Shifting the Burden: Presuming Prejudice for Failing to Contact an Alibi Witness

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”

I. INTRODUCTION

The U.S. Constitution affords criminal defendants the right to representation by counsel at every critical stage of the proceedings against them. The Sixth Amendment provides:

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

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2. See United States v. Wade, 388 U.S. 218, 224-25 (1967) (reiterating right to counsel extends to all critical stages of criminal proceedings); Moore v. Illinois, 434 U.S. 220, 229-30 (1977) (holding defendant’s Sixth Amendment rights violated because counsel not present at critical stage); Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) (holding Alabama’s preliminary hearing critical stage and therefore defendants entitled to counsel). Counsel is required at any stage that may affect the accused’s substantial rights. See Mempa v.Rhay, 389 U.S. 128, 134 (1967) (explaining when defendant has right to counsel). Courts determine whether an event constitutes a critical stage by analyzing whether there is a potential for “substantial prejudice to [a] defendant’s rights . . . and the ability of counsel to help avoid that prejudice.” See Wade, 388 U.S. at 227 (establishing two-step process for determining when proceedings deemed “critical”). A defendant may have the opportunity to waive counsel at a critical stage of proceedings after a waiver inquiry where the court inquires whether the defendant knowingly and intelligently waives their right to counsel. See, e.g., State v. Wischhusen, 677 A.2d 595, 600-01 (Md. 1996) (holding Maryland allows defendants to waive counsel during critical stages); Headen v. United States, 373 A.2d 599, 601 (D.C. 1977) (recognizing defendant must knowingly and voluntarily waive counsel); People v. Rainwater, 566 N.E.2d 822, 825 (Ill. App. Ct. 1991) (requiring court inquiry before valid waiver of right to counsel at critical stage).
3. U.S. CONST. amend. VI.
The Due Process Clause also grants defendants the right to effective assistance of counsel.\textsuperscript{4} Throughout the course of client representation, “[a] lawyer shall act with reasonable diligence and promptness.”\textsuperscript{5}

To ensure due process, a court must do more than merely appoint counsel to represent a defendant—that representation must also be effective.\textsuperscript{6} In cases where ineffective assistance of counsel has occurred, the defendant may have grounds to seek an entirely new trial.\textsuperscript{7} To establish that they received ineffective assistance of counsel, the defendant must show that their counsel’s performance was deficient and that the deficient performance prejudiced them.\textsuperscript{8}

One important aspect of an effective criminal defense is an alternate theory of events, which defense attorneys often present to the factfinder through an alibi witness.\textsuperscript{9} An alibi demonstrates that the defendant was somewhere else at the time the crime was committed, forcing the prosecution to present evidence to overcome this theory.\textsuperscript{10} An alibi witness is a tool defense counsel can use to illuminate reasonable doubt in the prosecution’s case.\textsuperscript{11} Failing to contact an


\textsuperscript{5} See Model Rules of Pro. Conduct r. 1.3 (Am. Bar Ass’n 1983) (setting forth professional duty). The American Bar Association (ABA) adopted rules of professionalism as part of its goal to ensure the highest standards of professional competence and ethical conduct in the practice of law. See Model Rules of Pro. Conduct: Preface (Am. Bar Ass’n 2020) (asserting mission of ABA and model rules).

\textsuperscript{6} See Powell v. Alabama, 287 U.S. 45, 71 (1932) (explaining Fourteenth Amendment requires effective assistance of counsel); see also Avery v. Alabama, 308 U.S. 444, 446 (1940) (explaining Constitution guarantees more than formal appointment of counsel).


\textsuperscript{8} See id. at 687 (majority opinion) (creating two-prong test for ineffective assistance of counsel claims); see also Williams v. Taylor, 529 U.S. 362, 390 (2000) (reaffirming Strickland test).


\textsuperscript{10} See Mann, 207 A.3d at 661 (describing implications of introducing alibi witnesses at trial); Fedeli, supra note 9, at 155 (noting use of alibi witness); Alibi, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining alibi); see also What Is an Alibi and How Does it Work?, HG.ORG, https://www.hg.org/legal-articles/what-is-an-alibi-and-how-does-it-work-31342 [https://perma.cc/AW86-XMYZ] (explaining how alibi witnesses can help defendants at trial). The State must overcome evidence of an alibi witness to prove the defendant committed the crime beyond a reasonable doubt. See Mann, 207 A.3d at 661 (creating additional hurdle for prosecution).

\textsuperscript{11} See Fedeli, supra note 9, at 155 (noting interaction between alibi and reasonable doubt); Mann, 207 A.3d at 661 (explaining purpose of introducing alibi witness at trial); Leland v. Oregon, 343 U.S. 790, 795 (1952) (stating State’s burden of proof in criminal prosecutions). The government must prove the defendant’s guilt beyond a reasonable doubt to reduce the risk of convictions based on factual error. See In re Winship, 397 U.S. 358, 363 (1970) (explaining purpose behind reasonable doubt standard). Reasonable doubt does not equate to a reason to doubt. See Miller v. Shealy, Jr., A Reasonable Doubt About “Reasonable Doubt,” 65 Okla. L. Rev. 225, 226-27 (2013) (positing difference between reasonable doubt and reason to doubt). Judges have struggled, and sometimes refused, to define what reasonable doubt means. See id. at 227-28 (criticizing Supreme Court’s unwillingness to clarify standard for reasonable doubt).
alibi witness can be grounds for a defendant’s successful ineffective assistance of counsel claim.\textsuperscript{12} This Note will analyze the difficulty defendants face to win ineffective assistance of counsel claims for failure to contact an alibi witness.\textsuperscript{13} Part II of this Note will explain the history of criminal defendants’ due process rights, including the right to counsel, and how courts have interpreted the right to counsel and ineffective assistance of counsel claims.\textsuperscript{14} Part II will also discuss the significance of alibi witnesses, particularly how the failure to contact an alibi witness can support a claim of ineffective assistance of counsel.\textsuperscript{15} This Note will then analyze the steep burden defendants must satisfy to show they faced prejudice and argue that failure to contact an alibi witness should amount to a constructive denial of counsel that creates a presumption of prejudice and shifts the burden to the prosecution to rebut that presumption.\textsuperscript{16} This Note concludes that the defendant’s burden of proving prejudice, as it stands, is too onerous because proving that an uncontacted alibi witness would have changed the outcome at trial is extremely difficult, and creating a presumption of prejudice would appropriately temper this high bar and ensure that defendants receive their constitutionally-protected right to effective assistance of counsel.\textsuperscript{17}

\section*{II. HISTORY}

\subsection*{A. Due Process}

The concept of due process of law is deeply rooted in American history and guaranteed under the Fifth and Fourteenth Amendments.\textsuperscript{18} Defendants receive due process when the criminal justice system honors their rights under the Sixth Amendment.\textsuperscript{19} While the Sixth Amendment once applied exclusively to federal

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\item[12.] See Blackmon v. Williams, 823 F.3d 1088, 1105, 1107 (7th Cir. 2016) (holding trial counsel’s performance both deficient and prejudicial after not contacting alibi witnesses); Holmes v. McKune, 59 F. App’x 239, 249 (10th Cir. 2003) (holding prejudice to defendant because counsel failed to investigate alibi), rev’d on other grounds, 59 F. App’x 239 (10th Cir. 2003); see also infra Section II.E (examining failures concerning alibi witnesses under ineffective assistance of counsel claims).
\item[13.] See infra Part III (highlighting problems facing defendants in claims of ineffective assistance of counsel).
\item[14.] See infra Sections II.A-D (exploring due process and right to counsel).
\item[15.] See infra Section II.E (explaining importance of alibi witnesses and their relation to ineffective assistance of counsel claims).
\item[16.] See infra Part III (analyzing problems with how courts apply Strickland to alibi witnesses and arguing for burden shift).
\item[17.] See infra Part IV (concluding per se prejudice should apply when defense counsel fails to contact alibi witnesses).
\item[18.] See U.S. CONST. amends. V, XIV, § 1 (guaranteeing due process).
\item[19.] See U.S. CONST. amend. VI (delineating rights for defendants in criminal trials); Washington v. Texas, 388 U.S. 14, 18 (1967) (requiring defendant receive rights under Sixth Amendment to meet due process under law). The Supreme Court explained, “due process requires that the accused have the assistance of counsel for his defense, that he be confronted with the witnesses against him, and that he have the right to a speedy and public trial.” See Washington, 388 U.S. at 18.
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cases, the Supreme Court has interpreted the Fourteenth Amendment to incorporate almost all of its guarantees and make them applicable to the states.20

The right to a public trial, the right to know the nature and basis of the accusations, and the right to confront the witnesses against them—all rights guaranteed under the Sixth Amendment—help ensure due process for the defendant.21 The Due Process Clause has always applied to defendants in both criminal and civil trials, although it does not apply to each area in the same way.22 Because the Sixth Amendment explicitly provides for the right to counsel, due process has become a standard basis for ineffective assistance of counsel claims.23

B. Right to Counsel

According to the Sixth Amendment and subsequent interpretations, a person facing criminal charges with the potential for imprisonment as a penalty has the right to have counsel represent them in both state and federal cases.24 The “right

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21. See Argersinger v. Hamlin, 407 U.S. 25, 27-28 (1972) (explaining rights afforded to defendants under Due Process Clause). The Supreme Court clearly stated that these same constitutional rights apply regardless of the type of charge. See id. at 28 (holding no difference in due process protections for felony and misdemeanor offenders). The Court has recognized,

A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.

In re Oliver, 333 U.S. 257, 273 (1948) (highlighting basic protections afforded to defendants).


23. See Powell v. Alabama, 287 U.S. 45, 71 (1932) (linking due process and effective counsel); see also McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (connecting due process right to counsel and right to effective counsel). Defendants appealing their convictions can base an ineffective assistance of counsel claim on due process because due process includes the right to counsel. See Powell, 287 U.S. at 71 (determining clear denial of due process where no counsel afforded). In Powell, the Supreme Court held that the right to counsel was so vitally important that denying the defendants counsel constituted the denial of due process itself. See id. (recognizing importance of counsel). Limiting its opinion to capital cases, the Court held that where the defendant is unable to afford their own defense and is incapable of representing themselves, due process demands that courts provide counsel. See id. (recognizing court’s duty to provide counsel in these narrow circumstances). McMann reiterated the idea that a right to counsel implies a right to effective counsel. 379 U.S. at 771 n.14; see Richard L. Gabriel, Comment, The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emmaculating the Sixth Amendment in the Guise of Due Process, 134 U. Pa. L. Rev. 1259, 1270 & n.63 (1986) (noting implication).

