Marquette Law Review

Volume 93
Issue 2 *Symposium: Criminal Appeals: Past, Present, and Future*

Article 8

Taking *Strickland* Claims Seriously

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TAKING *STRICKLAND* CLAIMS SERIOUSLY

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Every criminal defendant is promised the right to the effective assistance of counsel. Whether at trial or on first appeal of right, due process is violated when attorney negligence undermines the fairness and reliability of judicial proceedings. That, at least, is the black-letter law articulated in Strickland v. Washington, *466 U.S. 668 (1984). In practice, however, the right to effective representation has meant surprisingly little over the last two decades. Under the standards that emerged from* Strickland, *scores of defendants have received prison or death sentences by virtue of serious unprofessional errors committed by their attorneys.*

This Essay canvasses a line of recent Supreme Court cases that have breathed new life into Strickland *as a meaningful guarantee of effective defense representation. These cases—all of which involved sentences of death—pointedly reject the understanding of* Strickland *that made it exceedingly difficult to prevail on ineffective-assistance claims. Although the new line of* Strickland *cases were undoubtedly motivated by concerns about the proper administration of the death penalty, the more rigorous understanding of* Strickland *should not be limited to capital cases. Whether or not the death penalty is at stake, appellate courts should be vigilant in policing the effectiveness of defense attorneys so that the determinative factor in criminal proceedings will be the strength of the government's case on the merits, not the weakness of the defense put forth by the lawyers for the defendants.*

I. INTRODUCTION

Important as it is in our adversarial system of justice, the right of criminal defendants to be represented by counsel rests on a contradiction. On the one hand, the right to counsel is deemed an essential component of due process—essential because a judicial system that denies suspects access to counsel for their defense is likely to produce inaccurate and unreliable outcomes.[1] Without lawyers, defendants, innocent and guilty alike, typically will have little hope of presenting credible defenses or successfully asserting their legal

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1. *See* Gideon v. Wainwright, 372 U.S. 335, 342–44 (1963) (incorporating the Sixth Amendment right to counsel against the states). In *Douglas v. California*, 372 U.S. 353, 356 (1963), the Supreme Court ruled that suspects also have the right to counsel in their first appeals of right (as distinct from discretionary and postconviction review proceedings). *Douglas* rested on due process as well as equal protection concerns. *See id*. at 356–58. The due process roots of the right to counsel can be traced back to at least *Powell v. Alabama*, 287 U.S. 45, 71 (1932), in which the Court ruled that, even apart from the Sixth Amendment, the Fourteenth Amendment's Due Process Clause itself requires the appointment of counsel in certain situations.

rights.[2] Mere access to counsel, however, is not enough to avert the danger of inaccurate, unreliable results. The attorneys who represent criminal defendants must actually discharge their responsibilities *effectively*—that is, with professional competence and diligence—in order for the criminal justice system to work properly.[3] So viewed, criminal defense attorneys are not the crafty individuals of the public imagination who subvert justice by getting the guilty off on technicalities. Instead, they are a salutary part of a criminal justice system in which the search for truth, and the rule of law, critically depends on the vigorous adversarial testing of criminal charges.

On the other hand, constitutional ineffectiveness doctrine treats the right to counsel as itself a technicality rather than a procedural safeguard to be taken seriously. The lower federal courts originally refused to grant relief for defense attorney blunders unless the attorney's poor performance rendered the entire proceeding a "mockery of justice."[4] Even after endorsing the standard of "reasonable competence" in *Strickland v. Washington*,[5] the Supreme Court framed the standard in such unforgiving terms, and applied it so strictly, that the new standard did little to actualize—and, indeed, *undermined*—the ideal of effective representation. For many years under *Strickland*, the Court repeatedly tolerated minimal effort and preparation by defense attorneys,

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2. The classic statement of this point comes from *Powell v. Alabama*:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 69.

3. Recognizing the vital linkage between access to counsel and attorney competence, the Court in *Powell* suggested that the relevant right is the right to the *effective* representation of counsel, not simply the right to counsel. *See id*. at 71 (holding that, to comport with due process, appointed counsel must give "effective aid in the preparation and trial of the case"); *see also, e.g.*, McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (stating that "the right to counsel is the right to the effective assistance of counsel"). Half a century after *Powell*, the Supreme Court extended the right to effective assistance to the appellate context. *See* Evitts v. Lucey, 469 U.S. 387, 397 (1985) (holding that in cases where the right to appellate counsel applies under *Douglas v. California*, attorneys must discharge their duties effectively).

4. *See, e.g.*, United States v. Long, 419 F.2d 91, 94 (5th Cir. 1969) (describing the "well established" rule that criminal defendants are not entitled to relief for attorney errors unless those errors are "of such a nature as to render the trial a farce and a mockery of justice which shocks the conscience of the court").

5. 466 U.S. 668, 690 (1984).

refused to hold defense attorneys to the minimum standards of conduct prescribed by the legal profession, and blindly deferred to strategic and tactical decisions by counsel. In stark contrast to the access-to-counsel cases, then, the ineffectiveness cases signaled that the right to counsel is not terribly important after all: in the vast majority of cases, all that really matters is that the defendant was represented by a licensed attorney.

Interestingly, the Supreme Court's recent ineffectiveness decisions have finally begun to take the right to counsel as seriously as the access-to-counsel cases would require. In a line of recent cases, the Court has granted relief to several defendants whose death sentences likely resulted from attorney error. These cases, which have not yet gotten the attention they deserve,[6] mark a dramatic shift from prior practice before and after *Strickland*. Now, the Court no longer ignores professional standards of conduct in deciding what constitutes constitutionally "effective" representation or tolerates minimal effort by counsel. Defense attorneys must, on pains of being faulted for ineffective assistance, diligently investigate and defend their clients' cases—in capital cases, at least.

This Essay explores the recent shift in ineffectiveness doctrine. Part II discusses the traditional, hands-off approach to regulating the effectiveness of defense attorneys. As the discussion indicates, that approach is one that essentially replaces the right to effective representation with the considerably more modest right to be represented by counsel—and, in doing so, compromises the accuracy and reliability imperatives that undergird the constitutional ideal of effective representation.

Part III canvasses recent cases that have begun to take the guarantee of effective representation of counsel seriously. At a minimum, these cases suggest that the Court has adopted a heightened standard of attorney performance in capital cases, where the defendant's life hangs in the balance. The Court finally appears to have recognized that its ongoing efforts under the Eighth Amendment to rationalize the imposition of the death penalty will be futile without renewed emphasis on the quality of representation that defendants receive in capital cases. Part IV contends that the more stringent standard of attorney effectiveness, though undoubtedly motivated by concerns over the administration of the death penalty, should not be limited to capital cases. In this respect, "death" is not "different": If the legal system truly does value the goals of accuracy and reliability, the right to counsel should be taken

6. The most extensive treatments to date are John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again":* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127 (2007), and Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283 (2008).

seriously in *all* criminal proceedings, not just capital cases.

II. *STRICKLAND V. WASHINGTON* AND INEFFECTIVE-ASSISTANCE CLAIMS

A. The Strickland *Standards (Plural)*

The governing standard for constitutional claims of ineffective assistance of counsel comes from *Strickland v. Washington*.[7] In that case, the Supreme Court held that defendants cannot prevail on ineffectiveness claims unless they prove both defective performance by their attorneys and legally cognizable prejudicial effect on the relevant outcome. Attorney performance is not defective unless, based on what the attorney knew or should have known at the time, his actions were "outside the wide range of professionally competent assistance."[8] No matter how poor the attorney's performance was, prejudice—defined as a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"—is required in order for a defendant to win relief.[9]

Although courts and commentators frequently refer to "the *Strickland* standard" in the singular, the reference is really something of a misnomer. The phrase is used as shorthand for the two-pronged, performance-and-prejudice test that *Strickland* announced. Unfortunately, the economy of words that the shorthand produces may come at the expense of a proper understanding of the law that *Strickland* announced. In addition to being descriptively false,[10] references to the performance-and-prejudice test as "the *Strickland* standard" suggest that it is the performance and prejudice requirements that determine the vitality of ineffectiveness doctrine in promoting the ideal of effective representation in criminal cases. This suggestion, however, is mistaken.

The basic approach in *Strickland*—to restrict relief to cases where it is

7. 466 U.S. 668, 690–92 (1984).

8. *Id*. at 690.

9. *Id*. at 694. Several violations of the representational ideal are so inherently prejudicial that they are reversible even if *Strickland* prejudice cannot be shown. Among these are denials of counsel, actual or constructive, and simultaneous representation of clients with conflicting interests. *See id*. at 692.

