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“Lucky” Adnan Syed

COMPREHENSIVE CHANGES TO IMPROVE CRIMINAL DEFENSE LAWYERING AND BETTER PROTECT DEFENDANTS’ SIXTH AMENDMENT RIGHTS

Meredith J. Duncan[†]

INTRODUCTION

Almost twenty years ago, seventeen years old and accused of murder, Adnan Syed was deprived of his Sixth Amendment right to effective assistance of counsel at trial and sentenced to life in prison as a result.¹ Fortunately, Syed has recently secured post-conviction relief.² Although he has had to wait almost two decades—and as of this writing, remains in prison awaiting a new trial—the social media and public attention to his situation have made Adnan Syed a lucky man. The reality is that Syed is just another casualty of the criminal justice system’s tolerance of poor defense lawyering.³ The substandard quality of legal representation highlighted in Syed’s case continues to harm countless defendants nationwide, and the promise of effective assistance of counsel for the accused remains unfulfilled due to a combination of factors. This article suggests comprehensive changes to certain aspects of the criminal justice system in an effort to improve the overall quality of criminal defense lawyering.

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¹ Memorandum Opinion II at 56–58, *Syed v. State*, No. 199103042–046 (Md. Cir. Ct. June 30, 2016).

² *Id.*

³ See Jessica Anderson, *Judge Denies ‘Serial’ Subject Adnan Syed’s Release on Bail*, BALT. SUN (Dec. 29, 2016), <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-syed-bail-denied-20161229-story.html> [<https://perma.cc/SF3S-2TFU>].

In the more than thirty years since the definitive ineffective assistance of counsel case *Strickland v. Washington*,⁴ prisoners have famously had difficulty proving that their trial counsel provided constitutionally inadequate representation.⁵ The success rate of ineffective assistance of counsel claims is well documented as abysmally low.⁶ Worse still, the failure rate of ineffective assistance claims does not accurately reflect the

⁴ *Strickland v. Washington*, 466 U.S. 668 (1984); see Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 518 (2009) (describing *Strickland* as providing the “governing standard” in ineffective assistance of counsel claims).

⁵ One of the most notorious debates regarding whether a defendant’s Sixth Amendment rights pursuant to *Strickland* had been violated took place in *Burdine v. Johnson*, also known as the “sleeping lawyer case.” *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc); see Diane Jennings & Ed Timms, *Court Sides with Inmate in Sleeping-Lawyer Case*, DALLAS MORNING NEWS, Aug. 14, 2001, at 1A (referring to *Burdine* as “Sleeping-Lawyer Case”). Calvin Burdine was accused of killing a man during a robbery in Texas. *Burdine*, 262 F.3d at 338–39. Joe Cannon, an experienced criminal defense attorney, was appointed to represent Burdine against capital murder charges. *Id.* at 339. At trial, Burdine’s lawyer slept through “substantial periods” of the trial. *See id.* at 339–40. Not surprisingly, Burdine was convicted and sentenced to death. *Id.* at 339. After his direct appeal was denied by the Texas Court of Criminal Appeals, Burdine sought collateral relief from the state courts based on his lawyer’s poor representation. *Id.* at 339–40. The Texas lower court concluded that Burdine had in fact received ineffective assistance of counsel. *See id.* at 340 (stating that the habeas court found that “[b]ased on evidence that ‘defense counsel repeatedly dozed and/or actually slept during substantial portions of [Burdine’s] capital murder trial so that defense counsel was, in effect, absent[,]’ the habeas court concluded that a showing of prejudice in accordance with *Strickland v. Washington* was not required. . . . [T]he court recommended that habeas relief be granted.” *Id.* (alterations in original) (footnote omitted) (citation omitted)). However, on appeal to the Texas Court of Criminal Appeals, the highest court in Texas that reviews criminal cases, the court reversed the grant of habeas. *Id.* In a one-page opinion, the court ruled that even though Burdine’s claim that his lawyer slept through portions of his trial were supported by the record, Burdine still failed to establish an ineffectiveness claim pursuant to *Strickland*. *Id.* Burdine then appealed to the federal courts for habeas relief. *Id.* A panel of the Court of Appeals for the Fifth Circuit reversed the grant of relief. *Id.* at 338. It was not until the Fifth Circuit reheard the case sitting *en banc* that a sharply divided court ruled that Burdine’s sleeping lawyer amounted to constitutionally inadequate representation under *Strickland*. *Id.* at 349–50. Arguing that there was no evidence that a sleeping person was in fact an unconscious person, *id.* at 362 n.2, the dissenting judges explained that under the circumstances, a showing of prejudice should be required. *Id.* at 364. The most striking and disturbing aspect of Burdine’s sixteen-year travail through the state and federal court systems is that ostensibly reasonable minds, applying *Strickland*, sharply differed regarding whether a lawyer, who was *proved* to have slept through “substantial periods” of his client’s trial, provided ineffective assistance of counsel. *Id.* at 340. The ability to differ intellectually considering such egregious circumstances does not speak well for the means by which our justice system measures constitutionally acceptable legal representation. *See* Ira Mickenberg, *Drunk, Sleeping, and Incompetent Lawyers: Is It Possible to Keep Innocent People off Death Row?*, 29 U. DAYTON L. REV. 319 (2004).

⁶ *See generally* Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 259 (1995) (explaining that ineffective assistance of counsel claims are granted at a rate of less than 1% in federal courts and less than 10% in state courts); Nancy J. King, Essay, *Enforcing Effective Assistance After Martinez*, 122 YALE L.J. 2428, 2431 (2013) (describing the “notoriously low rate of relief in federal habeas [claims]. . . . [as] less than 1% of noncapital habeas petitions”).

frequency with which defendants receive unacceptable legal representation at trial. Yet despite well-reasoned criticism,⁷ a majority of the Supreme Court has thus far failed to recognize the insufficiency of current ineffective assistance jurisprudence. In addition to the Court's ruling in *Strickland*, the poor quality of appointed counsel can be attributed to a combination of factors including the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996,⁸ grossly underfunded public defender systems in the states, prosecutorial resistance to pretrial discovery and disclosure requirements, and the failure of jurists to report instances of incompetent lawyering in their courtrooms.

Not all poorly represented or wrongfully convicted prisoners can be as "lucky" as Adnan Syed—but luck should not be a factor in fulfilling the promise of effective assistance for the criminally accused. This article suggests changes to several sectors of the criminal justice system to bolster the provision of quality defense lawyering and protect defendants' Sixth Amendment rights.⁹ Part I underscores the unique juncture between the criminal justice system and the strong public interest in Syed's case created by the media. Part II explains how the Court's decision in *Strickland v. Washington* has contributed to the pervasive problem of inadequate representation of criminal defendants nationwide. Part III discusses the difficulty of obtaining a federal writ of habeas corpus as a result of AEDPA—thus making it all the more problematic for prisoners to secure post-conviction relief based on ineffective assistance of counsel. Part IV explores recent ineffective assistance decisions and considers changing societal attitudes toward wrongful convictions and what that might signal about ineffective assistance of counsel jurisprudence. Part V proposes comprehensive reforms to the criminal justice system, all geared toward improving the quality of criminal defense lawyering and providing more protection for criminal defendants' right to the effective assistance of counsel. Suggested reforms include: (a) modifying *Strickland*;¹⁰ (b)

⁷ See, e.g., Larry Yackle, *AEDPA Mea Culpa*, 24 FED. SENT'G REP. 330, 330 (2012) (describing habeas litigation as a nightmare which delivers "unjust and bizarre results" and squanders limited resources).

