
Article

The United States Supreme Court (Mostly) Gives Up Its Review Role with Ineffective Assistance of Counsel Cases

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GIDEON

On the fiftieth anniversary of *Gideon v. Wainwright*,¹ just a few years ago, both legal and lay commentators wrote and spoke glowingly of this “landmark case, guaranteeing the right to counsel in criminal cases, [which] forever changed America’s criminal justice system.”² “*Gideon*, like several other of the landmark cases . . . seemed to offer a promise to all people in the American criminal justice system. In this case it was supposed to be complete equality before the law, even if one could not afford counsel.”³ Congressman John Conyers said this about *Gideon*: “Fair trials, wherein everyone—no matter their ability to pay—is equal before the law through the right to counsel, is at the core of our country’s judicial system. The Supreme Court made history in recognizing this fundamental right, and extending it to defendants at the state level.”⁴ As then Attorney General Robert Kennedy said:

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1. 372 U.S. 335 (1963).
2. *Gideon v. Wainwright—Case Providing Defendants an Attorney—Turns 50*, CBS NEWS (Mar. 16, 2013, 1:32 PM), <http://www.cbsnews.com/news/gideon-v-wainwright-case-providing-defendants-an-attorney-turns-50>.
3. Kenneth J. Bernstein, *Thoughts on the 50th Anniversary of Gideon v. Wainwright*, DAILY KOS (Mar. 18, 2013, 4:55 AM), <http://www.dailykos.com/story/2013/03/18/1194921/-Thoughts-on-the-50th-Anniversary-of-Gideon-v-Wainwright>.
4. *Conyers Honors 50th Anniversary of Gideon v. Wainwright Decision*, HOUSE COMM. ON THE JUDICIARY DEMOCRATS (Mar. 15, 2013), <http://>

If an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, and if the Court had not taken the trouble to look for merit in that one crude petition . . . the vast machinery of American law would have gone on functioning undisturbed. But Gideon did write that letter, the Court did look into his case . . . and the whole course of American legal history has been changed.⁵

To be sure, I would go even a step beyond this celebratory language and note that the *Gideon* decision remains the single most significant criminal justice decision ever written by an American court. More important than the death penalty cases,⁶ *Miranda v. Arizona*,⁷ or even the exclusionary rule holdings.⁸ The reason can be stated plainly: prior to *Gideon*, many criminal defendants were not represented by lawyers even in serious criminal cases. It is, certainly, difficult to give precise empirical support for this conclusion more than fifty years after the fact. Still, with but a few observations, the statement seems more than reasonable. The vast majority of criminal cases are resolved in state courts, not in the federal system.⁹ Also, the vast majority of criminal defendants are indigent, unable to pay for their own lawyers.¹⁰ While the federal system recognized the

democrats.judiciary.house.gov/press-release/conyers-honors-50th-anniversary-gideon-v-wainwright-decision.

5. *The Legacy of Gideon v. Wainwright*, U.S. DEP'T OF JUSTICE (Feb. 3, 2016), <http://www.justice.gov/atj/fifty-years-later-legacy-gideon-v-wainwright> (quoting Attorney General Robert F. Kennedy, Speech Before the New England Conference on the Defense of Indigent Persons Accused of Crime (Nov. 1, 1963)).

6. This includes cases initially limiting or striking down capital punishment, *Furman v. Georgia*, 408 U.S. 238 (1972), and reinstating it, *Gregg v. Georgia*, 428 U.S. 153 (1976).

7. 384 U.S. 436 (1966) (holding that, under the Fifth Amendment privilege against self-incrimination, warnings must be given to suspects in custody who are being interrogated).

8. Beginning with *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court has used the exclusion of evidence as the key remedy in some federal and state cases for government violations of rights under the Fourth, Fifth and Sixth Amendments (search and seizure, privilege against self-incrimination, and the right to counsel, respectively).

9. It has been fairly estimated that ninety-five percent of all criminal cases are tried in state courts. See Amanda Myra Hornung, *The Paper Tiger of Gideon v. Wainwright and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants*, 3 CARDOZO PUB. L. POL'Y & ETHICS J. 495, 499 n.6 (2005).

10. As stated by one commentator, "Though indigents probably represent no more than 10–20 percent of the population, they account for 80 percent of those charged in felony cases." Stephen J. Schulhofer, *Client Choice for Indigent Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 507 n.14 (2015).

counsel right for indigent criminal defendants long ago,¹¹ many states did not at the time of *Gideon*.¹² It is not a very large leap,

11. In an opinion written by Justice Black, the Court discussed the need for counsel in all criminal cases prosecuted in federal court:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done. It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious

The . . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. 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 defence [sic], even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel.

Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (citations omitted).

12. Justice Black, dissenting in *Betts v. Brady*, 316 U.S. 455, 477 n.2 (1942)—the so-called “special circumstances” case overruled by *Gideon*—discussed the numbers:

In thirty-five states, there is some clear legal requirement or an established practice that indigent defendants in serious noncapital as well as capital criminal cases (e.g., where the crime charged is a felony, a “penitentiary offense,” an offense punishable by imprisonment for several years) be provided with counsel on request. In nine states, there are no clearly controlling statutory or constitutional provisions, and no decisive reported cases on the subject. In two states, there are dicta in judicial decisions indicating a probability that the holding of the court below in this case would be followed under similar circumstances. In only two states (including the one in which this case arose) has the practice here upheld by this Court been affirmatively sustained

Justice Roberts, writing for the majority, believed that most states did not view counsel as central to our system of justice:

This material demonstrates that, in the great majority of the States, it has been the considered judgment of the people, their representatives, and their courts that appointment of counsel is not a fundamental right, essential to a fair trial. On the contrary, the matter has generally been deemed one of legislative policy.

Id. at 471. As further proof of the point, one ought not forget that Clarence Earl Gideon—clearly indigent—was convicted of a felony—breaking and entering with intent to commit a crime—after representing himself at trial. *Gideon*

then, to say that *Gideon* affected enormous numbers of state criminal defendants, and did so almost immediately.

