FURTHER DEVELOPMENTS ON PREVIOUS SYMPOSIA

THE CONSTITUTIONAL FAILURE OF THE *STRICKLAND* STANDARD IN CAPITAL CASES UNDER THE EIGHTH AMENDMENT

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I

INTRODUCTION

Not until the twentieth century did the United States Supreme Court rule that all criminal defendants, whether in state or federal court, had a right to be represented by counsel under the Sixth Amendment.[1] Until nearly the end of that century, however, the Court went no further than stating that defendants had a right to counsel, without specifying whether that meant competent counsel. In 1984, there were two landmark cases in Sixth Amendment jurisprudence. The first is the source of the requirement that counsel provide *effective* assistance, although the Court did not clarify what such assistance would entail.[2] Out of this requirement have arisen countless appeals based on ineffective assistance of counsel ("IAC"). Until the Court heard the second landmark case, *Strickland v. Washington*,[3] that same year, courts ruled on these claims without any guidance. The Court defined effective assistance of counsel according to what it was not: a deficient performance that so prejudiced the defense as to deprive the defendant of a fair trial.[4]

The Court gave little guidance about what constitutes a constitutionally deficient performance, and even less to how prejudicial the effect of the deficient performance has to be in order to be found unconstitutional. As a result, the Court did little more than to sanction the broad discretion already employed by courts in considering IAC claims. This discretion leads to arbitrary determinations in capital cases, which, although they may satisfy the low bar set for Sixth Amendment analysis, violate the Eighth Amendment.

In the 1995 *Law and Contemporary Problems* symposium entitled "Toward a More Effective Right to Assistance of Counsel," Professor Uelmen gave a

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1. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *see also infra* notes 11-25 and accompanying text.

2. *See* United States v. Cronic, 466 U.S. 648 (1984).

3. 466 U.S. 668 (1984).

4. *See infra* text accompanying notes 87-113.

"guided tour" of the Sixth Amendment from which he gleaned several lessons.[5] First, criminal defense will never have a high funding priority in this nation.[6] Second, the difference between no counsel and incompetent counsel is a judicial fiction that enables courts to make distinctions under the Sixth Amendment that do not exist in reality.[7] Finally, Professor Uelmen noted the shortcomings in the current standards for legal counsel: "[I]f courts regarded the competence of defense counsel as just as essential to the achievement of justice as the competence of the judge, we would certainly see a different standard of competence applied."[8] It is these lessons, combined with the utter lack of any meaningful guidance from the Supreme Court as to what constitutes a prejudicial effect, that makes the *Strickland* standard a violation of the Eighth Amendment. Just as legislation that gave juries complete and unguided discretion over the sentencing of capital defendants was deemed unconstitutional because it resulted in arbitrary punishment,[9] so the *Strickland* standard is unconstitutional because it recreates those same problems at the appellate level.

Criminal defendants are guaranteed the right to effective assistance of counsel under the Sixth Amendment, but the Supreme Court's decision in *Strickland* has given appellate courts overly broad discretion to determine exactly what constitutes ineffective assistance of counsel. As a result, there is little consistency within judicial districts or across districts.[10] Legal assistance that might be constitutionally deficient and prejudicial before one judge may not even be considered unreasonable before another. Although most courts and legal scholars have examined the constitutionality of the assistance of counsel on an individual basis under Sixth Amendment jurisprudence, the appellate review of IAC claims in capital cases itself violates the Eighth Amendment prohibition of cruel and unusual punishment, especially as it is analyzed in *Furman v. Georgia*,[11] because it results in impermissible arbitrariness in the sentencing of capital defendants. Part II of this note begins with a review of the right to counsel, which leads to a discussion of the importance of this right in capital cases. Part III discusses the crucial role of counsel in capital cases throughout the trial and appellate processes. In Part IV, the *Strickland* decision is analyzed from a constitutional perspective, and from a pragmatic approach that considers outside factors that influenced the jury's decision. The final section of Part IV reviews some decisions that have applied the *Strickland* standard, comparing the facts and the outcome on appeal. While this note does not attempt to catalogue every case that has made an IAC claim, its comparison of similar capital cases demonstrates the impermissible level of arbitrariness that stems from the

5. *See* Gerald F. Uelmen, *2001: A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, 58 LAW & CONTEMP. PROBS. 13 (Winter 1995).

6. *See id.* at 28.

7. *See id.*

8. *Id.*

9. *See infra* notes 117-22.

10. *See* discussion *infra* Part IV, Section D at pp. 31-38.

11. 408 U.S. 238 (1972).

Strickland decision. In conclusion, this note argues that the current test for IAC claims is unconstitutional, failing to provide proper guidance and resulting in impermissible arbitrary disposition of IAC claims.

II

BACKGROUND: THE RIGHT TO COUNSEL

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defence [sic]."[12] While this provision was initially held to be applicable only to federal criminal cases, the Supreme Court in *Powell v. Alabama*[13] held that denial of the right to counsel in a state rape case violated the Due Process Clause of the Fourteenth Amendment.[14] Seven young black men traveling on a train bound for Alabama were accused of assaulting two white girls;[15] they were taken into custody upon the train's arrival. During the course of the proceedings, which the Supreme Court characterized as taking place in a hostile environment,[16] the court never appointed counsel for the defendants. Instead, the court "'appointed all the members of the bar' for the limited 'purpose of arraigning the defendants.'"[17] But no attorney ever stepped forward to accept the appointment, and the defendants were tried and convicted without any counsel to assist them.[18] The Supreme Court first undertook a factual determination of whether the defendants were in substance denied the right of counsel.[19] Upon the determination that the court's general appointment of the entire bar resulted in no appointment at all, the Court undertook an analysis of the application of the Fourteenth Amendment to the right to counsel for criminal defendants.[20]

The Court held that denial of the Sixth Amendment right to counsel violated those "'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"[21] As such, even though the Sixth Amendment specifically dealt with the issue, denial of counsel in a state criminal rape proceeding "is obviously one of those compelling considerations which must prevail in determining whether it is embraced within the due process

12. U.S. CONST. amend. VI. Prior to its decisions regarding the right to counsel in all state cases, the Supreme Court held that the Sixth Amendment precluded a valid conviction and sentencing where the defendant was not represented by counsel and had not "competently and intelligently waived his constitutional right" to counsel. Johnson v. Zerbst, 304 U.S. 458, 468 (1938). A judgment obtained without assistance of counsel, where the right was not waived, was void, and an individual imprisoned thereunder was entitled to release by habeas corpus. *See id.*

13. 287 U.S. 45 (1932).

14. *See id.* at 70.

15. *See id.* at 57.

16. *See id.* at 51.

17. *Id.* at 56.

18. *See id.* at 50.

19. *See id.* at 53-56.

20. *See id.* at 60-73.

21. *Id.* at 67 (quoting Hebert v. State of Louisiana, 272 U.S. 312 (1926)).

clause of the Fourteenth Amendment."[22] While the language of the *Powell* decision did not appear to be limited to the particular facts of the case, a subsequent decision by the Court significantly narrowed its scope.[23]

> Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial.[24]

Twenty years after the Court removed the teeth from the *Powell* decision, it revisited the issue of whether states must appoint counsel for defendants in criminal prosecutions and whether the right to counsel was a fundamental right protected under the Due Process Clause.[25] In *Gideon v. Wainwright*, the Court overruled its fact-specific application of the Sixth Amendment right to counsel in state proceedings, stating that "[w]e think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment."[26] After reviewing the *Powell* decision and other case law, the Court concluded that the right to counsel was indeed a fundamental right, mandating its protection by the states.[27]

The Supreme Court elaborated somewhat on what exactly is required under the Sixth Amendment in *United States v. Cronic*.[28] Here, the Court stated that:

> the presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.[29]

While the Court had considered Sixth Amendment claims based on actual or constructive denial of assistance of counsel or state interference with counsel's ability to render effective assistance, it did not address the issue of "actual ineffectiveness" until its decision in *Strickland*.[30] The deep impact on capital defendants of that decision is analyzed below.

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22. *Id.*
23. *See* Betts v. Brady, 316 U.S. 455 (1942).
24. *Id.* at 462.
25. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).
26. *Id.* at 341.
27. *See id.* at 344.
28. 466 U.S. 648 (1984).
29. *Id.* at 659.
30. *See* Strickland v. Washington, 466 U.S. 668 (1984).

