INEFFECTIVE ASSISTANCE BY COUNSEL DURING PLEA NEGOTIATIONS REVISITED

***Burt, Warden v Titlow* certiorari to the US Ct App for the Sixth Circuit no 12-414, decided 5 November 2013**

1 INTRODUCTION

Plea bargains are touted in many international instruments and foreign jurisdictions, for example, the United Nations *Guidelines on the role of prosecutors* (Item 18 "Alternatives to prosecution", adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August–7 September 1990) and the United States of America (US; see, eg, *Santobello v New York* 404 US 257 264 (1971)) to promote effectiveness, fairness and consistency in criminal matters. It is also clear that South African authorities are placing an increasing reliance on plea bargaining (and other alternatives to prosecution) to assist a gravely under-performing criminal justice system to effectively move cases through the system (see, eg, Witten *IOL news* "Plea bargains to help tackle court backlogs" (15 January 2010), accessed at http://bit.ly/12kAMlS (1 September 2014)). Certain issues that have concerned other jurisdictions that utilise plea bargains are therefore bound to trouble our courts in the near future.

American law is of special significance as the vast majority of state and federal cases have been resolved by plea bargains under US law for many decades (see, eg, Bureau of Justice Statistics "Felony sentences in the State court 1992" US Dept of Justice *Bulletin* 9 (92% of cases) and Fields and Ehmshwiller "Guilty pleas in federal cases soar as bargains trump trials" (23 Sept 2012), accessed at http://on.wsj.com/1HUeZS2 (1 September 2014); 84% of cases in 1990 and 97% of cases in 2011). American law is furthermore apposite for comparison in light of the fact that the law of criminal procedure and evidence in the US and in South Africa are premised on the same English common law principles. The systems are therefore based on the same fundamental principles, and the underlying rationale or reasoning for their existence similar.

During 2006, I published a note that focused on the position of an accused under South African law that lost the opportunity to conclude a plea agreement because of the negligence of counsel ("Ineffective assistance by counsel during plea negotiations: An agreement lost" 2006 *THRHR* 484). In the note, I discussed the situation where an accused rejected a plea and sentence offer due to the fact that the offer had been miscommunicated to him by counsel. The accused proceeded to trial where he was convicted and sentenced only to later discover that the lost plea bargain would have brought a lighter sentence.

I showed that as a result of unfortunate drafting, and foundational confusion by the Constitutional Court when interpreting sections 11 and 25 of the Interim Constitution and 12 and 35 of the Final Constitution, only a detained person had a constitutional right to assistance by counsel during plea negotiations. Fortunately, section 73 of the Criminal Procedure Act 51 of 1977 (CPA) provided for such a right during the plea negotiation process. It also appeared that the right to legal assistance included the right to effective assistance of counsel. The assessment

whether the assistance was effective must be objective, without the benefit of hindsight. This is still the position today.

Under American law, the Sixth Amendment provides a defendant with a right to counsel, as well as an effective right to counsel. The US Supreme Court in *Strickland v Washington* 466 US 668 (1984) set a two-tier test for determining the adequacy of representation by counsel. The defendant firstly had to show counsel's assistance was deficient and, secondly, that the deficient assistance prejudiced the defence (687). The first requirement established an objective standard and the second requirement a subjective one.

Two issues discussed in the note were whether the accused's right to counsel would have been infringed if he had a fair trial in any event and what the appropriate remedy was to vindicate the rights of the accused in the circumstances. At that stage, there was no consistent approach under American or South African law with regard to the first issue. Under American law some cases required that the defendant prove the ineffective performance, and also that the error had an impact on the trial. In others (the majority) the defendant had to show that, but for the error, it is reasonably probable that he would have accepted the offer. In another case, the defendant had to prove the defective performance and show that the error prejudiced the defendant's right to a fair disposal of the charges against him. Under South African law, the vast majority of cases require that the trial had to be rendered unfair. At least one case found for ineffective assistance without requiring any influence thereof on the trial.

As far as a appropriate remedy is concerned, there was also no consistent approach under American law. Many courts at first granted a new trial to a defendant who was prejudiced in this manner. More recently, many other courts reversed the defendant's conviction and ordered the prosecution to reinstate the lost plea bargain. In another more recent judgement (*State v Taccetta* A-3983-99T2 (App Div) May 29 2002), the court found that the state could not be held to its original offer. The court held that it would be fairest to both the state and the defendant to return the defendant to the position in which he was prior to the plea offer. The state would then have the option of renegotiating a plea agreement or if it chose not to do so, or if it was rejected, to dispose thereof in a trial. Under South African law the problem had not yet arisen. I argued that the reinstatement of the original plea offer was the proper remedy.