There is, indeed, much to celebrate about *Gideon*. “The story of the case—that is, the story of Clarence Earl Gideon—is remarkable in every way.”¹³ It is especially worth writing about in this Symposium, for the involvements of the State of Minnesota, and one Minnesotan, Walter Mondale, were vital to the decision resulting in the great changes in our criminal justice system. Perhaps it is better to have a Minnesota judge explain why this is so:

Gideon v. Wainwright has a unique Minnesota connection. Walter Mondale was at the time the Attorney General of Minnesota. He had political ambition and so “siding” with a four-time convicted felon made simply no political sense. By today’s standards of politics, what Mondale did was political insanity. Minnesota already provided counsel for poor people accused of felonies as did a significant number of other states. Florida claimed Gideon’s case as a state’s rights issue. According to the Florida Attorney General, the United States Supreme Court had no business telling states what a fair criminal justice system entailed.

Rather than support Florida or simply ignore the issue, Mondale wrote, “I believe in federalism and states’ rights too. But I also believe in the Bill of Rights . . . Nobody knows better than an attorney general or a prosecuting attorney that in this day and age furnishing an attorney to those felony defendants who can’t afford to hire one is ‘fair and feasible.’ Nobody knows better than we do that rules of criminal law and procedure which baffle trained professionals can only overwhelm the uninitiated . . .” Mondale organized an effort to gain the support of other states in Gideon’s effort to require lawyers for the poor. Mondale got 23 states to join his brief on behalf of Gideon, including three, Hawaii, Maine and Rhode Island, that had no general requirement to appoint lawyers in felony cases.¹⁴

Quite remarkable.

requested that the court appoint a lawyer for him, but the judge could not do so: Florida state law only allowed for appointments in capital cases. Gideon was sentenced to five years in prison.

13. Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After “Gideon,”* ATLANTIC (Mar. 13, 2013), <http://www.theatlantic.com/national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433>. The title of Mr. Cohen’s article, of course, gives some idea what many—including this writer—believe has happened in the half century since the Court’s epic ruling.

14. Kevin Burke, *Happy Anniversary, Clarence Gideon,* MINNPOST (Mar. 22, 2013), <https://www.minnpost.com/community-voices/2013/03/happy-anniversary-clarence-gideon>.

STRICKLAND

In recent years especially, there has been considerable criticism over the way *Gideon* has been applied, or inadequately applied. On the former point, commentators have expressed frustration with Supreme Court decisions limiting the reach of *Gideon* only to cases involving actual imprisonment as a sentence for the convicted defendant,¹⁵ to important events that occur after an adversary judicial proceeding,¹⁶ and to pretrial proceedings in which the defendant is faced with an adversary judicial proceeding.¹⁷ On the latter point, many lawyers, judges, and commentators have discussed an overwhelmed criminal justice system in which defendants truly do not have adequate representation. One scholar wrote:

Despite voluminous empirical evidence and scholarly research describing the national crisis in indigent defense services, this seemingly intractable crisis persists . . . Indigent defense systems across the nation operate with far too little money, resulting in a host of interrelated consequences. Public defenders carry excessive caseloads, they have inadequate, if any, access to investigative and expert assistance, and they cannot meet with and counsel their clients effectively and in a timely manner. Defense counsel working under these circumstances can barely satisfy their professional and ethical obligations, let alone provide zealous representation. Clients of these defenders suffer a host of otherwise avoidable consequences. Many indigent defendants make unintelligent waivers of their right to counsel, endure months in jail without hearing a status report from their lawyers, fail to secure pre-trial releases from jail, and either agree to plea bargains or go to trial without adequate discussion or preparation. In short, the Sixth Amendment right to counsel has yet to be realized for most indigent defendants across the country.¹⁸

15. The right to counsel is not violated where the judge could have sentenced the defendant to a term of imprisonment but did not do so. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

16. *Kirby v. Illinois*, 406 U.S. 682 (1972) (holding the Constitution mandates a lawyer at a lineup only after the defendant has been formally charged).

17. *United States v. Ash*, 413 U.S. 300 (1973) (holding that, even if the defendant has been formally charged, there is no right to a lawyer at a photo identification display). These limitations are critiqued in Paul Marcus, *Why the United States Supreme Court Got Some (but Not a Lot) of the Sixth Amendment Right to Counsel Analysis Right*, 21 ST. THOMAS L. REV. 142, 145–49 (2009).

18. Cara Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation's Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487, 488–89 (2010). Another was more succinct: “Year after year, in study after study, observers find remarkably poor defense lawyering.” Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90

It is not simply that quite a number of public defense and appointed lawyers are overwhelmed by massive caseloads—though surely many are. It is that some of these attorneys, and others, provide assistance that is not competent and that ought not to be tolerated. The Supreme Court has made this point repeatedly, with the Justices frequently noting “the right to counsel is the right to the effective assistance of counsel,”¹⁹ and “the right to the effective assistance of counsel at trial is a bedrock principle in our justice system.”²⁰ The decision of the Court that has been the guiding light on ineffective assistance is *Strickland v. Washington*.²¹

While the Court in *Strickland* reiterated the long-held view that counsel in criminal cases must be effective,²² the decision there is chiefly looked to as laying out “the proper standards for judging a criminal defendant’s contention that the Constitution requires a conviction or death sentence to be set aside because counsel’s assistance at the trial or sentencing was ineffective.”²³ Justice O’Connor, for the majority, made clear that the standard really consisted of two different parts, each of which is a

IOWA L. REV. 219, 221 (2004). During his tenure as the Attorney General of the United States, Eric Holder expressed similar concerns:

America’s indigent defense systems exist in a state of crisis. Like many of you, this is something I’ve seen firsthand. As a judge on the District of Columbia Superior Court—and, later, as United States Attorney for the District of Columbia—I frequently witnessed the devastating consequences of inadequate representation. I saw that wrongful convictions and unjust sentences carry a moral cost that’s impossible to measure—and undermine the strength, integrity, and public trust in our legal system. I also recognize that, in purely economic terms, they drain precious taxpayer resources—and constitute an outrageous waste of court funds on new filings, retrials, and appeals just because the system failed to get it right the first time.

Andrew Cohen, *Eric Holder: A “State of Crisis” for the Right to Counsel*, ATLANTIC (Mar. 15, 2013), <http://www.theatlantic.com/national/archive/2013/03/eric-holder-a-state-of-crisis-for-the-right-to-counsel/274074>.

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

20. *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012); see also *Maryland v. Kulbicki*, 136 S. Ct. 2, 2 (2015).

21. 466 U.S. 668 (1984).

22. Noting:

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. For that reason, the Court has recognized that “the right to counsel is the right to the effective assistance of counsel.”