24. See Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (holding Sixth Amendment requires appointment of counsel for indigent defendants in state court); Argersinger, 407 U.S. at 38 (holding Gideon right to
to counsel” means a defendant has the right to hire private counsel at their own expense or to have the court appoint counsel free of charge if they are indigent. This right carries through automatic appeals, where courts must honor an indigent person’s request for counsel regardless of the court’s judgment of the merits of the appeal. Nevertheless, this right does not extend to discretionary appeals—where the court has discretion to review a decision or deny review—because they are not considered critical stages of the proceedings against the defendant. The defendant also has the right to counsel during the sentencing phase of a trial. The attorney ultimately hired or appointed can result in major differences in trial strategy, potentially leading to divergent outcomes for a defendant.

counsel extends to any prosecution involving potential for incarceration). In Arpersinger, Justice Brennan suggested that the right to counsel does not necessarily require a licensed attorney. See Arpersinger, 407 U.S. at 44 (Brennan, J., concurring) (noting law students could benefit indigent defendants, making significant contributions to defenses).

25. See Gideon, 372 U.S. at 343-44 (elucidating right to counsel); see also Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989) (explaining right to counsel means having qualified attorney).

26. See Douglas v. California, 372 U.S. 353, 357-58 (1963) (explaining no difference between rich and poor defendants during appeals). The Douglas Court reasoned that a rich man who can afford to hire an attorney has the opportunity for a meaningful appeal, while an indigent defendant who is not represented by counsel would have the right to a “meaningless ritual.” See id. (addressing economic disparities and their impact on defendants). Though the Court would later declare the right to counsel a “bedrock principle,” it did not recognize the right to counsel on an automatic appeal until 1963. See id. at 357 (extending right to counsel to automatic appeals); Martinez v. Ryan, 566 U.S. 1, 12 (2012) (describing importance of right to counsel). The Supreme Court recognized that without the assistance of counsel, a defendant with a strong defense still may not prevail at trial because they are unaware of the rules of evidence or court procedures. See Powell, 287 U.S. at 69 (explaining downsfalls of not having representation during trial).

27. See Ross v. Moffitt, 417 U.S. 600, 610 (1974) (declining to extend holding in Douglas). The Moffitt Court noted the difference between the Due Process and Equal Protection Clauses, reasoning that when asserting rights that exist under the Due Process Clause, the focus is on the fairness between the State and the individual, while the Equal Protection Clause is concerned with ensuring similar treatment by the State to “individuals whose situations are arguably” the same. See id. at 609 (distinguishing between due process and equal protection). States can provide for differences in the counsel they appoint so long as those differences do not amount to a denial of due process. See Douglas, 372 U.S. at 356-57 (explaining equity not always required). The Court clearly noted that states are not required to match the “legal arsenal” of privately-retained counsel for indigent defendants, only to provide an adequate opportunity for defendants to fairly present their claims. See Moffitt, 417 U.S. at 608 (holding equality of counsel need not exist to meet due process requirements).


29. See United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 150 (2006) (explaining Sixth Amendment guarantees of representation). In Gonzalez-Lopez, the Supreme Court held that erroneously denying a defendant the counsel of their choosing is a structural error. See id. at 150 (reasoning choosing counsel affects framework of trial). Structural errors are those that “affect[ ] the framework within which the trial proceeds,” not merely an error in the process of the trial. See id. at 148 (quoting Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991)) (defining structural errors).

Deprivation of the right is “complete” when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice—which is the right to a particular lawyer regardless of comparative effectiveness—with the right to effective counsel—which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.
Although British common law did not afford citizens the right to counsel in felony cases, it was a significant part of American principles of criminal justice by the time the Constitution was ratified. The right to counsel was included in the Bill of Rights. In *Powell v. Alabama*, the Supreme Court held that the right to counsel is a fundamental constitutional right. The Court explained that the right to counsel is important for uneducated and highly-educated people alike because most laypeople have a limited understanding of the law and how it operates. Without counsel, a defendant may face a trial even though the prosecution lacks proper evidence to support conviction. A defendant may be convicted not because of their guilt, but because they did not know how to properly present evidence of their innocence.

The constitutional right to counsel is not absolute, and there are some criminal proceedings where a defendant is not entitled to an attorney. The Supreme Court has recognized a major difference between a trial and an appeal; thus, a defendant has different rights during each. A defendant is not entitled to counsel during discretionary appeals because the Constitution simply requires the

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*See id. (differentiating between right to counsel of choice and right to effective assistance of counsel).*

30. *See Powell v. Alabama*, 287 U.S. 45, 60, 64-65 (1932) (describing colonial history relating to defendants’ right to counsel). The colonies rejected Britain’s view of the right to counsel, which included a right to counsel for petty offenses, but denied it “in the case of rimes of the gravest character.” *See id.* (explaining colonial rejection of English common law).

31. *See U.S. Const.* amend. VI (establishing constitutional right to counsel). Originally, the right to counsel only applied to federal courts, but the Supreme Court has interpreted the Fourteenth Amendment to apply the right to counsel to the states. *See Gideon v. Wainwright*, 372 U.S. 335, 342, 345 (1963) (incorporating right to counsel); *see also* *Strickland* v. Washington, 466 U.S. 668, 706-07 (1984) (Marshall, J., dissenting) (acknowledging Sixth and Fourteenth Amendments guarantee right to counsel).

32. *See Powell*, 287 U.S. at 72-73 (declaring right to counsel fundamental to due process).

33. *See id.* at 69 (noting without proper skill and knowledge, defendants will struggle to win cases without counsel).

34. *See id.* (describing importance of right to counsel).

35. *See id.* (recognizing possibility of conviction for innocent but uncounseled defendants, even with perfect defense).

36. *See Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991) (explaining no constitutional guarantee of right to counsel during discretionary appeals). The *Martinez* Court held that *Coleman* remains good law, except in the narrow circumstances of initial-review collateral appeals. *See Martinez*, 566 U.S. at 16 (clarifying narrow exception for ineffective assistance of counsel claims); *see also infra* note 39 and accompanying text (explaining importance of finding right to counsel exists). The Sixth Amendment guarantees the right to counsel and dictates that unless there has been a knowing and voluntary waiver of counsel, courts must provide counsel to a criminal defendant who cannot afford to hire their own. *See Johnson v. Zerbst*, 304 U.S. 458, 463-64 (1938) (holding federal courts required to provide counsel unless defendant waives right and defining waiver); *Faretta v. California*, 422 U.S. 806, 835 (1975) (requiring informed waiver); *Gideon*, 372 U.S. at 344-45 (providing right to counsel for indigent defendants). Voluntary and intelligent waivers are based on the facts of a particular case and require the person to be aware of their right. *See Johnson*, 304 U.S. at 464 (asserting standard for intelligent waivers); *Faretta*, 422 U.S. at 835 (clarifying Sixth Amendment waiver standard).

37. *See Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (distinguishing purpose of appeals and trials). The Court explained that the government initiates trials and must prove the defendant is guilty of the charged crimes. *See id.* (summarizing purpose of trial process). In contrast, on appeal the defendant does not need an attorney to serve as a shield against the government but instead as a sword to overturn the verdict against them. *See id.* at 610-11 (describing rationale for differing representation rights at different judicial stages).
State to afford the convicted an opportunity to fairly present their claims when challenging their conviction, not to provide the same defense that a private attorney could offer. The lack of a right to counsel in these circumstances has important implications: With no right to counsel, an indigent defendant cannot appeal a conviction on the grounds of ineffective assistance of counsel. Consequently, even if a defendant’s counsel represents them ineffectively, the defendant has no remedy because their representation on appeal is not always guaranteed by the Sixth Amendment’s right to counsel.

While the right to counsel includes the right to have that counsel be competent, there is no guarantee that counsel will actually perform competently and effectively. Historically, in cases where defense counsel’s incompetence was an issue, courts based the availability of relief on whether the defendant or the government should bear the risk of counsel performing incompetently. Today, in ineffective assistance of counsel claims, it is necessary to establish prejudice to the defendant as a result of their counsel’s incompetence. Prejudice exists when there is a reasonable probability that the outcome of the trial would have been different if the defendant had competent counsel. Allowing defendants to assert an ineffective assistance of counsel claim without a showing of prejudice would simply give defendants a “second bite at the apple”—allowing defendants a chance at a second trial without having shown their counsel’s incompetence.

38. See id. at 615-16 (explaining difference between benefits and constitutionally-required rights).
39. See Coleman, 501 U.S. at 757 (holding no ineffective assistance of counsel without right to counsel); see also Wainwright v. Torna, 455 U.S. 586, 587-88 (1982) (holding no ineffective assistance of counsel where defendant had no right to counsel). In addressing an issue left open by Coleman, the Martinez Court explained that it was not finding a constitutionally-protected right to counsel in initial-collateral appeals; instead, the Court found an equitable remedy applicable when state courts do not allow defendants to bring ineffective assistance of counsel claims during the direct appeal, when defendants do have a constitutionally guaranteed right to counsel. See Martinez, 566 U.S. at 16-17 (refusing to extend right to counsel while still providing remedy). Although under these circumstances defendants have no recourse against their attorney for ineffective assistance of counsel, the attorney may face disciplinary action for failing to meet prevailing professional and ethical standards. See Model Rules of Prof. Conduct R. ml. paras. 2, 4, 19 (AM. BAR ASS’N 1983) (setting forth zealous representation requirement); id. § 4 (explaining lawyers must act diligently and competently in all functions).
40. See Coleman, 501 U.S. at 756-57 (holding no ineffective assistance of counsel without right to counsel); Torna, 455 U.S. at 587-88 (denying appeal because no right to counsel existed); Martinez, 566 U.S. at 16 (allowing relief only based in equity and not in right to counsel).
42. See Gilles, supra note 41, at 1395 (describing early theory on risk allocation for claims involving incompetent representation). Some commentators argue that the defendant should bear the risk of incompetent counsel because the attorney acts merely as an agent. See id. (describing agency theory of risk allocation in effective assistance of counsel cases).
44. See id. at 694 (defining prejudice).
unfairly affected their original trial. A defendant who is unable to show prejudice is not entitled to any remedy, even when their rights have technically been infringed.

C. Ineffective Assistance of Counsel

The Supreme Court has held that “[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system.” In the landmark case Strickland v. Washington, the Court set out the framework for determining whether a defendant should receive a new trial because of their ineffective assistance of counsel. Reviewing ineffective assistance of counsel claims requires appellate courts to make determinations of fact and of law. Normally, appellate courts are bound by the trial court’s findings of fact, but courts reviewing ineffective assistance of counsel claims are not.