This case note describes the case history. It revisits the question whether the accused's right to counsel would have been infringed if he had a fair trial in any event, and the appropriate remedy to vindicate the rights of an accused in the circumstances. It discusses the issue whether counsel may negotiate a plea bargain where the accused proclaims his innocence. It also comments on the presumption of competence standard formulated by the US Supreme Court in *Strickland v Washington supra* (and followed in this case) with regard to the conduct of defence counsel.

2 FACTS

2 1 Background and proceedings in Michigan trial court

The respondent and the respondent's aunt, Billie Rogers, murdered Billie's husband (Don Rogers) by throwing Vodka down his throat and suffocating him with a pillow. With the assistance of an attorney (Lustig), the respondent reached an agreement with the state to testify against Billie. In return for her testimony,

she could plead to manslaughter and receive a 7 to 15-year prison sentence. Lustig confirmed at the plea hearing that he had discussed the evidence with the respondent over a lengthy period of time, and that the respondent understood that it supported a conviction of first degree murder. The Michigan trial court approved the plea and sentence agreement (App 43–44).

However, three days before the commencement of Billie Rogers' trial the respondent retained a new lawyer (Toca). With the assistance of Toca, the respondent demanded that the minimum period of incarceration in the plea and sentence agreement be lowered from seven to three years. The prosecutor did not accede to this demand and the respondent withdrew her plea. The respondent acknowledged the consequences of the withdrawal, including the reinstatement of the murder charge in open court. Billie Rogers was acquitted and later died.

The respondent subsequently stood trial. During the trial, the respondent denied that she had any intention to harm Billie Roger's husband. She also denied that she had any knowledge that Billie intended to harm her husband when she covered his mouth or poured Vodka down his throat. The respondent, instead, testified that she had attempted to stop Billie from harming her husband. The jury did not believe the respondent and relying on out of court statements made by the respondent which indicated her complicity, convicted her of second degree murder. The court imposed a jail sentence of 20 to 40 years.

2 2 Michigan Court of Appeals

On direct appeal, the respondent argued that Toca advised her to withdraw the guilty plea without taking time to learn more about the case, thereby not realising the strength of the state's case. Because of this, she did not have effective assistance of counsel.

The Court of Appeals did not agree and found that Toca acted reasonably in light of his client's affirmations of innocence. Referring to *Strickland v Washington* 466 US 668 (1984) which requires that defence counsel comply with "an objective standard of reasonableness", the court held that when a defendant proclaimed his innocence, it was not unreasonable for counsel to recommend that his client plead not guilty, no matter how favourable the plea and sentence agreement may appear (App to Pet for cert 102A).

2 3 Federal *habeus* petition

The respondent then filed a federal *habeus* petition in terms of 28 US Code §2254 ("State custody; remedies in Federal courts", Title 28, Part IV, Chapter 153). §2254(d)(2) provides that when a federal *habeus* petitioner challenges the factual basis for a prior state-court decision, the federal court may overturn the state court's decision if the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding".

The District Court, applying the deferential standard of review set out in the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat 1214 (AEDPA), found that the ruling of the Michigan Court of Appeals was "completely" reasonable on the facts and in law and denied relief (No 07-CV-13614, 2010 WL 4115410, 15 (ED Mich Oct 19 2010)). The court in particular pointed out that Toca tried to negotiate a deal as the trial of Billie Rogers was imminent, and that the respondent at the time affirmed that Billie Rogers had committed the murder without assistance. Counsel could therefore not be ineffective if he tried to negotiate a better deal (*ibid*).

2 4 United States Court of Appeals for the Sixth Circuit

The Sixth Circuit reversed the decision, finding that the facts upon which the state court relied for its decision, that is, that the withdrawal of the plea took place because of the respondent's protestation of innocence, was an unreasonable interpretation of the facts. The court held that Toca explained at the withdrawal hearing that the decision to withdraw was taken because the state's plea offer was substantially higher than the Michigan guidelines for second degree murder (680 F 3d 577, 589 (2012)). The court further observed that there was no evidence in the case record that Toca fully informed the respondent of the consequences of withdrawing the plea and found that counsel rendered ineffective assistance to the respondent. This resulted in the respondent's loss of the benefit of the plea bargain (589–592).