Id. at 685–86 (quoting *McMann*, 397 U.S. at 771 n.14).

23. *Id.* at 671.

major hurdle for a complaining, convicted criminal defendant to go over.

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.²⁴

The Supreme Court had, until recently, given little guidance as to how those two parts—deficient performance and prejudice to the defendant—were to be construed. What we did know, though, was that each was extremely challenging for defendants. The first part proved challenging because a "defendant must show that counsel's representation fell below an objective standard of reasonableness,"²⁵ and because there is a "strong presumption" that a lawyer's performance is "within the wide range of reasonable professional assistance."²⁶ Powerful language, made all the more trying because in many cases it is not that the defense counsel did something affirmatively wrong, such as citing overruled cases, relying on the wrong statute, etc. Rather, it could well be that—as pointed out by dissenting Justice Marshall in *Strickland*—the problem is that the defense counsel simply did not do her job vigorously in terms of preparation, organization, or thorough review.²⁷

24. *Id.* at 687. Professor Stephen J. Smith very capably explains the principles here in his essay, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515 (2009); see also Sanjay Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351 (2009); Brooke R. Hardy, *Criminal Procedure: Finding the Needle—Toward a More Stringent Standard for Effective Assistance of Counsel*, 58 FLA. L. REV. 449 (2006); Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77 (2007).

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

26. *Id.* at 689.

27. Marshall noted:

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

If, though, the record demonstrates low performance, establishing prejudice is even more difficult because the defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”²⁸ If Justice Marshall is correct, and I believe he is, how does one prove the negative: how does one show what would have happened if there had been an engaged, thoughtful, and committed lawyer handling the trial? Proof of prejudice? Hardly likely to happen very often.

THE CAPITAL CASES

For many years this trying situation was lamented, criticized, and anguished over. The Court was not movable. Not, that is, until two areas came before the Justices raising concerns over the application of *Strickland*. The first was with capital cases; the second was with cases involving so-called collateral consequences.

The Supreme Court has been actively involved with the review of ineffective assistance claims in death penalty convictions, unlike its role with other convictions (apart from the collateral consequences matters, below). In a series of decisions over the past two decades, the Justices have mapped out serious problems with capital representation and with the application of generally accepted best practices. As one observer opined, with these cases, “the Court no longer ignores professional standards of conduct in deciding what constitutes consti-

Id. at 710 (Marshall, J., dissenting).

28. *Id.* at 694. The Supreme Court in *Bell v. Cone*, 535 U.S. 685, 697 (2002), reiterated the three situations where prejudice could be presumed, as first identified in *United States v. Cronin*:

First and “[m]ost obvious” was the “complete denial of counsel.” A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at “a critical stage,” [denoting] a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused. Second, we posited that a similar presumption was warranted if “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” Finally, we said that in cases . . . where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected.

466 U.S. 648, 659 (1984). Such situations are rare.

tutionally ‘effective’ representation or tolerates minimal efforts by counsel.”²⁹

In each of these capital cases, the Court found Sixth Amendment violations, and strongly chastised the work of the attorneys involved:

Williams v. Taylor.³⁰ While there was considerable mitigating evidence that might have moved the decision from death to life,³¹ the trial attorneys did not begin preparation until just before the trial and missed out on quite a bit of that mitigating evidence. “[I]t is undisputed that Williams had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.”³²

Wiggins v. Smith.³³ The defense lawyers did conduct a limited investigation and did offer some mitigating evidence, but failed to engage in a broad investigation and thus did not uncover significant and disturbing mitigating evidence.³⁴ “[I]nvestigations into mitigating evidence ‘should comprise efforts to discover *all reasonably available* mitigating evidence

29. Smith, *supra* note 24, at 517.

30. 529 U.S. 362 (2000).

31. *Id.* at 370 (“Among the evidence reviewed that had not been presented at trial were documents prepared in connection with Williams’ commitment when he was 11 years old that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was ‘borderline mentally retarded,’ had suffered repeated head injuries, and might have mental impairments organic in origin.”).

32. *Id.* at 393. *Williams* is also noteworthy because the Court relied on the STANDARDS FOR CRIMINAL JUSTICE 44.1, cmt., at 4–55 (AM. BAR ASS’N 1980) in finding that trial counsel did not fulfill “their obligation to conduct a thorough investigation of the defendant’s background.” *Id.* at 396. *But see infra* note 42 and accompanying text (noting the Court’s late retreat on this subject).

33. 539 U.S. 510 (2003).

34. The lawyers’ performance was truly neglectful, as described by Justice O’Connor:

The records revealed several facts: Petitioner’s mother was a chronic alcoholic; Wiggins was shuttled from foster home to foster home and displayed some emotional difficulties while there; he had frequent, lengthy absences from school; and, on at least one occasion, his mother left him and his siblings alone for days without food. As the Federal District Court emphasized, any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner’s background.

Id. at 525 (citations omitted).

and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.”³⁵

Sears v. Upton.³⁶ The state court held that the trial attorney’s performance violated the Sixth Amendment, but concluded that the prejudice prong under *Strickland* had not been met. The United States Supreme Court did not agree:

We have never limited the prejudice inquiry under *Strickland* to cases in which there was only “little or no mitigation evidence” presented, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence “would barely have altered the sentencing profile presented” to the decision maker. But we also have found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.³⁷

Hinton v. Alabama.³⁸ The defense lawyer sought \$1,000 in funds to hire an expert to assist on a ballistics test. This test was central to the government’s case. The lawyer retained an expert he could afford for the \$1,000, but one whom he had doubts about. The lawyer asked for only \$1,000 in the mistaken belief that this was the statutory limit to which his client was entitled. “[I]t was unreasonable for Hinton’s lawyer to fail to seek additional funds to hire an expert where that failure was

35. *Id.* at 524 (quoting the ABA Guidelines). *Rompilla v. Beard*, 545 U.S. 374 (2005), relying on *Williams* and *Wiggins*, is another important case exploring a lawyer’s obligations in presenting mitigation evidence in a capital trial. And, once more, the concern here was with the lawyer’s inadequate investigation:

When new counsel entered the case to raise Rompilla’s postconviction claims, however, they identified a number of likely avenues the trial lawyers could fruitfully have followed in building a mitigation case. School records are one example, which trial counsel never examined in spite of the professed unfamiliarity of the several family members with Rompilla’s childhood, and despite counsel’s knowledge that Rompilla left school after the ninth grade. Others examples are records of Rompilla’s juvenile and adult incarcerations, which counsel did not consult, although they were aware of their client’s criminal record. And while counsel knew from police reports provided in pre-trial discovery that Rompilla had been drinking heavily at the time of his offense, and although one of the mental health experts reported that Rompilla’s troubles with alcohol merited further investigation, counsel did not look for evidence of a history of dependence on alcohol that might have extenuating significance.