III

THE INTERSECTION OF EFFECTIVE ASSISTANCE AND CAPITAL CASES: WHY AND WHERE IT IS MOST IMPORTANT

Counsel plays an especially crucial role in the prosecution of capital cases: "A capital trial is, in substance, two separate trials—the guilt/not guilty trial and the penalty trial."[31] As in any criminal proceeding, the capital defendant relies on his attorney's knowledge and skill to prevent a conviction. Unlike other criminal defendants, however, only capital defendants face the risk of losing their lives as well as their liberty. Although the defendant's own actions presumably play a large part in determining whether he or she will live or die, the responsibility for handling the sentencing phase of a capital trial rests squarely on the attorney's shoulders. While the defendant has some say over what avenues of investigation are pursued, the attorney must plan and present the mitigation evidence during the penalty phase.[32] Further, the attorney's presentation of mitigating evidence has a direct bearing on the appellate court's ability to exercise meaningful proportionality review.[33]

The American Bar Association, in establishing its 1989 guidelines for the appointment and performance of counsel in death penalty cases, acknowledged the crucial role played by such counsel:

> [D]eath penalty cases have become so specialized that defense counsel has duties and functions definably different from those of counsel in ordinary cases . . . . At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, and be able to develop strategies applying them in the pressure-filled environment of high-stakes, complex litigation.[34]

Trial counsel in capital cases face a dizzying array of tactical decisions, as well as the requirement of performing capably in a number of complex undertakings. For example, the lawyer must be able to apply sophisticated jury selection techniques, including attempted rehabilitation of venire members who initially state opposition to the death penalty.[35] In addition, she must know how to find and

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31. American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (Feb. 1989) (Commentary to Guideline 1.1, Objective) [hereinafter ABA Guidelines].

32. An attorney on a capital case may explore virtually any avenue of the defendant's past, so long as it amounts to mitigating evidence. The Supreme Court has held that states may not limit the presentation of such relevant information during the sentencing phase. *See* Lockett v. Ohio, 438 U.S. 586, 608 (1978) ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."). Therefore, the attorney must conduct an exceedingly thorough investigation of the defendant's life, leaving no stone unturned. *See* Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299, 324 (1983) ("There must be an inquiry into the client's childhood, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings.").

33. *See* Goodpaster, *supra* note 32, at 318. "If counsel fails to develop and present a potentially beneficial mitigating case when one exists, an apparently principled, but in fact disproportionate, death sentence will survive proportionality review and will stand." *Id.* at 319.

34. ABA Guidelines, *supra* note 31.

35. *See* Goodpaster, *supra* note 32, at 325 ("Counsel can increase the probability that the penalty hearing will be meaningful through voir dire and has an obligation to attempt to obtain a jury of persons open to an appeal for a life sentence."). To obtain such a jury, counsel must try to prevent the dis-

prepare expert witnesses on subjects ranging from mental defects to abusive backgrounds to forensic evidence. Appellate-level representation presents an additional difficulty: the necessity of familiarity with post-conviction procedures, ignorance of which could result in the waiver of certain issues on subsequent appeal.

One of the most damaging strategic errors counsel make in capital cases is to wait until the end of the guilt phase to begin thinking about how to proceed with the mitigation case.[36] Sometimes this shortsightedness stems from a lawyer's mistaken belief that the jury will never make a finding that could lead to a death sentence; other times, it is the result of an attorney focusing too much on how to avoid a guilty verdict and failing to consider the worst-case scenario. When this happens, the attorney has already missed key moments in the planning of the penalty phase: the shaping of relationships with the client, prosecutor, court personnel, and jurors; conduct of voir dire proceedings; and the nature of the defenses and affirmative mitigating case presented during the guilt phase.[37] These missed opportunities are nearly impossible to overcome once a guilty verdict has been entered.[38] If the lawyer has failed to introduce the jury and judge to the defendant's humanity before the sentencing phase begins, it will be difficult to break down the wall created by the horror of the crime and its accompanying testimony. Worse yet, if the attorney openly concedes defeat because "the guilt phase case is virtually indefensible," it could so prejudice the jury or judge that no amount of mitigating evidence would salvage the penalty phase presentation.[39]

To further complicate matters, the issue of money—or lack thereof—looms large in many capital cases.[40] "Even when experienced and competent counsel are available in capital cases, they often are unable to render adequate service for want of essential funding to pay the costs of investigations and expert wit-

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charge for cause of jurors generally opposed to the death penalty, which requires careful rehabilitation. *See id.* at 326. Such careful rehabilitation may also require an attorney's willingness to push a judge to probe further into a potential juror's initial response, because "[a] potential juror in a capital case who has expressed only general objections to the death penalty cannot be excused for cause if she might nonetheless vote to impose it in some circumstances." *Id.* at 325-26.

36. *See id.* at 329 ("Since the capital case defense attorney may have to be an advocate both for acquittal and for life, she should not frame a defense case for acquittal which will preclude or handicap effective advocacy for life.").

37. *See id.* at 320.

38. *See id.* at 324 ("It is essential that counsel try the guilt phase in a manner calculated to preserve credibility at the penalty phase.").

39. *Id*. at 329. Goodpaster argues that it is almost always appropriate to try to put on a reasonable doubt defense. Even in cases where there is no question as to the defendant's guilt, it is still beneficial to have introduced the jury to mitigating evidence before the sentencing phase begins. *See id.* at 331.

40. Compensation of court-appointed attorneys varies from state to state, but nowhere can it be said to be generous or perhaps even adequate. For example, Texas paid defense counsel in one capital case $11.84 an hour. The defendant was eventually released after nine years on death row when a jury refused to re-indict him—after his underpaid attorney was found constitutionally ineffective. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1838-39 (1994). For a discussion of the compensation systems in various states, see *id.* at 1853-55.

nesses."[41] Public defender programs have not been created in many jurisdictions, and in others they receive too paltry a sum to be effective.[42] Moreover, court-appointed lawyers are paid such minimal fees that they cannot afford to set aside other work; thus, they do not give the capital case the attention it requires and deserves.[43] State court judges often exacerbate this problem by "intentionally appointing inexperienced and incapable lawyers to defend capital cases"[44] and "denying funding for essential expert and investigative needs of the defense."[45] "The reality is that popularly elected judges, confronted by a local community that is outraged over the murder of a prominent citizen or angered by the facts of a crime, have little incentive to protect the constitutional rights of the one accused in such a killing."[46] One Alabama attorney assigned to a capital case explained how he had to forego much of his investigation for lack of funding, even though he would not have done so in a civil case because such failure would have constituted malpractice.[47] Ultimately, defense attorneys in capital cases end up making choices, not between useful and useless lines of investigation, but between the absolutely necessary minimum and other relevant matters that cost too much.[48]

The view from each side of the criminal fence is markedly different in terms of resources and expertise. On the prosecution side, there are often two state-

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41. ABA Guidelines, *supra* note 31.

42. *See* Bright, *supra* note 40, at 1844.

43. *See id.*

44. Bright, *supra* note 40, at 1844. Some states assign lawyers at random from a list, "a scheme destined to identify attorneys who lack the necessary qualifications and, worse still, regard their assignments as a burden." Resolution of the ABA House of Delegates (Feb. 1997) (Introduction: Competent Counsel) [hereinafter Resolution]. Other courts utilize a "contract" system that appoints indigent cases to the lowest bidders, which often does not coincide with skill level. *See* Richard Klein, *The Emporer Gideon Has No Clothes: the Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 679-81 (1986). A third system is the employment of a group of lawyers or an organization to handle all capital cases, a sort of private "public defender" program. *See* Bright, *supra* note 40, at 1850. Judges have the power to ensure the quality of the defense through their appointment of defense counsel, but "it is no secret that elected state court judges do not appoint the best and brightest of the legal profession to defend capital cases." Bright, *supra* note 40, at 1855-56.

45. Bright, *supra* note 40, at 1844. Courts often will not approve funding requests for investigation and experts, or will require an extensive showing of need, which the lawyer cannot make without doing some digging to discover what is important. *See id.* at 1846. "Many lawyers find it impossible to maneuver around this 'Catch 22,' but even when a court recognizes the right to an expert, it often authorizes so little money that no competent expert will get involved." *Id.* at 1847.