Citing the decision of the US Supreme Court in *Lafler v Cooper certiorari* to the US Ct App Sixth Circuit, no 10-29, decided March 11 2012, the court remanded the case with the instruction that the respondent be offered the original plea agreement and that the State should "consul[t]" the plea agreement and "fashion" a remedy for the violation of respondent's Sixth Amendment right.

2 5 Supreme Court of the United States

The court held that the Sixth Circuit failed to comply with the double deferential standard of review recognised by the US Supreme Court when it refused to credit the state court's reasonable factual finding, and assumed that counsel was ineffective where the record was silent (4–11). The double deferential standard in this case requires that both the state court and the defence attorney are presumed to be competent. (See the further discussion below.) Because the AEDPA (§2254) and *Strickland* (*supra* 690) do not allow federal judges to casually second-guess the decisions of their state court colleagues or defence counsel, the Sixth Court decision had to be reversed.

With regard to the AEDPA, the court reiterated that the prisoner bears the burden of rebutting the state court's factual findings by clear and convincing evidence (§2254(e)(1)). The court also reiterated that a state court's factual determination is not unreasonable merely because the federal *habeus* court would have reached a different conclusion in the first instance (see also *Wood v Allen* 558 US 290, 301 (2010)).

With regard to legal error by state courts, a writ of *habeus corpus* shall not be granted unless the decision by the state court was contrary to, or involved an unreasonable application of, clearly-established federal law as determined by the Supreme Court of the United States (§2254(d)(1)).

The court reiterated that the AEDPA recognised the foundational principle of the federal system that state courts are adequate forums for the vindication of federal rights. It has consistently been held that state courts have inherent authority, and are thus presumed to be competent to adjudicate issues arising under the laws of the United States (see, eg, *Tafflin v Levitt* 493 US 455, 458 (1990)). This is especially so where a common issue such as ineffective assistance of counsel under *Strickland* is concerned.

Recognising the ability of the state courts to adjudicate claims of constitutional infringement, the AEDPA erects a formidable barrier to federal *habeus corpus* relief where a prisoner's claim has been adjudicated in a state court. The AEDPA

requires a prisoner to show that the state court's ruling on the relief sought in federal court "was so lacking in justification that there was an error . . . beyond any fair-minded disagreement" (*Harrington v Richter* certiorari to the US Ct App for the Ninth Circuit, decided January 19 2011 (slip op 13)).

The court furthermore held that the record readily supported the finding by the Michigan Court of Appeals that Toca only advised a withdrawal of the plea after the respondent's proclamation that she was innocent. The respondent passed a polygraph test in which she denied that she planned to kill Don Rogers or that she was in the room when he died. She thereafter discussed her case with a jailer who advised her not to plead guilty if she was not guilty (App 298). That conversation initiated respondent's decision to retain Toca. These facts and the hiring of Toca on the eve of the trial where she was to implicate herself, strongly suggest that the respondent had second thoughts about confessing her guilt. The respondent also bolstered this conclusion by maintaining her innocence at the trial.

The only evidence cited by the Sixth Circuit for its conclusion that the plea withdrawal was not based on the respondent's proclamation of innocence was Toca's explanation at the withdrawal hearing that he moved to withdraw the plea because the state's plea offer was substantially higher than that provided for by the Michigan guidelines. The Sixth Circuit held that this as enough to rebut the Court of Appeal's finding that the plea was withdrawn because of the respondent's avowal of innocence (680 F 3d 589).

Yet, the Court of Appeals was aware of Toca's explanation to the trial court that the plea was being withdrawn because the agreed sentence exceeded the sentencing guidelines (App to Pet for Cert 100a). However, unlike the Sixth Circuit, the Court of Appeals correctly accepted that there was nothing inconsistent with the defendant asserting innocence on the one hand, and refusing to plead accompanied by a higher than usual punishment on the other. The Sixth Circuit therefore set aside a reasonable state court determination in favour of its own debatable interpretation of the record (see also *Rice v Collins* 546 US 333, 335 (2006)).