⁸ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified at scattered sections of 8 U.S.C., 18 U.S.C., 22 U.S.C., 28 U.S.C., 42 U.S.C.).

⁹ In relevant part, the Sixth Amendment of the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

¹⁰ See discussion *infra* Section V.A.

revising AEDPA;¹¹ (c) encouraging jurists to report lawyer misconduct in their courtrooms;¹² (d) adopting open-file systems in all prosecutors' offices;¹³ and (e) increasing the funding of public defender offices.¹⁴ Adoption of any one of the proposed reforms will result in better criminal defense lawyering and significant advancement toward the protection of criminal defendants' constitutional right to the effective assistance of counsel. Implemented as a whole, these suggestions will result in a vast improvement in criminal defense lawyering overall and more meaningful protection of criminal defendants' Sixth Amendment rights, hopefully eliminating the need for defendants to be lucky.

I. "LUCKY" ADNAN SYED'S USE OF SOCIAL MEDIA YIELDS REMARKABLE RESULTS

In January 1999, seventeen-year-old Hae Min Lee disappeared after attending class at her high school in Baltimore County, Maryland. Her body, which had been strangled to death and partially covered in a makeshift grave, was discovered a few weeks later.¹⁵ Shortly after the discovery and relying on an anonymous tip, the authorities focused their investigation almost exclusively on Adnan Syed.¹⁶ At the time, Syed, also seventeen years old, and Lee were classmates.¹⁷ They had previously dated and were friends at the time of her killing.¹⁸

After an initial mistrial, Syed's second trial began in January 2000 and lasted for almost two months.¹⁹ At trial, Syed was represented by Christina Gutierrez—an experienced criminal defense attorney who, after working at Baltimore's public defender's office, privately practiced in the Baltimore area for well over twenty years.²⁰ Gutierrez came highly recommended to the Syed family.²¹ Unfortunately for Syed, Gutierrez's ability to represent her clients adequately deteriorated drastically over the years, as she was suffering from multiple sclerosis, had encountered serious financial

¹¹ See discussion *infra* Section V.B.

¹² See discussion *infra* Section V.C.

¹³ See discussion *infra* Section V.D.

¹⁴ See discussion *infra* Section V.E.

¹⁵ See RABIA CHAUDRY, ADNAN'S STORY: THE SEARCH FOR TRUTH AND JUSTICE AFTER SERIAL 44–47 (2016); see also Memorandum Opinion II, *supra* note 1, at 3.

¹⁶ See CHAUDRY, *supra* note 15, at 55.

¹⁷ See *id.* at 2, 50–51.

¹⁸ See *id.*

¹⁹ See *id.* at 2, 149.

²⁰ See *id.* at 105–06.

²¹ See *id.* at 103.

troubles, and was struggling to handle her very busy docket—all of which contributed to an inability to represent them competently.²² Gutierrez’s defense theory was so incoherent that, at times, it was unclear whether she actually had a clear understanding of the theory of defense she was presenting to the jury.²³

A myriad of errors occurred at Syed’s trial, some of which were patent, others not so easily detected, even by those present at his trial. Nonetheless, errors permeated the entire trial process. For example, before Syed’s trial, Gutierrez made several critical mistakes, not the least of which was failing to contact and investigate an alibi witness—Asia McClain—who would have established that she was with Syed during the window of time in which Lee was allegedly killed.²⁴ Importantly, Gutierrez botched the cross-examination of one of the State’s key witnesses, cell phone record expert Abraham Waranowitz, whose testimony was presented to establish Syed’s whereabouts at the time of the crime.²⁵ The cell tower

²² The combination of her problems ultimately led to her disbarment. Sarah Koenig, *Lawyer Gutierrez Agrees to Disbarment*, BALTIMORE SUN (June 2, 2001), http://articles.baltimoresun.com/2001-06-02/news/0106020237_1_lawyer-gutierrez-clients [<https://perma.cc/3PZB-U58Z>]. In May 2001, faced with multiple grievances filed against her with the Maryland Attorney Grievance Commission, Gutierrez agreed to her own disbarment. *Id.* Shortly after her disbarment (and only a year and a half after representing Syed at trial), Gutierrez said that she was blind in one eye, could barely walk, and had been hospitalized for most of the winter. *Id.* In addition to her deteriorating health, Gutierrez had mishandled and misappropriated client funds, and dozens of clients claimed that they had paid Attorney Gutierrez but that Gutierrez failed to file their pleadings. *Id.* After another practicing lawyer reported her to the Commission, she consented to her disbarment. *Id.*; see also CHAUDRY, *supra* note 15, at 198–99, 201, 229, 369 (discussing Gutierrez’s deteriorating health and ultimate disbarment); Justin George, *Son of ‘Serial’ Subject’s Lawyer Defends Mother*, BALTIMORE SUN (Apr. 9, 2015), <http://www.baltimoresun.com/news/maryland/crime/bs-md-serial-syed-lawyer-20150408-story.html> [<http://perma.cc/342B-UDGV>].

²³ See CHAUDRY, *supra* note 15, at 157–69 (describing Gutierrez’s defense of Syed throughout his second trial as “confused,” “rambling,” and “barely coherent”); *id.* at 156 (quoting Gutierrez’s trial argument). Gutierrez also questioned witnesses in a bizarre fashion and made confusing arguments before the jury and judge. *Episode 14—Tina*, UNDISCLOSED (Nov. 2, 2015) (downloaded using iTunes) (containing audio recording of Gutierrez’s disjointed trial argument).