10. Properly understood, *Strickland* contains not one standard, but several. The first is a constitutional standard of performance for criminal defense attorneys (an "objective" standard of "reasonable competence"). *Id*. at 688, 696, 714. The second is a standard of prejudice telling courts when they may and may not grant relief for defective performance (reasonable likelihood that the outcome would have been more favorable to the defendant with effective representation). *Id*. at 696. The third encompasses a variety of meta-rules instructing courts how they should go about deciding whether or not defendants have met *Strickland*'s performance and prejudice standards. *Id*. at 696–97. For example, courts must evaluate performance without hindsight and cannot find prejudice based on lost opportunities for jury nullification. *See id*. at 689, 695.

reasonably likely that serious attorney error had a detrimental effect on the outcome—is not only sensible but entirely consistent with the ideal of effective representation. Error-free trials are impossible (or virtually so), and accurate and reliable outcomes can be reached in spite of attorney or other error.[11] In addition, retrials are quite costly, both in terms of judicial resources and the strong interest in preserving the finality of criminal convictions. These costs should not be lightly incurred.

Moreover, the constitutional ideal of effective representation does not seek to improve the quality of representation bar members provide. That laudable goal, after all, is the proper concern of law schools, state bar authorities, and legal professional organizations such as the American Bar Association (ABA). The Constitution is concerned about the level of competence of defense attorneys only to the extent attorney performance threatens the ability of the judicial system to reach accurate and reliable results in criminal cases.[12] Therefore, it makes perfect sense to condition relief for an ineffectiveness claim on proof that the unprofessional errors of the defense attorney likely had an adverse effect on the outcome.

Of course, there is much more to *Strickland* than simply the performance-and-prejudice test. There are also meta-rules instructing lower courts about how to apply each prong of the test. It is here that the true threat to the ideal of effective representation lies.

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11. This is why, for example, most constitutional criminal procedure claims are subject to harmless-error analysis, on both direct and collateral review, and precious few such claims (often collected under the heading of "structural error") are reversible per se, regardless of effect on the proceeding. *See generally* Arizona v. Fulminante, 499 U.S. 279, 306–07 (1991) (distinguishing "trial errors" that are subject to harmless-error analysis from "structural errors"). Of course, because a showing of prejudice is necessary to establish a *Strickland* violation, ineffectiveness claims are not subject to harmless-error analysis. The two-pronged *Strickland* test necessarily assumes that defendants are entitled to relief if it is reasonably probable that the outcome would have been more favorable to them had they been assisted by competent counsel. Not only is there no hint anywhere in *Strickland* that violations of the right to the effective assistance of counsel can be disregarded as harmless error, but *Strickland* specifically states that a successful ineffectiveness claim "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687. This is the language of a "structural defect," within the meaning of *Fulminante*, that defies harmless-error analysis.

12. As the *Strickland* majority noted:

> In giving meaning to the requirement [of effective assistance of counsel] . . . , 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. at 686. *But see id*. at 711 (Marshall, J., dissenting) ("Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.").

The meta-rules ensured that defense attorney actions would receive, at most, only minimal judicial scrutiny. Courts were basically left without standards to apply in deciding whether the attorney had provided professionally competent representation. Courts could not generate fixed constitutional rules about what attorneys should and should not do in particular circumstances. Such rules would be inappropriate, in the *Strickland* majority's view, because criminal defense is "art," not science, and there are a wide variety of different approaches that defense attorneys might responsibly take on any set of facts.[13] Naturally, the bar and legal professional groups generate standards to guide bar members, but *Strickland* dismissed legal professional standards as "only guides" to determining what constitutes effective representation, the implication being that attorney actions that violate governing professional norms can nonetheless be constitutionally adequate.[14]

In addition to being left without standards by which to decide whether attorney performance is objectively reasonable, courts were pointedly instructed to err on the side of rejecting *Strickland* claims. In this area, said the Court, judicial scrutiny "must be highly deferential," particularly when matters of strategy and tactics are at stake.[15] Accordingly, courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[16] To do otherwise and allow "[i]ntensive scrutiny of counsel," the Court feared, would "dampen the ardor and . . . independence of defense counsel" and "discourage the acceptance of assigned cases."[17] In combination, these meta-rules signaled that *Strickland*

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13. *Id*. at 681 (majority opinion); *see also id*. at 688 (rejecting the idea of "a checklist for judicial evaluation of attorney performance").

14. *Id*. at 688; *see also id*. at 693 (noting that "an act or omission that is unprofessional in one case may be sound or even brilliant in another").

15. *Id*. at 689.

16. *Id*.; *see also id*. at 690 ("[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."). The Court added that, in reviewing the reasonableness of defense attorney actions, judges must "eliminate the distorting effects of hindsight" by evaluating those actions "from counsel's perspective at the time." *Id*. at 689.

17. *Id*. Although the meta-rules described in the text concerned the performance prong, *Strickland* also described a rule concerning the application of the prejudice prong:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. . . . The assessment of prejudice . . . should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

claims are to be denied if there is *any* conceivable basis for rationalizing the attorney's actions.

B. The Strickland *Standards, As Applied*

To see the impact of the meta-rules announced in *Strickland*, consider the facts of that case. During a bizarre, ten-day crime spree, the defendant had committed multiple murders and related serious crimes. He turned out not only to be a public menace, but his own worst enemy in court. Against his court-appointed attorney's advice, the defendant pled guilty to all charges and waived his right to an advisory sentencing jury, opting instead to be sentenced by the trial judge.

Understandably beset with a "sense of hopelessness about the case,"[18] the attorney all but gave up on his client. Even though the defendant had told the court that his crimes were committed under extreme mental or emotional distress, his attorney did not request a psychiatric evaluation, which might have been used to avoid a death sentence. Instead of thoroughly investigating his client's background in search for potential character witnesses or other mitigating evidence, the attorney merely had a conversation with the defendant and two family members. Ultimately, the attorney threw his client on the mercy of the court, citing the defendant's admission of guilt and claim of emotional distress. The judge, not surprisingly, was unimpressed and imposed three death sentences.

The majority's resolution of the case before it powerfully underscored the message that *Strickland* claims are not to be taken seriously. Given that the aggravating factors were "utterly overwhelming"[19] and no significant mitigation evidence was ever found, the majority could simply have rejected the ineffectiveness claim for lack of prejudice. The majority, however, also went to great lengths to demonstrate that the lackluster effort of the defense attorney did not constitute defective performance. Where the dissent saw an attorney giving up on his client as a lost cause,[20] the majority saw a "strategic choice" to ignore potential grounds for mitigation based on psychological and character evidence and to focus almost entirely on his client's acceptance of responsibility.[21] To the majority, although this choice was not the product of

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Id. at 694–95. A later line of cases addresses the kinds of outcome effects that do, and do not, count as *Strickland* prejudice. *Compare, e.g.*, Glover v. United States, 531 U.S. 198 (2001) (incremental jail time resulting from attorney error counts) *with* Nix v. Whiteside, 475 U.S. 157 (1986) (loss of opportunity to present a perjured defense does not count).

18. *Strickland*, 466 U.S. at 672. For the facts on which the following summary is based, see *id*. at 671–75.

19. *Id*. at 699.

20. *See id.* at 717–19 (Marshall, J., dissenting).

21. *Id*. at 699 (majority opinion).

diligent investigation into the available alternatives, it was reasonable because psychological and character evidence would have been "of little help" if introduced and might have harmed the defendant's cause by prompting rebuttal from the prosecution.[22]

Here is where the Court seriously undermined the ideal of effective representation. The Court's application of the performance prong gave attorneys license to make precipitous judgments ruling out certain lines of defense very early in the case based on what amounts to speculation, as well as the ability to insulate those judgments against judicial scrutiny by uttering the magic words of "strategy" and "tactics." Common sense suggests that lawyers cannot reasonably decide to pursue certain lines of defense to the exclusion of others unless they have first investigated the pertinent options. Only then will they be in a position to exercise professional judgment, and to make reasonable strategic or tactical choices, about whether to pursue all lines of defense or, if a choice is necessary, about which should and should not be pursued.

The attorney in *Strickland* did not know—and could not possibly have known—what the potential psychological and character evidence was, much less how strong or weak it was. After all, he did not ask for a psychological examination and did nothing to seek character evidence other than speak with the defendant's wife and mother. For all the lawyer knew, there might have been "smoking gun" evidence supporting the defense's claim of severe emotional distress and compelling character evidence showing that, apart from this crime spree, he was a nonviolent person.[23]

Although the attorney could properly doubt how significant a character defense would be for someone accused of a spate of brutal murders, that most certainly was not the case for the psychological evidence. The attorney actually argued emotional distress, a statutory mitigating circumstance, at the penalty hearing as a ground for leniency. Having recognized the importance of that mitigating circumstance to the defendant's admittedly slim chances of avoiding a death sentence, any reasonable attorney would have known that, without testimony from a mental health professional or other evidence supporting the claim of severe emotional distress, the claim was sure to fail.