Id. at 382 (citations omitted).

36. 561 U.S. 945 (2010).

37. *Id.* at 954 (citations omitted).

38. 134 S. Ct. 1081 (2014).

based not on any strategic choice but on a mistaken belief that available funding was capped at \$1,000”³⁹

Still, even in capital cases the Court will not easily find constitutional problems with less than superior representation. To be sure, there are also capital cases in which the Court did not find Sixth Amendment violations. In each case, though, it gave a careful review of the work of the attorneys involved⁴⁰:

Bobby v. Van Hook.⁴¹ When determining ineffectiveness under *Strickland*, it is improper to rely heavily on the American Bar Association guidelines for performance of counsel. “[The] American Bar Association standards and the like’ are ‘only guides’ to what reasonableness means, not its definition.”⁴²

39. *Id.* at 1088. Because no state court had considered the prejudice question, the Court remanded. Still, its view on the subject was hardly hidden:

[I]f there is a reasonable probability that Hinton’s attorney would have hired an expert who would have instilled in the jury a reasonable doubt as to Hinton’s guilt had the attorney known that the statutory funding limit had been lifted, then Hinton was prejudiced by his lawyer’s deficient performance and is entitled to a new trial.

That the State presented testimony from two experienced expert witnesses that tended to inculcate Hinton does not, taken alone, demonstrate that Hinton is guilty. Prosecution experts, of course, can sometimes make mistakes. Indeed, we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts, noting that “[s]erious deficiencies have been found in the forensic evidence used in criminal trials One study of cases in which exonerating evidence resulted in the overturning of criminal convictions concluded that invalid forensic testimony contributed to the convictions in 60% of the cases.”

Id. at 1089–90 (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009)).

40. *See Knowles v. Mirzayance*, 556 U.S. 111, 113 (2009) (“The failure to show ineffective assistance is also confirmed by the Magistrate Judge’s finding that counsel’s decision was essentially an informed one ‘made after thorough investigation of law and facts relevant to plausible options,’ and was therefore ‘virtually unchallengeable.’” (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986) (“In this case, there are several reasons why counsel reasonably could have chosen to rely on a simple plea for mercy from petitioner himself. Any attempt to portray petitioner as a nonviolent man would have opened the door for the State to rebut with evidence of petitioner’s prior convictions. This evidence had not previously been admitted in evidence, and trial counsel reasonably could have viewed it as particularly damaging.”).

41. 558 U.S. 4 (2009).

42. *Id.* at 17 (quoting *Strickland*, 466 U.S. at 688). Concurring Justice Alito—while acknowledging that the “ABA is a venerable organization with a history of service to the bar”—went further:

The views of the association’s members, not to mention the views of the members of the advisory committee that formulated the 2003

Bell v. Cone.⁴³ The government had very strong evidence that the defendant had committed “a horribly brutal” crime against two elderly people, had earlier shot two others (one of whom was a police officer), and committed a robbery. At trial the defense lawyer gave no closing argument. The majority reiterated that under *Strickland*, “a court must indulge a ‘strong presumption’ that counsel’s conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.”⁴⁴

Lockhart v. Fretwell.⁴⁵ It is “defective” to apply the second part of the *Strickland* standard using “an analysis focusing solely on mere outcome determination, without attention to

Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

Id. at 14.

43. 535 U.S. 685 (2002).

44. *Id.* at 702. The majority concluded that no constitutional violation had occurred:

[Defense counsel] could make a closing argument and reprise for the jury, perhaps in greater detail than his opening, the primary mitigating evidence concerning his client’s drug dependency and posttraumatic stress from Vietnam. And he could plead again for life for his client and impress upon the jurors the importance of what he believed were less significant facts, such as the Bronze Star decoration or his client’s expression of remorse. But he knew that if he took this opportunity, he would give the lead prosecutor, who all agreed was very persuasive, the chance to depict his client as a heartless killer just before the jurors began deliberation.

Id. at 701–02. Dissenting Justice Stevens disagreed:

Counsel’s shortcomings included a failure to interview witnesses who could have provided mitigating evidence; a failure to introduce available mitigating evidence; and the failure to make any closing argument or plea for his client’s life at the conclusion of the penalty phase. Furthermore, respondent’s counsel was, subsequent to trial, diagnosed with a mental illness that rendered him unqualified to practice law, and that apparently led to his suicide. These circumstances “justify a presumption that respondent’s conviction was insufficiently reliable to satisfy the Constitution.”

Id. at 702–03 (Stevens, J., dissenting) (quoting *United States v. Cronin*, 466 U.S. 648, 662 (1984)). For a non-capital case in which the Court reiterated that the “strong presumption” must be followed, see *Premo v. Moore*, 562 U.S. 115 (2011).

45. 506 U.S. 364 (1993).

whether the result of the proceeding was fundamentally unfair or unreliable.”⁴⁶

Burger v. Kemp.⁴⁷ The ineffective assistance claim was keyed to the fact that defense counsel had a conflict of interest because his law partner had been appointed to represent one of the other defendants in that person’s later, separate trial, and that counsel had provided aid in that representation.

[T]he overlap of counsel, if any, did not so infect [counsel’s] representation as to constitute an active representation of competing interests. Particularly in smaller communities where the supply of qualified lawyers willing to accept the demanding and unrewarding work of representing capital prisoners is extremely limited, the defendants may actually benefit from the joint efforts of two partners who supplement one another in their preparation⁴⁸

Not surprisingly, the Court has considered many capital cases dealing with ineffective assistance of counsel claims. In a number of areas, Justices have stated that capital cases involve “the penalty of death [which] is different in kind from any other punishment imposed under our system of criminal justice.”⁴⁹ Nevertheless, the actual number of capital cases in the United States, in comparison to all criminal prosecutions, is extremely small.⁵⁰ Therefore, while significant, judicial actions in this ar-

46. *Id.* at 369. The Court explained further: “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Id.* (quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)).