²⁴ See Memorandum Opinion II, *supra* note 1, at 12. In its opinion, the Circuit Court for Baltimore City explained that the State’s evidence presented at trial established that Lee was killed between 2:35 p.m. and 2:40 p.m. on January 13, 1999, at a Best Buy parking lot. *Id.* at 11–12. McClain would have testified that she was with Syed in the library, located several miles from Best Buy, on that date between 2:20 p.m. and 2:40 p.m. *Id.*

²⁵ *Id.* at 38–40. The State presented cell tower location evidence from which the jury was to infer the precise location of Syed during the alleged burial of Lee’s body. *Id.* at 38–39. The exhibit containing the cell phone information that the State presented at trial was an excerpt of a complete set of cell phone tower information, which the State supplied to Syed’s attorney during pretrial discovery months before the trial. *Id.* at 40. The coversheet from the phone company, which accompanied the records, explained how the records were to be interpreted and included a disclaimer providing that incoming

evidence was unreliable, however, and should not have been used to determine a person's—more specifically, Syed's—precise location.²⁶ Nonetheless, Gutierrez failed to question the witness about the use and reliability of cell tower evidence in determining Syed's location.²⁷

In addition to Gutierrez's mistakes, the prosecution engaged in questionable conduct both before and during Syed's trial.²⁸ Prior to trial, the prosecution failed to turn over discoverable information, even after multiple requests by Gutierrez.²⁹ For example, the defense repeatedly sought information about the anticipated testimony of one of the State's key witnesses, Jay Wilds.³⁰ The defense also requested the results of Lee's autopsy, a request which was not honored.³¹ The autopsy report described the pattern of lividity on Lee's body, a pattern that was in opposition to the prosecution's theory of the case.³² In addition to the prosecution's reluctance to produce the requested material, at trial the prosecution also made missteps (to put it graciously) in apparently failing to detect the dishonesty of its witnesses, including police officers who initially and repeatedly interviewed Wilds.³³ All of this

calls could not be used as reliable information of a cell phone's location. *See id.* However, the prosecution used the information about incoming phone calls listed on the cell tower logs to prove Syed's location during the alleged crime, in direct contradiction of the disclaimer. *See id.* at 42–43. Gutierrez failed to cross-examine the State's expert about the disclaimer. *See id.* at 43; *see also* CHAUDRY, *supra* note 15, at 338.

²⁶ There is substantial literature on the inappropriate use of cell phone tower triangulation to determine a cell phone caller's location. *See, e.g.*, Tom Jackman, *Experts Say Law Enforcement's Use of Cellphone Records Can Be Inaccurate*, WASH. POST (June 27, 2014), https://www.washingtonpost.com/local/experts-say-law-enforcements-use-of-cellphone-records-can-be-inaccurate/2014/06/27/028be93c-faf3-11e3-932c-0a55b81f48ce_story.html (explaining severe limitations on use of cell tower information to determine a person's whereabouts); Michael Cherry et al., *Cell Tower Junk Science*, 95 JUDICATURE 151, 151 (2012) (explaining that cell tower evidence cannot reliably determine a person's location).

²⁷ *See* Memorandum Opinion II, *supra* note 1, at 46 (in which the court ruled that Gutierrez had failed to cross-examine cell phone expert properly in light of cell phone record coversheet).

²⁸ *See* CHAUDRY, *supra* note 15, at 318 (explaining that “the prosecution clearly did everything in its power to thwart discovery and withhold as much information as possible” from Syed's attorney).

²⁹ *Id.* at 131 (explaining Gutierrez had to make multiple demands to compel full discovery on details of Syed's case).

³⁰ *Id.* at 319. Jay Wilds ultimately testified that Syed showed him Lee's body immediately after she was killed and that Wilds was with Syed when Syed buried her body in a local park. *Id.* at 144.

³¹ *See id.* at 131, 318.

³² *Id.* at 305. Lividity is settling of blood in a body post mortem. *Id.* at 304. In a deceased body, gravity pulls blood to portions of the body closest to the ground causing a purplish discoloration where the blood and tissues have settled. *Id.*

³³ *Undisclosed* revealed that Wilds was likely coached into testifying falsely by the police officers who were later witnesses at Syed's trial. *See id.* at 328–29; *see also* Cristina Everett, *5 Key Findings from Undisclosed that Serial Missed*, ENTMT WEEKLY

conduct, combined with the prosecution’s misguided reliance on the cell tower evidence—in contradiction with the cell tower evidence’s evidentiary value—proved problematic.³⁴

The culmination of mistakes by Syed’s attorney as well as questionable prosecutorial conduct resulted in the conviction of Adnan Syed for the kidnapping, robbery, and murder of Hae Min Lee. Post-conviction, Syed fired Gutierrez, and a public defender represented him at sentencing,³⁵ where he was sentenced to life in prison plus thirty years.³⁶ Since his conviction, Syed has received legal assistance from various attorneys who have repeatedly argued that the case was plagued with defense counsel errors amounting to constitutional violations and prosecutorial missteps, including multiple *Brady* violations.³⁷ Nonetheless, for almost twenty years, Syed’s requests for relief were denied.

Then came the social media frenzy. It started when the creators of the podcast *Serial* decided to focus on Syed’s story in the show’s inaugural season. In October 2014, *Serial* released its first episode, and the podcast series quickly became wildly popular, receiving several awards.³⁸ Public interest in Syed’s case exploded.³⁹ *Serial* was so popular that it spawned other podcasts that focused initially on Syed’s case as well, the most

(Aug. 24, 2015), <http://ew.com/article/2015/08/24/5-key-finding-undisclosed-serial-adnan-syed/> [<https://perma.cc/C6WV-HLQV>].

³⁴ See *supra* notes 25–27 (describing that the cell tower evidence indicated that it was unreliable to use to determine a caller’s location).

³⁵ See CHAUDRY, *supra* note 15, at 179–80.

³⁶ See *id.* at 183.

³⁷ In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court ruled that the constitution requires prosecuting authorities to disclose to the defense all material, exculpatory evidence in the government’s possession, *id.* at 87. Failure of the prosecutor to do so is commonly referred to as a “*Brady* violation.” In Syed’s case, the State was accused of “suppress[ing] favorable and material evidence of an oral side agreement with the State’s key witness,” as well as “introducing false and misleading evidence.” See Memorandum Opinion II, *supra* note 1, at 1, 8–10.

³⁸ *Serial* investigative reporter Sarah Koenig was named one of *Time Magazine*’s 100 Most Influential People in 2015. See Ewan McGregor, *Sarah Koenig: The Investigator in Your Ear*, TIME (Apr. 16, 2015), <http://time.com/3823276/sarah-koenig-2015-time-100/> [<https://perma.cc/LMB3-SFTQ>]. *Serial* was awarded the Peabody Award in 2014. See *Serial*, PEABODY AWARDS, <http://www.peabodyawards.com/award-profile/serial> [<https://perma.cc/4YMM-EM4A>]; Richard Gorelick, ‘*Serial*’ Is First-Ever Podcast to Win Peabody Award; Creator Sarah Koenig Makes Time’s 100 Most Influential People List, BALTIMORE SUN (Apr. 21, 2015), <http://www.baltimoresun.com/features/baltimore-insider-blog/bal-serial-peabody-podcasts-20150420-story.html> [<http://perma.cc/6VAL-WV8R>].