Needless to say, presenting psychological evidence would have opened

22. *Id*.

23. As it turned out, strong psychological or character evidence in favor of the defendant was never found, even on postconviction review, but the lawyer had no way to know at the time whether or not such evidence existed. This is significant because, under *Strickland*, attorney performance is judged "from counsel's perspective at the time." *Id*. at 689. In any case, the failure of postconviction counsel to find helpful mitigation evidence does not necessarily mean that no such evidence could have been found with reasonable diligence. It may simply mean that postconviction counsel was ineffective in his effort to prove the ineffectiveness of trial counsel.

the door to rebuttal, but that risk was clearly worth taking in the circumstances. In the face of the overwhelming aggravating factors, it was very unlikely, if not impossible, that the judge would credit an emotional-distress argument unsupported by evidence or rule out execution for a triple homicide simply because the defendant had admitted guilt. Facing such long odds, a reasonable attorney would have thrown caution to the winds and aggressively sought evidence supporting the emotional-distress claim, secure in the knowledge that, if the evidence turned out to be weak, the attorney could still make the mitigation argument without offering supporting evidence. If, as *Strickland* suggests, fear of possible rebuttal is an excuse, not just for not introducing evidence on a point, but also for not *investigating* what the evidence might be, then even the most inept or inattentive lawyer will have an ironclad response whenever challenged for ineffective assistance.

Of course, guilt was admitted and beyond doubt in *Strickland*, and so the defense attorney's decisions could not have undermined the reliability of the guilt determination. Nevertheless, those decisions were reasonably likely to have undermined the accuracy and reliability of the determination of the proper sentence. Even in noncapital cases, attorney errors that result in a more severe sentence are proper concerns of the ineffectiveness doctrine, no matter how small the incremental sentence.[24] Under Eighth Amendment doctrine, concerns about accuracy and reliability in sentencing are of heightened concern in capital cases. The goal is to ensure that the death penalty is reserved, in law and in fact, for the "worst" offenders and applied fairly, reliably, and evenhandedly.[25]

The lax performance standards adopted in *Strickland* pose a serious threat to the Eighth Amendment's goal of rationalizing the imposition of the death penalty. In order for capital juries to determine whether or not a defendant deserves death, defense attorneys must seek to humanize their client and develop and present grounds for showing mercy despite the seriousness of his crime. If prosecutors vigorously present the case for death—and elected prosecutors have every reason to do so to avoid potentially stigmatizing defeats—a lackluster defense effort will tend to skew the life/death balance in favor of death.[26] In that event, as Justice Thurgood Marshall argued in

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24. *See, e.g.*, Glover v. United States, 531 U.S. 198, 200 (2001) (ruling that incremental jail time resulting from attorney error constitutes *Strickland* prejudice).

25. *See generally* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361–403 (1995).

26. As I have explained elsewhere:

> Ordinarily, vigorous prosecution is an unmitigated good because it helps ensure that the truth-seeking function of criminal trials will be fulfilled. In the context

Strickland, the capital sentencing decision may well turn on lapses of lawyering, as opposed to constitutional and statutory standards concerning when death is, and is not, the appropriate sanction.[27]

The problem is deeper than simply performance standards that are too lax. Even in cases where defective performance can be shown, the meta-rules concerning prejudice make it difficult to overturn a death sentence on ineffectiveness grounds. Under *Strickland*, "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like" by the decision maker does not constitute prejudice.[28] This makes it difficult to reverse where, as in *Strickland* itself, the aggravating factors are strong. In those situations, it would seem, only a lawless sentencer could have rejected a sentence of death.

This rule that lost opportunities for "lawless" decision making cannot constitute *Strickland* prejudice makes sense at the guilt stage (where nullification is forbidden) and in determinate sentencing schemes (such as the then-mandatory Federal Sentencing Guidelines) that impose legally binding limits on sentencing discretion. After all, in those contexts, the relevant decision makers are bound to follow the legal standards that govern their decisions. The *Strickland* rule makes no sense at all, however, for the

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> of capital sentencing hearings characterized by severe resource constraints on defense counsel, however, the effect is not nearly so salubrious. Many resource-constrained defense attorneys (particularly those who lack extensive experience in capital litigation) focus their efforts on the guilt phase at the expense of the penalty phase. With astonishing frequency, the result is weak or nonexistent mitigation cases. For example, in the trials of forty of the 131 prisoners Texas executed from January of 1995 to June of 2000, defense lawyers presented "no evidence whatsoever or only one witness during the trial's sentencing phase." Given how unlikely resource-constrained capital defenders are to present serious cases in mitigation, the more effort and resources the prosecution invests at the sentencing stage, the less likely it will be that the jury's eventual life/death decision will accurately reflect whether or not the defendant truly deserves to die.

Smith, *supra* note 6, at 316–17 (footnotes and emphasis omitted).

27. Justice Marshall argued:

> The performance of defense counsel is a crucial component of the system of protections designed to ensure that capital punishment is administered with some degree of rationality. "Reliability" in the imposition of the death sentence can be approximated only if the sentencer is fully informed of "all possible relevant information about the individual defendant whose fate it must determine." The job of amassing that information and presenting it in an organized and persuasive manner to the sentencer is entrusted principally to the defendant's lawyer. The importance to the process of counsel's efforts, combined with the severity and irrevocability of the sanction at stake, require that the standards for determining what constitutes "effective assistance" be applied especially stringently in capital sentencing proceedings.

Strickland, 466 U.S. at 715–16 (Marshall, J., dissenting) (internal citation and footnotes omitted).

28. *Id*. at 694–95, 699–700.

life/death decision that capital sentencers make at the penalty phase.

Under Eighth Amendment case law, the fact finder is far more than simply a balancer of aggravating and mitigating circumstances. Its most important function, perhaps, is to serve as a dispenser of mercy—in the case of juries, to bring the mores of the community to bear on whether to spare the life of a defendant whom the law deems "death-eligible." Indeed, the Supreme Court has repeatedly ruled that a valid death penalty scheme must afford capital sentencers not only discretion, but *unfettered* discretion to impose a sentence other than death.[29] As even their most trenchant critic recognizes, these rulings mandate that "the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not 'deserve to be sentenced to death.'"[30] This description implies that, in "death" cases, defendants are entitled to seek leniency based on what *Strickland* derided as "lawless" grounds, even when the law defining death-eligibility and the balance of aggravating and mitigating factors would permit a reasonable jury to impose a sentence of death.

To be consistent with the jury's recognized role as a dispenser of mercy in capital cases, the definition of *Strickland* prejudice should allow for the possibility that sentencers might choose to exercise their constitutional prerogative to grant mercy to defendants who otherwise could lawfully be sentenced to death. The contrary definition of prejudice in *Strickland* fails to do so. By assuming that a reasonable likelihood of a different result cannot be shown when the aggravating factors are strong, the definition of prejudice treats capital juries as simple fact finders who balance aggravating and mitigating factors instead of making the distinctly moral judgment of whether the defendant should receive mercy despite the severity of his crime. *Strickland*'s narrow conception of the role of capital juries not only disserves the Eighth Amendment goal of allowing unrestricted opportunities for mercy in capital sentencing; it also creates perverse incentives for attorneys defending individuals convicted of capital crimes to ignore a core purpose of capital sentencing hearings—namely, to determine whether the defendant is morally (as well as legally) deserving of a death sentence. In cases where the aggravation evidence is strong, *Strickland* makes it all too easy for defense attorneys to defend tactical choices to focus on the guilt phase to the exclusion of the penalty phase, or to ignore a mitigation defense in favor of other defenses, or to simply throw the client on the mercy of the court.

In light of *Strickland*, it comes as no surprise that successful

29. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 608 (1978); Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

30. Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in judgment) (citation omitted).

ineffectiveness claims were rare, in capital and noncapital cases alike, over the ensuing decades. As one commentator reports: "Courts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable. In short, any 'lawyer with a pulse will be deemed effective.'"[31] It is difficult to imagine an outcome more at odds with the ideal of effective representation in criminal cases and, in capital cases, with the additional constitutional imperative of rational and evenhanded sentencing based on individual desert.

III. TAKING *STRICKLAND* CLAIMS SERIOUSLY (IN "DEATH" CASES)

Over the last few years, *Strickland* claims have received a markedly different reception in the Supreme Court. In 2000, the Court issued the first of a series of ineffective-assistance decisions that suddenly began to take *Strickland* claims—and hence the ideal of effective representation—seriously.[32] In each case, the defendant was sentenced to death after his lawyer failed to discover and present readily available evidence that would have constituted strong grounds for leniency. Each time, the Court found that the defense attorney had rendered ineffective assistance.