47. 483 U.S. 776 (1987).

48. *Id.* at 783–84. Once again dissenters took a different view:

The presumption of prejudice in cases presenting a conflict of interest that adversely affected counsel’s performance is warranted because the duty of loyalty to a client is “perhaps the most basic” responsibility of counsel, and “it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.” This difficulty in assessing prejudice resulting from a conflict of interest is due in part to the fact that the conflict may affect almost any aspect of the lawyer’s preparation and presentation of the case. Because the conflict primarily compels the lawyer not to pursue certain arguments or take certain actions, it is all the more difficult to discern its effect.

Id. at 800 (quoting *Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

49. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). Capital cases are scrutinized more closely than all other prosecutions. As stated in *Cheney v. State*, “[T]he death penalty may only be imposed upon those few murderers who are deemed the worst of the worst murderers.” 909 P.2d 74, 78 (Okla. Crim. App. 1995).

50. Figuring out the ratio of all criminal cases to capital prosecutions is not a simple task. Of course, the states and the federal government can both prosecute capital cases if authorized by statute. On the federal level, the Attorney General must approve all death penalty prosecutions. See Memorandum

ea are of limited guidance in non-capital cases unless there is

dum from Eric H. Holder, Jr. to All Federal Prosecutors (July 27, 2011), <http://www.deathpenaltyinfo.org/documents/FedDPRules2011.pdf>. According to the Federal Death Penalty Resource Counsel, since the death penalty was reinstated in 1988, 498 cases have been approved by the Attorney General and prosecuted. *Federal Death Penalty*, FED. DEATH PENALTY RES. COUNSEL (Sept. 22, 2015), https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=94&id=2094. Each year more than 60,000 criminal cases are prosecuted by the United States. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 8 (2013), <http://www.justice.gov/sites/default/files/usao/legacy/2014/09/22/13statrpt.pdf>.

Extensive research could not locate a single detailed database for all the states combined. The numbers for North Carolina may be seen as somewhat typical. In 2007, six capital cases were prosecuted in the state, compared to just under 100,000 total criminal cases that year. N.C. OFFICE OF INDIGENT DEF. SERV, CAPITAL TRIAL CASE STUDY: PAC AND EXPERT SPENDING IN POTENTIALLY CAPITAL CASES AT THE TRIAL LEVEL 8 (2008), <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf>; see also N.C. DEP'T OF JUSTICE, ANNUAL SUMMARY REPORT (2014), <http://crimereporting.ncdoj.gov/Reports.aspx>.

The numbers are even more stark when viewing this chart:

SIZE OF DEATH ROW BY YEAR (1968–present)

1968	517	1982	1,050	1996	3,219	2010	3,158
1969	575	1983	1,209	1997	3,335	2011	3,082
1970	631	1984	1,405	1998	3,452	2012	3,033
1971	642	1985	1,591	1999	3,527	2013	2,979
1972	334	1986	1,781	2000	3,593	2014	3,054
1973	134	1987	1,984	2001	3,581	2015	3,019
1974	244	1988	2,124	2002	3,557		
1975	488	1989	2,250	2003	3,374		
1976	420	1990	2,356	2004	3,315		
1977	423	1991	2,482	2005	3,254		
1978	482	1992	2,575	2006	3,228		
1979	539	1993	2,716	2007	3,215		
1980	691	1994	2,890	2008	3,207		
1981	856	1995	3,054	2009	3,173		

Size of Death Row by Year, DEATH PENALTY INFO. CTR (2016), <http://www.deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year?scid=9&did=188#year>.

application beyond the death penalty area, a point to be discussed later in this Article.

COLLATERAL CONSEQUENCES

In another area, however, the Court has issued only one major decision as to ineffective assistance, but it has already had a tremendous impact. In *Padilla v. Kentucky*,⁵¹ the Justices determined that, before a plea agreement is reached, the criminal defense attorney must advise his client regarding the immigration consequences of a guilty plea. Without such advice, the defendant may successfully claim ineffective assistance of counsel. The state court in *Padilla* would not consider the constitutional assertion because “the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.”⁵² The rejection of that argument, as well as the view that the Sixth Amendment comes into play only with affirmatively erroneous advice, was powerful in *Padilla*:

We have given serious consideration to the concerns . . . regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar “floodgates” concern [earlier] but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.

A flood did not follow in that decision’s wake. Surmounting *Strickland*’s high bar is never an easy task. “Judicial scrutiny of counsel’s performance must be highly deferential”; “[a]ttorney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial.” Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.⁵³

For two reasons, the impact of *Padilla* was both swift and widespread. First, the vast majority of criminal prosecutions are resolved through the plea bargaining process.⁵⁴ Second,

51. 559 U.S. 356 (2010).

52. *Id.* at 364; see also NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, www.abacollateralconsequences.org (last visited Mar. 22, 2016) (laying out in detail these consequences throughout our nation).

53. *Padilla*, 559 U.S. at 371–72 (citations omitted).

54. The consistent estimate is that ninety percent or more criminal justice resolutions in the United States occur through plea bargaining. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014),

there is little reason to believe that the *Padilla* holding is limited to only those collateral consequences associated with immigration. As one astute scholar observed, a number of other matters can come within the holding.

Because of their importance and their automatic application after certain criminal convictions, strong candidates for Sixth Amendment coverage include sex offender registration and incarceration, losing the ability to earn a living, and losing the ability to have or gain custody of a relative or foster child. Other collateral consequences may loom large with respect to particular clients based on their particular circumstances.⁵⁵

To be sure, this was much of the reasoning in Justice Alito's concurrence there:

[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses All of those consequences are "serious"⁵⁶

Justice Scalia, too, in his dissent warned that there was "no logical stopping point" that would limit the majority's holding to deportation.⁵⁷ The cases raising just such matters began immediately after *Padilla* and continue in a wide range of areas.⁵⁸

<http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty>.

55. Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L. REV. 675, 676 (2011).

56. *Padilla*, 559 U.S. at 377 (alteration in original). As stated in Derek Wikstrom, "No Logical Stopping-Point": *The Consequences of Padilla v. Kentucky's Inevitable Expansion*, 106 NW. L. REV. 351, 361 (2012) (footnote omitted), "[i]f deportation cannot be distinguished from other collateral consequences on the basis of its relative seriousness or severity, or its relatedness to the penalties imposed by a criminal sentence, it will be difficult for courts to limit *Padilla* to the context in which it was decided."