Strickland requires that defendant’s counsel performed deficiently and that the deficiency prejudiced the defendant. This two-part test places the burden on the defendant to prove both prongs; a court need not analyze both prongs if

45. See Gilles, supra note 41, at 1429-30 (arguing prejudice required for claims of incompetence).
47. See Martinez v. Ryan, 566 U.S. 1, 12 (2012) (describing importance of right to counsel); McMann v. Richardson, 397 U.S. 759, 771 (1970) (explaining Constitution requires effective assistance of counsel). A prisoner likely needs counsel to properly present an ineffective assistance of counsel claim. See Martinez, 566 U.S. at 11-12 (observing without counsel, prisoners do not know proper procedures for appeal). When a petitioner proceeds pro se, they must conform to the procedures of the court or risk losing their appeal. See id. at 9 (noting failure to abide by state procedure can lead to courts denying defendant’s appeal). A federal court will not hear a habeas petition, a petition where courts review “the constitutionality of a state prisoner’s conviction and sentence,” that a state court refused to hear simply because of procedural defects. See id. (explaining federal rules respect state court’s finality and integrity of legal system).
48. See 466 U.S. at 687 (establishing framework for ineffective assistance of counsel claims). Almost all federal courts adopted a “reasonably effective assistance” standard for examining trial counsel’s performance, but the Supreme Court did not have the occasion to determine whether this standard was proper until Strickland. See id. at 683-84 (explaining basis for deciding Strickland on its merits). Ineffective assistance of counsel claims are not applicable when the issue on appeal relates to the autonomy expressed by the defendant, rather than trial counsel’s competence or skill. See McCoy v. Louisiana, 138 S. Ct. 1500, 1510-11 (2018) (differentiating between errors of trial counsel and errors relating to defendant autonomy). Courts still apply the Strickland framework for ineffective assistance of counsel claims today. See, e.g., Griggs v. Lempke, 797 F. App’x 612, 617 (2d Cir. 2020) (citing Strickland ineffective assistance of counsel standard for review of defendant’s claims).
50. See id. (explaining state’s court’s conclusion on ineffective assistance of counsel does not bind federal courts). Appellate courts typically defer to state courts’ findings of fact and view them under the clearly erroneous standard. See id. (explaining standard of review for trial court decisions on fact and law). Because ineffective assistance of counsel claims involve questions of law and fact, however, the federal court is not bound by the state court’s analysis. See id. (differing between ineffective assistance of counsel claims and normal habeas review standards); see also 28 U.S.C. § 2254(d) (stating relief for petitioners in habeas reviews); Lawrence v. Armontrout, 900 F.2d 127, 129 (8th Cir. 1990) (using Strickland and Lockhart to determine standard of review); FED. R. CIV. P. 52(a) (outlining standards for habeas reviews); Thomas v. Lockhart, 738 F.2d 304, 307 (8th Cir. 1984) (reiterating standard for ineffective assistance of counsel claims in habeas review).
51. See Strickland, 466 U.S. at 687 (identifying two-part test).
the defendant fails to prove either one.\textsuperscript{52} The purpose of this framework is to guide the court’s analysis rather than create a bright-line rule, because the court’s primary focus is to determine whether the proceeding was reliable.\textsuperscript{53}

\textit{Strickland} established the proper standard to assess a defendant’s ineffective assistance of counsel claim.\textsuperscript{54} According to the \textit{Strickland} Court, “[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”\textsuperscript{55} Under the first prong of the test, the defendant must show that their counsel’s performance was deficient.\textsuperscript{56} Thus, counsel’s performance needs only be reasonably effective to satisfy the prong; this low standard for trial counsel is purposeful because, as the Court explains, there should be great deference to trial counsel.\textsuperscript{57} Reasonableness is key because a more detailed, exacting guideline would lead to intrusive post-conviction analysis and encourage more ineffective assistance of counsel claims.\textsuperscript{58} The Court explained that “[t]he 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.”\textsuperscript{59}

When defining the prejudice prong of the test, the Court explained that an attorney’s acts having “some conceivable effect” on the trial’s outcome is insufficient to constitute an ineffective assistance of counsel claim.\textsuperscript{60} Proving there

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\item \textsuperscript{52} See \textit{id.} at 697 (explaining no proper order for analysis exists, Court only requires defendant satisfy both prongs); \textit{cf.} Batson v. Kentucky, 476 U.S. 79, 94 (1986) (requiring defendant meet threshold burden); Commonwealth v. Long, 152 N.E.3d 725, 739 (Mass. 2020) (describing burden defendant must overcome).
\item \textsuperscript{53} See \textit{Strickland}, 466 U.S. at 696 (articulating purpose of test). The \textit{Strickland} Court also noted that the focus of the inquiry should be on the fairness of the proceeding. \textit{See id.} (identifying focus of judicial inquiries for ineffective assistance of counsel claims). The Constitution guarantees fairness in a criminal trial. See \textit{Engle v. Isaac}, 456 U.S. 107, 134 (1982) (recognizing constitutional guarantee of fairness).
\item \textsuperscript{54} See \textit{Strickland}, 466 U.S. at 687 (setting forth standard).
\item \textsuperscript{56} See \textit{id.} at 687 (pointing out all federal courts use reasonableness to determine counsel’s effectiveness). The majority notes that this is not a new standard. \textit{See id.} For example, the Supreme Court has determined that a guilty plea entered into after a defendant receives “reasonably competent advice” is not open to attack for ineffective assistance of counsel. \textit{See McMann v. Richardson}, 397 U.S. 759, 770 (1970) (holding pleas under such circumstances intelligently made); \textit{see also Strickland}, 466 U.S. at 687-88 (basing decision off \textit{McMann} Court’s reasoning).
\item \textsuperscript{57} See \textit{Strickland}, 466 U.S. at 687, 689 (warning against dangers of viewing counsel’s performance with hindsight). This deferential standard requires defendants to overcome the presumption that trial counsel’s decisions were based on sound trial strategy. \textit{See id.} (recognizing many ways to represent defendants exist and attorneys may approach representation differently).
\item \textsuperscript{58} See \textit{id.} at 690 (highlighting problematic nature of viewing counsel’s decisions with hindsight). Hindsight allows an appellate court to view the evidence in a very different light than trial counsel did, and assessing trial counsel’s performance while knowing the outcome of the case would be unfair to the attorney. \textit{See id.} at 689 (elaborating on importance of avoiding viewing case through hindsight).
\item \textsuperscript{59} See \textit{id.} at 686 (basing ineffectiveness on fairness defendant received during trial).
\item \textsuperscript{60} See \textit{id.} at 693 (arguing every act or omission by counsel would qualify under “some conceivable effect” standard). The majority also noted that while the government is not responsible for, and cannot control, the
would have been a different outcome at trial is not an easy task for a defendant.\textsuperscript{61} Many defendants’ ineffective assistance of counsel claims are unsuccessful because courts hold that even though counsel may have been deficient, the defendant was not prejudiced.\textsuperscript{62} The \textit{Strickland} Court explained that although it established this framework, the focus of any ineffective assistance inquiry is ultimately grounded in the fairness of the proceeding.\textsuperscript{63}

\textbf{D. Applying Strickland Generally}

In his dissent, Justice Marshall explained that the prejudice prong fails to consider how good defense attorneys can dismantle cases that appear impenetrable, and how the purpose of the constitutional guarantee of counsel is based on fairness rather than simply avoiding convicting innocent people.\textsuperscript{64} He emphasized that the petitioner in \textit{Strickland} was appealing a death sentence and thus the majority should have applied the ineffective assistance standards more stringently, highlighting that ineffective assistance of counsel claims have more detrimental consequences in some cases than others.\textsuperscript{65} Justice Marshall’s focus on fairness, rather than showing the probability of a different outcome, has recently been

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\item \textit{See, e.g., Menzies} v. State, 344 P.3d 581, 625 (Utah 2014) (holding even if trial counsel’s performance deficient, it did not prejudice Menzies); State v. Syed, 204 A.3d 139, 165 (Md.) (holding trial counsel’s failure to contact alibi witness deficient but did not prejudice Syed), \textit{cert. denied}, 140 S. Ct. 562 (2019).
\item \textit{See} \textit{Strickland}, 466 U.S. at 696 (highlighting importance of focusing on fairness rather than on new standard established).
\item \textit{See id. at} 710-11 (Marshall, J., dissenting) (identifying flaws in majority’s opinion). Justice Marshall noted that when defense counsel was incompetent, it can be very difficult to identify prejudice on a trial record. \textit{See id. at} 710 (noting trial counsel’s incompetence could explain why defendant’s injury missing from trial record). Justice Marshall refused to accept that prejudice needs to be shown for the defendant to receive a new trial. \textit{See id. at} 712 (arguing defendant deserves new trial any time counsel “depart[s] from constitutionally prescribed standards”).
\item \textit{See id. at} 715-16 (looking to Court’s history of acknowledging “stricter adherence to procedural guidelines” during capital cases); \textit{see also id. at} 696 (majority opinion) (highlighting importance of focusing on fairness rather than on new standard established). The Court held that \textit{Strickland}’s counsel had not been ineffective. \textit{See id. at} 699-700 (holding defense counsel did not act below reasonable standards of conduct and no prejudice). Here, in a death penalty case, the Court determined defense counsel’s decision to argue the \textit{Strickland}’s extreme emotional distress and acceptance of responsibility as mitigating factors was well within the bounds of reasonable conduct. \textit{See id. at} 699 (noting aggravating circumstances overwhelming). As to prejudice, the Court explained that “the overwhelming aggravating factors” created “no reasonable probability that the omitted evidence would have changed the” outcome of the trial. \textit{See id. at} 699-700 (reasoning evidence offered could have harmed \textit{Strickland} rather than helped).
\end{enumerate}
\end{footnotesize}
considered by the Court as a potential alternative way to prove prejudice under Strickland.\footnote{66}

