluation of the claims did not require fact finding outside the scope of information available to his attorney at the time of his direct appeal.⁴⁸ The claims were, in essence, procedurally barred.

2. Ineffectiveness of Appellate Counsel

In addition to a claim of ineffective assistance of trial counsel requiring fact-finding outside the direct appeal record, the Act provides that a claim could not have been previously raised if it

is a claim contained in an original timely application for post-conviction relief relating to ineffective assistance of appellate counsel and the Court of Criminal Appeals first finds that if the allegations were

41. *Walker*, 933 P.2d at 330.

42. *Id.* at 331.

43. *See id.* at 340.

44. 22 OKLA. STAT. § 1089(D)(4)(b)(1) (Supp. 1995).

45. *Walker*, 933 P.2d at 332.

46. *See id.* at 331-32.

47. *See id.* at 332.

48. *See id.*

true, the performance of appellate counsel constitutes the denial of reasonably competent assistance under prevailing professional norms.⁴⁹

From this legislative provision, the *Walker* court fashioned a three-pronged test to replace the *Strickland* two-pronged test for evaluating ineffectiveness of appellate counsel.⁵⁰ The threshold inquiry now becomes (1) whether appellate counsel actually committed the act which gave rise to the ineffective assistance allegation. If the petitioner establishes that his appellate counsel actually performed in a manner supporting the allegation, the court then asks (2) whether such performance was deficient under the first prong of *Strickland*. If the petitioner proves deficient attorney performance, the court may then consider the mishandled claims, asking (3) whether the claims support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent.⁵¹

Walker offered several reasons for concluding that he was denied his right to effective assistance of appellate counsel. First, he alleged that Johnie O'Neal, his direct appeal attorney, had a conflict of interest, resulting in the omission on direct appeal of all the alleged instances of trial counsel's ineffectiveness.⁵² Second, Walker alleged that O'Neal was ineffective because O'Neal failed to raise three substantive issues that Walker believed would have warranted relief on direct appeal: (1) the trial court improperly instructed the jury on the presumption of "not guilty" rather than on the presumption of innocence; (2) police improperly obtained Walker's statement and there was no hearing to determine the statement's voluntariness; and (3) the trial court did not properly determine Walker's competency.⁵³

The court evaluated each of these claims according to its new test, and in so doing clarified the requirements of the first two prongs. In practical application, the first prong simply entails the court reviewing the direct appeal record to see if appellate counsel in fact did or failed to do that which the petitioner alleged. For instance, as to Walker's claim that O'Neal had a conflict of interest which caused him to omit the allegations of trial counsel's ineffectiveness, the court reviewed the record and indeed noted the absence of these allegations.⁵⁴

In clarifying the second prong — whether the attorney's performance was deficient — the court reiterated the *Strickland* Court's notions of the general duties attorneys owe their clients. The court was quick to note that appellate counsel's duty to advocate his client's cause does not require him to raise all nonfrivolous issues available.⁵⁵ The court echoed *Strickland's* mandate of high deference in assessing an attorney's performance, noting that it must "evaluate appellate counsel's

49. 22 OKLA. STAT. § 1089(D)(4)(b)(2) (Supp. 1995).

50. See *Walker*, 933 P.2d at 333.

51. See *id.*

52. See *id.* at 332-33.

53. See *id.* at 333.

54. See *id.* at 335.

55. See *id.* at 334.

challenged conduct from counsel's perspective at the time" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."⁵⁶

Indulgence the court preached and indulgence the court practiced. The court did not deem that any of O'Neal's challenged acts or omissions compelled a conclusion that his performance was constitutionally deficient, and the court's analysis ended. As a result, the *Walker* court never had the opportunity to implement its third prong.