57. *Padilla*, 559 U.S. at 390. One commentator strongly disagreed with Justice Scalia about the wisdom of limiting *Strickland* and *Padilla*. See Hanh H. Le, *The "Padilla Advisory" and Its Implications Beyond the Immigration Context*, 20 WM. & MARY BILL RTS. J. 589, 614 (2011).

58. See, e.g., *Bauder v. Dep't of Corr.*, 619 F.3d 1272, 1273–75 (11th Cir. 2010) (discussing additional involuntary civil commitment under state law); *Taylor v. State*, 698 S.E.2d 384, 387 (Ga. Ct. App. 2010) (looking to application of sex offender registry); *State in Interest of C.P.H.*, No. A-0936-08T4, 2010 WL 2926541, at *4 (N.J. Super. Ct. App. Div. July 23, 2010) (same); *Calvert v. State*, 342 S.W.3d 477, 487–90 (Tenn. 2011) (discussing mandatory lifetime community supervision sentence). Not all courts have read *Padilla* so expansively. As one judge stated, in *Kim v. Director, Virginia Department of Corrections*, 103 F. Supp.3d 749, 756 (E.D. Va. 2015) (involving civil commitment as a sex offender), "there is no Supreme Court precedent rejecting the application

A MORE ACTIVE ROLE FOR THE SUPREME COURT

One can be quite critical of individual ineffective assistance decisions of the Court,⁵⁹ and yet still praise it for the active role it played in looking at the performance of lawyers in capital prosecutions and cases involving collateral consequences. Yes, one should praise the Justices' engagement in those areas, but surely one must also express genuine regret for the Court's unwillingness to broadly discuss ineffective assistance almost anywhere else after *Strickland* was decided. There are some such cases, though not many. *Glover v. United States*,⁶⁰ *Roe v. Flores-Ortega*,⁶¹ and *Kimmelman v. Morrison*⁶² all come to mind.

of the direct/collateral consequences dichotomy in the context of ineffective assistance of counsel claims arising outside of the context of deportation." See *United States v. Bruno*, 614 F. App'x 72, 74 (3d Cir. 2015) (dealing with forfeiture of pension); *Commonwealth v. Abraham*, 62 A.3d 343, 344 (Pa. 2012) (same); see also *Sames v. State*, 805 N.W.2d 565, 570 (Minn. Ct. App. 2011) (discussing eligibility to possess a firearm).

59. And I am. In particular, I believe the Court in *Strickland* got it wrong both in deferring so substantially to the trial lawyer and in making it so difficult to get a reversal even where defense counsel was ineffective. In short, I am persuaded by Justice Marshall's dissent there.

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney," is to tell them almost nothing.

Strickland v. Washington, 466 U.S. 668, 707–08 (1983) (Marshall, J., dissenting) (citation omitted).

[T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures.

Id. at 711 (footnote omitted).

60. 531 U.S. 198 (2000).

61. 528 U.S. 470 (2000).

62. 477 U.S. 365 (1986). There are others, though the number is surprisingly limited. All totaled up, the Court has dealt in any sort of detailed way with less than twenty cases (apart from the capital and collateral consequences cases discussed above) which seriously discuss substantive concerns raised by *Strickland*. Some of these are certainly significant, but not for a look at the role of the defense lawyer at trial. See *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam) (discussing how counsel's brief absence during testimony concerning other defendants did not make representation ineffective); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012) (dealing with the important obligations of the defense lawyer at the plea negotiation stage); *Missouri v. Frye*, 132 S. Ct. 1399, 1406 (2012) (same); *Premo v. Moore*, 131 S. Ct. 733, 746 (2011) (discussing valid strategy of a lawyer to advise defendant to enter a no-contest plea);

Each of these cases, though, is more than fifteen years old, and each also involves very narrow sets of circumstances. In *Glover v. United States*, the issue concerned the proper prejudice standard when a defendant is convicted in a mandatory non-capital sentencing system (held, prejudice is shown even if the increase in sentence was not great).⁶³ In *Roe v. Flores-Ortega*, the defendant pled guilty to second-degree murder and claimed his lawyer was ineffective in failing to file a notice of appeal (held, failure to file with the consent of the defendant is not *per se* deficient).⁶⁴ In *Kimmelman v. Morrison*, the Court decided that the limitation on federal habeas corpus review of Fourth Amendment claims does not extend to Sixth Amendment ineffective assistance claims that are founded primarily on poor legal representation as to a Fourth Amendment issue.⁶⁵

The response to the lament of insufficient involvement by the Supreme Court is surely this: “You, oh author, may not believe that it is clear *Strickland* applies well beyond the capital crime and collateral consequences situations, but many judges out there do, and there has already been a measurable impact in non-capital and non-collateral consequence cases.” As to the first point, consider this statement: “There is no reason to think that the Court’s recent emphasis on the reviewability of strate-

Berghuis v. Thompkins, 560 U.S. 370, 372 (2010) (failing to request a limiting instruction to the jury was not ineffectiveness); Wright v. Van Patten, 552 U.S. 120, 121 (2008) (per curiam) (finding no constitutional problem with counsel briefly being linked to the courtroom via speakerphone); Massaro v. United States, 538 U.S. 500, 504 (2003) (holding defendant can raise ineffectiveness claim in a collateral proceeding).

Yarborough v. Gentry, 540 U.S. 1 (2003) (per curiam), is perhaps the most noteworthy, as the Justices considered a true trial issue—closing argument—on the merits, though the case came up as a habeas corpus petition. Still, the entire discussion in the per curiam opinion is less than four pages in the Supreme Court Reporter, with the Court emphasizing that, under the habeas review statute, federal courts must give “deference to the state courts that have primary responsibility for supervising defense counsel in state criminal trials.” *Id.* at 11. The courts must also—under *Strickland*—give “deference to counsel’s tactical decision in his closing presentation.” *Id.* at 6. The most recent decision is *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015) (per curiam), though it dealt with a remarkably narrow set of facts. In a very short per curiam opinion, the Court determined that it was not ineffective assistance for a lawyer to fail to challenge testimony based upon the so-called Comparative Bullet Lead Analysis, widely relied upon at the time of the trial. This analysis “had fallen out of favor . . . [And] was not generally accepted by the scientific community.” *Id.* at 2.