³⁹ By the end of its first season, *Serial* had been downloaded more than 80 million times, making it the most popular podcast series to date. Monica Hesse, ‘*Serial*’ takes the stand: How a podcast became a character in its own narrative, WASH. POST (Feb. 8 2016), https://www.washingtonpost.com/lifestyle/when-a-post-conviction-hearing-feels-like-a-sequel-the-weirdness-of-serial-back-on-the-stand/2016/02/08/b3782c60-2a49-48f7-9480-a34dd9e07ab6_story.html?utm_term=.d204186ba68d [<https://perma.cc/Y4YV-W9UW>]; see Memorandum Opinion II, *supra* note 1, at 58 (describing “phenomenally strong public interest [in Syed’s case] created by modern media”).

popular of which was *Undisclosed*.⁴⁰ Countless articles and news reports regarding Syed's situation and the death of Hae Min Lee followed,⁴¹ and the spotlight on the conviction of Adnan Syed shone brightly.⁴²

One of the podcasts about Syed's case, *Undisclosed*, was co-hosted by three lawyers.⁴³ Through meticulous examination of the record, one co-host—Susan Simpson—realized that the cell tower evidence introduced at Syed's trial was erroneously used to determine Syed's location at the time of Lee's death.⁴⁴ Simpson's occasion to scour the record in Syed's case meticulously was largely a result of society's insatiable interest in Syed's situation.⁴⁵ Presented with new information regarding potential alibi witness Asia McClain as well as the newly discovered knowledge about the cell tower location evidence, Syed's appellate attorney, Justin Brown, fought and successfully secured a hearing on Syed's appeal from the trial court's denial

⁴⁰ See Erin Whitney, *Listen to the First Episode of 'Undisclosed,' the New Adnan Syed Podcast*, HUFFINGTON POST (Apr. 13, 2015), http://www.huffingtonpost.com/2015/04/13/adnan-syed-undisclosed-podcast_n_7057760.html [<https://perma.cc/ZH74-9BS3>]. *Undisclosed* debuted on April 13, 2015. Hosted by two lawyers and a law professor, *Undisclosed* promised to give a "smart, nuanced legal argument based on the totality of the facts in the case." *Id.* *Undisclosed* did not disappoint, as one of the hosts of *Undisclosed* uncovered information that would prove to be critical in the court granting Syed's Petition for Post-Conviction Relief. See CHAUDRY, *supra* note 15, at 338 (describing Susan Simpson's discovery of the AT&T fax coversheet containing disclaimer that cell tower records could not be used to determine location of calls); Memorandum Opinion II, *supra* note 1, at 40 (finding that Gutierrez performed deficiently when she failed to cross-examine the cell tower expert properly regarding the disclaimer in fax coversheet).

⁴¹ See CHAUDRY, *supra* note 15, at 263 (describing the extensive media coverage, which included outfits such as *Time Magazine*, *MSNBC*, *Wall Street Journal*, *New Yorker*, *New York Times*, *Rolling Stone*, *The Guardian*, and *Washington Post*).

⁴² *Serial* and *Undisclosed* led to somewhat of a revolution not just confined to social media. For example, Netflix's *Making a Murderer* highlighted the questionable convictions of Steven Avery and Brendan Dassey. See, e.g., Amelia McDonnell-Parry, *'Making a Murderer' One Year Later: Everything You Need to Know*, ROLLING STONE (Dec. 16, 2016), <http://www.rollingstone.com/culture/news/making-a-murderer-one-year-later-everything-to-know-w455262> [<https://perma.cc/RP5D-Y9TZ>] (describing how the show raised questions regarding the validity of the convictions of Avery and Dassey). Since the broadcast of *Making a Murderer*, the conviction of Brendan Dassey has been overturned. See Merritt Kennedy, *Judge Overturns Conviction of 'Making a Murderer' Subject Brendan Dassey*, NPR (Aug. 13, 2016), <http://www.npr.org/sections/thetwo-way/2016/08/13/489882661/judge-overturns-conviction-of-making-a-murderer-subject-brendan-dassey> [<https://perma.cc/9M5L-JRPK>].

⁴³ The co-hosts of *Undisclosed* are Rabia Chaudry, Colin Miller, and Susan Simpson. See CHAUDRY, *supra* note 15, at 301–302, 325–28.

⁴⁴ See *id.* at 301–02.

⁴⁵ See *id.* at 284–288 (explaining Simpson's detailed investigation into Syed's case was prompted by the *Serial* podcast). Additionally, the *Undisclosed* podcast has raised, through crowd-sourcing, thousands of dollars for Syed's legal defense team. See *#FreeAdnan—the Adnan Syed Trust*, LAUNCHGOOD, https://www.launchgood.com/project/the_adnan_syed_trust [<https://perma.cc/4KFN-RUC5>].

of his application for post-conviction relief.⁴⁶ At the five-day-long February 2016 hearing, Brown argued that Syed received ineffective assistance of counsel based in part on Gutierrez's failure even to contact the critical alibi witness, as well as her failure to cross-examine properly the State's expert witness regarding the cell tower evidence.⁴⁷ Amazingly—to those familiar with the rarity of ineffective assistance of counsel claim successes⁴⁸—the court granted relief, ruling that Syed “was entitled to post-conviction relief because trial counsel rendered ineffective assistance when she failed to cross-examine the State's expert regarding the unreliability of cell tower location evidence.”⁴⁹ Because the State is currently appealing the decision within the state court system, Syed's case does not yet qualify for post-conviction consideration in federal court.⁵⁰

Luckily, Syed managed to secure the interest of the American public and, if one believes the court, was coincidentally able to secure the post-conviction relief he sought for almost two decades. Without the media's attention to and society's interest in his case, Syed would not have had the resources needed to hire the high-quality lawyers who successfully secured post-conviction relief and now work on his behalf. Yet a properly functioning criminal justice system should detect and resolve such

⁴⁶ See Memorandum Opinion II, *supra* note 1, at 59 (granting Syed's petition for post-conviction relief, vacating Syed's conviction, and granting a new trial).

⁴⁷ *Id.* at 57–58.

⁴⁸ See, e.g., Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 101 & n.173 (2008) (explaining in 2007, after passage of AEDPA, there was only 1 successful habeas petition in 284, far lower than the 1% success rate pre-AEDPA); see generally Flango & Mckenna, *supra* note 6 (detailing high failure rate of ineffective assistance of counsel claims); see also Smith, *supra* note 4 (discussing how right to effective representation means little); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007) (explaining how ineffective assistance of counsel claims currently lack meaningful remedies).

⁴⁹ See Memorandum Opinion II, *supra* note 1, at 38. The court explained:

This case represents a unique juncture between the criminal justice system and a phenomenally strong public interest created by modern media. Throughout the proceedings, the parties made repeated efforts to direct the Court's attention to the *Serial* podcast . . . *Serial* has attracted millions of active listeners worldwide and inspired many, through social media, to support or advocate against [Syed's] request for post-conviction relief. Regardless of the public interest surrounding this case, the Court used its best efforts to address the merits of [Syed's] petition for post-conviction relief like it would in any other case that comes before the Court; unfettered by synopathy, prejudice, or public opinion.

Id. at 58–59 (footnote omitted).

⁵⁰ See *infra* Part III (discussing qualification for federal review pursuant to AEDPA).

injustices without the added pressures of social and news media attention.⁵¹ Syed is a “lucky” guy.

