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CHAMBERS, J. (dissenting) — I agree with much in the majority opinion. I agree that a petitioner need not double prove prejudice in an ineffective assistance of counsel claim. Once is enough. I also agree that the right to effective assistance of counsel goes to the fundamental fairness of the trial itself. I part company with the majority on how the standard applies in this case. In my view, Hoyt Crace has shown both deficient performance and a reasonable probability of prejudice and is entitled to a new trial. I respectfully dissent.

Because the majority only analyzes prejudice, so will I. A jury could well have found that Crace lacked the ability to form the intent to commit assault. Witnesses testified that he was hysterical, screaming that he was being pursued, and wielding a sword. When a police officer arrived, Crace ran for him, screaming for help. Crace dropped his sword 50 feet away from the officer. While he continued to run toward the officer he stopped five to seven feet away. Under these facts, he was entitled to a jury instruction on the lesser included offense of unlawful display of a weapon, a nonstrike offense. There is a reasonable probability that given the option of a verdict that would have allowed it to find Crace did the act but lacked the malice necessary for the greater offense, the jury would have returned a verdict on the lesser crime. This would have spared Crace the consequences of a third strike. How much more prejudice do we need?

I respectfully dissent.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Justice Charles W. Johnson