Accepting as true that the respondent proclaimed innocence to Toca, the Sixth Circuit's *Strickland* analysis cannot be sustained. Although an assertion of innocence does not relieve counsel of his duties under *Strickland*, it may affect the advice that counsel gives. The finding by the Court of Appeals that Toca's advice satisfied *Strickland* fell within the bounds of reasonableness under the AEDPA. A lawyer must not override his client's desire to plead not guilty (*Brookhart v Janis* 384 US 1 7–8 (1966)). It has also been held that the client has the ultimate authority whether to accept a plea bargain or not (*Florida v Nixon* 543 US 175 187 (2004)). The Sixth Circuit's finding to the contrary was therefore an error.

The court found even more troubling the finding by the Sixth Circuit that Toca was ineffective because the record contained no evidence that he gave constitutionally inadequate advice on whether to withdraw the guilty plea. Referring to *Strickland* (690), the court indicated that counsel should be strongly presumed to have rendered effective assistance and to have made all significant decisions in the exercise of a reasonable professional judgment. The burden to show that counsel's performance was deficient rests with the defendant (687). The absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (689). Without evidence that Toca gave incorrect advice, or failed to give material advice, it

cannot be said that Toca's performance was ineffective. The singular fact on record that Toca failed to retrieve respondent's file from former counsel cannot overcome *Strickland*'s strong presumption of competence. He may well have had access to other sources.

3 DISCUSSION

I submit that the reasoning by detractors, namely, that the prejudice required by *Strickland* cannot arise if the defendant is later convicted at a fair trial, is unconvincing. The right to effective legal assistance is not only there to ensure the fairness of the trial or to ensure the reliability of the conviction (see, eg, *Halbert v Michigan* 545 US 605 (effective assistance on appeal) and *Glover v United States* 531 US 198-204 (effective assistance during sentencing)). Such a view fails to comprehend the full scope of the protection offered by the right to legal assistance.

In judging any claim of ineffectiveness, the test must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the process cannot be relied on as having produced a fair result. In this instance, a fair trial does not wipe away ineffective assistance during plea bargaining. In the give and take of plea negotiations the charge or charges are adjusted and/or a lighter sentence or sentences than that what would normally flow from the commission of the crime(s) are accepted by the prosecution in return for a guilty plea. The question here is therefore not about the fairness of the trial, but of the process that preceded it where the defendant would have had the benefit of an important cog in the process, had it not been for counsel's ineffective assistance.

This view was also adopted by the US Supreme Court in *Lafler v Cooper* certiorari to the US Ct App for the Sixth Circuit, no 10-209, decided March 21 2012, and followed by the Sixth Circuit in the present case and other federal appeal courts since. In *Lafler* the court held that the *Strickland* test required a defendant to show a reasonable possibility that the outcome of the plea process would have been different with competent advice. The court explained that the sole purpose of the Sixth Amendment was not to protect the right to a fair trial but rather to ensure effective assistance at every critical stage of the criminal justice process, including pre-trial procedures. There was no rigid rule that a fair trial remedied errors that did not occur during the trial. Instead it must be inquired whether the trial did in fact cure the error at issue (see, eg, *Vasquez v Hillery* 474 US 254; see also *State v Lentowski* 569 NW 2d 758, 761 Wis Ct App 1997 and Perez "Deal or no deal? Remedying ineffective assistance of counsel during plea bargaining" 2011 *Yale LJ* 1532 1553).

I accordingly submit that an accused's right to counsel would have been infringed if he missed a plea bargain due to ineffective assistance, even if he subsequently had a fair trial.

With regard to the appropriate remedy, the Supreme Court in *Lafler v Cooper supra* held that the remedy should be tailored to the injury suffered from the constitutional violation and should not unnecessary infringe on competing rights. Thus, the remedy must "neutralise the taint" of a constitutional violation ((quoting *United States v Morrison* 449 US 361, 364 (1981)), but must not be a windfall to the defendant or unnecessarily squander the resources invested by the state in a proper prosecution (see also *United States v Mechanik* 475 US 66).

The court further held that if the only advantage is that the defendant would have received a lesser sentence under the plea, the court may by way of an

evidentiary hearing look into whether the defendant has shown a reasonable probability that he would have accepted the plea, had it not been for counsel's inefficiency. (Unlike in some lower courts, there is no US Supreme Court precedent or statute that requires the defendant to show that the court would also have accepted the plea bargain. See Perez *supra* 1565.) If it is found that the defendant would have accepted the plea, the court may in its discretion determine whether the defendant should receive the term of imprisonment offered in the plea, the sentence received at trial, or something in between.