63. *Glover*, 531 U.S. at 198.

64. *Roe*, 528 U.S. at 470.

65. *Kimmelman*, 477 U.S. at 365.

gic decisions by defense attorneys is limited to capital cases.”⁶⁶ This could be true, but the best evidence still may be whether the Supreme Court itself has taken cases raising ineffective assistance more broadly. The answer is that the Court has not. While it has—in detailed fashion—decided quite a number of capital cases in the area through the years, there are few non-capital cases of true significance. Moreover, the central case is, of course, *Strickland*—a capital case—which linked the Sixth Amendment standard to the death penalty prosecution situation. This point was emphasized in Justice Brennan’s separate opinion in *Strickland*.

Because of their flexibility and the requirement that they be considered in light of the particular circumstances of the case, the standards announced today can and should be applied with concern for the special considerations that must attend review of counsel’s performance in a capital sentencing proceeding. In contrast to a case in which a finding of ineffective assistance requires a new trial, a conclusion that counsel was ineffective with respect to only the penalty phase of a capital trial imposes on the State the far lesser burden of reconsideration of the sentence alone. On the other hand, the consequences to the defendant of incompetent assistance at a capital sentencing could not, of course, be greater

For that reason, we have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding

This Court has always insisted that the need for procedural safeguards is particularly great where life is at stake. Long before the Court established the right to counsel in all felony cases, it recognized that right in capital cases. Time and again the Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case.⁶⁷

Still, it is undeniable that many judges and lawyers have looked at *Strickland* and the later Supreme Court capital cases and concluded that the standard set out there does apply in non-capital cases. This may be seen in state and federal decisions relying on *Strickland* in non-capital cases,⁶⁸ and in the

66. Smith, *supra* note 24, at 539.

67. *Strickland v. Washington*, 466 U.S. 668, 704–05 (1984) (citations omitted). The majority opinion explains:

When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.

68. See, e.g., *Commonwealth v. Kolenovic*, 32 N.E.3d 302, 304 (Mass. 2015) (murder in the first degree—no capital punishment in the state); see also

empirical evidence available to show the impact of *Strickland* outside of the death penalty context.⁶⁹

With that in mind, then, one might well ask why the Supreme Court has not taken non-capital cases that raise ineffective assistance claims. It is not as if no such cases have come to the Court. Indeed, over the past twenty years numerous petitions for certiorari have been presented that raise just such claims. In each case, the petition was denied.⁷⁰ That there has not been an enormous number of such petitions is itself surprising. Considering some of the truly awful lawyering cases out there,⁷¹ one would have thought that many would ultimately

United States v. Rangel, 781 F.3d 736, 738 (4th Cir. 2015) (narcotics conspiracy); *Profitt v. Waldron*, 831 F.2d 1245, 1247 (5th Cir. 1987) (aggravated rape); *Code v. Montgomery*, 799 F.2d 1481, 1482 (11th Cir. 1986) (armed robbery); *United States v. Jasin*, 215 F. Supp. 2d 552, 555 (E.D. Pa. 2002) (arms embargo violation); *Berry v. Gramley*, 74 F. Supp. 2d 808, 809 (N.D. Ill. 1999) (aggravated kidnapping and aggravated criminal sexual assault); *Terrero v. State*, 839 So. 2d 873, 874 (Fla. Dist. Ct. App. 2003) (armed robbery); *Gennetten v. State*, 96 S.W.3d 143, 147–48 (Mo. Ct. App. 2003) (second degree murder).

69. The evidence is somewhat sparse. The best study, by John H. Blume and Stacey D. Neumann, is now a decade old. Still, looking at cases after the Court's *Williams* decision in 2003, researchers found some evidence of more successful ineffective assistance claims. Many, if not most, rely on *Strickland* and the later capital cases. 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. LAW 127, 156 (2007).

70. See, e.g., *Dorsey v. Stephens*, 720 F.3d 309, 313 (5th Cir. 2013), cert. denied, 134 S. Ct. 1292 (2014) (ineffective assistance on direct appeal); *Darden v. United States*, 708 F.3d 1225, 1230 (11th Cir. 2013), cert. denied, 133 S. Ct. 2871 (2013) (defense counsel conceding to jury guilt on some charges to preserve credibility in defending other charges); *Muniz v. Smith*, 647 F.3d 619, 625 (6th Cir. 2011), cert. denied, 132 S. Ct. 1575 (2012) (defense attorney slept through portions of the trial and used cocaine); *Fields v. Brown*, 503 F.3d 755, 757 (9th Cir. 2007), cert. denied, 552 U.S. 1314 (2008) (prejudice resulting from counsel's deficient questioning during voir dire); *Sweeney v. Carter*, 361 F.3d 327, 330 (7th Cir. 2004), cert. denied, 543 U.S. 1020 (2004) (lawyer's performance was terrible, but review limited by Antiterrorism and Effective Death Penalty Act of 1996); *Moss v. United States*, 323 F.3d 445, 449 (6th Cir. 2003), cert. denied, 540 U.S. 879 (2003) (attorney conflict of interest); *Hines v. Miller*, 318 F.3d 157, 160 (2d Cir. 2003), cert. denied, 538 U.S. 1040 (2003) (alleged coercion in entering plea); *State v. Wille*, 595 So. 2d 1149, 1150 (La. 1992), cert. denied, 506 U.S. 880 (1992) (lawyer required to represent defendant as part of community service obligation).