Considering the various meta-rules announced in *Strickland*, the safe bet would have been that each death sentence would be upheld. After all, the defense attorneys made (or arguably made) strategic decisions not to pursue the lines of inquiry that would have led to helpful mitigation evidence and to focus on other ways to avoid a death sentence. Without the benefit of hindsight, it seemed difficult for the "highly deferential" review that *Strickland* mandated to result in a finding that the attorneys had rendered ineffective assistance, and next to impossible in light of the strict standard of review that governs habeas corpus actions.[33] Nevertheless, in each case, the

31. Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (footnote omitted) (quoting Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999) (book review)). The infamous "sleeping lawyer" case was *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000), *vacated en banc*, 262 F.3d 336 (5th Cir. 2001), in which the defendant challenged his capital conviction on the ground that his lawyer had slept through entire portions of the trial. Rejecting the notion that prejudice should be presumed in these circumstances, the panel majority ruled that the defendant could not win without showing that he suffered *Strickland* prejudice as a result of something that happened while his attorney dozed. *Id*. at 964. The en banc court disagreed and ruled that prejudice should be presumed when a defense lawyer sleeps through substantial parts of his client's capital trial. *See* Burdine v. Johnson, 262 F.3d 336, 349 (5th Cir. 2001) (en banc). The panel decision in *Burdine*, though extreme, illustrates how dismissive many courts have been of ineffectiveness claims.

32. *See* Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000).

33. Under the Antiterrorism and Effective Death Penalty Act, federal courts may not grant habeas relief to a state prisoner unless the the state court outcome was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2006). This provision means that federal courts cannot

Supreme Court ruled in favor of the death row inmate, concluding that he had received ineffective assistance at the penalty phase. Where it was once concerned about deferring to strategic choices and not restricting the autonomy of defense attorneys, the Court now insists that attorneys representing individuals charged with capital crimes must investigate mitigation evidence and other potential grounds for avoiding a death sentence with reasonable diligence and professional competence. Thus, at least in death penalty cases, *Strickland* claims are now being taken seriously.

A. Mitigation Evidence: Williams v. Taylor *and* Wiggins v. Smith

1. *(Terry) Williams v. Taylor*

The first of the new *Strickland* cases was *(Terry) Williams v. Taylor*.[34] In that case, the defense attorney did not even begin to prepare for the penalty phase until a week beforehand.[35] Not surprisingly, the defense failed to discover a treasure trove of mitigating evidence, including records showing that the defendant was borderline mentally retarded and had endured what the majority described as a "nightmarish childhood" of severe physical abuse and neglect.[36] The attorneys also failed to offer evidence from state correctional officers who offered to testify that the defendant would not be a danger in prison and failed to return the call of a prominent prison ministry volunteer who volunteered to testify for the defendant. Having failed to discover any grounds for leniency, all the attorney could do was plead for mercy based on his client's voluntary confession.[37] The jury sentenced the defendant to death.

By a vote of 6–3, the Supreme Court overturned the sentence. Justice John Paul Stevens wrote for the majority that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background."[38] In support of the notion that defense attorneys must conduct a background investigation in search of mitigating evidence, the Court cited only the ABA's *Standards for Criminal Justice*[39]—the kind of professional

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grant habeas relief based merely on a conclusion that the state court committed constitutional error. In order for relief to be proper, the state court's articulation or application of federal law has to be so wrong, in light of clearly established Supreme Court precedent, as to be deemed "unreasonable." *See, e.g*, *Williams*, 529 U.S. at 412–13.

34. 529 U.S. 362 (2000). There was a separate ruling in 2000 by the Supreme Court in another Virginia case involving a different petitioner named Williams. All citations and references in this Essay to *Williams v. Taylor* concern the case involving Terry Williams.

35. *Id*. at 395. For the discussion of the facts, see *id*. at 367–74, 395–96.

36. *Id*. at 395–96.

37. Even then, the attorney told the jury that his client's decision to come forward was "dumb" and proceeded to explore why jurors would find it very difficult to spare his client's life. *Id*. at 369.

38. *Id*. at 396.

39. *Id*.

norms that *Strickland* had dismissed decades earlier as "only guides."[40] Although the proper scope of investigation could be considered a matter of "strategy" entitled to substantial deference under *Strickland*, the *Williams* majority ruled that no deference was due to counsel's choice. By their own admission, the reason the attorneys did not seek the records containing the helpful background information was that they incorrectly believed those records were nondiscoverable.[41] Having failed to make a defensible strategic choice not to investigate mitigation evidence, the attorneys committed defective performance in not conducting such an investigation.

The Court further ruled that the failure to investigate prejudiced the client in his effort to avoid a death sentence. Had counsel conducted a reasonable investigation into mitigating evidence, they would have discovered a wealth of evidence about their client's tragic background, evidence constituting strong grounds for leniency. The dissent, however, had a strong counterargument based on *Strickland*. As in *Strickland*, the mitigation evidence would likely have made no difference in the outcome given the "overwhelming" nature of the prosecution's evidence that the defendant would be a future danger unless executed.[42] Thus, even if the attorneys performed defectively by not discovering the helpful evidence, their client suffered no prejudice and hence could obtain no relief.

The majority held that the strength of the aggravation evidence did not preclude a finding of prejudice. Although the mitigation evidence "may not have overcome a finding of future dangerousness, the graphic description of Williams's childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."[43] In other words, given the wide discretion that capital juries have to grant leniency, the helpful evidence need not "undermine or rebut the prosecution's death-eligibility case."[44] The defendant was prejudiced if, as was the case, it might have influenced the jury's decision that, as a moral matter, he deserved death. On these grounds, the Court made history by invalidating a death sentence on *Strickland* grounds.

2. *Wiggins v. Smith*

Three years later, the Supreme Court decided *Wiggins v. Smith*.[45] In that

40. Strickland v. Washington, 466 U.S. 668, 688 (1984).

41. *Williams*, 592 U.S. at 395.

42. *Id.* at 418–19 (Rehnquist, C.J., concurring in part and dissenting in part). Essentially, the dissent's point was that the evidence of future dangerousness was so strong that only a lawless jury could have chosen a life sentence over death.

43. *Id.* at 398 (majority opinion).

44. *Id.*

45. 539 U.S. 510 (2003).

case, the public defenders representing the defendant had social services records indicating that their client had suffered an abusive childhood and had experienced serious emotional difficulties in his youth as he was shuttled among various foster homes.[46] Based on their own statements at the penalty phase, the defense knew that these records showed that "Kevin Wiggins has had a difficult life" and that "[life] has not been easy for him."[47]

Nevertheless, the defense did not follow up on the leads they had. Although the local practice in their jurisdiction was to request preparation of a "social history" covering the background of defendants facing the death penalty (which would have been prepared for the defense, free of charge, by a social worker), the defense did not ask for a social history—a move the state trial court later characterized as "absolute error."[48] Consequently, the defense went into the sentencing phase ignorant of other records documenting, in even more graphic detail, the defendant's "excruciating life history" of severe physical and sexual abuse and privation.[49] Counsel also failed to present the records they did have, or any other evidence, concerning the defendant's "difficult life." Accordingly, the only arguments presented against a death sentence were that Wiggins was not primarily responsible for the victim's death and that Wiggins had no prior convictions, arguments the jury rejected.[50]

Wiggins was a much stronger case for the prosecution than *Williams* on the performance issue. In *Williams*, the defense lawyers mistakenly thought the documents containing mitigating evidence were not discoverable; they were thus unaware of the potential mitigating evidence and could do little more than throw their client on the mercy of the court. In *Wiggins*, by contrast, the defense did search for mitigation evidence and had learned, at least in broad outlines, of a potential mitigation defense based on the defendant's background. The failure to discover and present the detailed mitigation evidence found on postconviction review seemingly reflected a

46. *Id*. at 523, 525.

47. *Id*. at 515 (internal citation and quotation marks omitted).

48. *Id*. at 517, 524 (internal citation and quotation marks omitted).

49. *Id*. at 537. The abuse included multiple episodes of sexual molestation and outright rape while in various foster care facilities. *Id*. at 517. It also included regular abandonment as a child, with no source of food for days on end other than "beg[ging] for food" and "eat[ing] paint chips and garbage." *Id*. at 516–17. *See generally id*. at 516–18 (discussing results of social history prepared on postconviction review).

