

Counsel's Prevention of Defendant's Testimony Is Ineffective Assistance

BY LAZAR EMANUEL

The Sixth Amendment guarantees that "In all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense." The courts have construed this to mean not only that the defendant shall have the assistance of a lawyer, but that the lawyer's assistance must be effective.

The definition of the term "ineffective assistance" was clearly set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). To establish that counsel has rendered "ineffective assistance," the defendant must show two things: 1) that the assistance of his attorney was "deficient," *i.e.*, that he was not "a reasonably competent attorney;" and 2) that counsel's deficiencies were prejudicial to the defense, *i.e.*, that there is a "reasonable probability" that, except for those deficiencies, the outcome of the trial would have been different.

A line of cases has applied the *Strickland* standards in different factual contexts. The Court of Appeals for the Fifth Circuit recently applied the *Strickland* test to a defendant's claim that counsel interfered with his constitutional right to testify in his own defense. *U.S. v. Mullins*, 5th Cir., No. 01-10524, 12/16/02. The Court's decision provides interesting instruction to defense counsel in determining how to respond to the client's determination whether to testify or not to testify.

Defendant Mullins was tried as a felon in possession of a firearm. He was convicted on one count and sentenced to prison for 235 months. His sentence was confirmed on appeal. More than four years after the conviction, Mullins filed a petition under 28 U.S.C §2255. Mullins argued that his attorney had prevented him from testifying at trial over his express wish to do so. The district court rejected Mullins' motion, but the 5th Circuit ordered a hearing by a magistrate judge who recommended that Mullins' claim be granted because of ineffective counsel.

The Court of Appeals distinguished between 1) interference with the right to testify committed by counsel; and 2) interference with that right by the trial court or the prosecutor. The key question in Mullins was: what constitutes "interference by counsel." Clearly, a critical issue faced by criminal defense counsel in many trials is a determination whether the defendant should or should not testify as a "matter of trial strategy." In assessing counsel's strategy in Mullins, the Court said, "we keep in mind that 'the decision whether to put the defendant on the stand is a judgment call, which should not easily be condemned with the benefit of hindsight.'"

Defendant's Decision Trumps Lawyer's Strategy

At the same time, the Court said, it can never be permissible trial strategy to override and frustrate the decision of the defendant to testify, even when that decision is contrary to the lawyer's analysis and advice.

In many cases, it's not clear whether the defendant has or has not acquiesced in the lawyer's advice that he not testify. "These cases implicitly, and we think correctly, conclude that when the record is simply that the defendant knew of his right to testify and wanted to do so but counsel was opposed, defendant acquiesced in his lawyer's advice, and therefore the only inquiry is whether that advice was sound trial strategy." The Court found, however, that *Mullins* was not one of these cases.

Instead, *Mullins* was a case in which both the defendant and his attorney "testified credibly at the evidentiary hearing that he expressed a desire to testify [to his counsel] numerous times during trial and that counsel alone chose to prevent his testimony...In this circumstance, we cannot infer from Mullins' silence before the trial court that he acquiesced in the advice not to testify."

The Court rejected the argument that a defendant should appeal to the trial judge directly when his lawyer rejects his wish to testify. The argument has some merit in that it offers an alternative to "after trial" swearing contests between lawyer and client, but trial practice does not provide easily for direct appeals from defendant to judge. On the contrary, defendants are often admonished to address the court only when asked to do so. We are served better by the present system in which the client relies on the advice of counsel. Lawyers routinely advise the court when their clients will ignore their advice to testify or not to testify, and careful judges usually inquire of defendants if they understand their right to testify.

The Court in *Mullins* found, however, that the defendant had not satisfied the second prong of *Strickland*. He had failed to show he was prejudiced by his lawyer's performance. The record did not evidence the reasonable probability that a different outcome would have occurred if Mullins had testified in his own behalf. His testimony would have exposed his extensive criminal record and would have been disputed by the testimony of a police officer and the defendant's own signed statement. In passing, the Court observed that counsel's decision not to permit defendant to testify was not bad trial strategy. Counsel had other witnesses who could testify to the same effect and had sound reason not to reveal Mullins' prior record.

Nevertheless, Mullins' decision to testify should have been honored. It was his decision, and his alone.

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