II. *STRICKLAND* USHERS IN DECADES OF DISREGARD FOR DEFENDANTS’ RIGHT TO COUNSEL

To better understand Syed’s situation and in order to appreciate the negative impact of *Strickland* on the quality of criminal defense lawyering, it is important to consider the Supreme Court’s treatment of the right to counsel in general. Historically, when the Supreme Court considered the right to counsel in criminal cases⁵²—and indeed in civil proceedings involving fundamental rights⁵³—the Court rhapsodized about the value of counsel.⁵⁴ The Court’s language soared as it described the importance of the assistance of counsel. However, the tenor of the Court in right to counsel cases sharply contrasted with the language the Court used when determining whether an attorney had provided the constitutionally required *effective* assistance of counsel. Consider the following discussion of the history of the right to counsel cases and the development of the Court’s ineffective assistance of counsel jurisprudence.⁵⁵

A. *Right to Counsel Law*

*Powell v. Alabama*⁵⁶ was the first case in which the Court ruled that a state’s mere appointment of counsel was insufficient to satisfy the due process mandates of the Fourteenth Amendment to the Constitution.⁵⁷ Instead, the Court held that the Constitution requires the *effective* assistance of counsel in the preparation and trial of a capital case.⁵⁸ *Powell* involved several young, impoverished African American men

⁵¹ Cf. Joseph L. Hoffman, *Innocence and Federal Habeas After AEDPA: Time for the Supreme Court to Act*, 24 FED. SENT’G REP. 300, 303 (2012) (observing that actors outside the court system may be better positioned to investigate prisoner claims than are courts).

⁵² See, e.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵³ See, e.g., *In re Gault*, 387 U.S. 1 (1967); *Kent v. United States*, 383 U.S. 541 (1966).

⁵⁴ See, e.g., *Gideon*, 372 U.S. at 344 (“[L]awyers in criminal courts are necessities, not luxuries.”).

⁵⁵ The following section is not meant to be a comprehensive consideration of right to counsel and ineffective assistance of counsel law, as such a treatment would be beyond the scope of this piece.

⁵⁶ *Powell v. Alabama*, 287 U.S. 45 (1932) (ruling appointment of counsel without “accustomed incidents of consultation and opportunity of preparation for trial” insufficient).

⁵⁷ *Id.* at 50.

⁵⁸ *Id.* at 53 (explaining Alabama’s appointment of the entire Alabama bar amounted to “a denial of effective and substantial aid” of counsel).

and boys⁵⁹ accused in Alabama state court of raping two white women, a state capital offense at the time.⁶⁰ At arraignment, the trial judge appointed the entire Alabama state bar to represent the defendants through trial.⁶¹ After each defendant was convicted and sentenced to death,⁶² the U.S. Supreme Court was called upon to decide whether these young men and boys were constitutionally entitled to a more meaningful appointment of counsel at their capital murder trials.⁶³ A divided Court⁶⁴ ultimately decided that they were.⁶⁵ After describing that it had no authority to opine on any possible error that the state court might have made involving violations of state statutes or its own constitution,⁶⁶ the Court explained that under the federal constitution "the necessity of counsel was so vital and imperative that the failure of the trial court to make an *effective* appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."⁶⁷ The Court clarified the constitutional

⁵⁹ See generally JAMES GOODMAN, STORIES OF SCOTTSBORO (1994). All nine of the defendants accused in the Scottsboro tragedy were teenagers. The two youngest were thirteen years old at the time they were accused of the crime; the oldest was nineteen. *Id.* at 6; see DAN CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969).

⁶⁰ See *Powell*, 287 U.S. at 49–50.

⁶¹ *Id.* at 49, 53–54, 56.

⁶² *Id.* at 50.

⁶³ The sole issue considered by the Court was whether the defendants "were denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial." *Id.*

⁶⁴ Justice Butler dissented in an opinion joined by Justice McReynolds, arguing that there was no showing that the petitioners were denied the right to counsel. *Id.* at 73–74 (Butler, J., dissenting).

⁶⁵ *Id.* at 71 ("[W]e think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.").

⁶⁶ *Id.* at 52 (majority opinion) ("With any error of the state court involving alleged contravention of the state statutes or Constitution we, of course, have nothing to do.").

⁶⁷ *Id.* at 71 (emphasis added). The Court further stated:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. To hold otherwise would be to ignore the fundamental postulate, already adverted to, "that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard."

Id. at 71–72 (quoting *Holden v. Hardy*, 169 U.S. 366, 390 (1898)). Rejecting the argument that the appointment of counsel would interfere with the efficiency with which trials could proceed without the presence of defense attorneys, the Court stated:

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of

importance of criminal defendants receiving a fair trial and that it was impossible to conceive of a fair trial when a criminal defendant was denied the effective assistance of counsel.⁶⁸ The Court elucidated that properly appointed counsel would have been “impressed with that individual sense of duty which should and naturally would accompany the appointment of a selected member of the bar, specifically named and assigned.”⁶⁹ Without proper counsel, it was impossible to discern what their defenses may have been.⁷⁰ The Court described the right to the effective assistance of counsel as a fundamental right,⁷¹ essential to any fair trial,⁷² and a vital component of due process.⁷³ Thus, *effective* became part of the assistance of counsel lexicon and applied to the states through the Due Process Clause of the Fourteenth Amendment.

Several years later, in *Johnson v. Zerbst*,⁷⁴ the Court was called upon to decide whether an indigent defendant in *federal* court was constitutionally entitled to the assistance of counsel.⁷⁵ Not having the funds to retain counsel, the defendants in *Zerbst* were tried, convicted, and sentenced for violating federal law—all without a lawyer.⁷⁶ On writ of habeas

motions for new trial and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the clam spirit of regulated justice but to go forward with the haste of the mob.

Id. at 59; *cf.* *Burdine v. Johnson*, 262 F.3d 336, 357 (5th Cir. 2001) (Barksdale, J., dissenting).

⁶⁸ *Powell*, 287 U.S. at 72 (“[I]t is impossible to conceive of a fair trial where he is compelled to conduct his cause in court, without the aid of counsel.” (quoting *Hendryx v. State*, 29 N.E. 1131, 1132 (Ind. 1892))).

⁶⁹ *Id.* at 56–57 (“[T]he circumstance lends emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.”). The Court even pointed out that in the instant case, a member of the bar appointed to represent the defendants had an impermissible conflict of interest: “a leading member of the local bar accepted employment on the side of the prosecution and actively participated in the trial.” *Id.*

⁷⁰ *Id.* at 58 (“Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given.”).

⁷¹ *Id.* at 67–68.

⁷² *Id.* at 70.

⁷³ *Id.* at 71.

⁷⁴ *Johnson v. Zerbst*, 304 U.S. 458, 458–60 (1938).

⁷⁵ *Id.* at 459. The defendants in *Zerbst* were charged with violating federal law by “possessing and uttering counterfeit money.” *Id.*

⁷⁶ *Id.* at 460.

corpus, the Court directed that the Sixth Amendment to the United States Constitution granted indigent criminal defendants charged in federal courts the assistance of counsel and mandated that counsel be provided for them.⁷⁷

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. . . . He lacks both the skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.”⁷⁸

Because *Zerbst* was a federal case, the Court’s decision was seemingly straightforward—there was little question that the Sixth Amendment applied in federal court. The more difficult question would be whether the Sixth Amendment’s guarantee of assistance of counsel extended to state criminal proceedings as well. The Court first confronted the state issue in 1942, when it decided *Betts v. Brady*.⁷⁹ In *Betts*, the Court held that, absent special circumstances, the Sixth Amendment right to counsel did not extend to state defendants.⁸⁰ The defendant in *Betts* was a poor farm hand with little education⁸¹ who was indicted and tried in a Maryland state court for felony robbery.⁸² Unable to afford an attorney, he requested that one

⁷⁷ *Id.* at 462–63. The Court explained:

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.