46. Bright, *supra* note 40, at 1857. Bright notes that many state judges come from a prosecutorial background and have gained popularity with their constituents through their dogged pursuit of criminals while serving as prosecutors. *See id.* Former North Carolina Judge Joe Freeman Britt (known as "the nation's deadliest prosecutor" during his time as a district attorney prior to being elected to the court) exemplifies this career path. *See* Sheryle McCarthy, *Fugitive from Justice: Carolina Suspect in NY Court*, NEWSDAY (Feb. 28, 1989), *available in* 1989 WL 3362314; *see also $1.5 Million Awarded in Wrongful Death Suit*, WILMINGTON MORNING STAR (Nov. 1, 1997), *available in* WL 16970284 ("Joe Freeman Britt [has been] dubbed the deadliest district attorney in America because he had the most death-penalty convictions.").

47. *See* Bright, *supra* note 40, at 1848.

48. *See id.* ("An attorney in the defense of many capital cases in Arkansas has described how lawyers in that state are forced to perform 'a sort of uninformed legal triage,' ignoring some issues, lines of investigation, and defenses because of the lack of adequate compensation and resources.").

funded offices that specialize in criminal cases.[49] The attorneys in these departments are well-compensated, well-educated through conferences and continuing legal education programs, and are provided with generous funding, the cooperation of police and investigative agencies, and the knowledge of experts.[50] After all, the prosecutors have what is understandably perceived as the worthy task of catching "bad guys." It would be nearly impossible to garner public support for more funding to aid these same "bad guys." The first state office, the District Attorney's office in each judicial district, is staffed by lawyers who devote their time exclusively to criminal matters.[51] Most court-appointed defense attorneys, on the other hand, must rely on any number of other kinds of legal work to pay the bills while they are doing their poorly funded "duty." The second state office is the Attorney General's office, which usually staffs a specialized unit to handle criminal appeals and habeas corpus matters.[52] These same inequities are perpetuated through the appellate process, in which the state's resources are overwhelmingly directed at preventing the resentencing or retrial of convicted defendants, not at enabling appellate counsel to conduct an investigation of matters that were neglected at the trial level.

The result of underfunded defense investigations and public defender systems (where they exist), reluctant court appointees, and elected judges who are more concerned with pleasing retribution-minded constituents than with guarding constitutional protections for capital defendants is that capital defendants receive assistance of counsel that falls woefully short of the standards observed in any other area of law, regardless of how the Supreme Court defines "ineffectiveness." Lawyers are appointed who do not want the cases, who cannot afford to take the cases, who have no interest or experience in criminal law, or who lack the necessary skills to defend a capital defendant.[53] "As a result, the poor are often represented by inexperienced lawyers who view their responsibilities as unwanted burdens, have no inclination to help their clients, and have no incentive to develop criminal trial skills."[54] Ironically, once attorneys have learned enough from their experience as appointed counsel to become truly effective advocates, they often become too cynical, tired, or emotionally drained to continue voluntarily to represent indigent capital defendants. Then another round of young, inexperienced attorneys are run through the appointment wringer, only to escape as quickly as possible.[55]

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49. *See id.* at 1844.

50. *See id.*

51. *See id.*

52. *See id.* At least one such unit has been given the "affectionate" nickname of the "death squad," because of its role in ensuring that capital sentences are not overturned. Interview with Joan Erwin, Former Prosecutor, North Carolina Attorney General's Office, at Duke University (Oct. 28, 1999). Erwin formerly was a member of the capital prosecution team of the North Carolina Attorney General's Office.

53. *See* Bright, *supra* note 40, at 1849.

54. *Id.* at 1849-50.

55. *See id.* at 1851.

As a cumulative result of these circumstances, capital defendants' fates hinge not so much on an individualized determination of the aggravating and mitigating factors of their cases as on the performance of counsel. Whereas a civil client seeking legal assistance on a matter can rely on her attorney being properly educated and experienced in that particular subject area, capital defendants often must take what they can get. There are legitimate and constitutional reasons that some individuals receive the death penalty, while others are given life sentences. However, even some who work *in* the system acknowledge that the facts of the cases do little to help sort out how life is meted out versus death.[56] States generally concern themselves very little with the adequacy of the performance of defense attorneys in capital cases, focusing instead on whether the defendant was physically accompanied by someone during the trial.[57]

Some efforts have been made to establish standards for counsel in capital cases.[58] They are, however, merely recommendations, and, given budgetary constraints and the unpopularity of capital defendants as a "cause," it is unlikely that they will become anything more in the future. The ABA has stated that its "guidelines make it clear that ordinary professional qualifications are inadequate to measure what is needed from counsel" in death penalty litigation.[59] Instead, they provided a list of qualifications that were viewed as imperative to providing effective assistance. The main requirements concern years of litigation experience, prior experience in criminal trials, participation in capital cases, and specific training in capital defense litigation.[60] The guidelines also provide

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56. *See id.* at 1841. "A member of the Georgia Board of Pardons and Paroles has said that if the files of 100 cases punished by death and 100 punished by life were shuffled, it would be impossible to sort them out by sentence based upon information in the files about the crime and the offender." *Id.* at 1840.

57. *See id.* at 1852 ("The vice president of the Georgia Trial Lawyers Association once described the simple test used in that state to determine whether a defendant receives adequate counsel as 'the mirror test.' 'You put a mirror under the court-appointed lawyer's nose, and if the mirror clouds up, that's adequate counsel.'").

58. For example, the Montana Supreme Court released a proposed set of competency standards for counsel in capital cases, which resemble the ABA's recommended guidelines. *See Standards Seek to Ensure Competent Defense in Death Penalty Cases*, MONTANA LAWYER, Feb. 24, 1999, at 27. The standards include a requirement that two counsel be appointed to represent capital defendants, and appellate counsel are required to have appellate experience, not just capital trial experience. *See id.* The Supreme Court of Indiana has also adapted a framework for dealing with ineffectiveness claims. *See* Woods v. Indiana, 701 N.E.2d 1208 (Ind. 1998) (describing three broad categories of issues dealing with IAC claims and whether they should have been raised earlier—those that can be evaluated on the face of the record, those that require some development of the record in order to evaluate the claim and those that are a mixture of both—and requiring a more stringent application of the cause and prejudice test where the record is well developed); *see also* Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103 (1999) (arguing that federal courts, when considering procedurally defaulted IAC claims made by state prisoners, should consider three variables in evaluating the element of cause in procedural default—whether counsel would have been required to plead his or her own incompetence, whether the petitioner could have reasonably recognized possible grounds for the claim at the time it should have been raised, and whether the record would have been adequately developed to evaluate such a claim at the time it should have been raised).

59. Resolution, *supra* note 44.

60. *See* ABA Guidelines, *supra* note 31.

standards for plea negotiations, voir dire, and jury selection.[61] The ABA has further stated that minimum standards that have been promulgated are not sufficient, and "counsel in death penalty cases should be required to perform at the level of an attorney reasonably skilled in the *specialized practice of capital representation*, zealously committed to the capital case, who has had adequate time and resources for preparation."[62]

Almost a decade after it published its guidelines for capital defense counsel, the ABA revisited the issue, finding that "administration of the death penalty . . . is instead a haphazard maze of unfair practices with no internal consistency. To a substantial extent, this situation has developed because death penalty jurisdictions generally have failed to implement the types of policies called for by existing ABA policies."[63] In 1982, the ABA, together with the National Legal Aid and Defender Association, stated that the promise of *Gideon v. Wainwright*[64] remains unrealized because courts and legislatures have been unwilling to "put our money where our mouth is."[65] Challenges have been brought to the inadequacy of fees paid to court-appointed attorneys, and commissions have undertaken a number of studies on the defects in representation of indigent defendants.[66] Despite these and other protests against the current system, however, Congress and the Supreme Court have narrowed capital defendants' opportunities for appeal without dealing with the problems detailed above and below.[67] Until these problems are addressed, capital defendants—individuals who face the gravest punishment—will continue to be deemed worthy only of the bare minimum legal representation.[68]

IV

THE *STRICKLAND* STANDARD IN REVIEW OF CAPITAL IAC CLAIMS

All of the problems detailed above have resulted in countless appeals based on the errors and omissions of counsel. In fact, challenges to death sentences are frequently based on claims of ineffective assistance of counsel in both state

61. *See id.*

62. *Id.*

63. Resolution, *supra* note 44.

64. 372 U.S. 335 (1963).