While the Strickland test remains good law, a recent Supreme Court case more precisely defined what appellate courts may consider when conducting an ineffective assistance analysis for certain types of errors.\footnote{67} In Weaver v. Massachusetts, Weaver claimed ineffective assistance based on counsel’s failure to object to a closure of the courtroom during jury selection and argued that even when there is no prejudice to the defendant as a result of their counsel’s ineffectiveness, unfairness to a defendant as a result of trial counsel’s deficiencies should be enough to merit relief.\footnote{68} The Supreme Court was unwilling to adopt that interpretation, but was notably willing to apply it in the analysis.\footnote{69} The Court determined under Strickland that Weaver had not shown that the trial outcome would have been different had Weaver’s counsel been effective and, using Weaver’s own interpretation of Strickland, there was no fundamental unfairness.\footnote{70} Thus, the Court left open the possibility that a defendant can prove prejudice for certain types of errors by establishing the probability of a different outcome or by demonstrating the violation was so serious that the proceeding was fundamentally unfair to the defendant as a result.\footnote{71}

1. Deficient Performance

Appellate courts base their determination of trial counsel’s efficacy on the prevailing norms of reasonableness in the legal profession.\footnote{72} A defendant must

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\footnote{66}{See Weaver v. Massachusetts, 137 S. Ct. 1899, 1911 (2017) (using fairness instead of determining possibility of different outcome); Williams v. Burt, 949 F.3d 966, 977 (6th Cir.) (applying unfairness standard from Weaver), cert. denied, 141 S. Ct. 276 (2020).}

\footnote{67}{See Weaver, 137 S. Ct. at 1911 (using fairness standard to show prejudice prong in Strickland); Cam Barker et al., United States Supreme Court Update, 30 A.B.A. ADVOC. 67, 87 (2017) (delineating issue resolved in Weaver). The Weaver Court used fairness instead of the prejudice prong purely for their analysis; it did not alter the Strickland test because that issue was not before the Court. See Weaver, 137 S. Ct. at 1911 (clarifying issue before Court).}

\footnote{68}{See Weaver, 137 S. Ct. at 1906, 1911 (presenting facts and arguing unfairness alone should lead to relief). The Supreme Court noted that in the adjudication of ineffective assistance of counsel claims, finality plays a crucial role and therefore courts must apply the standards for ineffective assistance of counsel scrupulously. See id. at 1912 (reiterating finality of criminal proceedings requires defendants to show prejudice before receiving relief).}

\footnote{69}{See id. at 1911. The Tenth Circuit made clear that in its interpretation, the Supreme Court did not change the Strickland standard in Weaver. See id. (using fairness for analysis purposes); Johnson v. Raemisch, 779 F. App’x 507, 513 n.5 (10th Cir. 2019) (dismissing argument Weaver changed Strickland jurisprudence).}

\footnote{70}{See Weaver, 137 S. Ct. at 1913 (holding Weaver not entitled to new trial). Justice Alito argued in his concurrence that it was improper for the majority to conduct its analysis this way because there were already two ways for Weaver to meet the prejudice prong, either by showing prejudice under Strickland or per se prejudice. See id. at 1915-16 (Alito, J., concurring) (disagreeing with majority analysis but agreeing with outcome of case); see also infra note 97 and accompanying text (explaining ways to show per se prejudice).}

\footnote{71}{See Weaver, 137 S. Ct. at 1911 (using fairness for analysis); see also Williams, 949 F.3d at 978 (applying Weaver unfairness standard).}

\footnote{72}{See Strickland v. Washington, 466 U.S. 668, 688 (1984) (refusing to adopt more specific standards for effective assistance of counsel). A defense strategy that proves unsuccessful is not dispositive of ineffective
show trial counsel’s errors were so substantial that they deprived the defendant of their Sixth Amendment right to counsel.73 When a court analyzes whether counsel was effective, it must consider the totality of the circumstances to determine the reasonableness at the time of the conduct.74 Trial counsel is not required to pursue every possible claim to meet the objective standard of reasonable conduct.75 Additionally, courts maintain a strong presumption that trial counsel acted reasonably based on sound decisions.76 This presumption is even stronger when trial counsel is an experienced attorney.77 The more experienced an attorney is, the greater the presumption they were effective; lack of experience, however, does not equate to a presumption of ineffectiveness.78 The presumption that counsel acted reasonably is a heavy—though not insurmountable—burden

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73. See Strickland, 466 U.S. at 687 (noting presumption trial counsel acted reasonably in making trial decisions). Justice Marshall took issue with the majority’s analysis of the presumption that counsel acted reasonably. See id. at 713 (Marshall, J., dissenting) (rejecting automatic presumption trial counsel acted reasonably). Justice Marshall explained, “little will be gained and much may be lost by instructing the lower courts to proceed on the assumption that a defendant’s challenge to his lawyer’s performance will be insubstantial.” Id. Reasonable performance by trial counsel encompasses the duty to advocate for their client, to keep them informed, and to possess the requisite knowledge to conduct a reliable defense. See id. at 688 (majority opinion) (identifying basic duties for representing criminal defendants). While courts generally presume that trial counsel’s performance is reasonable, the opposite presumption arises when the attorney has a conflict of interest. See id. at 692 (recognizing conflict of interest presumes unreasonable behavior of trial counsel). A conflict of interest results in presumed prejudice, but it does not equate to per se prejudice under United States v. Cronic. See id. (distinguishing between conflicts of interest and Cronic per se prejudice); United States v. Cronic, 466 U.S. 648, 662 n.31 (1984); see also infra note 97 and accompanying text (describing Cronic factors). Per se prejudice does not apply to conflicts of interest because courts only presume lack of reasonableness when counsel “‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” See Strickland, 466 U.S. at 692 (quoting Cuyler v. Sullivan, 446 U.S. 343, 349-50 (1980)) (explaining presumption of prejudice when conflicts of interest arise).


75. See Cronic, 466 U.S. at 665 (reasoning every lawyer has first trial and inexperience not basis for ineffective assistance claim).
the defendant must overcome to prevail on an ineffective assistance of counsel claim.  

In conducting this inquiry, courts rely heavily on the set of facts before the appellate court.  

For example, failing to inform the defendant that a jury could convict them of a lesser-charged offense, negotiating poorly during a capital sentence case, and failing to object to evidence are all bases for showing trial counsel’s performance was deficient.  

On the other hand, trial counsel’s performance can still constitute reasonable conduct if they refuse to go to the crime scene and instead rely only on photographs or fail to discuss recent case law developments with their client.  

This type of fact-determinative analysis requires courts to use the totality-of-the-circumstances test to make their decisions.

An appellate court must consider trial counsel’s investigation of the relevant facts when determining whether their strategy was supported and their performance was reasonable.  

The lower court in Strickland held that defense counsel had an affirmative duty to investigate, the scope of which depends on the strength

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79. See Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc) (identifying small window for successful ineffective assistance of counsel claims); see also Gable & Green, supra note 61, at 758 (elucidating presumption of reasonableness).


84. See Wiggins v. Smith, 539 U.S. 510, 527 (2003) (clarifying investigative duties of defense attorneys when strategic decisions challenged). The Wiggins Court noted that Strickland does not allow a cursory investigation to automatically justify strategic decisions, but instead considers whether the investigation itself was reasonable. See id (maintaining importance of counsel conducting reasonable investigation before committing to trial strategy). Although the Supreme Court has required counsel to conduct some investigation on their client’s behalf, some courts have allowed attorneys to avoid conducting an investigation based on health concerns, even though it could detrimentally impact the defendant’s case. See Strickland, 466 U.S. at 691 (requiring defense counsel to conduct reasonable investigations); see also, e.g., Torres, 894 N.W.2d at 203 (noting counsel could reasonably rely on photographs and physical evidence instead of investigating in person).
of the government’s case against the defendant. The Supreme Court agreed and held that counsel can make strategic decisions without an appellate court second guessing them, but only after they conduct a proper investigation.

2. Prejudice

Even if a court finds that trial counsel’s performance fell below that of a reasonable attorney under the circumstances, the defendant still must show that this deficient performance prejudiced them. When considering this prong, the defendant must establish and the trial court must determine “whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” A reasonable probability is defined as “a probability sufficient to undermine confidence in the outcome.” This standard requires more than just a small possibility that the court will reach a different outcome at trial: It must be probable. The Weaver Court clarified that not every unfairness during a trial prejudices the defendant. Prejudice becomes more difficult to show as the strength of the case against the defendant increases, adding to the burden a defendant must overcome to establish a claim of ineffective assistance of counsel.

86. See Strickland, 466 U.S. at 690 (asserting strategic decisions “virtually unchallengeable” after thorough investigation). When counsel does not conduct a complete investigation, it must be because counsel has reasonably determined, through conversations with the defendant, that an investigation is unnecessary. See id. at 691 (describing alternative to trial counsel conducting full investigation).
87. See id. at 697 (requiring ineffective assistance of counsel claims have both deficient performance and prejudice to defendant); see also United States v. John Doe No. 1, 272 F.3d 116, 126 (2d Cir. 2001) (declining to analyze trial counsel’s performance because Findley could not establish prejudice).
88. See Strickland, 466 U.S. at 695 (declaring standard for prejudice prong). Appellate courts base this determination on the totality of the evidence the judge or jury heard. See id. (declaring appropriate standard of review). The Court explained that some factual findings will be unaffected by counsel’s errors and those affected will be affected in different ways: Some errors will have a trivial effect on the outcome, while other errors “alter[] the evidentiary picture.” See id. at 695-96 (outlining possibilities under totality-of-circumstances test). “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 693 (recognizing how differently trial counsel can perform, while still acting reasonably).
90. See Menzies v. State, 344 P.3d 581, 624 (Utah 2014) (emphasizing difficulty of showing prejudice to defendant). In Menzies, even if Menzies could have shown that trial counsel performed deficiently by failing to obtain educational records, he did not establish that he was prejudiced as a result. See id. at 626 (rejecting Menzies’s ineffective assistance of counsel claim).
92. See John Doe No. 1, 272 F.3d at 126 (highlighting difficulties in establishing possibility of different trial outcome); Jackson v. United States, 638 F. Supp. 2d 514, 591 (W.D.N.C. 2009) (acknowledging strength of prosecution’s case in determining prejudice to defendants); Bolin v. Chappell, No. 99-cv-05279-SAB, 2016 U.S. Dist. LEXIS 75493, at *77 (E.D. Cal. June 9, 2016) (agreeing strength of case relevant for concluding trial counsel made strategic decision). When there is overwhelming evidence of a defendant’s guilt, it is less likely that
The *Strickland* Court opined that if an appellate court determined that the trial counsel did not prejudice the defendant, that conclusion would easily dispose of the defendant’s ineffective assistance claim without requiring the court to analyze trial counsel’s performance for possible deficiency.93 When courts examine whether a defendant was prejudiced, there is a presumption that the judge and jury acted in accordance with the law, which makes it more difficult to show that the outcome of the trial would have been different.94 There is also a strong presumption that the proceeding was fair and reliable, inhibiting a defendant’s ability to show that their counsel’s deficiencies prejudiced them.95 The *Strickland* Court explicitly stated that it did not intend for ineffective assistance of counsel claims to overburden the court system.96

3. *Per Se* Prejudice

There are three circumstances in which an appellate court presumes prejudice to the defendant: when there is an actual denial of counsel, when there is a constructive denial of counsel, and when no lawyer—even a fully competent one—could have provided effective assistance under the circumstances.97 A constructive denial of counsel occurs when there has not been a meaningful challenge to

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93. See *Strickland*, 466 U.S. at 697 (allowing and encouraging courts to only address prejudice for convenience).