The court also held that in some situations resentencing alone may not adequately redress the constitutional injury. If, for example, the offered plea was for less serious offences than the ones on which the defendant was convicted at trial, or where a mandatory sentence confines a judge's discretion, a resentencing based on the conviction at trial may not suffice (see also *Williams* 571 F 3d 1088; *Riggs v Fairman* 399 F 3d 1179, 1181 (CA9 2005)). In such circumstances, the proper remedy may be for the court to require the prosecution to reoffer the plea. The court can then decide whether to vacate the conviction at trial and accept the plea, or leave the conviction undisturbed.

The court also explained that various factors had to be weighed. Principles elaborated over time in court decisions and in statutes and rules will serve to give a more complete guidance as to the factors that should bear upon the exercise of the court's decision. A defendant's earlier expressed willingness or unwillingness to accept responsibility may for example be taken into account. It is furthermore not necessary to find as a constitutional rule that a court is required to disregard any information concerning the crime that was discovered after the plea offer was made. The time that has elapsed makes it difficult to restore the defendant and the prosecution to the precise position that they occupied before the rejection of the plea offer. Yet, these pointers could be considered in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

I agree with the principles laid down in *Lafler* that the appropriate remedy in the circumstances under discussion (the respondent accepted the plea offer but withdrew at a later stage) would not be to grant a new trial or to return the defendant to the position that he was prior to the plea offer (see also my arguments in my note *supra*). I also agree that where the offered plea was for less serious offences than the ones on which the defendant was convicted at trial, or where a mandatory sentence confines a judge's discretion, a resentencing based on the conviction at trial may not sufficiently redress the constitutional injury. In such circumstances, the proper remedy will be to reinstate the plea agreement. (S 173 of the South African Constitution, 1996 provides that the Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice. See also *Parbhoo v Getz* 1997 10 BCLR 1337 (CC); *S v Pennington* 1997 10 BCLR 1413 (CC); *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 2 BCLR 167 (CC).)

The indication by the US Supreme Court in *Lafler*, that where the only advantage is that the defendant would have received a lesser sentence under the plea, the court may decide whether the defendant should receive the term of incarceration offered in the plea, the sentence received at trial, or something in between appears to be in line with how things ought to play out under South African law.

The basis of the claim of ineffective assistance in the case under discussion was that there was a reasonable possibility that the accused would not have withdrawn the plea agreement had he received effective legal assistance. The proper remedy is therefore to place the defendant in the position in which he would have been had he not withdrawn the plea and sentence agreement. This will "neutralise the taint" of the constitutional violation (see *Lafler supra*). To achieve this, the plea and sentence agreement must be reinstated (ito s 173 of the Constitution).

If the agreement is accepted by the court, the accused will be convicted and sentenced in terms of the initial plea and sentence agreement (s 105A(7) and (8) of the CPA). If the court does not consider the sentencing agreement to be just it must inform the prosecutor and the accused of the sentence which it considers to be just (subs (9)(a)). The prosecutor and the accused may then decide to abide by the agreement with regard to the charge whereupon the court may proceed in imposing a just sentence (subs (9)(b) and (c)). In both these instances the conviction and sentence at trial must be vacated (ito s 173 of the Constitution).

If the accused does not decide to abide by the agreement because of the sentence that the court deems just, the trial shall start *de novo* before another court (subs (9)(d)). However, pragmatism dictates that a new trial will not be held before another court where a proper trial has already been held. Apart from the fact that a proper trial has already been held, a new trial squanders the resources already invested by the state and takes place at a huge social cost. It forces the courts, the prosecution, the witnesses, the accused, the defence team and other role players to repeat a trial that has already taken place (see also *United States v Mechanik supra*).

The conviction and sentence at trial will accordingly stand. Being aware of this, the accused will only decide to abide by a sentence that the court considers to be just in terms of subsection (9)(b) and (c) where the sentence is less harsh than that which was imposed at trial. The accused will therefore be sentenced to the sentence offered in the plea (where the court accepts the agreement ito subs (8)), the sentence received at trial (where the accused decides not to abide by the sentence that the court deems just and a new trial must take place ito subs (9)(d)), or something in between (where the accused decides to abide by the sentence that the court considers to be just ito subs (9)(b) and (c)).