III. Analysis of the Walker Decision

A. The Implications of the Oklahoma Court of Criminal Appeals' Departure from Precedent

1. Three Prongs Rather than Two

The Oklahoma legislature, committed to the legal principle of finality of judgment,⁵⁷ restricted the scope of review available to post-conviction petitioners. Under the Uniform Post-Conviction Procedure Act, the only issues the court of criminal appeals may review are those that "were not and could not have been raised on direct appeal," and that "support a conclusion either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent."⁵⁸ An example offered by the legislature of a ground that could not have been previously raised is an allegation of ineffective assistance of appellate counsel.⁵⁹ However, the legislature confines the court's review of such claims to situations in which the court "first finds that if the allegations were true, the performance of appellate counsel constitutes the denial of reasonably competent assistance of counsel under prevailing professional norms."⁶⁰

For well over a year following the Oklahoma legislature's adoption of this statutory language, the court of criminal appeals continued evaluating claims of ineffective assistance of appellate counsel according to the historical *Strickland* standard.⁶¹ Suddenly and inexplicably, while reviewing Walker's application for post-conviction relief, an application like so many others before it, the court decided that the legislature actually intended to revolutionize the ineffective assistance of appellate counsel test. The court translated the statutory language "[if] the Court of Criminal Appeals first finds that the allegations in the application were true"⁶² into its new test's first prong: "whether appellate counsel actually committed the act

56. *Id.* at 336 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

57. *See id.* at 331 n.16 (citing *McCleskey v. Zant*, 499 U.S. 467, 491 (1991) ("One of the law's very objectives is the finality of its judgments.")).

58. 22 OKLA. STAT. § 1089(C) (Supp. 1995).

59. *See id.* § 1089(D)(4)(b)(2).

60. *Id.*

61. *See, e.g., Medlock v. State*, 927 P.2d 1069, 1071-72 (Okla. Crim. App. 1996) (holding that where the defendant is not prejudiced by appellate counsel's failure to raise an issue, the court need not determine whether counsel's performance in failing to raise such claim was deficient).

62. 22 OKLA. STAT. § 1089(D)(4)(b)(2) (Supp. 1995).

which gave rise to the ineffective assistance allegation."⁶³ Out of the Act's words, "the performance of appellate counsel constitutes the denial of reasonably competent assistance of counsel under prevailing professional norms,"⁶⁴ the court created prong two: "whether such performance was deficient under the first prong of the two-pronged test in *Strickland v. Washington*."⁶⁵ Finally, the court transformed the statute's prerequisite to post-conviction review, that "the outcome of the trial would have been different but for the errors or that the defendant is factually innocent,"⁶⁶ into prong three.⁶⁷

The majority was adamant in its assertion that the legislature, not the court, mandated the modification of the ineffective assistance of appellate counsel analysis.⁶⁸ In his concurring opinion, Judge Lumpkin criticized the language of Oklahoma's post-conviction statute as "vague at best and utterly confusing at worst."⁶⁹ Though conceding that the three-pronged test is one possible interpretation of the statute, Judge Lumpkin correctly disbelieved that the legislature, despite its use of such imprecise language, intended to alter the way the court had long handled claims of ineffective assistance of appellate counsel.⁷⁰

Assuming, *arguendo*, that the Act indeed necessitated the implementation of a test with three prongs rather than two, the test appears on its face to be merely *Strickland* by another name. The first prong of the *Walker* test is simply a procedural requirement. To answer the threshold inquiry — whether appellate counsel actually committed the act which gave rise to the ineffective assistance allegation — the court need only refer to the direct appeal record. Judge Lumpkin adeptly assessed the practical implication of prong one:

Since in virtually all cases, the allegation is that appellate counsel failed to present a claim in the direct appeal, the first prong is virtually always going to be met, as that omission will be readily apparent from the record. A requirement which fails to differentiate one case from another is, at best, a requirement with no teeth; at worst, it is no requirement at all.⁷¹

The second prong — whether such performance was deficient — is by its own terms a direct application of *Strickland*. The third prong — that the claim must support a conclusion that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent — seems strangely reminiscent of *Strickland's* prejudice prong. Under this analysis, because prong one is really no prong at all, the *Walker* test is analytically indistinct from the *Strickland* test. The

63. *Walker*, 933 P.2d at 333.

64. 22 OKLA. STAT. § 1089(D)(4)(b)(2) (Supp. 1995).

65. *Walker*, 933 P.2d at 333.

66. 22 OKLA. STAT. § 1089(C)(2) (Supp. 1995).

67. *See Walker*, 933 P.2d at 333.

68. *See id.* at 333 n.23.

69. *Id.* at 341.

70. *See id.*

71. *Id.*

court of criminal appeals' application of its three-pronged test, however, is quite the contrary.