94. See *id.* at 694-95 (reasoning idiosyncrasies of particular judges should make no difference in prejudice determination). A defendant’s claim cannot be based on the “arbitrariness, whimsy, caprice, [or] ‘nullification’” of the court; these factors are not relevant to prejudice determinations, even if they played a role in counsel’s strategy. See *id.* at 695 (limiting prejudice inquiry to include information from record under review, not actual decision-making process).


96. See *id.* at 697 (trying to prevent ineffective assistance of counsel claims from becoming overly burdensome to defense attorneys).

97. See *United States v. Cronic*, 466 U.S. 648, 658-60 (1984) (setting forth three bases for prejudice presumption in ineffective assistance of counsel claims). Counsel is actually denied when a defendant is denied counsel at a critical stage of the proceedings. See *id.* at 659. The third category of per se prejudice existed in *Powell*, where counsel was appointed so close to the date of trial that they could not have possibly provided effective assistance. See *Powell v. Alabama*, 287 U.S. 45, 53 (1932) (detailing impossibility of competent counsel); see also *Cronic*, 466 U.S. at 659-60 (citing *Powell* for example of per se prejudice).
the prosecution’s case. When none of these presumptions apply, the analysis returns to the prejudice standards set out in Strickland.

E. Alibi Witnesses

Alibi witnesses provide an important avenue of defense for defendants. An alibi defense may undermine the prosecution’s theory of a case whenever the theory posits that the defendant was in “a particular place, at a particular time,” in order for them to have committed the crime. Defendants do not carry the burden of proving an alibi; rather, the prosecution has the burden to disprove it and show that the defendant was the person who committed the crime.

1. The Importance of Investigating the Alibi Witness

a. Failure to Contact Alibis Typically Constitutes Deficient Performance

A court’s finding that trial counsel conducted a sufficient investigation plays a major role in whether trial counsel acted reasonably under the totality of the circumstances, and thus whether a defendant has a viable ineffective assistance of counsel claim. Unfortunately for defendants, proving their counsel’s

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See Cronic, 466 U.S. at 659 (articulating constructive denials of counsel). For example, in Glover, the court held that there was no constructive denial of counsel when defense counsel acted as [an] advocate at every step. He contacted some potential witnesses. He asked for a continuance. He vigorously cross-examined witnesses. He questioned motives. He highlighted testimonial inconsistencies. He advised his client on possible plea deals. He pointed out the flaws of the State’s case to the jury. He made a vigorous closing statement. He asked the judge for a directed verdict both after the State’s case and after the jury verdict.


99. See Glover, 262 F.3d at 275 (determining defendant must show prejudice under Strickland if no per se prejudice); see also supra note 88 and accompanying text (providing Strickland standard for prejudice). Proving that there has been per se prejudice is a difficult task for any defendant. See Brown v. French, 147 F.3d 307, 313 (4th Cir. 1998) (stressing Cronic standard cannot apply under ordinary circumstances). The Brown court held there was overwhelming evidence against Brown, therefore trial counsel’s access to the crime scene did not change the outcome of the trial. See id. at 314 (affirming lower court ruling and denying Brown’s writ of habeas corpus).

100. See Grooms v. Solem, 923 F.2d 88, 91 (8th Cir. 1991) (concluding trial counsel deficient for handling of potential alibi witness); 27 AM. JUR. 2D Proof of Facts § 1 (2019) (outlining significance of alibi witnesses). Defense counsel uses alibi witnesses to show the defendant was not at the scene of the crime, thereby rebutting the prosecution’s allegations. See Proof of Facts, supra, § 1 (highlighting benefit of presenting alibi witness during trial).

101. See Proof of Facts, supra note 100, § 2 (noting when alibi witnesses appropriate to defend charges against accused).

102. See id. § 6 (discussing burden of proof relating to alibi witnesses).

103. See Wiggins v. Smith, 539 U.S. 510, 534-35 (2003) (failing to present mitigating evidence after poor investigation unreasonable); Campbell v. Reardon, 780 F.3d 752, 764 (7th Cir. 2015) (holding inadequate
investigation was unreasonable is difficult. One way a defendant can show that their trial counsel acted unreasonably is by showing that their counsel committed to a trial strategy without contacting a witness that the police already interviewed. A defendant must convince the appellate court that trial counsel conducted an insufficient investigation in order to undermine the presumption that counsel’s failure to call a witness at trial was simply a strategic decision. Defendants struggle to show that their trial counsel’s investigation was unreasonable because counsel’s inquiry is limited to the amount of information counsel receives from the defendant to investigate.


104. See Elizabeth Connelly, Current Development, The Striking Similarities Between the Business Judgment Doctrine and the Strickland Test, 18 GEO. J. LEGAL ETHICS 669, 672-75 (2005) (analyzing difficulty of proving unreasonable investigation); Campbell, 780 F.3d at 763 (noting how state court improperly assessed trial counsel’s performance). The court’s inquiry need not be whether the defense theory was reasonable, but rather, whether defense counsel conducted the investigation reasonably. See Wiggins, 539 U.S. at 521-22 (describing deference to defense counsel); see also Campbell, 780 F.3d at 763 (discussing reasonableness of investigation); Lambert, 2016 U.S. Dist. LEXIS 57862, at *21-22 (finding counsel’s investigation sufficient).

105. See Campbell, 780 F.3d at 763-65 (emphasizing duty to conduct pretrial investigation before committing to trial strategy). In Campbell, counsel failed to interview two available witnesses before committing to a trial strategy, and the decision not to investigate was unreasonable under the circumstances. See id. (concluding no strategic decision because trial counsel needed to investigate witnesses); see also State v. Herring, 28 N.E.3d 1217, 1233 (Ohio 2014) (holding counsel did not conduct proper investigation because they failed to contact witnesses).

106. See Campbell, 780 F.3d at 763 (explaining deference to trial counsel in decision making); Strickland v. Washington, 466 U.S. 668, 690-91 (1984) (establishing jurisprudence concerning strategic decision deference); cf. Lambert, 2016 U.S. Dist. LEXIS 57862, at *20 n.1 (distinguishing facts from Campbell based on factual predicate not at issue). “[S]trategic choices made after thorough investigations . . . are virtually unchallengeable,” while decisions not to investigate are assessed for reasonableness with a deference to trial counsel; under either scenario defendants are unlikely to prevail. See Strickland, 466 U.S. at 690-91 (setting forth standards for trial counsel investigations); Campbell, 780 F.3d at 763 (reiterating standards); see also Connelly, supra note 104, at 674 (reiterating limited number of times Supreme Court has held investigation unreasonable).

107. See Rizo v. United States, 662 F. App’x 901, 914 (11th Cir. 2016) (holding not ineffective assistance of counsel because defense counsel’s information regarding alibi limited and inconsistent); see also Strickland, 466 U.S. at 690-91 (limiting duty to investigate to information counsel receives); Connelly, supra note 104, at 674 (arguing difficult for defendants to prove unreasonable investigation).

108. See, e.g., Brown v. Myers, 137 F.3d 1154, 1156-57 (9th Cir. 1998) (holding failure to investigate alibi witness deficient performance); Bryant v. Scott, 28 F.3d 1411, 1418 (5th Cir. 1994) (holding failure to adequately investigate alibi witnesses constitutes ineffective counsel); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (holding counsel’s failure to investigate alibi witness does not withstand Sixth Amendment scrutiny). The application of the Strickland test for whether failing to contact an alibi witness is deficient performance is fairly standard, but is not without its exceptions. See Griffin v. Warden, Md. Corr. Adjustment Ctr., 970 F.2d 1355, 1358 (4th Cir. 1992) (holding trial counsel’s performance deficient for failing to contact alibi witness). But see Rizo, 662 F. App’x at 914 (deciding counsel not deficient for failing to contact alibi witness). The attorney in Rizo asked Rizo to tell the witness to call his office, and no potential witness ever called. See id. (summarizing important factors for determining counsel not deficient in their investigation). The Eighth Circuit has found trial
counsel can still act reasonably, even when failing to contact an alibi witness, if they only receive limited information about the potential alibi. Generally speaking, however, courts have found that failing to present exculpatory evidence—like an alibi witness—is unreasonable, and therefore falls below the standards of prevailing norms of reasonableness in the legal profession. Adequate pretrial investigation of potential witnesses is important because without it, an appellate court could determine a defense attorney’s conduct was unreasonable. A defendant’s failure to provide their counsel with the names and contact information of witnesses does not alleviate the duty of trial counsel to conduct some investigation. Defense counsel cannot make a proper judgment of the quality of a witness without interviewing that witness. The burden is on the defendant to show that counsel has failed to investigate potential

counsel deficient for failing to contact an alibi witness when testimony by the witness would have bolstered and not hindered Lawrence’s case. See Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990) (concluding potential alibis could have contradicted eyewitness testimony placing Lawrence at crime scene).

See Strickland, 466 U.S. at 691 (explaining counsel not required to investigate if determined pointless based on information received by defendant); Rizo, 662 F. App’x at 914 (finding counsel not deficient because information Rizo provided limited and inconsistent). When counsel receives limited information from the defendant about a potential alibi witness, it is reasonable for them to conclude an investigation into the alibi would be fruitless. See Rizo, 662 F. App’x at 914 (providing basis for determining counsel not deficient). The Rizo court determined that under the totality of the circumstances, defense counsel did not owe a duty to pursue the alibi defense. See id. (applying Strickland standard for deficient performance).

See, e.g., Griffin, 970 F.2d at 1358 (holding trial counsel’s performance deficient for failing to contact alibi witness); Pavel v. Hollins, 261 F.3d 210, 220 (2d Cir. 2001) (holding alibi-like witness would have provided exculpatory evidence); Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991) (explaining counsel acts unreasonably by not making some effort to contact alibi witnesses). When trial counsel fails to present exculpatory evidence, their conduct is deficient unless it can be justified as a strategic decision. See Griffin, 970 F.2d at 1358 (explaining deficient performance easily met when trial counsel does not present exculpatory evidence).