Id. (footnote omitted).

⁷⁸ *Id.* at 463 (omission in original) (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

⁷⁹ *Betts v. Brady*, 316 U.S. 455 (1942), *overruled by* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁸⁰ *Id.* at 471 (“[W]e are unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States . . . to furnish counsel in every such case.”); *see Gideon*, 372 U.S. at 350–51 (Harlan, J., concurring). In elucidating upon the decision in *Betts v. Brady*, Justice Harlan explained:

[T]here have been not a few cases in which special circumstances were found in little or nothing more than the “complexity” of the legal questions presented, although those questions were often of only routine difficulty. The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted in itself special circumstances requiring the services of counsel at trial.

Id.

⁸¹ *Betts*, 316 U.S. at 474 (Black, J., dissenting).

⁸² *Id.* at 456–57 (majority opinion).

be appointed for him, a request that was denied.⁸³ Betts was ultimately convicted and sentenced to eight years in state prison.⁸⁴ On appeal and relying on *Powell* and *Zerbst*, Betts argued that defendants in state court were entitled to the assistance of counsel under the Sixth Amendment, just as defendants in federal courts.⁸⁵ The six-justice majority disagreed and affirmed the lower court's decision,⁸⁶ explaining that the Due Process Clause of the Fourteenth Amendment did not make the Sixth Amendment applicable to the states.⁸⁷ Rather, the majority held that a criminal defendant in state court was entitled to the appointment of counsel only where there existed "certain circumstances" justifying such appointment.⁸⁸

The *Betts* dissenters argued that the Fourteenth Amendment made the Sixth Amendment applicable to the states and that the denial of counsel to indigent defendants ran the risk of "subject[ing] innocent men to increased dangers of conviction merely because of their poverty."⁸⁹ Writing for the dissent, Justice Black explained that "[w]hether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was

⁸³ *Id.* He requested that counsel be appointed, as he was unable to employ counsel. *Id.* After an unsuccessful bid at habeas relief in the state courts, the United States Supreme Court granted his petition for certiorari.

⁸⁴ *See id.* at 457–58.

⁸⁵ *Id.* at 464 ("The question we are now to decide is whether due process of law demands that in every criminal case, whatever the circumstances, a State must furnish counsel to an indigent defendant.").

⁸⁶ *See id.* at 471–73 (explaining that "appointment of counsel is not a fundamental right, essential to a fair trial").

⁸⁷ *See id.* (spelling out that the Court is "unable to say that the concept of due process incorporated in the Fourteenth Amendment obligates the States, whatever may be their own views, to furnish counsel in every such case"). The Court explained:

The Sixth Amendment of the national Constitution applies only to trials in federal courts. The due process clause of the Fourteenth Amendment does not incorporate, as such, the specific guarantees found in the Sixth Amendment although a denial by a state of rights or privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth.

Id. at 461–62 (footnotes omitted).

⁸⁸ *See id.* at 462. "[W]e cannot say that the [Fourteenth] amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." *Id.* at 473.

⁸⁹ *Id.* at 474–76 (Black, J., dissenting). Justice Black's dissent was joined by Justices Douglas and Murphy. *Id.* at 474. Justice Black would later pen the majority's opinion in *Gideon v. Wainwright*, the opinion overruling *Betts*. *See Gideon v. Wainwright*, 372 U.S. 335, 336 (1963); *see also* discussion *infra* Section II.A.1 (discussing *Gideon*).

adequately presented.”⁹⁰ Relying on *Powell v. Alabama*, the dissenters proclaimed the right to counsel as fundamental in criminal proceedings.⁹¹

Fortunately, the majority opinion in *Betts* proved to be an aberration.⁹² After the 1950s, the Court—relying more heavily on due process—found special circumstances in most every case. Such rulings were in tension with what came to be known as *Betts*’s “special circumstances” test, which denied counsel in the absence of so-called “special circumstances.”⁹³ For instance, in the 1961 case *Hamilton v. Alabama*,⁹⁴ the Court concluded that in capital cases, the defendant’s arraignment was a critical stage of the proceeding, necessitating the presence of counsel.⁹⁵ During the same era, the Court held that due process was violated if a defendant’s *retained* counsel was prohibited from assisting his client on any issue in the case.⁹⁶ In *Chewing v. Cunningham*, the last of the *Betts* line of cases, the majority reversed the conviction and ten-year sentence pursuant to a

⁹⁰ *Betts*, 316 U.S. at 476 (Black, J., dissenting). In a footnote, Justice Black explained, “Discussion of the Fourteenth Amendment by its sponsors in the Senate and House shows their purpose to make secure against invasion by the states the fundamental liberties and safeguards set out in the Bill of Rights.” *Id.* at 474 n.1. This debate among the jurists is part of the incorporation debate, the discourse concerning whether the entirety of the Bill of Rights was applicable to the states. Justice Black was of the opinion that the Bill of Rights was applicable to the states. *See, e.g., McDonald v. Chicago*, 130 S. Ct. 3020, 3033 (2010) (explaining that Justice Black championed the theory that the Fourteenth Amendment incorporated all Bill of Rights provisions, a theory that the full Court never embraced). Thus, his dissent in *Betts* is entirely consistent with his incorporation view.

⁹¹ *See Betts*, 316 U.S. at 475 (Black, J., dissenting) (emphasis added) (quoting *Powell v. Alabama*, 287 U.S. 45, 70 (1932)).

⁹² Nonetheless, during the *Betts* era, the Court strongly intimated that in capital cases there was a *per se* rule requiring counsel. *See, e.g., Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (“When one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted.”). In 1954 the Court found another basis for applying the right for granting indigents access to the criminal justice system. *Griffin v. Illinois* held that both due process and equal protection required that all indigents be given a transcript of the trial so that they could appeal. *Griffin v. Illinois*, 351 U.S. 12 (1956). Although the state was not required to grant appellate review, once it did, access could not be denied because of poverty. *Id.* at 18. Justice Black pointedly noted that “the ability to pay costs in advance bears no rational relationship to a defendant’s guilt or innocence.” *Id.* at 17–18. Following this decision, the *Griffin* principle was extended even beyond *Gideon*. *See Mayer v. Chicago*, 404 U.S. 189 (1971) (unanimous court holding that an indigent defendant appealing convictions of an ordinance violation punishable by fine only was entitled to a transcript). The case goes beyond the right to counsel under the Sixth Amendment, which requires actual imprisonment. *See Scott v. Illinois*, 440 U.S. 367 (1979).

⁹³ *See Gideon*, 372 U.S. at 350–51 (referring to *Betts*’s “special circumstances” test).