65. Bright, *supra* note 40, at 1866 (citing AMERICAN BAR ASS'N AND THE NAT'L LEGAL AID & DEFENDER ASS'N, GIDEON UNDONE! THE CRISIS OF INDIGENT DEFENSE FUNDING 3 (1982)).

66. *See generally* Bright, *supra* note 40, at 1866-70.

67. *See* discussion *infra* Part IV, Section C. The discussion centers on the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 and several Supreme Court decisions that elaborated on or narrowed *Strickland*.

68. *See* Bright, *supra* note 40, at 1870:

> "[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question. Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all."

Id. (quoting Chief Justice Harold G. Clarke, Annual State of the [Georgia] Judiciary Address, *reprinted in* FULTON COUNTY DAILY REP., Jan. 14, 1993, at 5).

and federal post-conviction proceedings.[69] Although it has long been established that criminal defendants have the right to assistance of counsel, it was not until 1970 that the Supreme Court described this right as "the right to the effective assistance of counsel."[70] With the exception of one decision dealing with the issue of counsel having a conflict of interest,[71] however, the Court did not define "effective" until it entered judgment in *Strickland*.[72] With that decision, the Supreme Court effectively undermined the landmark decision of *Furman v. Georgia*[73] and returned the imposition of death sentences to the realm of arbitrariness, inconsistency, and—according to its own analysis in *Furman* and subsequent cases—unconstitutionality.[74] Defendants who raise claims of ineffective assistance of counsel are now forced to allow appellate judges to consider the facts as they *should* have been presented and then to accept the judges' determination of how a jury would have considered that information. *Strickland*, which is nothing more than a carefully reasoned capitulation to the myriad flaws in the nation's system of capital punishment, therefore violates the Eighth Amendment's prohibition of cruel and unusual punishment, based on past Supreme Court jurisprudence.

A. Overview of *Strickland v. Washington*

The respondent in *Strickland* went on a crime spree in 1976 that included "three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft."[75] He eventually confessed to all the crimes, notwithstanding his counsel's advice.[76] The respondent once again acted against his lawyer's advice by waiving his right to a jury trial and pleading guilty to all charges.[77] After experiencing "a sense of hopelessness about the case,"[78] counsel did only minimal preparation for the respondent's sentencing hearing.[79] He spoke with the respondent about his background and spoke on the telephone with the respondent's wife and mother; otherwise, he did not seek out

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69. *See* Voigts, *supra* note 58, at 1118:

> In part, the large number of petitions raising such claims derives from the fact that a complaint of ineffective assistance is often a precondition for raising claims that the courts could not otherwise decide either because of waiver or procedural default. In addition, such claims show up on collateral review because practical and legal obstacles bar their correction on direct appeal.

Id. For example, it is unlikely that appellate counsel who is the same as trial counsel will assert a claim of ineffective assistance; but, in failing to do so, the defendant may be precluded from later raising an IAC claim in state court.

70. McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

71. *See* Cuyler v. Sullivan, 446 U.S. 335 (1980).

72. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984).

73. 408 U.S. 238 (1972).

74. *See id.* at 239-40.

75. *Strickland*, 466 U.S. at 672.

76. *See id.*

77. *See id.*

78. *Id.*

79. *See id.*

character witnesses for the sentencing.[80] The lawyer also did not conduct other investigations typically undertaken in capital cases, including a request for a psychiatric examination and a search for other evidence of his client's character and emotional state.[81]

In the majority opinion, Justice O'Connor attributed this lack of investigation to "trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes."[82] Her opinion puts the cart before the horse, stating that "because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior history, no substantial prejudice resulted from the absence at sentencing of the character evidence . . . . "[83] The Court therefore affirmed the trial court's decision that was made without the complete picture. In effect, the Court held that some cases have such bad facts that it does not matter what the complete story is. Such an assumption directly contradicts the Court's holding that the sentencing body is entitled to hear *any* mitigating evidence before making its decision.[84]

The respondent claimed that the Constitution required that a conviction or death sentence be set aside when counsel's assistance at the trial or sentencing was ineffective.[85] By deciding the case as it did, the Court appears to apply the *Strickland* rule to all criminal convictions and sentences, not just to capital cases. The Court's Eighth Amendment analysis, however, only addresses the flaws in the decision as they affect capital defendants. The Court evaluated the attorney's strategic choices in the respondent's trial, concluding that counsel's performance was not so inadequate as to constitute a violation of the Sixth Amendment right to assistance of counsel.[86] In so doing, the Court established a two-part test of effectiveness. To obtain a reversal of a conviction or a death sentence, a convicted defendant must show that counsel's performance was deficient, *and* that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.[87] A court considering an ineffective assistance

80. *See id.* at 673.

81. *See id.*

82. *Id.* While Justice O'Connor appears to accept this as a valid justification, it is not. Respondent's guilt is not the issue at the sentencing phase; it has already been established. Rather, counsel's role is to show the court why, despite his guilt, the respondent was deserving of mercy. A mentally ill person or an individual from a horribly abusive, unstable environment may well be unquestionably guilty, but the circumstances of his or her upbringing may convince a judge or jury that a life sentence is appropriate. Further, even though the respondent may have disregarded counsel's advice, that does not justify his attorney giving up on the mitigation case. Frustrating as such a decision may be, it is the client's to make, and counsel's job is to be a zealous advocate in whatever advocacy is needed.

83. *Id.* at 677.

84. *See* Lockett v. Ohio, 438 U.S. 586 (1978). If the Court does indeed believe that some facts are so bad that no untold story could make a difference, then its prohibition of mandatory death penalty statutes in *Woodson v. North Carolina*, 428 U.S. 280 (1976), seems an empty principle.

85. *See Strickland*, 466 U.S. at 671.

86. *See id.* at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

87. *See id.* at 687.

claim does not have to approach the inquiry in the same order or even consider both; if the defendant makes an insufficient showing on one of the components, the court need not consider the other.[88] The Court also held that a federal habeas challenge based on an ineffective assistance of counsel claim presents a mixed question of law and fact; therefore, a federal court is not bound by state court findings of fact.[89]

The first prong of the required showing addresses the performance of counsel, requiring evidence that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[90] Because the standard under the Sixth Amendment has been held to be reasonably effective assistance,[91] the "defendant must show that counsel's representation fell below an objective standard of reasonableness."[92] Reasonableness in this context is measured under prevailing professional norms and according to the circumstances at the time of trial. This notion of reasonableness is a slippery one: "Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides."[93] Because no set of rules could adequately or fairly take into account the wide range of circumstances faced by such counsel, the Court held that judicial scrutiny of counsel's performance must be highly deferential.[94] In fact, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[95]

The Court left a great deal of flexibility for appellate courts to determine if counsel's performance—or, as is more common, lack of performance—is somehow strategic or reasonable.[96] This reflects the Court's belief that any higher standard would "encourage the proliferation of ineffectiveness challenges."[97] Apparently, the Court decided that controlling the deluge of appeals by convicted defendants was preferable to holding attorneys accountable for anything but the most blatant sort of negligent practice. Granted, it was facing not only the issue of appeals for individuals on death row, but rather for any convicted criminal. Nonetheless, the Court had the power to apply a "death-is-different" standard in capital cases, if it so desired.

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88. *See id.* at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.").

89. *See id.* at 698. State court findings of fact, however, are subject to the deference requirement of 28 U.S.C. §2254(d) (1994), and district court findings are reversible only if found to be clearly erroneous under Federal Rule of Civil Procedure 52(a). *See id.*

90. *Id.* at 687.

91. *See id.* at 687 (citing Trapnell v. United States, 725 F.2d 149, 151-52 (2d Cir. 1983)).

92. *Id*. at 687-88.

93. *Id.* at 688.

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

95. *Id.* (citing Michel v. Louisiana, 350 U.S. 91, 101 (1995)).

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

97. *Id.* at 690.