2. *The Application of the Three Prongs*

In *Strickland*, the Supreme Court noted that courts need not approach an ineffective assistance of counsel inquiry in any particular order. Under *Strickland*, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.⁷² In sharp contrast, the *Walker* court established the first prong as a threshold for consideration of the second, and the second prong as a threshold for the third. It is this unique application of the test, not the test on its face, that constitutes a radical departure from precedent.

The *Walker* court expressly and purposely discarded the "prejudice" prong of the *Strickland* test.⁷³ In his *Walker* concurrence, Judge Lumpkin expressed his dismay at the court of criminal appeals' abandonment of the prejudice requirement. Citing *Strickland* for the proposition that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,"⁷⁴ Judge Lumpkin maintained that in order to make that assessment, both prongs of the *Strickland* test must be met.⁷⁵ The premise of *Strickland*, argued Judge Lumpkin, is based on a petitioner's showing two requirements, deficient performance and prejudice.⁷⁶ According to Judge Lumpkin, "the language describing one is supported by the language describing the other. One cannot separate the two parts and expect either one to function properly alone."⁷⁷

Unquestionably, the prejudice component had previously been a vital and integral part of the court of criminal appeals' evaluations of ineffective assistance of appellate counsel claims. In *Hooks v. State*,⁷⁸ a 1995 case before the court of criminal appeals, a capital post-conviction petitioner claimed that his direct appeal attorneys were ineffective because they failed to raise meritorious claims and inadequately briefed the claims they did raise. The court of criminal appeals noted that the substantive claims had been either technically waived for not having been previously raised, or technically barred by the doctrine of res judicata for having been previously considered.⁷⁹ The court recognized, however, that post-conviction appeal provided the petitioner his first opportunity to argue appellate counsels' ineffectiveness.⁸⁰ Accordingly, the court examined the substantive issues on the merits to determine whether, despite appellate counsels' omission of certain of these

72. See *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

73. See *Walker*, 933 P.2d at 333, n.24.

74. *Id.* at 341 (citing *Strickland*, 466 U.S. at 686).

75. See *id.* at 342.

76. See *id.*

77. *Id.*

78. 902 P.2d 1120, 1122-23 (Okla. Crim. App. 1995).

79. See *id.* at 1123.

80. See *id.*

substantive issues and poor briefing of certain other of these substantive issues, the attorneys' performance met *Strickland's* requirement of reasonably effective assistance of counsel.⁸¹

Likewise, in *Pickens v. State*,⁸² the court of criminal appeals evaluated technically waived substantive claims on the merits in order to determine whether the petitioner was denied his right to the effective assistance of appellate counsel. In both *Hooks* and *Pickens*, the court demanded that the petitioner establish that his appellate counsel failed to raise issues warranting reversal, modification of sentence, or remand for resentencing. In other words, the court demanded a showing of prejudice.

The Tenth Circuit's handling of ineffective assistance of appellate counsel claims further illustrates the symbiotic relationship historically manifest between the deficiency and prejudice prongs. In *Banks v. Reynolds*,⁸³ the Tenth Circuit dealt with a habeas corpus petitioner's claims that his appellate attorney was ineffective for withholding exculpatory information on direct appeal. The Tenth Circuit stated that "when a habeas petitioner alleges that his counsel was ineffective for failing to raise an issue on appeal, we examine the merits of the omitted issue."⁸⁴ "The question of 'prejudice' in the context of an ineffective assistance claim," noted the Tenth Circuit, "necessarily requires a reviewing court to look at the merits of the underlying claim."⁸⁵

It is clear from these cases that Judge Lumpkin was correct. In all Oklahoma precedent, both state and federal, the language describing deficiency was supported by the language describing prejudice. Historically, Tenth Circuit and Oklahoma state courts have interpreted the deficiency prong of *Strickland* as a function of the effects or consequences of appellate counsel's acts or omissions. These courts have, in other words, looked at the substantive claim.

Under *Walker*, the court of criminal appeals explicitly precludes review of the substantive claim. The *Walker* court offered a rationale for this departure: capital post-conviction petitioners, of course desiring full review of technically waived substantive claims, had discovered an allegation of ineffective assistance of appellate counsel as a method of achieving this goal.⁸⁶ Prior to the inception of the three-pronged procedural scheme, said the *Walker* court, post-conviction petitioners would simply argue their technically barred substantive claims, and then summarily conclude that their appellate counsel's decision not to raise them constituted ineffectiveness under the *Strickland* test.⁸⁷

The *Walker* court lamented that in applying the "prejudice" prong of the *Strickland* test, it was essentially forced to examine the merits of the technically waived claim to determine whether the claim was so serious as to deprive the

81. *See id.*

82. 910 P.2d 1063 (Okla. Crim. App. 1996).