50. *Id*. at 515, 537. To be fair, the defendant's lawyers had vigorously sought to have the penalty phase bifurcated so that they could lead with their preferred defenses and, in the event those defenses failed, fall back on a mitigation defense. According to defense counsel, when the trial court denied the bifurcation motion, they decided to drop the mitigation defense rather than take the risk that it might detract from their arguments about the client's secondary role in the murder and lack of prior criminal record. *Id*. at 515.

choice by counsel to focus on lines of defense they regarded as more promising than a mitigation defense. The choice among potential lines of defense, not to mention how far to search for helpful evidence, would appear to be exactly what *Strickland* had in mind by "strategic" decisions that receive, at most, only highly deferential review.

Nevertheless, the Supreme Court again ruled for the prisoner—this time, by an even wider (7–2) margin. As in *Williams*, the Court cited ABA standards requiring defense attorneys to search for mitigation evidence in capital cases; this time, however, the Court also looked to local practice as informing the ineffectiveness inquiry. It was "standard practice" in Maryland capital cases to have a thorough social history prepared gathering and synthesizing potential mitigation evidence based on the background and life history of the defendant.[51] The Court saw no valid reason for counsel to have departed from that practice in Wiggins's case: counsel already had reason to suspect that promising mitigation evidence would be found in the client's background, and the report would have been prepared, at no cost, for the defense.

The majority refused to defer to counsel's choice as a strategic decision not to expand their investigation into the defendant's background or request a social history. Far from supplying an accurate explanation of counsel's actions, the claim of tactics was merely a "*post hoc* rationalization," an effort, in effect, to provide cover for their serious errors of judgment.[52] As the Court viewed the case, counsel's failure to discover and present mitigation evidence "resulted from inattention," the very antithesis of the professional judgment and skill that attorneys are obligated to bring to bear on behalf of their clients.[53]

Significantly, the defense's decision could not be upheld even if viewed as a strategic decision. Citing *Strickland*, the Court ruled that the deference due to strategic decisions critically depends on the degree of investigation on which those decisions are based: "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'"[54]

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51. *Id*. at 524.

52. *Id*. at 526–27. The majority noted, for example, that although counsel claimed to have made the tactical decision not to present a mitigation defense, their own opening statement at the penalty phase belied that claim. *Id*. at 526. The defense signaled that they were going to put on a mitigation defense, telling the jury that "'Kevin Wiggins has had a difficult life'" and that "'[life] has not been easy for him.'" *Id*. at 515 (citation omitted).

53. *Id*. at 526.

54. *Id*. at 533 (citation omitted) (quoting Strickland v. Washington, 466 U.S. 668, 690–91

Here, as Maryland's local practice suggested, it was unreasonable to short-circuit the search for mitigation evidence and to forgo the social history, particularly given that counsel already knew, as they would tell the jury at sentencing, that their client had had a "difficult life." With such promising early returns on the mitigation issue, any reasonably competent lawyer would have delved deeper to get a better idea of what mitigation evidence was available.[55] Absent reasonable investigation into the potential mitigation evidence, the majority concluded, "counsel were not in a position to make a reasonable strategic choice" to write off a mitigation defense.[56]

The issue of *Strickland* prejudice was more straightforward. Although counsel insisted that they made a conscious decision to forgo a mitigation defense, the majority believed it reasonably probable that, once they had seen how powerful the background evidence was, even they would have introduced it.[57] Had they done so, the jury might have been moved by the defendant's "excruciating life history" to show leniency. Importantly, even if some jurors (or a majority of jurors) might nonetheless have voted for a death sentence, prejudice still existed. Given the requirement under Maryland law that the death penalty cannot be imposed without juror unanimity, it was enough that "at least one juror" might have opted for leniency if apprised of the mitigation evidence.[58]

B. Aggravation Evidence: Rompilla v. Beard

In the last of the trilogy of new *Strickland* cases, *Rompilla v. Beard*,[59] the Supreme Court considered the duty of defense attorneys to investigate possible grounds for disproving or minimizing the aggravating factors identified by prosecutors. The prosecution sought to prove an aggravating factor with testimony from someone whom the defendant had attacked decades earlier under allegedly similar circumstances.[60] Nevertheless, the

(1984)).

55. *Id*. at 534.

56. *Id*. at 536. The majority was careful to disclaim any suggestion that defense attorneys must always present mitigation evidence in capital cases, leaving open the possibility that attorneys might reasonably elect, after due investigation, to bypass potential mitigation defenses in favor of other defenses. *See id*. at 533.

57. With the voluminous, and quite graphic, evidence of severe childhood abuse and mental deficiencies that was later discovered, a reasonable attorney would have concluded that a mitigation defense was not only strong but arguably stronger than the other defenses counsel presented. Coupled with the fact that mitigation evidence was not inconsistent with the other defenses, a reasonable attorney likely would have opted to present a mitigation defense alongside the other defenses. *Id*. at 535.

58. *Id*. at 537.

59. 545 U.S. 374 (2005).

60. *Id*. at 383–84.

public defenders who represented the defendant did not even investigate the prior crime (which was a matter of public record open to public inspection in the courthouse's files), much less challenge the prosecution's account of the prior crime.[61] The jury seemed to be looking for grounds on which to show mercy—it even cited, as a mitigating factor, the fact that the defendant had a young son who testified that he loved his father and would visit him in prison if his father's life was spared[62]—but was given nothing to counter the prosecution's aggravation evidence and no mitigation evidence of the kind presented in *Williams* and *Wiggins*. The sentence was death.

Again, the Supreme Court reversed. Though clearly troubled by the various shortcuts the defense team took in the search for mitigation evidence—which led them to miss helpful background evidence that presented strong grounds for mercy—the Court did not rest its decision on the shortcomings of the mitigation case. The attorneys' ineffectiveness lay in their failure to investigate the circumstances of the prior crime cited by the prosecutor as an aggravating factor.[63]

Disregarding *Strickland*'s mandate that attorney autonomy should not be restricted by hard-and-fast rules about how to represent their clients, the majority announced a sweeping duty to investigate in capital cases. "It is the duty of the lawyer," the Court ruled, "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction."[64] The Court grounded that unyielding duty squarely on several provisions of the ABA's *Standards for Criminal Justice*, essentially treating those "guides" under *Strickland*, in the dissent's words, "as if they were binding statutory text."[65]

The majority, however, was unmoved by the criticism. In its view, it "flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence."[66] This is because defense attorneys who fail to investigate the aggravating factors on which the prosecution intends to rely at the penalty phase "seriously compromis[e] their opportunity to respond to a case for aggravation" and allow prosecutors who are so inclined to misstate the evidence or conceal helpful evidence from the jury.[67] That is why, for example, the *Standards for Criminal Justice*

61. *Id*. at 384–85.

62. *Id*. at 378.

63. *Id*. at 383.

64. *Id*. at 387 (quoting STANDARDS FOR CRIMINAL JUSTICE §§ 4–4.1 (2d ed. 1982 Supp.) [hereinafter STANDARDS]) (internal quotation marks omitted).

65. *Id*. at 400 (Kennedy, J., dissenting).

66. *Id*. at 389 (majority opinion).

67. *Id*. at 385–86.

admonish defense attorneys that their investigation "should include efforts to secure information in the possession of the prosecution and law enforcement authorities."[68]

The duty to investigate is not necessarily as sweeping as the language from *Rompilla* might suggest. The operative test, as the Court made clear, remains what a "reasonable lawyer" would do in a particular case.[69] A lawyer could reasonably decide not to pursue a line of investigation that amounts to a fishing expedition or would be so boundless and resource-intensive as to be impracticable. Consequently, the *Rompilla* majority cautioned that a defense lawyer is not required to "look[] for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there,"[70] or to examine "warehouses of records" in the search for helpful evidence.[71] In such circumstances, reasonable attorneys will necessarily limit the scope of their investigation.

Nevertheless, evidence that defense attorneys know the prosecution will use in aggravation at the penalty phase is in a very different category. As the Court declared, "defense counsel *must* obtain information that the State has and will use against the defendant [in aggravation]."[72] This duty is so important to the accuracy of the adjudicative process in general, and of the capital sentencing process in particular, that the majority was unable to "think of any situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities."[73] Therefore, in order to render effective assistance at the penalty phase of a capital case, defense counsel must make reasonable efforts to investigate the aggravating factors cited by the prosecution and, more generally, to find out everything that the government knows about the

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68. *Id*. at 387 (quoting STANDARDS, *supra* note 64, at §§ 4–4.1) (internal quotation marks omitted and emphasis added).

69. *Id*. at 389; *see also id*. at 381 (stating that attorney performance is measured against a "standard of reasonableness applied as if one stood in counsel's shoes").

70. *Id*. at 389.