Instead, all that is imposed on counsel in capital cases is "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[98] One big qualification further muddies any semblance of a standard provided by the first prong: "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."[99] But this qualification, which states that counsel's decisions are properly based on information supplied by the defendant,[100] presupposes a defendant who understands what kind of mitigating evidence could save his life, who is mentally stable enough to be cooperative and to trust an attorney, and who comprehends what sorts of harmful experiences in the past might have bearing on a capital sentence.[101]

The second prong of the *Strickland* inquiry also eludes any true comprehension or predictability. The Court had previously held that "an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[102] In other words, the defendant must be prejudiced by the ineffective assistance in order to establish a violation of the Sixth Amendment.[103] Very few actions warrant a presumption of prejudice—namely, some types of state interference with counsel's performance and an actual conflict of interest for the attorney.[104] Further, the defendant must show more than "some conceivable effect."[105] Rather, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[106] The Court rejected an even more stringent requirement that the defendant show that counsel's poor performance more likely than not altered the outcome of the case.[107] Nonetheless, the standard has proven to be a very difficult hurdle to clear in many jurisdictions.[108] This variation between jurisdictions in how much prejudice is enough makes an unclear test even more inconsistent in application.[109]

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98. *Id.* at 691.

99. *Id.*

100. *See id.*

101. In addition, it presupposes a defendant who is *interested* in saving his own life, which is often not the case. Some might argue that there is no problem in proceeding with an execution, since even the defendant himself does not object. However, given that many individuals on death row are mentally ill, suicidal, or severely depressed, this argument does not provide much consolation to prisoners' advocates.

102. *Id.* (citing analogous statement in United States v. Morrison, 449 U.S. 361, 364-65 (1981)).

103. *See id.* at 692.

104. *See id.*

105. *Id.* at 693.

106. *Id.* at 694. This test finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution and the test for materiality of testimony made unavailable to the defense by the government in deportation cases. *See id.*

107. *See id.* at 693 (Marshall, J., dissenting).

108. For example, the Fourth Circuit has yet to find that counsel was ineffective in a capital case.

109. *See id.* at 708 (Marshall, J., dissenting). Justice Marshall in his dissent voiced the concern that the majority's decision will increase inconsistency and inject more arbitrariness into death penalty deci-

When considering whether there is a reasonable probability that counsel's deficient conduct altered the *result* (not merely the presentation) of the case, the appellate court is to presume that the decisionmaker was "reasonably, conscientiously, and impartially applying the standards that govern the decision."[110] In a challenge to a death sentence, the defendant must show that there is a reasonable probability that the sentencer would have voted for a life sentence if counsel had provided effective assistance.[111] This requires consideration of all of the evidence before the judge or jury.[112] Because only some of the factual findings will be affected by counsel's errors, it is important to look at the totality of the circumstances when determining whether the errors were constitutional violations. For example, failure to put on a case in the mitigation phase of trial does not necessarily have any bearing on the conviction, whereas it may have had a prejudicial effect on the sentence. Ultimately, the appellate court must decide whether "the result of the particular proceeding is unreliable because of a breakdown in the adversarial process."[113]

B. The Constitutional Failings of *Strickland*

While the majority was apparently satisfied that its decision cleared up questions about what the Sixth Amendment right to counsel meant in terms of challenges to convictions and sentences, *Strickland* only served to perpetuate the arbitrariness supposedly prohibited by *Furman* and to leave courts wide latitude to ignore the low standard of performance expected of counsel appointed to represent individuals on trial for their lives. As Justice Marshall stated, the standard adopted in *Strickland* "is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts."[114] Appellate courts are left to discern what a reasonable attorney would have done in representing a client, based on counsel's explanations of "strategy" and on the actions of and information provided by a convicted murderer. And, given countless problems in the current defense system for indigents, Justice Marshall asked a crucial question: "Is a 'reasonably competent attorney' a reasonably competent *adequately paid retained* lawyer or a reasonably competent *appointed* attorney?"[115] Another question that the Court did not answer is whether appellate courts should be troubled by the fact that "a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney."[116] The answer requires an analysis of the Sixth Amend-

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sions. *See id.* ("Should the standard of performance mandated by the Sixth Amendment vary by locale?").

110. *Id.* at 695.

111. *See id.*

112. *See id.*

113. *Id.* at 696.

114. *Id.* at 707 (Marshall, J., dissenting).

115. *Id.* at 708 (Marshall, J. dissenting) (emphasis added).

116. *Id.* at 711 (Marshall, J. dissenting).

ment right to assistance of counsel that has not been undertaken. If the right to effective counsel is the fundamental right the Court has declared it to be, then it would seem that even the guilty are entitled to receive it, because the Constitution does not sanction the violation of the guilty's constitutional rights.

The "malleability" of the *Strickland* standard is contrary to the Court's decision in *Furman* regarding the constitutionality of the death penalty.[117] The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[118] The Due Process Clause makes this prohibition against cruel and unusual punishment applicable to state proceedings as well.[119] The five justices who wrote the separate, concurring opinions that held unconstitutional a death penalty statute whose imposition was left up to the discretion of the judge or jury repeatedly emphasized that death is different.[120] Justice Stewart expressed the opinion that:

> [T]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[121]

Because the courts are dealing with the life of a human being, any discretion given to the sentencing or appellate body should be guided and limited to minimize arbitrariness.[122]

After *Furman*, the Supreme Court rejected mandatory death penalty statutes because of their "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[123] Without such individualized trials and sentencing, capital defendants were being treated just as arbitrarily as they were when their lives were in the hands of an unguided judge or jury. Either way, the facts and circumstances of the individual defendant's life were not taken into account. Justice Douglas wrote in *Furman* that permitting unbridled discretion was part of:

> a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination of whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, depending on the whim of one man or of twelve.[124]

But after *Strickland*, capital defendants who raise IAC claims live or die on the unguided determination of an appellate court that was never intended to be the

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117. *See* Furman v. Georgia, 408 U.S. 238 (1972).

118. U.S. CONST. amend. VIII.

119. *See Furman*, 408 U.S. at 257 n.1.

120. *See id.* at 305.

121. *Id.*

122. *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

123. Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

124. *Strickland*, 408 U.S. at 253 (Douglas, J., concurring).

only hearer of the evidence ineffective counsel failed to present. All *Strickland* did was shift the unguided discretion up a level. The majority stated that it was providing a standard by which to judge the effectiveness of counsel.[125] But the questions it leaves up to the individual appellate court are too big to provide the controls required by the Eighth Amendment.

By allowing judges to determine whether a lawyer's performance in a capital trial meets a reasonable standard, and whether a deficient performance led the decisionmaker to impose death where it otherwise would have imposed a life sentence—an inquiry that eludes standardization—*Strickland* has resurrected some of the same fears that were supposedly put to rest after *Furman*. In discussing the history of the Eighth Amendment and the Founders' desire for equality in the law, Justice Douglas acknowledged that:

> the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[126]

As the cases raising IAC claims discussed below demonstrate, defendants on death row who have received subpar legal counsel face appellate decisions that are as predictable as a lightning strike.[127] As Justice Brennan stated in *Furman*:

> [w]hen a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied . . . . When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system.[128]

Though the numbers may have changed somewhat, especially given recent efforts to shorten the chain of available appeals, the death penalty is still imposed in a small percentage of cases. And for those who are unfortunate enough to receive barely passable counsel, their only protection from further arbitrariness is a standard that does little more than state what effective counsel *should* be, while leaving it up to appellate courts to determine what in fact it was in a particular case. Meanwhile, the judges and juries who made their decision based on an incomplete story are foreclosed from expressing the opinion that the whole story would have meant *everything*, especially to the defendant.

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125. *See Strickland*, 466 U.S. at 686:

> In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Id.

126. *Furman*, 408 U.S. at 255.

127. *See id.* at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

128. *Id.* at 293 (Brennan, J., concurring).

C. Other Failings of *Strickland*: Caving to Pressures Outside of Constitutional Law

The problems with the system of court appointments and poorly funded public defenders offices, as well as problems inherent in the court system in general, likely contributed to the constitutional backpedaling evident in *Strickland* and to more recent efforts to further limit appeals by capital defendants. Time constraints are one example of outside pressure that has affected courts' willingness to be fierce guardians of inmates' constitutional rights. The courts are so backlogged and overburdened that judges are eager to support any legislation that will curtail additional burdens. As Justice O'Connor noted in *Strickland*, the availability of "intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation" would invite a flood of IAC claims.[129] Lest that happen, judges were left with wide discretion to evaluate such claims.