83. 54 F.3d 1508, 1513 (10th Cir. 1995).

84. *Id.* at 1515.

85. *Id.* at 1516.

86. *See Walker*, 933 P.2c at 334.

87. *See id.*

defendant of a fair trial.⁸⁸ Triumphantly, the court announced that this would no longer be the case. The *Walker* court's solution mandated that capital post-conviction petitioners prove deficient attorney performance as a precondition to having their underlying claim reviewed.⁸⁹ Thus, the new approach allows the court to analyze fully this "pivotal and narrow threshold issue" without examining the merits of the technically waived substantive claim.⁹⁰

Strangely, Judge Lumpkin, who was so astute in his analysis that the Act did not mandate implementation of a three-pronged test, dramatically misjudged the implications of this new test. The main thrust of his discontent is that by its abandonment of the prejudice requirement, the court of criminal appeals has created a more lenient test for evaluating ineffective assistance of appellate counsel claims.⁹¹ According to Judge Lumpkin, the "prejudice" prong of *Strickland* is more strict than prong three of the *Walker* test. Under prong three of the *Walker* test, the petitioner must show "either that the outcome of the trial would have been different but for the errors or that the defendant is factually innocent."⁹² Judge Lumpkin's quarrel is that *Strickland* demands a showing that counsel's deficient performance rendered the trial unreliable or the proceeding fundamentally unfair rather than a mere look at whether the outcome would have been different.⁹³

Judge Lumpkin's concern is misplaced. The flaw of the three-pronged *Walker* test is not that its third prong is not as strict as the "prejudice" prong of *Strickland*. Quite the contrary, the problem is that *Walker*'s second prong, a threshold for consideration of the third, represents such a high hurdle that the third prong will rarely even be addressed. Far from creating a more lenient standard, as Judge Lumpkin believed, the *Walker* test presents an obstacle for post-conviction petitioners that is perhaps insurmountable.

3. Deficiency Defined

Under *Walker*'s unique interpretation of deficient attorney performance, capital post-conviction petitioners "must devote much greater time and attention to what counsel did or did not do and *why* counsel's acts or omissions constituted deficient performance."⁹⁴ *Walker*'s specific allegations of appellate counsel's ineffectiveness provide insight into the nature of evidence the court will demand to find deficient performance under its new test.

Walker alleged that his trial counsel, O'Neal, was ineffective for failing to raise several substantive claims. First, O'Neal failed to argue that police improperly obtained *Walker*'s statement, and that there was no hearing to determine the

88. *See id.*

89. *See id.*

90. *Id.*

91. *See id.* at 342. Lumpkin also expressed dissatisfaction with prong one of the new *Walker* test. *See supra* text accompanying note 71.

92. *Id.* at 333 n.25.

93. *See id.* at 342-43.

94. *Id.* at 334 (emphasis added).

statement's voluntariness.⁹⁵ Second, O'Neal failed to raise any arguments on direct appeal regarding Walker's competency and how it was determined.⁹⁶ Third, O'Neal failed to argue that Walker was in fact tried while incompetent.⁹⁷

In addressing all of these allegations, the court noted that an attorney is not ineffective simply because he failed to press an arguably meritorious claim.⁹⁸ Rather, the court demanded that Walker present *facts*, for example that O'Neal breached a duty owed to him, to show that O'Neal's omission of these claims was unreasonable under the circumstances or did not fall within the wide range of professional assistance.⁹⁹ Walker failed to present such facts, thus the court declined to review the claims on the merits.