71. *Id*. at 386 n.4, 389; *see also id*. at 382–83 (cautioning that "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up").

72. *Id*. at 387 (emphasis added).

73. *Id*. at 387 n.6. That was most certainly true in *Rompilla*, as the concurrence argued:

> [T]he prosecutor clearly planned to use details of the prior crime as powerful evidence that Rompilla was a dangerous man for whom the death penalty would be both appropriate punishment and a necessary means of incapacitation. This was evidence the defense should have been prepared to meet: A reasonable defense lawyer would have attached a high importance to obtaining the record of the prior trial, in order to anticipate and find ways of deflecting the prosecutor's aggravation argument.

Id. at 394 (O'Connor, J., concurring) (citation omitted).

case.

Even more interesting than what *Rompilla* had to say about the duty to investigate is the context in which the Court said it. One might infer from the finding of defective performance in *Rompilla* that the defense team had missed available grounds for undermining the prosecutor's claim that the prior crime was an aggravating factor. That inference, however, would be incorrect. Although the defective performance in *Rompilla* was the failure to investigate the aggravating factors, the prejudice concerned missed mitigation evidence. Had the defense searched the court file on the prior crime for grounds to counteract the prosecutor's aggravation evidence, the majority ruled, they "would have found a range of mitigation leads that no other source had opened up," revealing a history of severe mental illness, child abuse, and alcoholism[74]—a theory of prejudice, as the dissent tendentiously put it, based on "serendipity" in that by investigating the aggravation evidence the defense would have "stumbled across" previously undiscovered mitigation evidence.[75]

Rompilla is significant because it forces defense attorneys to approach capital sentencing hearings in the same holistic fashion that prosecutors do. Instead of focusing their investigative efforts just on "their" part of the case (namely, the mitigation case), defense attorneys must investigate the *entire* case. By pushing defense attorneys to try to learn as much as they can about the case as a whole (and, ideally, everything that the government knows about the case), the constitutional duty to render effective assistance will help ensure that *both* sides of the life/death balance jurors must strike in capital cases will receive meaningful adversarial testing, instead of just the mitigation side of the balance. To the extent that happens, the life/death decision will be better informed and more likely to reflect true individual desert, as Eighth Amendment precedent demands, and less likely to be skewed by arbitrary factors such as attorney performance and resource disparities between prosecution and defense.

C. Strickland *and the "Politics of Death"*

It is hardly coincidental that capital cases gave rise to the Supreme Court's new, more solicitous approach to *Strickland* claims. Cases such as *Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard* are best understood as an effort to reshape ineffective-assistance doctrine in light of the deleterious effects of the "politics of death" on the administration of the death penalty.[76]

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74. *Id*. at 390 (majority opinion).

75. *Id*. at 405 (Kennedy, J., dissenting).

76. The following passage captures the essence of the politics of death:

> With the death penalty established as a highly salient political issue, politicians

By virtue of the politics of death, indigent capital defense is notoriously underfunded, both in absolute terms and in comparison to prosecutors, particularly in states that lead the nation in executions, such as Texas and Virginia.[77] The underfunding of indigent capital defense, in turn, makes it exceptionally difficult for the lawyers who represent indigent capital defendants to conduct the exhaustive investigation necessary to discover helpful evidence at sentencing—which, as *Williams* and its progeny show, can mislead juries into imposing death on defendants who had strong grounds for leniency that the jurors never got to hear or see developed in a professionally competent manner.[78] A rational, fairly applied death penalty cannot be attained as long as resource constraints cripple public defenders and appointed counsel in the effort to discover and develop evidence to counteract the aggravation evidence that prosecutors, with their significantly greater levels of funding,[79] vigorously present in capital cases.

> have strong institutional incentives to make death sentences easier to achieve. Legislatures expand the scope of the death penalty and restrict access to the courts for prisoners on death row. Most importantly, legislatures tie the hands of indigent defenders by denying them the funding and resources that they need, and that prosecutors receive, to be effective in resource-intensive capital trials. Prosecutors have incentives to use the death penalty as leverage to get defendants to plead guilty and, in cases where death will not be traded for guilty pleas, to win and carry out death sentences. As resource-constrained capital defenders get steamrolled by prosecutors determined to win even at great cost, juries are given inadequate reasons for showing leniency (even when compelling reasons exist) and thus often respond with verdicts of death. Try as they might, state judges are, in the final analysis, unable to counteract the push toward death, and state governors will usually have strong incentives, except in clear cases of actual innocence or major failures of the judicial process, to punt the life/death decision to the courts.

Smith, *supra* note 6, at 285–86.

77. *See generally id*. at 302–07 (explaining that legislatures better fund prosecutors than indigent defenders because doing so facilitates punishing crime, an outcome voters desire).

78. Justice O'Connor, who not only authored *Strickland* but was in the majority in *Williams*, *Wiggins*, and *Rompilla*, has openly worried that the death penalty is skewed by the poor representation that indigent defendants receive. *See* Maria Elena Baca, *O'Connor Critical of Death Penalty: The First Female Supreme Court Justice Spoke in Minneapolis to a Lawyers' Group*, STAR TRIB. (Minneapolis, Minn.), July 3, 2001, at A1. In a 2001 speech to a Minnesota women's bar group, Justice O'Connor expressed serious doubts "about whether the death penalty is being fairly administered in this country." *Id.* (internal quotation marks omitted). As proof, she cited grisly statistics from Texas indicating that "those who were represented by appointed defense attorneys were 28 percent more likely to be convicted than were those who had retained their own attorneys; if convicted, they also were 44 percent more likely to be sentenced to death." *Id*. Based on this phenomenon, Justice O'Connor suggested that "it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used." *Id*. (internal quotation marks omitted).

79. *See generally* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 394–95 (1995) (citing figures showing that "[p]rosecutors receive on average more than three times the funding that is provided to

Seen in this light, the Supreme Court's renewed interest in the right to effective assistance of counsel in capital cases makes perfect sense. The undemanding standard of effectiveness adopted in *Strickland* contributed to a death penalty that is applied haphazardly by giving the political branches carte blanche to use resource constraints to stack the deck against indigent defendants in capital sentencing hearings. This result is ironic indeed: while the Court's Eighth Amendment cases insist that death penalty schemes be structured in ways that promote rationality and fairness in the application of the ultimate sanction,[80] the Court's Sixth Amendment cases, from *Strickland* until *Williams*, tolerated—and, in light of death's politics, essentially *guaranteed*—that the goals of the Eighth Amendment cases would remain largely unfulfilled. With *Williams* and its progeny, the Court has finally harmonized the two divergent strands of cases, making it more likely that capital sentencers will receive the information they need to make reasoned appraisals of whether particular defendants deserve death or leniency.

defenders in the United States" and explaining that "the differential is really much greater than that figure indicates").

80. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (invalidating death penalty schemes that allow arbitrary imposition of death sentences as violative of the Cruel and Unusual Punishment Clause).

IV. "DEATH" MAY NOT BE ALL THAT "DIFFERENT" AFTER ALL: TAKING *STRICKLAND* CLAIMS SERIOUSLY (IN *ALL* CASES)

As previously explained, the new *Strickland* cases have a lot to say about the death penalty. It is tempting to conclude that they speak *only* to capital cases and, consequently, have nothing at all to say about how ineffectiveness challenges should be treated in other cases. There is much to be said for this view—after all, the Supreme Court often treats the death penalty as "different" and hence subject to more stringent safeguards,[81] and attorney error is widely believed to be an especially serious problem in complex, resource- and labor-intensive capital cases.[82] These facts, coupled with the Court's failure, to date, to apply heightened standards of effectiveness in noncapital cases, add up to strong grounds for concluding that the Court has essentially adopted a heightened standard for attorney performance that is reserved for capital cases only.

Nevertheless, closer inspection reveals that there is a decent case to be made that the recent ineffectiveness cases should apply to all criminal prosecutions. To restrict the new *Strickland* decisions to capital cases is to ignore several key changes they worked in ineffectiveness doctrine. These changes take aim at the *Strickland* meta-rules that led courts not to take ineffectiveness claims seriously in the first place. Just as these changes in ineffectiveness doctrine resulted in more vigorous review of attorney error in capital cases, so too should these changes lead courts to take *Strickland* claims more seriously in cases involving lesser sanctions.

A. Distinguishing Strategy from "Strategery"[83]

Strickland was read for many years as creating a "magic words" jurisprudence of sorts. Whenever an attorney committed an error, all that seemed necessary was for the attorney to say "strategy" and, lo and behold, even the most egregious and prejudicial errors could be made to vanish. Indeed, when attorneys failed to utter the magic word, courts were all too eager to supply the necessary incantation for them, upholding as strategic

81. *See, e.g.*, Steiker & Steiker, *supra* note 25, at 397–401. For a recent critique of the death-is-different approach, see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009).