⁹⁴ *Hamilton*, 368 U.S. 52.

⁹⁵ *Id.* at 53 (“Arraignment under Alabama law is a critical stage in a criminal proceeding.”).

⁹⁶ *Chandler v. Fretag*, 348 U.S. 3 (1954) (characterizing counsel’s assistance as an unqualified right).

Virginia recidivist statute, the result of a trial at which the defendant was denied legal representation.⁹⁷ The Court explained that the recidivism charge was so serious, the issues were so complex, and the potential prejudice was so great, that the denial of counsel constituted the denial of due process.⁹⁸ Envisioning several issues that an imaginative attorney could have put forth on behalf of his client, Justice Douglas, writing for the majority, concluded that the accused was constitutionally entitled to legal representation.⁹⁹ *Chewing* signaled the ebb and flow of the Supreme Court's right to effective counsel jurisprudence. The following discussion explores what has come to be the most celebrated right to counsel case, *Gideon v. Wainwright*, and its legacy.

1. "Guiding Hand of Counsel at Every Step"

In August 1961, Clarence Earl Gideon, an indigent drifter accused of stealing five dollars and some beer from a pool hall, was charged with felony breaking and entering.¹⁰⁰ Having no money to pay for a lawyer, Gideon requested that the court appoint one for him, a request that was denied.¹⁰¹ Without the requested attorney, Gideon defended himself at trial the best he could, by making an opening statement, cross-examining the State's witnesses, presenting his own witnesses, and making closing arguments.¹⁰² He even declined to testify on

⁹⁷ See *Chewing v. Cunningham*, 368 U.S. 443, 447 (1962). The statute of conviction provided that:

[W]hen it appears that a person convicted of an offense has been previously sentenced "to a like punishment," he may be tried on an information that alleges "the existence of records of prior convictions and the identity of the prisoner with the person named in each." The . . . prisoner may deny the existence of any such records, or that he is the same person named therein, or both. If the existence of the records is denied, the court determines whether they exist. If the court so finds and the prisoner denies he is the person mentioned in the records or remains silent, a jury is impaneled to try that issue. If the jury finds he is the same person and if he has one prior conviction, the court may sentence him for an additional term If he has been twice sentenced, the court may impose . . . additional sentence as it "may deem proper."

Id. at 443–44.

⁹⁸ See *id.* at 446–47 ("In trials of this kind the labyrinth of the law is, or may be, too intricate for the layman to master.").

⁹⁹ *Id.* "Double jeopardy and *ex post facto* application of a law are also questions which . . . may well be considered by an imaginative lawyer, who looks critically at the layer of prior convictions on which the recidivist charge rests." *Id.* at 447.

¹⁰⁰ *Gideon v. Wainwright*, 372 U.S. 335, 336–37 (1963).

¹⁰¹ See *id.* at 337.

¹⁰² *Id.*

his own behalf.¹⁰³ The jury convicted and sentenced Gideon to five years.¹⁰⁴ After his conviction, Gideon pursued state habeas relief, which was denied.¹⁰⁵ He then filed a handwritten request for federal habeas relief.¹⁰⁶ Although factually similar to *Betts v. Brady*, which was decided more than thirty years earlier,¹⁰⁷ the Supreme Court agreed to hear the case, as the issue of whether a criminal defendant had a per se federal constitutional right to counsel in state felony cases had become a source of controversy and litigation.¹⁰⁸ In a unanimous decision,¹⁰⁹ the Court overruled *Betts v. Brady*,¹¹⁰ explaining that the Court in *Betts* had made an “abrupt break with its own well-considered precedents.”¹¹¹

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See *Records of Rights*, NAT’L ARCHIVES, <http://recordsofrights.org/records/298/gideons-handwritten-supreme-court-petition> [<https://perma.cc/5H3C-5JQX>] (providing National Archive’s image of Gideon’s handwritten petition to the Supreme Court); *Facts and Case Summary—Gideon v. Wainwright*, U.S. COURTS, <http://www.uscourts.gov/educational-resources/educational-activities/facts-and-case-summary-gideon-v-wainwright> [<https://perma.cc/6JEH-TXHN>].

¹⁰⁷ See discussion *supra* Section II.A (examining *Betts v. Brady*).

¹⁰⁸ See *Gideon*, 372 U.S. at 337–38. The Court appointed Abe Fortas to represent Gideon. *Id.* at 335, 338. Abe Fortas, a future Supreme Court Justice, was a well-respected and competent lawyer. See LARA KALMAN, ABE FORTAS: A BIOGRAPHY (1992); BRUCE ALLEN MURPHY, FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE (1988).

¹⁰⁹ Justice Black delivered the opinion of the Court. See *Gideon*, 372 U.S. at 336. Justice Douglas joined the decision, yet wrote separately to emphasize that “rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.” *Id.* at 347 (Douglas, J., concurring). Justice Clark wrote separately to speak to the distinction that had been drawn over the years between the right to counsel in capital cases such as *Powell v. Alabama* and the right to counsel in noncapital cases such as *Gideon*:

[T]he Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprivation of “liberty” just as for deprivation of “life,” and there cannot constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved.

Id. at 349 (Clark, J., concurring). Justice Harlan concurred separately as well, disagreeing with the majority’s statement that *Betts v. Brady* represented the Court’s “abrupt break with its own well-considered precedents,” but Justice Harlan explained that the application of *Betts*’s special circumstances rule by the state courts had become unworkable. *Id.* at 344, 351 (Harlan, J., concurring). He continued, “To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system.” *Id.* at 351.

¹¹⁰ See *id.* at 339 (majority opinion).

¹¹¹ *Id.* at 343–44.

We accept *Betts v. Brady*’s assumption . . . that a provision of the Bill of Rights which is “fundamental and essential to a fair trial” is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights.

In commanding and persuasive language, harkening generously back to the days of the Court's decisions in *Powell* and *Zerbst*,¹¹² the Court emphasized the important role that criminal defense attorneys play in any fair criminal justice system.¹¹³ It aptly affirmed that "lawyers in criminal courts are necessities, not luxuries."¹¹⁴ It also stressed that both state and national constitutions have in place protections to ensure that defendants receive fair trials, and defense counsel is one of those important safeguards.¹¹⁵ The Court quoted the powerful words in *Powell*, which years earlier had stressed the importance of effective criminal defense lawyering, holding that a criminal defendant "requires the guiding hand of counsel at every step."¹¹⁶

Gideon v. Wainwright is an American gem—it was a landmark opinion when it was issued and remains so today. It is hailed as a critical opinion, not merely because it expanded the fundamental right to counsel for the criminally accused in state courts, but also because it appeared to embrace important ideals of America: a poor man fought the state, asked for the backing of the highest court in the land, and won.¹¹⁷ For Clarence Earl Gideon, a person with no resources, the courts worked to protect him from the dangers of an unfair conviction.

¹¹² See *id.* at 343; see also *supra* notes 56–78 and accompanying text (discussing the *Powell* and *Zerbst* opinions).