Further to limit "frivolous" appeals (and, unfortunately, many meritorious ones), Congress in 1996 enacted the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")[130], which limits appeals for individuals on death row in a number of ways.[131] A key provision of the AEDPA is § 2254(d)(1), which now states that:

> federal courts may not grant an application for habeas corpus with respect to any claims that were adjudicated on the merits in the state court proceedings, unless that adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" . . . or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[132]

In 1999, the Supreme Court granted certiorari[133] on the question of the standard to be applied by federal courts in granting a habeas petition following the passage of the AEDPA, and on the Fourth Circuit's application of the *Strickland* standard in a capital case.[134] The Court granted certiorari to decide the following three questions: (1) whether a court properly should require that a defendant show that, absent the trial counsel's deficient performance, all twelve jurors would have voted for life imprisonment instead of imposing the death

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129. *Strickland*, 466 U.S. at 690; *see also supra* text accompanying note 97.

130. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1218, 1219 (codified as amended at 28 U.S.C. 2254(d)(1)-(2)).

131. *See* Resolution, *supra* note 44:

> [The Act] establishes deadlines for filing federal *habeas* petitions, places limits on federal evidentiary hearings into the facts underlying federal constitutional claims, sets timetables for federal court action, limits the availability of appellate review, establishes even more demanding restrictions on second or successive applications for federal relief, and, in some instances, apparently bars the federal courts from awarding relief on the basis of federal constitutional violations where state courts have erred in concluding that no such violation occurred.

Id.

132. Voigts, *supra* note 58, at 1112 (citing 28 U.S.C. § 254 (d) (West Supp. 1998)).

133. *See* Williams v. Taylor, 526 U.S. 1050 (1999).

134. *See* Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000).

penalty, even where state law would have mandated a life sentence if only one juror had voted for life imprisonment; (2) whether a state court's decision to deny a federal constitutional claim is contrary to "clearly established federal law only if it is in square conflict" with a decision of the U.S. Supreme Court; and (3) whether the appellate court erred by improperly limiting the responsibility of federal courts to decide questions of federal constitutional law.[135]

In the underlying case, the Virginia Supreme Court had held that *Lockhart v. Fretwell*,[136] modified the *Strickland* standard for determining prejudice by requiring a separate inquiry into fundamental fairness, "even when [the defendant] is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding."[137] The Supreme Court reaffirmed the two-pronged *Strickland* test, holding that the Virginia Supreme Court's "decision turned on its erroneous view that a'mere' difference in outcome is not sufficient to establish constitutionally ineffective assistance of counsel."[138]

The second part of the Court's analysis concerned the standard federal courts should apply under the AEDPA. The Court reversed the Fourth Circuit's interpretation of an "unreasonable application" of law under § 2254(d)(1), which was that "a state-court decision involves an 'unreasonable application of . . . clearly established Federal law' only if the state court has applied federal law 'in a manner that reasonable jurists would *all* agree is unreasonable.'"[139]. The Court noted that "Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved,"[140] but it did not "mislead federal habeas courts by focusing their attention on a subjective inquiry rather than on an objective one.".[141] Rather, the Court held that, under the "unreasonable application" clause, "a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."[142] While the Court's decision did leave federal courts some discretion in granting habeas petitions, it nonetheless left *Strickland* as ambiguous as before and reinforced the goal of the AEDPA that federal courts use the "utmost care" by "carefully weighing" a state court's reasons for denying an IAC claim.[143]

In addition to the problems created for defense programs, budget problems no doubt played a role in the Supreme Court's decision that the Constitution does not require states to provide counsel in capital post-conviction proceed-

135. *See Williams*, 526 U.S. at 1050.
136. 506 U.S. 364 (1993)
137. *Williams*, 120 S.Ct. at 1513.
138. *Id*. at 1515
139. *Id*. at 1521 (citing Williams v. Taylor, 143 F.3d 860, 870 (4th Cir. 1998)) (emphasis added).
140. *Id*. at 1518.
141. *Id*. at 1522.
142. *Id*. at 1523.
143. *Id*. at 1518.

ings.[144] Similarly, Congress ended funding for post-conviction defender organizations, which handled many post-conviction cases and assisted lawyers working on such cases.[145] These two changes have contributed greatly to the problem of ineffective assistance of counsel being provided to capital defendants.

Federalism has also been an underlying theme in some of the recent decisions and legislation limiting habeas petitions.[146] Congress and the Supreme Court have been increasingly reluctant to give federal courts much power to second-guess the decisions of state courts regarding appeals from capital sentences.[147] Another factor in this reluctance may be the public's negative perception of the appellate process and the view that inmates on death row use the courts to delay their executions with frivolous claims. The public does not want to see any more money "wasted" on capital appeals, a powerful force in convincing elected state judges to push for less interference from federal courts.

The nature of the current system of court appointments also may have contributed to increasing limitations placed on IAC claims, beginning with *Strickland.* There is an obvious conflict between the practice of appointing counsel and the lawyer's ethical obligation to be a zealous advocate for the client.[148] When lawyers are forced into complex, emotionally draining service and then compensated with minimal pay, they are unlikely to embrace their role with the zeal envisioned by the ABA. However, the use of full-time death penalty litigation centers also has its disadvantages, namely quick burnout, few resources, case overloads, and an increasing cynicism that interferes with counsel's ability to be an effective advocate. If courts acknowledge these systemic failings, more standards will be implemented that make the death penalty increasingly rare. But if this were to happen, it would become increasingly difficult for the Supreme Court to justify the constitutionality of the death penalty, given its past jurisprudence. Moreover, courts would face the unpopular task of thwarting the will of the majority, albeit a slender one, by abolishing the death penalty. There is also a long history of conflict between the public's understanding of the death penalty as an appropriate punishment for *any* guilty murderer and the principles of *Furman*, which makes it impossible for judges to uphold the will of the people *and* the Constitution, at least in the realm of capital punishment. The Court was unwilling to address these factors in its analysis in *Strickland*, because recognition of the broken system would require a *Furman*-type deci-

144. *See* Murray v. Giarrantano, 492 U.S. 1 (1989).

145. *See* Resolution, *supra* note 44.

146. *See, e.g., Williams*, 163 F.3d at 860; Lockhart v. Fretwell, 506 U.S. 364 (1993) (holding that the court making a prejudice determination under *Strickland* may not consider the effect of an objection it knows to be meritless under current governing state or federal law, even if the objection might have been meritorious at the time counsel failed to raise it). Both of these cases are based on challenges to the state supreme court's denial of habeas petitions, despite subsequent reversals by federal courts. Federal courts will be limited beyond the AEDPA in the future if the Supreme Court finds for the state in *Williams*, because it would allow state courts even greater latitude in determining how *Strickland* should be applied.

147. *See* Resolution, *supra* note 44.

148. *See* ABA Guidelines, *supra* note 31.

sion. Instead, the Court avoided the issue by letting appellate courts sort out the mess left by these conflicts and problems.

D. *Strickland* as Applied in IAC Claims: Inconsistency Stems from an Ambiguous Standard

There are numerous examples of cases that failed the *Strickland* test, as well as examples of cases that survived it. What is most striking in examining these cases, however, is the factual similarity between the winners and losers. Although the Supreme Court seemed to believe that its test would ensure consistency in appellate decisions on IAC claims, instead it has added another layer of arbitrariness that was found unconstitutional in *Furman.* In the discussion of the several cases that follow, it becomes disturbingly clear that *Strickland* did little more than assent to the practice of appellate judges disposing of IAC claims based on their personal view of the mitigating evidence the decisionmakers never heard or saw, because there does not seem to be any pattern to what type of information will pass muster and what will not. While *Strickland* implies that these contradictions are permissible when the sentencing body has been given some guidance in making its decisions,[149] because of this nation's long tradition of trusting juries to sort out the distinctions between seemingly similar facts, nothing in the Court's pre-*Strickland* jurisprudence would indicate that it is permissible for appellate courts to decide whether a defendant lives or dies based on *their* weighing of facts that were never heard by the constitutionally-sanctioned decisionmaker.

Many of the cases that have passed the *Strickland* test involve counsel's failure to investigate and present mitigation evidence at the sentencing phase.[150] While the mitigation evidence later investigated by appellate counsel varied from case to case, most courts seem to find that an absolute lack of a case in mitigation does not rise to the level of a constitutional violation. This is not surprising, because it is more or less the "mirror test"[151] that requires at least some participation by counsel. Because the cases discussed below provide sufficient examples of the kinds of information ineffective counsel can fail to discover, it is unnecessary to provide details from the above-mentioned cases. (Unfortunately, the number of ways in which lawyers can be ineffective is probably as great as the number of ways individuals can end up on death row.) Very few cases successfully raise IAC claims at the guilt level, typically because there is plenty of independent evidence of guilt; thus, any stumbling by counsel does not cast doubt on the reliability of the decision. Therefore, this section will focus on errors at the sentencing phase.