82. *See generally* Smith, *supra* note 6, at 302–07.

83. *See generally* Wikipedia.org, Strategery, http://en.wikipedia.org/wiki/Strategery (last visited Jan. 7, 2010). The word "strategery" was first used in a *Saturday Night Live* sketch aired October 7, 2000, satirizing the performances of Al Gore and George W. Bush, two candidates for President of the United States, during the first presidential debate for election year 2000. Comedian Will Ferrell played Bush and used the word "strategery" (a play on "strategy") to satirize Bush's tendency to mispronounce words. *Id.* I use the term "strategery" here to refer to litigation tactics that purport to be strategy, but are anything but strategic.

choices decisions that even the attorney involved may have attributed to another ground.[84] To do otherwise was seen as inconsistent with meta-rules in *Strickland* suggesting that it is improper and beyond the judicial ken for courts to second-guess attorneys on matters that might reflect strategy calls.

A key component of the new approach to ineffective-assistance claims after *Williams v. Taylor* is recognition of the overriding need to distinguish between "strategery"—attorney blunders masquerading as "strategy"—from tactical decisions that are exercises in sound professional judgment and thus deserving of judicial deference. Where *Strickland*, as originally understood, made it all too easy for defense attorneys to defend errors of judgment as tactical moves that, as (bad) luck would have it, ended in disaster for the client, courts are now instructed to view self-serving invocations of "strategy" by counsel with a jaundiced eye. Far from requiring reflexive deference to claimed exercises of strategic judgment, the judicial role actually demands that judges carefully probe claims of "strategy" for accuracy (as an account of counsel's actual thought process at the time of the challenged decision) and reasonableness in light of the circumstances of the case. By smoking out pretextual claims of "strategy" and sorting tactical decisions that are the product of reasonable professional judgment from those that are not, the objective is to ensure that judicial outcomes are not skewed by serious attorney error.

Wiggins v. Smith illustrates both aspects of the current heightened scrutiny for claims of "strategy." After delivering an opening statement telling jurors that the defense would use their client's "difficult life" as mitigation evidence warranting leniency, the lawyers failed to present any mitigation evidence. That did not stop them from claiming that they had made a strategic decision to rely on grounds for defense other than mitigation evidence at the penalty phase. The Court rejected the strategy claim as merely a "*post hoc* rationalization," citing the defense's opening statement as proof that they had not, in fact, opted against a mitigation defense.[85] Moreover, even though it might be reasonable to give up a mitigation defense in some cases (perhaps

84. For example, in *Strickland*, the attorney admitted that it was a bout of "hopelessness" about the client's fate that caused him to cut short his efforts on the client's behalf, a fact the dissent understandably stressed. *See* Strickland v. Washington, 466 U.S. 668, 718 (1984) (Marshall, J., dissenting) (internal citation and quotation marks omitted). The majority, however, refused to accept the attorney's admission and said that "counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on [the client's] acceptance of responsibility . . . ." *Id*. at 699 (majority opinion).

85. Wiggins v. Smith, 539 U.S. 510, 526–27 (2003); *see also id*. at 526 (stating that counsel's "failure to investigate thoroughly resulted from inattention, not . . . strategic judgment"). In *Wiggins*, the Court refused to credit the attorney's testimony that the defense team already knew the matters they were accused of not having fully investigated, testimony that struck the Court as contrary to the record as a whole. *Id*. at 530–32.

even in Wiggins's case), the price of judicial deference to strategic choices is reasonable investigation of the pertinent considerations. As the *Wiggins* majority put it, until they have conducted a reasonable investigation into the relevant facts and circumstances (such as the relative strength of the grounds for defense being surrendered and those being pursued), "counsel [are] not in a position to make a reasonable strategic choice."[86]

There is no reason to think that the Court's recent emphasis on the reviewability of strategic decisions by defense attorneys is limited to capital cases. Capital cases are hardly unique in requiring defense attorneys to make strategic decisions. In all but the simplest of cases, criminal defense attorneys are required to make a variety of strategic choices that can significantly affect the outcome of the case.[87] Indeed, this is precisely why *Strickland* rejected a "checklist" or "guideline" approach to legal representation in the first place: such an approach would fail to accommodate the need for attorneys, in *all* kinds of criminal cases, to make strategic decisions about how best to advance their clients' interests in particular contexts. The need for attorneys to make strategy decisions, in noncapital and capital cases alike, implies a corresponding need for courts to scrutinize those decisions to ensure that they comported with professional standards of competence. Failing such scrutiny, serious attorney error will potentially undermine the reliability and accuracy of criminal proceedings.

B. Holding Defense Attorneys to Professional Standards of Practice

Strickland was long understood to mean that professional standards of representation are "only guides" and thus not controlling for constitutional purposes.[88] The obvious—and quite damaging—implication was that attorney conduct that falls below professional standards of representation might nonetheless be deemed to be "effective" in the constitutional sense. Without a baseline against which to measure the reasonableness of attorney conduct challenged as ineffective, it is little wonder that courts so readily deferred to the judgment of defense attorneys about how to handle their cases in the first two decades under *Strickland*.

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86. *Id*. at 536; *see also id*. at 522–23 ("[O]ur principal concern . . . is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*.").

87. These include (1) the scope of discovery and pretrial investigation to conduct, (2) the terms to seek from the prosecutor during plea negotiations, (3) whether or not to advise the client to enter into a plea agreement, (4) the defenses and arguments that should and should not be raised (both at trial and sentencing), (5) whether to make objections and on what grounds, (6) the witnesses to call (and not to call) to testify, (7) whether (and how extensively) to cross-examine adverse witnesses, and (8) the evidence to offer (or not to offer) during the defense case.

88. *Strickland*, 466 U.S. at 688.

The recent ineffectiveness cases, beginning with *Williams v. Taylor*, refute the idea that the standards of representation generated by the legal profession carry little, if any, weight in determining what constitutes constitutionally effective representation. In each case, the Court relied heavily on professional standards in determining that the attorneys had rendered their clients ineffective assistance.[89] With objective standards to ground the inquiry into the performance prong of *Strickland*, it makes sense that courts will find cases where attorneys crossed the line separating "effective" from "ineffective" representation.

The fact that the performance inquiry is now informed, to a large extent, by professional standards of representation has broad implications for how *Strickland* claims are to be received in noncapital cases. Professional standards, after all, do not simply speak to capital cases; they also provide important guidance as to how defense attorneys should represent clients in other criminal cases. A prime example is the American Bar Association's influential *Standards for Criminal Justice* (ABA Standards), which address both the prosecution and defense functions.[90]

Promulgated after "extensive review by representatives of all segments of the criminal justice system," including judges, prosecutors, private defense counsel, and public defenders, the ABA Standards reflect "a consensus view of all segments of the criminal justice community about what good, professional practice is and should be."[91] The standards for the defense function contain dozens of separate professional norms, organized in eight different parts, addressing in detail how defense attorneys should handle criminal cases. As its drafters hoped, the ABA Standards provide "extremely useful standards for consultation by lawyers and judges who want to do the 'right thing' or, as important, to avoid doing 'the wrong thing.'"[92]

There are, to be sure, special guidelines for capital cases, such as the ABA's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines).[93] As previously noted, some of

89. In *Rompilla*, for example, the Court repeatedly cited and quoted from the American Bar Association's *Standards for Criminal Justice* in its discussion of the contours of the constitutional duty to investigate. *See generally* Blume & Neumann, *supra* note 6, at 152 (noting that "*Wiggins* referenced ABA standards six times as the benchmark of appropriate attorney conduct" and "*Rompilla* cited to ABA standards on eight occasions as evidence that trial counsel's efforts were below the constitutional floor"). *Wiggins* likewise relied heavily on professional standards, but also relied on contemporary local practice in the jurisdiction where the trial occurred. *See Wiggins*, 539 U.S. at 524.

90. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, at xii (3d ed. 1993).

91. *Id.* at xii, xiv.

92. *Id.* at xiv.

93. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH

the recent ineffective-assistance cases have relied on these guidelines, as distinct from the generally applicable ABA Standards. Nevertheless, it is significant that these cases also relied heavily on the ABA Standards, which apply to all criminal cases.[94] By repeatedly relying on the ABA Standards, the recent *Strickland* cases make clear that general norms of professional criminal representation must be applied in evaluating attorney performance.