Another basis for Walker's claim of ineffectiveness of appellate counsel was that O'Neal failed to raise meritorious claims of trial counsel's ineffectiveness.¹⁰⁰ This time, Walker did plead facts to show that O'Neal's omission of the claim was unreasonable. Walker indicated that O'Neal was trial counsel's supervisor at the Tulsa County Public Defender's office, and that O'Neal himself participated in the trial.¹⁰¹ Walker argued that O'Neal did not raise the ineffective assistance claim on direct appeal for fear of exposing his own and his subordinate's poor legal performance and judgment.¹⁰² The court, focusing on the fact that O'Neal's involvement with the original trial was minimal, found that Walker failed to establish that O'Neal was driven by an actual conflict of interest.¹⁰³ The court also took into account the fact that Walker did not object to being represented by O'Neal on direct appeal. Even though this time Walker indeed pled facts explaining *why* O'Neal's performance was deficient, the court said this was still not enough.

The final basis for Walker's claim of ineffectiveness was that O'Neal failed to attack the trial judge's improper "presumption of not guilty" instruction.¹⁰⁴ Walker again attempted to plead facts indicating that this omission constituted ineffective assistance. He alleged that O'Neal did not raise this issue on appeal because he was afraid that the judge who administered the improper instruction would retaliate by having him fired.¹⁰⁵ In support of this allegation, Walker submitted O'Neal's affidavit in which O'Neal stated that fear of retaliation in fact motivated the omission.¹⁰⁶ The court noted that when an attorney attests to his own ineffectiveness in an effort to obtain relief for a capital post-conviction petitioner, the court will thoroughly scrutinize the affidavit and rarely rely on it as sole support of a finding

95. *See id.* at 336.

96. *See id.*

97. *See id.* at 337.

98. *See id.*

99. *See id.*

100. *See id.* at 335.

101. *See id.*

102. *See id.*

103. *See id.*

104. *See id.*

105. *See id.*

106. *See id.* at 335-36

of deficient performance.¹⁰⁷ Again, Walker seemingly did what the court wanted. He pled facts. Those facts were, however, insufficient.

4. The Ramifications of Creating the Second Prong as a Threshold for Consideration of the Third

Clearly, the court of criminal appeals has imposed upon capital post-conviction petitioners a heavy burden to prove deficient performance. Nothing better illustrates the dramatic implications of this heavy burden than the *Walker* court's refusal to review the "presumed not guilty" issue on the merits. In *Flores v. State*,¹⁰⁸ the court of criminal appeals reasoned that the "presumption of innocence" instruction commands the jury to start their deliberations from the premise that there exists an absence of guilt, while the "presumption of not guilty" instruction conveys that there exists an absence of sufficient proof of guilt.¹⁰⁹ The *Flores* court stated that "while the distinction is subtle, we find it amounts to an impermissible lessening of the burden of proof by expanding the degree of doubt that is permissible."¹¹⁰

The Tenth Circuit used the term "dead-bang winner" to refer to an issue which was obvious from the record and which would have resulted in reversal on appeal.¹¹¹ In *United States v. Cook*, the Tenth Circuit held that counsel's omission of a "dead-bang winner" necessarily constitutes ineffective assistance.¹¹² The "presumed not guilty" instruction surely qualifies as a "dead-bang winner." In over forty cases on direct appeal, the court of criminal appeals has reversed the trial court on the basis of the "presumed not guilty" instruction forbidden under *Flores*.¹¹³

Now under the three-pronged *Walker* test, a petitioner must prove deficient performance as a threshold to consideration of the substantive claim. Because of the virtual impossibility that the court will find an attorney's performance deficient, capital post-conviction petitioners will be denied the opportunity to have considered substantive claims warranting reversal. Had Walker landed in any court still using the *Strickland* test, he would have succeeded in his challenge to the "presumed not guilty" instruction.¹¹⁴ Now, through a procedural nuance, Walker and others following him will assuredly be dead-bang losers.

B. The Aftermath of Walker

Since the *Walker* decision, the court of criminal appeals has had several opportunities to exercise its three-pronged test, and specifically to refine its new for-

107. See *id.* at 336.

108. 896 P.2d 558 (Okla. Crim. App. 1995).

109. See *id.* at 562.

110. *Id.*

111. See *United States v. Cook*, 45 F.3d 388, 394 (10th Cir. 1995).

112. See *id.*

113. See Brian Lester Dupler, *The Inglorious Revolution: Walker v. State and Capital Post-Conviction Procedure*, 68 OKLA. B.J. 2624, 2629 (1997).