71. As noted by the Innocence Project, "[a] review of convictions overturned by DNA testing reveals a trail of sleeping, drunk, incompetent and overburdened defense attorneys, at the trial level and on appeal." See generally *Inadequate Defense*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes-wrongful-conviction/inadequate-defense> (last visited Mar. 22, 2016).

have come before the United States Supreme Court on request for review. Why then has this not happened? Why have we not seen a steady stream of rulings from the Court (à la the Fourth or Fifth Amendment lines of decisions) construing *Strickland* outside of the two areas discussed above? One obvious answer, at least, is that lawyers working on such matters (either on appeal or, more likely, in a collateral proceeding) generally understand that the ineffectiveness standard is so very difficult to achieve that it may not be worth their effort to file petitions for certiorari. Statements abound to that effect:

“The *Strickland* test is notoriously difficult for defendants to meet, and the number of successful ineffective assistance claims is quite low.”⁷²

“In combination, these meta-rules signaled that *Strickland* claims are to be denied if there is *any* conceivable basis for rationalizing the attorney’s actions.”⁷³

“*Strickland*’s prejudice prong has proven to be a formidable obstacle in vindicating the right to counsel.”⁷⁴

“*Strickland* has been blasted by many commentators, rightly in my view. The simple restatement of the *Strickland* standard, as it has emerged in practice, is that a lawyer with a pulse will be deemed effective. Under the *Strickland* standard, a lawyer need not be awake, sober, prepared, knowledgeable, or sensible, at least in the large number of cases where courts find no prejudice.”⁷⁵

“When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect.”⁷⁶

“A defendant must overcome the strong presumption that counsel’s conduct falls within the wide range of reasonable assistance.”⁷⁷

72. Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1074 (2009) (footnotes omitted).

73. Smith, *supra* note 24, at 520–21.

74. Cecelia Klingele, *Vindicating the Right to Counsel*, 25 FED. SENT’G REP. 87, 87 (2012).

75. Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786–87 (1999) (reviewing MALCOLM M. FREELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* (2000)).

76. *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) (per curiam).

77. *People v. La Pointe*, 2015 IL App (2d) 130451. In *Commonwealth v. Kolenovic*, 32 N.E.3d 302, 311 (Mass. 2015), the Supreme Judicial Court of Massachusetts explained how the *Strickland* standard applies in its state, with the principle relating to the “reasonableness” of counsel’s performance.

“As to the prejudice prong of the *Strickland* standard, Petitioner’s burden to demonstrate prejudice is high.”⁷⁸

“The *Strickland* standard is, itself, already deferential, requiring courts to apply a ‘strong presumption’ that counsel’s representation was within the ‘wide range’ of reasonable professional assistance.”⁷⁹

Even with cases involving severely deficient lawyering or difficult questions of law in which the defendant lost, under an application of the *Strickland* rules, petitions for certiorari often were not filed.⁸⁰

CONCLUSION

It would be most unfortunate to have a set of rules created by the Supreme Court on ineffective assistance of counsel that

Reasonableness in the context of an ineffective assistance of counsel claim is an objective standard that measures counsel’s conduct against that which “lawyers of ordinary training and skill in the criminal law” would consider competent. Although our cases applying the manifestly unreasonable test have not precisely marked the limits of a trial attorney’s prerogative to make strategic decisions, we have been clear that reasonableness does not demand perfection. Nor is reasonableness informed by what hindsight may reveal as a superior or better strategy. Counsel may strive for perfection, but only competence or the avoidance of a “serious incompetency” is required. The manifestly unreasonable test, therefore, is essentially a search for rationality in counsel’s strategic decisions, taking into account all the circumstances known or that should have been known to counsel in the exercise of his duty to provide effective representation to the client and not whether counsel could have made alternative choices.

Id. (citations omitted).

78. *Rodriguez v. Secretary*, No. 2:12-CV-289-FTM-29, 2014 WL 7074210, at *3 (M.D. Fla. Dec. 15, 2014).

79. *Cannedy v. Adams*, 706 F.3d 1148, 1161 (9th Cir. 2013).

80. There are many cases in both categories. *Muniz v. Smith*, 647 F.3d 619, 625–26 (6th Cir. 2011) (demonstrating that defense counsel slept through some of the trial, and issue becoming whether he slept through a “substantial” portion of the trial); *McClure v. Thompson*, 323 F.3d 1233, 1256 (9th Cir. 2003) (finding that complying with rules of professional responsibility protects lawyer from ineffective assistance claim); *Kinsella v. State*, 840 N.W.2d 625, 630 (N.D. 2013) (illustrating a decision not to file motions to suppress). And the expenses involved—in both time and resources—of preparing petitions for review may be seen as too high, especially if the cause appears hopeless. Commentator Linda Greenhouse explained recently, “[g]iven the costs of appealing to the Supreme Court, potential petitioners calculate the odds. They will appeal when they conclude that the court wants to move the law in their direction, and will not appeal if they conclude otherwise.” Linda Greenhouse, Opinion, *The Illusion of a Liberal Supreme Court*, N.Y. TIMES (July 9, 2015), <http://www.nytimes.com/2015/07/09/opinion/the-illusion-of-a-liberal-supreme-court.html> (discussing Kevin T. McGuire et al., *Measuring Policy Content on the U.S. Supreme Court*, 71 J. POL. 1305 (2009)).

applies principally to a limited number of cases. This is especially so when virtually all criminal justice professionals agree that the indigent defense counsel system in our country is in crisis. Certainly there is a solution to the problem. The Supreme Court should take some broad ineffective assistance cases outside of the capital and collateral consequences areas. If it does, and the rulings make certain that *Strickland* and the later cases apply with equal force outside those areas, we would truly be able to believe that the Court meant what it said in *Strickland*:

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.⁸¹

Nothing less can satisfy the principle stated—and applauded—in *Gideon v. Wainwright*:

81. *Strickland v. Washington*, 466 U.S. 668, 688 (1983). There had been hope that the most recent case coming before the Court raising the ineffective assistance issue would help clarify matters. In *Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015) (per curiam), the Court stated that the Sixth Circuit found that the defense attorney provided prejudicial ineffective assistance when he was briefly absent during testimony concerning other defendants. The Justices did not reach the Sixth Amendment issue, looking to statutory limits on habeas corpus in reversing.

Federal courts may grant habeas corpus relief if the underlying state-court decision was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by” this Court. 28 U.S.C. § 2254(d)(1).

. . . .
AEDPA's standard is intentionally “difficult to meet.”

. . . .
Because we consider this case only in the narrow context of federal habeas review, we “expres[s] no view on the merits of the underlying Sixth Amendment principle.”

Id. at 1374 (alteration in original) (citations omitted).

Just two years earlier—in *Marshall v. Rodgers*—the Justices again declined to look at the Sixth Amendment issue in light of the statutory requirement that relief could only be granted if the state court action was contrary to “clearly established Federal law, as determined by the Supreme Court of the United States.” 133 S. Ct. 1447, 1449 (2013) (per curiam). There, the question dealt with a request to appoint an attorney to assist in filing a motion for a new trial. *Id.*

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.⁸²

82. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).