See Blackmon v. Williams, 823 F.3d 1088, 1105 (7th Cir. 2016) (rationalizing trial counsel cannot assess vulnerabilities of witnesses until some investigation completed); Holmes v. McKane, 117 F. Supp. 2d 1096, 1111 (D. Kan. 2000) (explaining defense counsel must investigate alibis and may stop after rationally determining further investigation unnecessary), rev’d on other grounds, 59 F. App’x 239 (10th Cir. 2003); Bryant, 28 F.3d at 1414 (noting failing to investigate alibi witnesses more unreasonable compared to failing to investigate regular witnesses). The defendant must show evidence that their counsel failed to investigate the witnesses. See Lambert v. Smith, No. 14-CV-10945, 2016 U.S. Dist. LEXIS 57862, at *21-22 (E.D. Mich. May 2, 2016) (determining Lambert did not provide evidence and therefore did not prove ineffective assistance of counsel), aff’d sub nom. Lambert v. Mackie, No. 16-2241, 2017 U.S. App. LEXIS 18068 (6th Cir. Mar. 24, 2017).

See Bryant, 28 F.3d at 1416, 1418 (holding defense attorney’s failure to investigate fell below prevailing professional norms at time). In Bryant, Bryant argued that his counsel’s failure to conduct any investigation into the alibi witness barred counsel from claiming he had made a strategic decision. See id. at 1417 (describing counsel’s unreasonable investigation). Bryant was ultimately unsuccessful in showing that he received ineffective assistance of counsel because he could not show his deficient conduct prejudiced him. See Bryant v. Johnson, No. 96-10339, 1997 WL 304262, at *3 (5th Cir. May 21, 1997) (affirming lower court ruling).

See Mosley v. Atchison, 689 F.3d 838, 848 (7th Cir. 2012) (pointing out no strategic decision exists when failing to call witnesses without interviewing them first); see also Campbell v. Reardon, 780 F.3d 752, 764 (7th Cir. 2015) (holding no reasonable explanation for not interviewing potential witnesses). Defense counsel cannot base their failure to investigate an alibi witness on their own belief that the prosecution has a weak case. See Garcia v. Portaondo, 459 F. Supp. 2d 267, 287 (S.D.N.Y. 2006) (reiterating counsel acts unreasonably when basing decisions on belief prosecutors have weak case); see also Pavel, 261 F.3d at 217-18 (failing to call witness not strategic because counsel relied on court granting their motion).
favorable witnesses.\textsuperscript{114} Once a defendant has provided the names of potential alibi witnesses to their trial counsel, courts can require counsel to make some effort to interview them in order to meet the requirements of effective assistance of counsel.\textsuperscript{115} Other courts have gone further and required counsel to take reasonable steps to acquire the testimony of potential alibi witnesses.\textsuperscript{116}

\textit{b. Does Failure to Contact an Alibi Witness Also Amount to Prejudice? Courts and Judges Vary Across Jurisdictions}

Defendants face a difficult hurdle in showing that ineffective assistance of counsel prejudiced them because courts are inconsistent in determining when failure to contact or investigate alibi witnesses would have changed the outcome of the trial.\textsuperscript{117} Failure to contact an alibi witness can meet the \textit{Strickland} test for prejudice in some ineffective assistance of counsel claims, but fail to meet it in others.\textsuperscript{118} These inconsistencies have caused similarly-situated defendants across the country to be treated differently.\textsuperscript{119} The inconsistent manner in which

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\textsuperscript{114} See Lambert, 2016 U.S. Dist. LEXIS 57862, at *19 (pointing out Lambert’s failure to produce evidence showing his counsel did not investigate potential witnesses).

\textsuperscript{115} See Lawrence v. Armontrout, 900 F.2d 127, 130 (8th Cir. 1990) (holding counsel’s performance deficient because they made no effort to interview potential witnesses).

\textsuperscript{116} See Tosh v. Lockhart, 879 F.2d 412, 414 (8th Cir. 1989) (holding failure to make reasonable efforts to procure alibi testimony constituted deficient performance).

\textsuperscript{117} See Strickland v. Washington, 466 U.S. 668, 695 (1984) (explaining standard for determining prejudice to defendants); Griffin v. Warden, Md. Corr. Adjustment Ctr., 970 F.2d 1355, 1359 (4th Cir. 1992) (explaining State’s evidence demonstrated exactly why alibi witnesses important for Griffin); Glover v. Miro, 262 F.3d 268, 279-80 (4th Cir. 2001) (holding no prejudice to Glover and therefore no relief); Johnson v. Raemisch, 779 F. App’x 507, 516 (10th Cir. 2019) (denying request and dismissing appeal). In \textit{Campbell}, the court determined the case against Campbell was far from overwhelming, and thus counsel’s deficient performance undermined its confidence in the jury’s verdict. See \textit{Campbell}, 780 F.3d at 772 (stating reasoning for determining prejudice to Campbell).

\textsuperscript{118} Compare \textit{Campbell}, 780 F.3d at 772 (holding Campbell prejudiced because confidence in verdict undermined for failure to contact potential alibi), and \textit{Griffin}, 970 F.2d at 1359 (determining confidence in verdict seriously undermined because counsel failed with respect to alibi witness), with \textit{Johnson}, 779 F. App’x at 515-16, 515 n.8 (explaining trial counsel’s failure to investigate and present alibi witness did not prejudice Johnson), and \textit{Glover}, 262 F.3d at 280 (holding no prejudice to Glover for failing to contact alibi witness). Defendants who prevail on these claims can potentially regain their freedom. See Blackmon v. Pfister, No. 11C2358, 2018 WL 741390, at *10 (N.D. Ill. Feb. 7, 2018) (granting writ of habeas corpus and releasing Blackmon from custody).

\textsuperscript{119} See Blackmon v. Williams, 823 F.3d 1088, 1107 (7th Cir. 2016) (holding trial counsel’s performance both deficient and prejudicial after not contacting alibi witnesses); Bryant v. Scott, 28 F.3d 1411, 1419-20 (5th Cir. 1994) (remanding for determination of whether deficient performance prejudiced Bryant); Holmes v. McKune, 59 F. App’x 239, 249 (10th Cir. 2003) (holding prejudice to Holmes because counsel failed to investigate alibi), rev’d on other grounds, 59 F. App’x 239 (10th Cir. 2003). The Bryant and Blackmon courts remanded to their respective trial courts for determinations on relief. See Blackmon, 823 F.3d at 1107 (remanding to determine whether Blackmon’s custody violates U.S. Constitution); Bryant, 28 F.3d at 1420 (remanding to determine prejudice from counsel’s defective performance). Bryant was ultimately unsuccessful in showing prejudice because the potential alibi witnesses had credibility problems; therefore, the court determined that it was unlikely a jury would have given their testimony much weight. See Bryant v. Johnson, No. 96-10339, 1997 WL 304262, at *3 (5th Cir. May 21, 1997) (affirming district court ruling determining Bryant not prejudiced). In \textit{Blackmon}, the court determined that Blackmon’s counsel could not determine any vulnerabilities in the alibis without an
courts apply the prejudice prong has allowed the Tenth Circuit to make the prejudice prong nearly impossible by denying ineffective assistance of counsel claims where the alibi witness’s testimony would have been duplicative.\footnote{120} Courts in the Tenth Circuit have done so even when the eyewitness would have corroborated the defendant’s story—potentially causing the jury to find reasonable doubt.\footnote{121} But for defendants in the Eighth Circuit, a trial attorney who merely fails to contact a business that has records of the defendant’s alibi constitutes prejudice.\footnote{122}


   In recent years, a Maryland state case involving Adnan Syed attracted widespread public interest because Syed’s attorney failed to contact an alibi witness.\footnote{123} Syed was convicted and sentenced to life in prison for the murder of his ex-girlfriend; the alibi witness would have testified that he was somewhere else at the time of the murder.\footnote{124} In his first post-conviction relief hearing, the Maryland Court of Special Appeals denied Syed relief when it determined that his trial counsel was ineffective for failing to contact his potential alibi witness.\footnote{125} Syed appealed and was allowed to reopen the post-conviction relief hearing.\footnote{126}

\footnote{initial investigation. See Blackman, 823 F.3d at 1105, 1107 (holding trial counsel’s performance prejudicial after counsel did not contact alibi witnesses). On remand, the court determined that Blackmon satisfied the prejudice prong because there were enough credible witnesses to testify that he did not leave the barbecue and therefore could not have committed the crime. See Blackmon, 2018 WL 741390, at *10 (granting writ of habeas corpus and releasing Blackmon from custody).}

\footnote{120. See Johnson, 779 F. App’x at 515 (explaining another witness testified to what alibi would have testified to, therefore no prejudice); see also Duncan, supra note 92, at 25-26 (highlighting difficulty for defendants to show prejudice).}

\footnote{121. See Johnson, 779 F. App’x at 515 (dismissing prejudice argument based on duplicative testimony).}

\footnote{122. See Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991) (holding reasonable probability of different outcome if counsel investigated and presented alibi to jury).}


\footnote{126. See id. at 873-74 (explaining procedural posture for second hearing).}
At this 2016 post-conviction relief hearing, the court denied Syed a new trial because it determined that his trial counsel’s failure to contact the alibi witness did not prejudice Syed, even though the court implied that the witness’s testimony was reliable.127 Both parties appealed and the appellate court held that the failure of Syed’s trial counsel to contact his alibi witness prejudiced him.128 In Syed’s next appeal, the court held that his counsel’s deficient performance did not prejudice him.129

During each appeal, the court overruled the lower court’s decision on whether the failure of Syed’s trial counsel to contact an alibi witness prejudiced him under Strickland.130 This case highlights the pervasive judicial disagreement over whether failure to contact an alibi witness rises to the level of ineffective assistance of counsel.131 The notoriety of this case amplified concerns that judicial inconsistencies relating to alibi witnesses can prejudice defendants, even within the same state, and highlights the need for binding precedent on the issue.132

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128. See Syed, 181 A.3d at 865, 918-19 (overturning lower court ruling on alibi issue).