114. See *id.* ("Appellate counsel's omission of a *Flores* claim would require relief under any scrupled application of the *Strickland* test.").

mulation of deficiency. The court has continued to require post-conviction petitioners to "set forth facts and law which allow the court to fully assess appellate counsel's allegedly deficient performance."¹¹⁵ In *Robinson v. State*,¹¹⁶ a post-conviction petitioner argued that his appellate counsel was ineffective for failing to raise a meritorious claim on appeal. The court again found that mere evidence of failure to present a claim is insufficient to support an allegation of ineffective assistance.¹¹⁷ This time, however, the court shed light on the kinds of "facts and law" it would consider as evidence of ineffectiveness. The court suggested that the petitioner could have indicated that appellate counsel was unaware of the allegedly meritorious argument, that she did not research the issues, that she did not read the relevant transcripts, or that she did not talk to witnesses in question.¹¹⁸ These facts would go to the showing required under *Walker* of "what counsel did or did not do and why counsel's acts or omissions constituted deficient performance."¹¹⁹

By requiring such facts, the court of criminal appeals has delivered on its promise that the burden to prove deficient attorney performance is "heavy."¹²⁰ Consequently, the entire three-tiered procedural scheme presents a difficult obstacle for capital post-conviction petitioners. Many critics have argued that the *Strickland* two-pronged test itself presents too difficult a hurdle for those arguing ineffective assistance of appellate counsel.¹²¹ In his *Strickland* dissent, Justice Marshall accused the majority of being overly concerned "that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits."¹²² Implicit in the *Strickland* test is the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."¹²³ Justice Marshall asserted that "to tell lawyers . . . that counsel for a criminal defendant must behave 'reasonably' and must act like a 'reasonably competent attorney' is to tell them almost nothing."¹²⁴ To Justice Marshall and similar *Strickland* detractors, according such deference to attorneys undermines the constitutional right to counsel.

The *Strickland* majority, with all its deference to attorney practices, at least recognized that ineffective assistance claims must be judged by whether or not the

115. *Robinson v. State*, 937 P.2d 101, 105 (Okla. Crim. App. 1997); see also *McGregor v. State*, 935 P.2d 332, 336 (Okla. Crim. App. 1997); *Rogers v. State*, 934 P.2d 1093, 1098 (Okla. Crim. App. 1997).

116. 937 P.2d 101 (Okla. Crim. App. 1997).

117. See *id.* at 109.

118. See *id.*

119. *Walker*, 933 P.2d at 334 (emphasis added).

120. See *id.* at 333.

121. See, e.g., Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413 (1988); Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus*, 29 U. RICH. L. REV. 1327 (1995).

122. *Strickland v. Washington*, 466 U.S. 668, 713 (1984).

123. *Id.* at 669.

124. *Id.* at 707-08.

trial produced a just result.¹²⁵ The "prejudice prong" is crucial to this determination. In Oklahoma, attorneys still reap the benefits of judicial indulgence. In fact, appellate attorneys are *less* likely to be found deficient because of the new requirement that post-conviction petitioners plead specific facts and law to prove deficiency. And now, no prejudice prong balances the equation. As the court of criminal appeals' refusal to examine Walker's "presumed not guilty" objection on the merits illustrates, there is now a reduced commitment to ensuring a just result. If *Strickland* represented too high a burden on post-conviction petitioners, *Walker* represents a virtual impossibility.

IV. Conclusion

When Jack Dale Walker filed his application for post-conviction relief, he doubtless had no idea he would be the catalyst for substantial change in Oklahoma post-conviction procedure. Unfortunately, the change has been for the worse, not merely for Walker, but for any criminal defendant alleging ineffective assistance of appellate counsel. By renouncing the traditional United States Supreme Court test, the Oklahoma Court of Criminal Appeals has made it even more difficult for capital post-conviction petitioners to prove that their appellate attorneys were ineffective.

The Supreme Court's test applies to attorney effectiveness at the trial level. Because of the dearth of Supreme Court authority concerning the proper standard by which to evaluate attorney effectiveness at the appellate level, the court of criminal appeals was free to apply whatever test it chose. Thus, the three-pronged test should not be obliterated on grounds of unconstitutionality. Rather, the court of criminal appeals should renounce its three-pronged test out of the interest in fundamental fairness. At the heart of our criminal justice system lies the premise that everyone, not just the innocent, deserves competent representation and a fair trial. In *Walker v. State*, the court of criminal appeals went a long way in undermining that value.

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125. *See id.* at 686.