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149. *See Strickland*, 466 U.S. at 687-88.

150. *See, e.g.,* Dobbs v. Turpin, 142 F.3d 1383 (11th Cir. 1998); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985), *overruled on other grounds*, Peek v. Kemp, 784 F.2d 1479 (11th Cir. 1986); Rondon v. Indiana, 711 N.E.2d 506 (Ind. 1999); Busby v. Butler, 538 So. 2d 164 (La. 1988).

151. *See supra* note 57 and accompanying text.

In three recent cases, counsel performed so poorly that the defendant's IAC claim managed to scale the high barrier created by *Strickland*. In the first, the federal district court for the western district of Pennsylvania granted habeas relief to the petitioner, Lawrence Duane Christy, after a veritable fiasco of a trial.[152] Christy had been involuntarily committed to various mental health institutions over a number of years.[153] During that time, Dennis McGlynn had presided over his commitment proceedings.[154] McGlynn was also one of the prosecutors at Christy's capital trial, in which the prosecution dismissed Christy's claims of mental illness and labeled him "manipulative."[155] The trial judge, who refused to appoint a defense psychiatrist, had also presided at several of Christy's commitment proceedings.[156] Defense counsel failed to conduct a psychiatric evaluation and never investigated Christy's records; if he had, he would have discovered that McGlynn had already compiled records identifying Christy's mental illnesses as "active psychosis," "schizophrenia," and "organic brain syndrome."[157] During the sentencing phase, defense counsel only called Christy's mother and a witness who hurt the defense.[158] He also failed to object to any of the prosecution's arguments about the state of Christy's mental health.[159] Worse yet, counsel failed to object to the prosecution's request that the defendant crawl on the floor to act out the victim's death.[160] There were several other glaring errors made by the defense, but the failure to present evidence on Christy's mental illness was the most damaging. As a result, his petition for habeas corpus was granted.[161]

In another case, *Collier v. Turpin*, the sentencing phase began—without counsel's objection—at 8:00 p.m., shortly after the jury returned with a guilty verdict.[162] The jury retired to deliberate at 9:28 p.m., returning its sentencing verdict just after midnight.[163] For reasons that the circuit court found improbable, defense counsel believed that the judge had limited mitigating evidence to the defendant's reputation for truth and veracity.[164] As a result, he failed to introduce evidence about the defendant's character and uncontrolled diabetes, which a doctor later testified could have contributed to his irrational behavior the day of the murder.[165] According to the appellate petition, such evidence would have demonstrated that the defendant was a good family man, an up-

152. *See* Christy v. Horn, 28 F. Supp. 2d 307 (W.D. Pa. 1998).
153. *See id.* at 311.
154. *See id.*
155. *See id.* at 315.
156. *See id.* at 311.
157. *Id.* at 314.
158. *See id.*
159. *See id.*
160. *See id.* at 323.
161. *See id.* at 327.
162. *See* Collier v. Turpin, 177 F.3d 1184, 1188 (11th Cir. 1999).
163. *See id.*
164. *See id.* at 1194.
165. *See id.* at 1198.

standing public citizen who had once risked his life to save another, and a diabetic who had trouble controlling his behavior when not properly medicated.[166] Because counsel "presented almost none of the readily available evidence of Collier's background and character that would have led the jury to eschew the death penalty," the Eleventh Circuit granted the defendant's habeas petition with respect to his death sentence.[167]

As a final example of assistance found to satisfy the *Strickland* standard, a defendant in Louisiana was granted an evidentiary hearing on the issue of ineffectiveness of counsel at the sentencing phase.[168] Wilson, the defendant, contended that his attorney did not adequately investigate his background and formulate a defense based on mental incapacity.[169] The mitigation evidence provided on appeal showed that Wilson had a poverty-stricken childhood, had suffered a series of convulsions, possibly causing organic brain damage, had an I.Q. of sixty-six, often went without medical treatment, and had little education.[170] Further, he was diagnosed with schizophrenia at the age of seventeen, and had been in and out of foster homes and then jail.[171] Wilson's lawyer never investigated his mental problems, sought medical records, or had Wilson examined by a psychiatrist.[172] Because his lawyer failed to conduct a reasonable investigation, and the facts ignored may have provided a statutory mitigating circumstance, the court ordered a hearing on this issue.[173] Had the court failed to do so, Wilson would have been convicted by a jury who had only heard about his violent crime, but were completely unaware that the man they had sentenced was mentally ill.

There are, unfortunately, any number of cases that demonstrate similar facts, but are found not to satisfy the prejudice prong of *Strickland.* Several such cases are chronicled in a law review article that criticizes the way defense is provided in capital cases.[174] In one, a Texas defense lawyer failed to introduce any evidence about the client at the penalty phase.[175] His closing argument regarding sentencing was: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say."[176] The Fifth Circuit held that counsel's performance was reasonable as a "dra-

166. *See id.* at 1197. For a detailed explanation of the mitigating evidence that was not presented, see *Collier,* 177 F.3d at 1200 n.20. Incidentally, the lawyer found constitutionally ineffective in this case was also the attorney in *Dobbs v. Turpin*, 142 F.3d 1383 (1998).

167. *Id.* at 1202.

168. *See* Wilson v. Butler, 813 F.2d 664 (5th Cir. 1987).

169. *See id.* at 668.

170. *See id.*

171. *See id.* at 669.

172. *See id.*

173. *See id.* at 673.

174. *See* Bright, *supra* note 40.

175. *See* Romero v. Lynaugh, 884 F.2d 871 (5th Cir. 1989).

176. *Id.* at 875.

matic ploy," thereby denying relief.[177] As a result, the defendant was executed while the lawyer later was suspended for an unrelated reason.[178]

In a Georgia case, the defendant, John Young, was represented by a lawyer who was dependent on amphetamines and other drugs during trial.[179] His attorney was also "physically exhausted, suffering severe emotional strain, and distracted from his law practice because of marital problems, child custody arrangements, difficulties in a relationship with a lover, and the pressures of a family business."[180] He prepared little for trial and performed ineptly.[181] A few weeks after Young was sentenced to death, he encountered his lawyer in prison, where he had been sent after pleading guilty to federal and state drug charges.[182] Young was executed on March 20, 1985.[183]

In a case very similar in facts to *Collier v. Turpin,*[184] a trial attorney failed to present any evidence of defendant James Messer's severe mental impairment, his steady employment record, military record, church attendance, and cooperation with the police.[185] To make matters worse, counsel "repeatedly hinted [in his closing argument] that death was the most appropriate punishment for his own client."[186] Despite these omissions and errors, Messer was executed in 1988. In another Eleventh Circuit case, the court denied defendant's habeas petition where his attorney failed to investigate his background in any way or to have a psychiatric evaluation conducted, stating that "nothing Solomon [counsel] could have presented would have rebutted the testimony concerning Thompson's participation in the brutal torture murder."[187] While the facts of the murder were extremely gruesome and disturbing, it is likewise disturbing to read a court expressing the view that it had decided on death, regardless of the mitigating case. When an appellate court has that sort of reaction to the facts, is there any way it can fairly apply the *Strickland* test?

Judge Stephen Reinhardt of the Ninth Circuit tells a tale of ineffective assistance of counsel and judicial procedure gone awry that should make even proponents of *Strickland* reconsider whether it has changed anything.[188] Thomas Thompson was executed in 1998 for the rape and murder of Ginger Fleischli. He maintained that he was innocent of the crime until his death.[189] Both

177. *See id.* at 877.

178. *See* Bright, *supra* note 40, at 1859.

179. *See id.* (citing Affidavit of Charles Marchman, Jr. at 1-5, Young v. Kemp, No. 85-98-2MAC (M.D. Ga. 1985)).

180. *Id.* at 1859.

181. *See id.*

182. *See id.*

183. *See id.*

184. 177 F.3d 1184 (11th Cir. 1999); *see supra* text accompanying note 162.

185. *See* Messer v. Kemp, 760 F.2d 1080, 1088 (11th Cir. 1985).