In doing so, they also indicate that the new, invigorated approach to *Strickland* claims is not limited to capital cases. If, as *Wiggins* and *Rompilla* show, noncapital professional norms (such as the ABA Standards) must be consulted in evaluating the performance of counsel in capital cases, it stands to reason that such norms must also be consulted in noncapital cases as well.[95] In both contexts, the Court—true to the original *Strickland* mandate that "the proper measure of attorney performance" is "reasonableness *under prevailing professional norms*"[96]—has made it clear that the effectiveness of defense counsel is no longer to be decided in a vacuum, without reference to the professional standards of representation that exist to guide attorneys in the performance of the criminal defense function. Finally, after twenty-five years, *Strickland* has teeth, and courts are taking *Strickland* claims seriously in all cases: when defense attorneys prejudice their clients' cause by acting unreasonably in light of professional norms, courts will not hesitate to find a violation of the right to the effective representation of counsel.[97]

This development is long overdue. The constitutional idea of effective representation exists so that criminal trials will generate accurate, reliable outcomes. As the Court recognized in *Strickland*, the lawyer's role in criminal proceedings (including capital sentencing hearings) is "to ensure that

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PENALTY CASES (rev. ed. 2003), *available at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf.

94. *See supra* note 89.

95. It is possible, of course, that in cases like *Wiggins* and *Rompilla* the Court merely seized upon the ABA Standards as support for reversing the death sentences before it without intending that those standards would apply in cases not involving the death penalty. This account is not only speculative, but unconvincing as well. In neither case were the ABA Standards the only basis on which to find that the lawyers had rendered ineffective assistance: in *Wiggins*, the defense team had violated clear local practice to always request a social history for a client facing a death sentence, and in *Wiggins* and *Rompilla* the inadequate investigation into mitigation evidence violated clear mandates from the ABA Guidelines. Wiggins v. Smith, 539 U.S. 510, 524 (2003); Rompilla v. Beard, 545 U.S. 374, 387 (2005). It simply was not the case that the Court was struggling to find a basis on which to reverse. Seen in this light, the opinions in both cases should be taken at face value: the Court cited and applied the ABA Standards as part of its inquiry into defective performance because it views those standards as properly informing what constitutes ineffective assistance under *Strickland*.

96. Strickland v. Washington, 466 U.S. 668, 688 (1984) (emphasis added).

97. *See* Blume & Neumann, *supra* note 6, at 156 (reviewing data indicating a "marked increase" in the number of successful ineffectiveness claims, in capital and noncapital cases alike, after *Williams* and its progeny).

the adversarial testing process works to produce a just result under the standards governing decision."[98] Accuracy and reliability are obviously important concerns when the death penalty is at stake; just as obviously, however, those concerns are also important in criminal cases involving lesser punishments. Criminal proceedings will not generate accurate, reliable results, or, ultimately, engender public confidence, if, as the Supreme Court once put it, defendants are "left to the mercies of incompetent counsel."[99] That, however, is precisely what the original *Strickland* standards did by making it exceedingly difficult for defendants to obtain new trials based on even the most egregious attorney errors. Now that, as a result of decisions like *Williams v. Taylor*, courts are taking *Strickland* claims seriously, ineffectiveness doctrine is, at long last, promoting, rather than undermining, the constitutional idea of effective representation.

V. CONCLUSION

The Supreme Court has come a long way since it decided *Strickland v. Washington* back in 1984. In that case, the Court paid homage to the constitutional ideal of effective representation and adopted a basic performance-and-prejudice standard that appeared to guard against the danger that the outcome of criminal trials would be skewed by serious defense attorney error. The appearance, however, was deceiving. It soon became clear that *Strickland* could never meaningfully promote the goal of effective representation because of various meta-rules announced in the case to guide the evaluation of ineffectiveness claims. These meta-rules mandated extreme deference to the choices of counsel that might reflect "strategy" or "tactics" and essentially blindfolded courts by requiring them to evaluate the performance of counsel without any authoritative judicial or professional standards of performance to apply. The *Strickland* standards (plural)—that is, the performance-and-prejudice standard and the various meta-rules governing the application of the performance and prejudice prongs—collectively ensured that ineffectiveness doctrine (and, with it, the constitutional ideal of effective representation) would be a dead letter. The ensuing two decades, which saw courts reject ineffectiveness challenges to a wide array of stunningly incompetent and unprofessional representation, made this reality painfully clear.

Fortunately, the Supreme Court has reversed course. In a trilogy of cases that began with *Williams v. Taylor*, the Court rejected the meta-rules that had rendered *Strickland* a paper tiger. The blindfold has been lifted, and now courts look closely at professional standards of representation in evaluating

98. *Strickland*, 466 U.S. at 687.

99. McMann v. Richardson, 397 U.S. 759, 771 (1970).

the effectiveness of attorney performance. Moreover, courts no longer respond to the "magic words" of "strategy" and "tactics": *all* attorney decisions, whether strategic or tactical in nature, are being reviewed with a jaundiced eye for reasonableness in light of prevailing professional norms. Thus, *Strickland* claims are now being taken seriously.

The result of the recently reinvigorated *Strickland* standards is striking. There has been a considerable increase in the number of successful ineffectiveness claims—in both federal and state court, and in capital and noncapital cases—since *Williams* was decided in 2000.[100] Each year, dozens of defendants who, in previous decades, would have been packed off to prison or the death chamber despite serious attorney errors in their cases, are thus now receiving new trials all over the country—opportunities, in other words, to obtain more favorable results, either at trial or sentencing, or on appeal, with the constitutionally effective representation the Constitution guarantees every criminal defendant.

The significance of the invigorated *Strickland* standards can be seen in the subsequent history in *Williams v. Taylor*. After the Supreme Court remanded for a new sentencing hearing, the prosecutor, faced for the first time with the prospect of a mitigation defense (which was conspicuously absent in the first trial due to the ineffectiveness of the defense team), dropped the execution demand and agreed to a life sentence.[101] One can hardly imagine a more vivid illustration of the value of effective assistance of counsel. The offender and the crime were precisely the same at Williams's trial and on remand. The only difference was the quality of the lawyers who represented Williams: his court-appointed attorneys earned him a death sentence by failing to look for evidence that might convince jurors that their client deserved mercy despite his terrible crime, whereas the lawyers who represented him on postconviction review did the diligent investigation that professional standards require and thus were able to assemble a mitigation case strong enough to convince the prosecutor to accept a life sentence instead of death. Seen in this light, Williams was really sentenced to die, not for the murder he committed, but rather for the ineptitude of his original attorneys, a factor that ought to play no part in who lives and who dies—or, for that matter, in the outcome of any criminal case.

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100. *See* Blume & Neumann, *supra* note 6, at 156.

101. *See* Frank Green, *Death Row Veteran's Life Spared*, RICHMOND TIMES-DISPATCH (Va.), Nov. 15, 2000, at A1 (reporting the terms of the agreement reached with Williams on remand from *Williams v. Taylor*). The prosecutor was not alone in his reaction to the newly discovered mitigation evidence: the state trial judge who presided over Williams's sentencing recommended that the state supreme court vacate the death sentence he himself had imposed after hearing, on postconviction review, the mitigation evidence that had not been presented at the sentencing phase. *See* Williams v. Taylor, 529 U.S. 362, 370–71 (2000).

Of course, in a world of resource constraints and wealth differentials among defendants, it is inevitable that attorney performance will, to some degree, impact the outcome of criminal cases. This fact of life does not mean, however, that constitutional criminal procedure should be indifferent to the adverse effects that resource constraints can have on the fairness and reliability of criminal proceedings. Perhaps criminal procedure can help eliminate, or at least reduce, those effects.

The recent ineffectiveness cases suggest that the Supreme Court is looking to current ineffectiveness doctrine to be part of the solution instead of part of the problem. If, as is commonly supposed, ineffective representation is largely a function of the severe resource constraints the political process imposes on lawyers for indigent defendants, a toothless constitutional standard of effective representation—the kind of standard *Strickland* represented in its first two decades—virtually invites legislatures to continue underfunding indigent defense. By contrast, a more demanding ineffectiveness standard can help counteract the legislative strategy of using resource constraints. As long as courts stand ready and willing to set aside convictions and sentences where attorney error factored into the outcome, underfunding will no longer remain a cost-free strategy. Underfunding may make it easier for prosecutors to win convictions and death sentences, but those fruits of their labors will be less impervious to attack on ineffectiveness grounds. This, in turn, may give legislatures a much-needed incentive to reduce the crushing caseloads and other severe resource constraints that make ineffective representation so commonplace. If that happens, then criminal trials will be more likely to result in the meaningful adversarial testing our system relies on to produce fair and accurate results, and prosecutors who win will do so on the right grounds—namely, the strength and justice of their cause—rather than the ineptitude of the defense lawyer.