130. See Syed v. State, 827 A.2d 114, 114 (Md. 2003) (unpublished table decision) (denying first appeal); Order, supra note 127, at 1-2 (denying new trial based on alibi issue, but granting it on other grounds); Syed, 181 A.3d at 919 (holding Syed prejudiced by counsel failing to contact alibi); State v. Syed, 188 A.3d 918, 918 (Md. 2018) (unpublished table decision); Syed, 204 A.3d at 160 (holding trial counsel’s failure to contact alibi witness did not prejudice Syed); see also supra notes 125-29 (setting forth procedural history).

131. See Syed, 204 A.3d at 165 (disagreeing with lower court’s conclusion Syed prejudiced by counsel’s failure to contact alibi). At the highest court in Maryland, three of the seven justices disagreed with the majority and concluded that failure to contact an alibi witness prejudiced Syed. See id. at 183 (Hotten, J., concurring in part and dissenting in part) (agreeing with lower court ruling on prejudice prong of Strickland test).

III. ANALYSIS

A. Inconsistent Results Under Strickland Were a Foreseeable Consequence

While the Strickland test is still the standard for ineffective assistance of counsel claims, it is not without flaws. Justice Marshall correctly predicted that the test would be unhelpful in adjudicating ineffective assistance of counsel claims, as so many defendants are unable to meet this burden. In highlighting the near impossibility of determining whether the trial’s outcome would have been different, Justice Marshall foresaw the exact difficulties plaguing defendants like Syed. The Supreme Court continues to struggle with implementing the Strickland test because of how difficult it is to truly understand the full extent of the potential prejudice a defendant faced due to the deficient performance of their trial counsel.

In Weaver, Justice Alito’s concurrence criticized the majority’s use of fairness, rather than prejudice, as the standard for an ineffective assistance of counsel claim because it directly contradicts the point of the prejudice prong in Strickland by allowing attorney errors that do not affect the trial’s outcome to rise to the level of prejudicial. But fairness should be the main focus of this type of inquiry. The importance of the prejudice prong is to be sure that courts do not overturn convictions unless the attorney’s error actually impacted the outcome of the trial, but in creating this high burden, defendants are left without a meaningful chance at relief. In Weaver, Justice Alito highlighted the difficulty that Justice Marshall foresaw when Justice Alito pointed out that a defendant only


135. See Strickland, 466 U.S. at 710 (Marshall, J., dissenting) (criticizing prejudice prong for its unfairness); State v. Syed, 204 A.3d 139, 158 (Md.) (holding no prejudice to Syed even though counsel provided deficient performance), cert. denied, 140 S. Ct. 562 (2019).

136. See Strickland, 466 U.S. at 710 (Marshall, J., dissenting) (explaining courts may not have record of all of trial counsel’s errors because of their incompetence); Duncan, supra note 92, at 18-20 (highlighting problems with prejudice prong interpretation). See generally Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) (highlighting disagreements among Supreme Court Justices on application of Strickland).

137. See Weaver, 137 S. Ct. at 1915-16 (Alito, J., concurring) (articulating fairness already built into Strickland test); Strickland, 466 U.S. at 696 (emphasizing role of fairness).

138. See Weaver, 137 S. Ct. at 1911 (using fairness for analysis purposes only).

139. See id. at 1915 (Alito, J., concurring) (reiterating standard under Strickland); Duncan, supra note 92, at 24-26 (criticizing high burden of prejudice); see also supra note 61 (highlighting difficulty of proving prejudice).
has two ways to prove prejudice. In his dissent, Justice Breyer explained that proving prejudice requires the defendant to do something that is impossible, which Justice Marshall predicted in *Strickland*, yet there still is not a better path for defendants to prove their ineffective assistance of counsel claims.

The courts’ inability to agree when prejudice has occurred exemplifies this issue facing defendants, which prevents relief for defendants harmed by their trial counsel. Even courts within the same jurisdiction come to different conclusions regarding whether counsel’s deficient performance investigating alibis is enough to impact the outcome of the trial. This makes it nearly impossible for a defendant to obtain relief, or even to understand when a grant of relief would be warranted. It comes as no surprise that lower courts cannot agree when even Justices of the Supreme Court continue to disagree about the prejudice prong and how and when it should apply.

### B. Challenges Defendants Face in Proving Prejudice

Though the task is not quite impossible, defendants asserting ineffective assistance of counsel claims face serious challenges when trying to show that their counsel’s failure to contact an alibi witness prejudiced them. Some courts

140. *See* *Weaver*, 137 S. Ct. at 1915 (Alito, J., concurring) (noting defendants can prevail by showing traditional prejudice or per se prejudice).

141. *See id.* at 1917 (Breyer, J., dissenting) (explaining difficulty defendants face attempting to prove prejudice); *Strickland* v. Washington, 466 U.S. 668, 710 (1984) (disagreeing with majority imposing burden of proof on defendants); *see also supra* note 97 and accompanying text (limiting presumption of prejudice to three categories).

142. *See* *Glover* v. Miro, 262 F.3d 268, 281 (4th Cir. 2001) (Michael, J., dissenting) (disagreeing with majority’s determination no prejudice occurred because no attorney could have provided effective representation); State v. Mann, 221 A.3d 905, 981 (Md. 2019) (overturning lower court decision regarding prejudice prong), *cert. denied*, 141 S. Ct. 337 (2020); State v. Syed, 204 A.3d 139, 183 (Md.) (Hotten, J., concurring in part and dissenting in part) (disagreeing with majority holding trial counsel did not prejudice Syed), *cert. denied*, 140 S. Ct. 362 (2019).


144. *See supra* note 117 and accompanying text (explaining inconsistencies plaguing defendants who attempt to show prejudice); Duncan, *supra* note 92, at 24-26 (criticizing high burden of proving ineffective assistance of counsel).

145. *See* *Wiggins* v. Smith, 539 U.S. 510, 554, 556 (2003) (Scalia, J., dissenting) (arguing defense counsel’s actions did not prejudice Wiggins). Justice Scalia explained that the evidence at issue in *Wiggins* would not have been introduced, and therefore any failure to further investigate could not have prejudiced Wiggins. *See id.* at 554 (arguing against any prejudice to Wiggins).

146. *See* *Glover*, 262 F.3d at 280 (deciding no prejudice to Glover for failing to investigate alibi witness); Syed, 204 A.3d at 165 (concluding no prejudice based on alibi witness investigation); Mann, 221 A.3d at 981 (determining failure with alibi did not cause prejudice); *see also* Duncan, *supra* note 92, at 24-26 (highlighting difficulty of proving prejudice in all cases). *But see* Campbell v. Reardon, 780 F.3d 752, 769, 772 (7th Cir. 2015) (holding trial counsel’s performance undermined confidence in verdict). The *Campbell* majority explained that the State’s case was underwhelming, and each potential witness would have added to the defense’s case. *See*
have erroneously held that trial counsel’s actions do not prejudice the defendant even when the witnesses they failed to contact could have refuted evidence of the defendant’s guilt.147 As the law stands, courts can make the important determination of prejudice based simply on whether they conclude trial counsel “strategically” decided not to even contact a potential witness.148

Similarly to an appellate court’s determination that trial counsel acted strategically, a “strong” case against the defendant can be fatal to a defendant’s claim.149 Consequently, courts can conclude that a defendant has not faced prejudice because the prosecution’s case was “strong.”150 Courts can unfairly decide the strength of the case against the defendant without ever knowing how effective counsel would have impacted the case in the minds of jurors.151 The problems with the prejudice prong are even more prevalent as related to alibi witnesses.152

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147. See State v. Torres, 894 N.W.2d 191, 201-02 (Neb. 2017) (concluding decision to focus witness testimony on crimes charged strategic decision). Nebraska Supreme Court precedent protects trial counsel that strategically decides not to call a particular witness, even if the strategy proves unsuccessful. See id. (reasoning trial counsel’s decision strategic because evidence of kidnapping strong).

148. Compare Campbell, 780 F.3d at 764, 772 (holding trial counsel did not make strategic decision because no investigation and caused prejudice), with Torres, 894 N.W.2d at 202 (holding no prejudice because trial counsel’s decision determined strategic). The evidence against Torres was so strong that adding witnesses on his behalf could have, according to the court, “bolstered the evidence” against Torres, therefore the court held that defense counsel’s decision was strategic. See Torres, 894 N.W.2d at 202 (reasoning trial counsel made strategic decision). Meanwhile, in Campbell, the potential alibi testimony would have been valuable because the witness would identify another person as a participant, negating the prosecution’s evidence against Campbell. See Campbell, 780 F.3d at 772 (explaining benefits of calling alibi witness during trial). The Campbell court further explained that even if the jury did not believe the identification of the other participant, the alibi witness continued to claim Campbell did not participate in the crime. See id. (emphasizing witness never wavered on this fact). Both Torres and Campbell considered whether trial counsel’s actions can be viewed as strategic. See Torres, 894 N.W.2d at 202 (reasoning trial counsel made strategic decision); Campbell, 780 F.3d at 766-67, 772 (holding trial counsel did not make strategic decision because no investigation).


150. See John Doe No. 1, 272 F.3d at 126 (concluding Findley could not show counsel’s deficiencies prejudiced him); Duncan, supra note 92, at 24-26 (criticizing Strickland claims application only to innocent defendants). The Second Circuit held that the confidential informant’s testimony against Findley was strong enough to outweigh any potential deficiencies in trial counsel’s performance and that the outcome would not have been different. See John Doe No. 1, 272 F.3d at 126 (concluding testimony made prosecution’s case strong enough to withstand prejudice prong in Strickland).


152. See, e.g., Campbell v. Reardon, 780 F.3d 752, 772 (7th Cir. 2015) (holding Campbell prejudiced because confidence in verdict undermined by failure to contact potential alibi); Griffin v. Warden, Md. Corr.
Even when a defendant can prove that their counsel was deficient for failing to contact an alibi witness, defendants struggle to find relief because they cannot establish the prejudice prong and prove that the outcome of the trial would have been different absent their counsel’s deficiencies.\textsuperscript{153}

\textit{C. Shifting the Burden: A Proposed Solution}

Justice Marshall was correct that the burden of showing prejudice should not be on a defendant who has already endured ineffective assistance of counsel.\textsuperscript{154} Not only is the burden too high but, as Justice Alito pointed out, there are only two ways a defendant can show prejudice: by showing either that the outcome of the trial would have been different, or that trial counsel’s error amounted to a denial of counsel all together.\textsuperscript{155} Prejudice can be difficult for a defendant to show, if not impossible, because injury to the defendant might be missing from the record as a direct result of the incompetence of their trial counsel.\textsuperscript{156} Courts should recognize that defendants face an excessively high burden when attempting to show that their counsel prejudiced them, and courts should relieve defendants of that burden when their trial counsel failed to contact their alibi witness.\textsuperscript{157} Courts should apply this type of burden shifting to ineffective assistance of counsel claims involving counsel that fails to contact an alibi witness in order to allow an easier path to relief for defendants and to ensure that their constitutional right to effective counsel is honored.\textsuperscript{158} Failing to contact an alibi witness requires a burden shift because forcing a defendant to show that the testimony of an alibi witness whom defense counsel did not investigate or even contact would have

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\textsuperscript{153} See State v. Syed, 204 A.3d 139, 165 (Md.) (holding failure to contact alibi witness amounted to deficient performance but not prejudicial, cert. denied, 140 S. Ct. 562 (2019).