The indication by the US Supreme Court that there is nothing inconsistent with a defendant proclaiming innocence on the one hand and participating in plea negotiations on the other hand is also an interesting matter. As far as effective assistance by counsel is concerned, *ABA Standard 14-3.2* does not require the permission of the defendant for defence counsel to enter into negotiations with the State regarding a plea agreement. However, *Standard 14-3.2(b)* directs counsel not to recommend acceptance of a plea unless the appropriate investigation and study of the case has been completed. Viewed in the hue of an ethical responsibility to justice, I understand this to include that counsel should not recommend that a plea be accepted before it has been determined that the offence has a basis in fact and law.

Unfortunately, the view that any guilty plea is unacceptable if there is no basis in law or fact has not universally been accepted under American law. Many American attorneys instead insist that in a specific case, for example where the offer was unusually generous or unusually coercive, accepting a plea bargain may be the best option for an innocent defendant (Alschuler "The defense

attorney's role in plea bargaining" 1975 *Yale LJ* 1179 1279; Bowers "Punishing the innocent" 2008 *U Pa LR* 1117 119–120).

Yet, before an American court may enter judgment on a guilty plea it has to determine that there is a factual basis for the plea (Federal Rule of Criminal Procedure 11(b)(3); also see *ABA Standard 14-1.6(a);* in *North Carolina v Alford* 400 US 25, 37-38 (1970) the US Supreme Court held that there should be a "strong factual basis" for the plea). This process involves "determining what acts and intents can be attributed to the defendant". If the "acts" and "intents" correspond to the elements of the crime in the plea offer, a factual basis for the plea is said to exist (Barkai "Accuracy inquiries for all felony and misdemeanour pleas: Voluntary pleas but innocent defendants?" 1977 *U Pa LR* 88 95 fn 35).

The court may as part of the enquiry ask the defendant to state on the record whether he agrees with, and in the case of a *nolo contendere* plea, does not contest, the factual basis as proffered (*ABA Standard 14-1.6(a)*). Whenever the defendant pleads guilty or *nolo contendere*, and simultaneously denies culpability, the court must take special care to ensure there is a factual basis for the plea. The guilty plea should not be refused solely because the defendant proclaims his innocence. The plea may be refused where the court has specific reasons for doing so and stipulates the reasons on record (*ABA Standard 14-1.6(b)*).

In practice, this requirement and supporting principles are not enough to stop innocent defendants from pleading guilty (Schmidt "The need for review: Allowing defendants to appeal the factual basis of a conviction after pleading guilty" 2010 *Minn LR* 284). In some instances, judges deem this requirement less important and do not diligently ensure that it is met (Schmidt *supra* 307). Nevertheless this does not detract from the fact that Federal Rule 11(b)(3), *ABA Standard 14-1.6* and the US Supreme Court have established this requirement.

It therefore appears that where the client proclaims innocence, but there is a factual basis for a conviction, counsel may negotiate and advise his client to accept an advantageous plea offer. Additionally, a prosecutor under American law does not have a due process obligation to refuse a plea bargain if the defendant pleads guilty but simultaneously attests his innocence (*North Carolina v Alford supra*).

I am of the view that counsel should not recommend to his client to accept a plea offer if there is no factual basis for the plea. Firstly, it addresses the problem that innocent accused may decide to plead guilty because of compelling pressure or incentives. Secondly, a court under American and South African law must satisfy itself that there is a factual basis for the conviction before it can convict. To advise an accused to enter into a plea agreement where there is no factual basis for a conviction unnecessarily burdens the court to investigate whether there is such a basis, it plays roulette with the fate of the accused, and is a waste of time and resources. Thirdly, I am of the view that a reasonable interpretation of *Standard 14-3.2(b) supra* supports my argument.

It now remains to comment on the presumption of competence standard formulated by the US Supreme Court in *Strickland v Washington* (and followed in the present case) with regard to the conduct of defence counsel.

I have already indicated that the first part of the *Strickland* test required that the defendant show that counsel's performance was deficient. I have also indicated that the test was an objective one. In the judgement the court disclosed its concern that drawing up a checklist, or adopting the ABA standards of reasonable

representation, might adversely affect the performance, willingness, ardour and independence of defence counsel (690). The court accordingly held that the "proper measure of attorney performance remains simple reasonableness under prevailing professional norms" (688–690), judged on the facts of the case, and the time of the conduct (690).