186. Bright, *supra* note 40, at 1860.

187. Thompson v. Wainwright, 787 F.2d 1447, 1453 (11th Cir. 1986).

188. *See* Stephen Reinhardt, *The Anatomy of an Execution: Fairness vs. "Process,"* 74 N.Y.U. L. REV. 313 (1999).

189. *See* Thompson v. Calderon, 120 F.3d 1045 (9th Cir. 1997) (en banc), *rev'd and remanded*, 118 S. Ct. 1489 (1998), *decided on remand*, 151 F.3d 918 (9th Cir. 1998).

Thompson and his roommate, David Leitch, were charged with first-degree murder.[190] Initially, Leitch was the state's primary suspect, because he had previously dated the victim, had a record of violent behavior, and had threatened the victim in the past.[191] The prosecution believed that Leitch had a motive, because Fleischli (his ex-girlfriend) had been interfering with his attempts to reconcile with his ex-wife.[192] At the joint preliminary hearing, the prosecution presented the testimony of four jailhouse informants who stated that Thompson confessed that Leitch recruited him to help kill the victim, and that Thompson said he had engaged in consensual sex with the victim earlier that night.[193]

The facts of the case are quite detailed, involving questionable conduct by the prosecution, little assistance from trial counsel, and a series of miscommunications amongst members of the Ninth Circuit that resulted in Thompson's death. The most salient points are that the prosecution used two blatantly contradictory theories of the case to convict both Thompson and Leitch. At Thompson's trial, the prosecution contended that he had raped the victim and then killed her to keep her from talking.[194] The prosecution used the testimony of two notoriously untrustworthy jailhouse informants (different from the ones used in the preliminary hearing), who received better parole arrangements as a result.[195] Once Thompson was prosecuted, the state subpoenaed the informants used by the defense in his trial to testify for the prosecution at Leitch's trial, after having just attacked their credibility.[196] Leitch received a fairly light sentence, unlike Thompson.[197] The ineffective assistance claim was based on Thompson's counsel's failure to contest the assertion that the victim had been raped.[198] Not only was this the aggravating factor that made Thompson, who had no prior criminal record, death-eligible, but there was very little evidence of rape, and Thompson maintained that they had consensual sex, which was corroborated by the testimony of the original informants.[199]

The details of the murder and the prosecution are enough to fill an entire law review article, but for purposes of this discussion, trial counsel's performance is the main issue. With regard to the rape charge and his failure to present rebuttal evidence, Thompson's attorney later testified that "he planned to argue that David Leitch, not Thompson, inflicted those bruises . . . . [He] somehow

190. *See id.* at 1055.
191. *See Calderon*, 118 S. Ct. at 1494-95.
192. *See Calderon*, 120 F.3d at 1056.
193. *See id.*
194. *See id.*
195. *See Calderon*, 118 S. Ct. at 1503.
196. *See id.*
197. *See id.* at 1495.
198. *See id.* at 1496.
199. An autopsy of Fleischli showed no vaginal tearing or bruising, and the semen sample that was taken indicated that the victim had showered (the semen matched the blood type of both defendants). *See id.* at 1505. While the victim had bruises on her wrists, palms, ankles, and other places, one expert stated that the bruises were several weeks old, while another theorized that they could have been caused by the removal of the body after death. *See Calderon*, 120 F.3d at 1052.

found it unnecessary to pursue readily available evidence that would have undermined the State's rape case because his theory was that Leitch raped Fleischli, not that no rape occurred."[200] In addition, counsel advanced a theory of the case that contradicted the coroner's statement that there was "no anatomical evidence of rape."[201] In so doing, he allowed the jurors to believe that a rape had occurred and that perhaps Thompson was lying. The district court found this error to be both constitutionally deficient and prejudicial.[202] A panel of the Ninth Circuit reversed, however, finding that the state presented strong evidence of rape and that, even if counsel's performance was constitutionally deficient, Thompson could not demonstrate prejudice.[203]

It was at this point that procedural mishaps brought about an ugly division within the Ninth Circuit. Following the Ninth Circuit's reversal of the district court, Thompson filed a petition for rehearing and suggestion for rehearing en banc, which was sent to each active judge.[204] The panel denied his petitions, so he filed with the Supreme Court, which denied certiorari.[205] The Ninth Circuit then issued its mandate denying all habeas relief.[206] Thompson then tried to petition for habeas based on new evidence, which was really more of the same testimony regarding consensual sex;[207] he also filed with the Ninth Circuit to recall its mandate, which it refused to do. Two days before his set execution date, a divided en banc panel recalled the court's mandate—long past the deadline established in court procedures, due to a clerical error.[208] The en banc panel based its recall decision on the fact that, absent certain "procedural misunderstandings within [the]court," it would have called for en banc review of the underlying decision before issuing the mandate denying relief.[209] Second—and more important—it stated that the original panel's reversal of Thomspon's *Strickland* claim would result in a "miscarriage of justice."[210]

Sadly, no amount of doubt about the facts, the prosecutorial misconduct, or the guilt of Thompson mattered. The Supreme Court held the general rule to be that, where a federal court of appeals recalls its mandate *sua sponte* in order to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by habeas corpus jurisprudence and the AEDPA.[211] Because the Court held that Thompson failed to show a miscarriage of justice in this case, it found that the en banc panel had abused its discretion by violating its

200. *Id.* at 1052-53.
201. *Id.* at 1053.
202. *See id.* at 1496.
203. *See* Thompson v. Calderon, 109 F.3d 1358, 1365 (en banc).
204. *See* Calderon v. Thompson, 118 S. Ct. 1489, 1496 (1998).
205. *See* Thompson v. Calderon, 117 S. Ct. 2426 (1997).
206. *See* Thompson v. Calderon, 151 F.3d 918, 920 (9th Cir. 1998).
207. *See id.*
208. *See Calderon*, 118 S. Ct. at 1497.
209. *Id*.
210. *Id.*
211. *See id.* at 1502.

procedural rules, and it remanded the subsequent petition for habeas relief back to the Ninth Circuit, instructing it to determine whether Thompson had introduced any new evidence as provided for under the AEDPA.[212] Because the Ninth Circuit found that he had only reintroduced the same testimony about his having engaged in consensual sex, the court denied this habeas petition.[213] In the end, despite a majority of the en banc panel deciding that Thompson's execution would be a "miscarriage of justice," he was killed. Once again, the Supreme Court was able to avoid consideration of guilt and innocence by focusing on the process of the decision. The issue would never have gotten to this stage in the first place, had the Ninth Circuit not been able to use *Strickland* to justify its reversal of the district court's carefully reasoned opinion.[214]

V

CONCLUSION

A comparison of the cases that cleared the *Strickland* hurdle and those that did not suggests that all that really matters in IAC claims is the appellate court's view of the case. Despite familiarity with other cases and other juries in which evidence about mental health, family relationships, and abusive backgrounds have made a difference, appellate courts are still able to find that such evidence just would not have mattered in a particular case. The Supreme Court in *Strickland* fostered this kind of post-trial, ad hoc interpretation. All that guides the courts is a vague notion of professional norms, which are based on the knowledge that the practice of law runs the entire spectrum from grossly negligent to excellent, coupled with a prejudicial effect prong that allows judges to determine the importance of new information to the triers of fact. The result is unpredictable, arbitrary rulings on IAC claims brought post-conviction. Judge Reinhardt convincingly sums up the dismal state of affairs for capital defendants after *Strickland* in his tale of the Ninth Circuit's execution of Thomas Thompson:

> When the state is out to execute the accused at all costs, and the nation's highest court's primary interest is in establishing procedural rules that preclude federal courts from considering even the most egregious violations of a defendant's constitutional rights, it is time to step back and look at what we are doing to ourselves and our system of justice[215]

It is certainly time to reexamine a standard that eludes consistent application and that defeats the purpose of requiring effective assistance of counsel at the trial level. The Supreme Court should reconsider the constitutionality of adding yet another layer of confusion to death penalty jurisprudence.

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212. *See id.* at 1506.

213. *See* Thompson v. Calderon, 151 F.3d 918, 926 (9th Cir. 1998).

214. The district court judge who reviewed Thompson's petition wrote a 101-page opinion, after spending five years reading thousands of pages of trial transcripts and holding an evidentiary hearing at which he heard additional testimony. *See* Bright, *supra* note 40, at 327.

215. Reinhardt, *supra* note 188, at 352.