\textsuperscript{154} See Strickland, 466 U.S. at 710 (Marshall, J., dissenting) (disagreeing with majority about imposing burden of proof on defendants).


\textsuperscript{156} See Strickland, 466 U.S. at 710 (Marshall, J., dissenting) (highlighting issue in prejudice prong).

\textsuperscript{157} See Weaver, 137 S. Ct. at 1917 (Breyer, J., dissenting) (refusing to require defendants to meet impossible burden); cf. Batson v. Kentucky, 476 U.S. 79, 94 (1986) (shifting burden to prosecutor once defendant makes required showing); Commonwealth v. Long, 152 N.E.3d 725, 736 (Mass. 2020) (shifting burden to Commonwealth for racially-based traffic stops after defendant establishes reasonable inference). In Commonwealth v. Long, the Massachusetts Supreme Judicial Court (SJC) recognized that the historic burden defendants carried in proving that a traffic stop was racially motivated was too high and impossible to meet. See 152 N.E.3d at 736-37. The SJC lowered the burden to require that a defendant only provide a reasonable inference that the stop was racially motivated in order to trigger a presumption of bias, which the Commonwealth must then rebut. See id. at 741 (describing burden shift).

\textsuperscript{158} See Strickland v. Washington, 466 U.S. 668, 687 (1984) (creating two-prong test for ineffective assistance of counsel claims); Weaver, 137 S. Ct. at 1917 (Breyer, J., dissenting) (criticizing impossibility of meeting Strickland standard); cf. Long, 152 N.E.3d at 738 (changing standard because of persistent difficulties defendants faced in meeting their burden).
had a reasonable probability of changing the outcome of the trial is unfair and would penalize the defendant for something entirely out of their control.\footnote{159}{See supra note 10 and accompanying text (explaining importance of alibi witnesses); Strickland, 466 U.S. at 710 (Marshall, J., dissenting) (arguing trial counsel’s incompetence could explain why defendant’s injury missing from trial record); see also Strickland, 466 U.S. at 696 (majority opinion) (noting importance of fairness).}

To achieve this burden shift under the current framework for ineffective assistance of counsel claims, courts should consider the failure to contact an alibi witness tantamount to a constructive denial of counsel under \textit{Cronic} such that the failure to contact an alibi witness creates a presumption of prejudice against the defendant.\footnote{160}{See United States v. Cronic, 466 U.S. 648, 659-60 (1984) (setting forth three bases for prejudice presumption in ineffective assistance of counsel claims); see also supra notes 97-98 and accompanying text (discussing per se prejudice under \textit{Cronic} and defining constructive denial of counsel).}

As such, defendants whose counsel failed to contact their alibi witness should be able to assert per se prejudice to obtain relief.\footnote{161}{See Cronic, 466 U.S. at 659 (establishing constructive denial of counsel constitutes per se prejudice); supra note 7 and accompanying text (addressing impact of successful ineffective assistance of counsel claim).}

A defense attorney who fails to contact an alibi witness has denied a defendant their right to counsel because an alibi witness could have been all the defendant needed to overcome the prosecution’s accusations.\footnote{162}{See State v. Syed, 204 A.3d 139, 185 (Md.) (Hotten, J., concurring in part and dissenting in part) (believing one juror could have found Syed’s alibi convincing enough to vote not guilty), cert. denied, 140 S. Ct. 562 (2019); see also supra note 10 and accompanying text (explaining benefits and importance of alibi witnesses).}

Once the defendant has established that their counsel failed to contact an alibi witness, the burden should then shift to the prosecutor to rebut the presumption that such a failure prejudiced the defendant.\footnote{163}{See Cronic, 466 U.S. at 659 (describing constructive denial of counsel); cf. Commonwealth v. Long, 152 N.E.3d 725, 736 (Mass. 2020) (shifting burden from defendant to prosecution). The prosecution could prove the lack of prejudice by using evidence of a strategic decision or the strength of their case. See supra notes 148-50 and accompanying text (using strategic decisions and strength of State’s case to deny ineffective assistance of counsel claims). While these are the very factors currently preventing defendants from obtaining relief, under this proposed framework the prosecution would need to affirmatively show that they can overcome the presumption of prejudice. See supra notes 148-50 and accompanying text (identifying reasons defendants fail to prove ineffective assistance of counsel claims).}

D. Could This Have Changed Things for Syed?

In \textit{Syed}, Maryland’s highest court properly held that trial counsel was deficient for not contacting a potential alibi witness, but incorrectly determined that this failure did not prejudice Syed because the State presented overwhelming evidence at trial.\footnote{164}{See Syed, 204 A.3d at 165 (holding deficient performance, but no prejudice to Syed).}

This result fails to acknowledge the importance of alibi witnesses and how Syed’s alibi could have changed the outcome of his case.\footnote{165}{See id. (concluding no prejudice even though trial counsel’s performance deemed deficient for failing to contact alibi). The majority in Syed claimed that the State’s evidence of Syed’s guilt was overwhelming, even though the alibi witness would have placed Syed far away from the crime scene at the exact time the prosecution alleged he was committing the murder. See id. at 155, 157-58 (arguing State showed premeditation and Syed’s involvement in burial of victim). The focus on the events after the murder were given more weight than necessary}
Syed’s alibi witness would have testified that Syed was with her at the time the State claimed he committed a murder; but even with this testimony, the Maryland Court of Appeals held that Syed had not established that the outcome of the trial would have been different. 166 In these cases, prejudice is an impossible burden for defendants because it asks them to show that a witness—who was never contacted—would have changed the outcome of the trial. 167 The current framework fails to guarantee a fair proceeding for the defendant: This impossible standard requires courts to shift the burden to the State to prove that they had enough evidence notwithstanding the alibi or that the alibi was unreliable. 168 For this reason, Justice Hotten, joined by Chief Justice Barbera and Justice Adkins, questioned the majority’s reasoning in their separate opinion and emphasized that the State provided no evidence to refute the alibi witness’s testimony. 169 Justice Hotten correctly interpreted Strickland by explaining that the defendant is not required to prove their innocence to prevail, instead they need only show that there was a reasonable probability of a different outcome—a fact seemingly overlooked by the majority opinion that detrimentally impacted Syed. 170 Syed deserved a new trial because—as both the majority and minority justices agreed—his counsel failed to contact his alibi witness. 171 Had the court

because the court improperly decided the jury could have disbelieved the State’s theory as to the time of the death, which the alibi witness’s testimony would have put into question. See id. at 157 (arguing alibi would not negate Syed’s “criminal agency” and therefore not prejudice). This type of erroneous conclusion caused the judge to deny Syed a new trial and ultimately uphold his conviction. See id. at 165 (concluding Syed not prejudiced by his counsel’s deficient performance).

166. See id. at 157-58 (explaining potential alibi witness testimony, but holding it would not have changed outcome); see also id. at 185 (Hotten, J., concurring in part and dissenting in part) (articulating benefit of Syed’s alibi witness).

167. See Weaver v. Massachusetts, 137 S. Ct. 1899, 1917 (2017) (Breyer, J., dissenting) (arguing against requiring defendants to meet impossible burden).


169. See State v. Syed, 204 A.3d 139, 185 (Md.) (Hotten, J., concurring in part and dissenting in part) (articulating how potential alibi witness could have explained Syed’s whereabouts during integral time period), cert. denied, 140 S. Ct. 562 (2019). The proposed alibi would have placed Syed with the alibi witness during the exact time the State argued that the murder took place, and the majority incorrectly allowed the State to argue—even though they did not present at trial—a theory that they could move the timeline of the murder. See id. at 184-86 (arguing majority’s decision conflicts with post-conviction court’s holding). Strickland requires the court to look at the totality of the circumstances presented to the factfinder, and the new timeline the State proposed in Syed should not have been allowed because the prosecution never presented it to the jury who convicted Syed. See Strickland, 466 U.S. at 695 (asserting courts should review case under totality of circumstances presented to factfinder); Syed, 204 A.3d at 185-86 (Hotten, J., concurring in part and dissenting in part) (asserting prosecution ignored time of murder and focused on time of burial).

170. See Syed, 204 A.3d at 185 (Hotten, J., concurring in part and dissenting in part) (concluding reasonable probability of different outcome exists under these circumstances); see also Strickland, 466 U.S. at 695 (noting not all errors would affect outcome of trial).

171. See Syed, 204 A.3d at 183 (Hotten, J., concurring in part and dissenting in part) (articulating how potential alibi witness could have explained Syed’s whereabouts during alleged time of murder).
presumed that failure to prejudice Syed, he would have gotten the new trial he deserves. 172

IV. CONCLUSION

The Strickland test is the proper way to measure whether a defendant’s counsel was so ineffective that the defendant deserves a new trial. On the matter of failing to contact an alibi witness, however, the burden should not be on the defendant to show prejudice. Failing to contact a potential alibi witness means never knowing whether the defendant would have been able to prevail at trial or, at the very least, cause the government to rethink their case. Credible alibi witnesses are important to any defense, and counsel cannot determine this credibility if they never contact the witness.

While the decision not to call an alibi witness to testify can be a strategic move, the failure to contact an alibi witness at all rises to a new level of incompetence. This is not to say that the defendant should automatically receive a new trial. Nevertheless, the state should carry the burden of showing they provided enough evidence at trial to prevail even if the alibi witness had been called, or that the alibi was simply unreliable. Under the current framework, too many defendants fall through the cracks because of the impossibly high burden to prove prejudice. This small procedural change in how courts review alibi witnesses under Strickland will not cause a massive outpouring of defendants receiving relief, but it will provide an easier path for those defendants who have been truly affected by the incompetence of their trial counsel. The bare minimum competence required by the Constitution should include defense counsel contacting potential alibi witnesses, and courts should presume that a failure to do so prejudiced the defendant.

Aziza Asad

172. See id. at 186-87 (recommending Syed receive new trial).