To ensure that counsel was free to pursue "a wide range of reasonable professional assistance" the reviewing court must be "highly deferential" and "indulge a strong presumption" of reasonableness (689). The reasonableness of counsel's conduct must be viewed with reference to the information available to counsel at the time of the conduct, and with "a heavy measure of deference to counsel's judgement" (691).

In a dissenting opinion Marshall J objected to the performance standard adopted by the court, holding that

> "it [was] so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts . . . In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs".

Unfortunately the caution by Marshall J proved to be prophetic. This doctrinal limitation (as well as the second requirement that the defendant must prove that the assistance was prejudicial) have been at the forefront of public and scholarly discourse for many years and have led to a number of unjust, even fatal consequences in individual cases, all of which have been chronicled in articles and newspaper reports (see, eg, Geimer "A decade of Strickland's tin horn: Doctrinal and practical undermining of the right to counsel" 1995 *Wm & Mary Bill Rts J* 91 94 and Chhablani "Disentangling the right to effective assistance of counsel" 2009 *Syracuse LR* 1).

Some scholars have argued that the limitations have created an almost impossible hurdle for defendants claiming ineffective assistance to overcome (see, eg, Calhoun "Note and comment, How to thread the needle: Toward a checklist-based standard for evaluating ineffective assistance of counsel claims" 1988 *Geo LJ* 413 427). Others have indicated that it fostered a tolerance for abysmal lawyering (see, eg, Duncan "The (so-called) liability of criminal defense attorneys: A system in need of reform" 2002 *BYULR* 1 6; and Rigg "The T-rex without teeth: Evolving *Strickland v Washington* and the test for ineffective assistance of counsel" 2007 *Pepp LR* 77 83).

It appears that much of the criticism has been directed at the unsound creation by the US Supreme Court in *Strickland* of a strong presumption of reasonableness of counsel's conduct (see, eg, Duncan *supra* 21–24), the failure by the Supreme Court to provide clear examples of unacceptable conduct, and by not making it clear that shoddy performances will not be ignored or glossed over (see, eg, Duncan *supra* 6 21).

However, it also appears that in some Supreme Court cases the courts after *Strickland* have used the ABA standards for counsel as the guiding rules and standards to define the "prevailing professional norms" (see *Strickland supra*) in ineffective assistance cases (see, eg, *B Wiggins v Smith* 539 US 510 (2003) and *Rompilla v Beard* 545 US 374, 387 (2005)). Looking at the language in these cases the courts may in fact have side-lined the presumption in favour of a detailed factual analysis of the alleged breach of duty (see also Riggs *supra* 97).

It goes without saying that the legitimacy of an adversarial system is dependent on the fair and adequate representation of all parties at all levels of the judicial process. In this system the prosecution and the defence do battle to reach a presumptively just and reliable result. Under American law, many scholars have argued that counsel's performance documented over the years since *Strickland* shows that there is no basis for a presumption of competence, especially in trials (see, eg, Bright "Counsel for the poor: The death sentence not for the worst crime but for the worst lawyer" 1994 *Yale LJ* 1835 and Rigg *supra* 105).

Under South African law, the criminal justice system is for its largest part still adversarial. It is also fair to say that the criminal justice system in South Africa is even more so plagued by counsel who are inexperienced, incompetent, or lack the necessary training or inclination, or the time or resources to provide adequate representation (see, eg, Lowe "IBA-South Africa: Pistorius case not typical of 'erratic' justice system" (9 March 2014) accessed at http://bit.ly/12kz1Em (2 September 2014)). Under these circumstances, a presumption of competency has no place. One would rather expect counsel not to be capable of rendering effective assistance where one or more of these deficiencies exist. It is furthermore a fact that the vast majority of criminal cases are, contrary to what happens in the US, resolved in criminal trials in South Africa.

Under the circumstances, I am of the view that there must be robust constructions of the right to effective assistance by counsel taken up in a set of standards under South African law. This will add clarity, detail and content to the more generalised and indefinite right provided for in sections 35(2)(b) and (c) and 35(3)(f) and (g) of the Constitution, and section 73 of the CPA. This should go some way towards ensuring that accused receive capable assistance under South African law.

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