¹¹³ *Gideon*, 372 U.S. at 343.

¹¹⁴ *Id.* at 344.

¹¹⁵ *Id.* ("[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. . . . 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. 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 a crime has to face his accusers without a lawyer to assist him.").

¹¹⁶ *Id.* at 345.

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. . . . 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.

Id. at 344–45 (citing *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)).

¹¹⁷ The story of Clarence Earl Gideon was portrayed in a television movie starring Henry Fonda as Clarence Gideon, Jose Ferrer as Abe Fortas, and John Houseman as the Chief Justice of the Supreme Court. See *GIDEON'S TRUMPET* (Worldvision 1980).

As the *Gideon* Court explained, “[t]his noble ideal” that “every defendant stands equal before the law” “cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.”¹¹⁸ The danger to those defendants is an unjust conviction. At that time, it appeared that the courts were to operate justly to protect the rights of those who are underprivileged, underrepresented, and often unheard.

2. Expansion of Right to Counsel

Gideon’s handwritten petition to the United States Supreme Court did more than just usher in the extension of the Sixth Amendment right to counsel in state felony trials. In the years following *Gideon*, the principles it enunciated were extended beyond the facts of that case. For instance, *Douglas v. California*¹¹⁹—decided on the same day as *Gideon*¹²⁰—held that a criminal defendant pursuing a first appeal as of right was entitled to the right to counsel within the meaning of the Due Process and Equal Protection provisions of the Constitution.¹²¹ In *Douglas*, the state’s procedure for assigning counsel on appeal did not comport with the Fourteenth Amendment’s mandate of equality among defendants able to retain counsel and indigent defendants forced to navigate the complexities of direct appeal.¹²²

¹¹⁸ *Gideon*, 372 U.S. at 344.

¹¹⁹ *Douglas v. California*, 372 U.S. 353 (1963).

¹²⁰ Both *Gideon* and *Douglas* were decided on March 18, 1963. *Douglas*, 372 U.S. 353; *Gideon*, 372 U.S. 335.

¹²¹ See *Douglas*, 372 U.S. at 357. Unlike *Gideon* which was a Sixth Amendment case, *Douglas* was based on *Griffin v. Illinois*’s due process and equal protection analysis. *Id.* at 356–57; see *supra* note 92 (discussing *Griffin v. Illinois*, 351 U.S. 12 (1956)); see also *Evitts v. Lucey*, 469 U.S. 387 (1985) (relying on the Equal Protection Clause, holding criminal defendant entitled to “effective assistance of counsel on first appeal as of right”).

¹²² See *Douglas*, 372 U.S. at 357–58. However, years later when the Court was asked to extend its ruling to discretionary appeals to the state court and the United States Supreme Court itself, the Court denied the extension. See *Ross v. Moffitt*, 417 U.S. 600, 610 (1974). Nonetheless, even while denying the right to counsel for discretionary appeals, the Court described the value of an attorney in that context:

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding.

Id. at 616. The dissent argued:

[A]n indigent defendant is as much in need of the assistance of a lawyer in preparing and filing a petition for certiorari as he is in the handling of an

In 1972 the Court ruled that under the Sixth Amendment a criminal defendant could not be imprisoned for any offense—whether a misdemeanor or felony—unless the defendant was afforded the assistance of counsel to aid in his defense.¹²³ In *Argersinger v. Hamlin*, the Court reversed the conviction of Argersinger, an indigent defendant convicted of the petty offense of carrying a concealed weapon in Florida state court.¹²⁴ After a trial before the bench and without the benefit of legal counsel as requested, Argersinger was sentenced to jail for ninety days.¹²⁵ Reiterating that the “assistance of counsel is often a requisite to the very existence of a fair trial,”¹²⁶ the Court held that without a knowing and intelligent waiver, no one may be imprisoned for any offense unless represented by counsel at trial.¹²⁷ The Court pronounced that, as a federal constitutional matter, the “denial of the assistance of counsel will preclude the imposition of a jail

appeal as of right. In many appeals, an articulate defendant could file an effective brief by telling his story in simple language without legalisms, but the technical requirements for applications for writs of certiorari are hazards which one untrained in the law can hardly be expected to negotiate.

Id. at 620–21 (Douglas, J., dissenting). Justices Marshall and Brennan joined Justice Douglas’s dissent. *Id.* at 619.

¹²³ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹²⁴ *See id.* at 26, 40.

¹²⁵ *Id.* at 26.

¹²⁶ *Id.* at 31.

¹²⁷ *Id.* at 37. Chief Justice Burger, concurring in the result, recognized that the “holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.” *Id.* at 44. Justice Brennan encouraged law students as well as practicing attorneys to provide representation of the poor. *Id.* at 40 (Brennan, J., concurring). Although he concurred in the result in this case, Justice Powell was unwilling to agree with the Court that a person could never constitutionally be imprisoned for a criminal offense if he had not been afforded the right to counsel at his trial. *Id.* at 47 (Powell, J., concurring). Tying the right to counsel with the right to a jury trial, he observed:

An unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together unassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant. If there is no accompanying right to counsel, the right to trial by jury becomes meaningless. . . . [T]he interest protected by the right to have guilt or innocence determined by a jury . . . while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel.

Id. at 46. Disagreeing with Chief Justice Burger’s expectation of the profession rising to the challenge of any new burden created as a result of this ruling, Justice Powell lamented that to require the appointment of counsel for every indigent charged with an imprisonable offense will work a practical impossibility for many small town courts, leaving them in the untenable position of being unable to enforce their own laws. *See id.* at 61.

sentence."¹²⁸ Relying in part on *Gideon*, the *Argersinger* Court made clear that it was serving notice to all state court judges that, when the trial of a misdemeanor begins, "no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel."¹²⁹

In 1974 when presented with the issue of whether the Due Process or Equal Protection provision required that indigent defendants be entitled to counsel on *discretionary* appeal to a state or federal court, the Court held in *Ross v. Moffit*¹³⁰ they did not.¹³¹ Similarly, in *Scott v. Illinois*,¹³² the state convicted the defendant for an offense for which imprisonment was authorized, but for which the state only fined the defendant.¹³³ Referring to the imposition of *actual* imprisonment as the central premise of *Argersinger*, the Court drew the line defining the right to a lawyer as the imposition of actual imprisonment.¹³⁴ In *Nichols v. United States*, the Court concluded that a conviction obtained without counsel could be used to enhance the sentence for a subsequent offense that resulted in imprisonment.¹³⁵ Sadly, *Scott* and *Nichols* are examples of cases in which there are serious repercussions to a defendant and the trajectory of his life, but apparently not serious enough to require a right to counsel in the Court's view. These limitations made the right to counsel in the Sixth Amendment—arguably the most fundamental guarantee in the amendment—less meaningful.¹³⁶

¹²⁸ *Id.* at 38 (majority opinion) (quoting *Stevenson v. Holzman*, 458 P.2d 414, 418 (Or. 1969) (en banc)).

¹²⁹ *Id.* at 31–32, 40.

¹³⁰ *Ross v. Moffit*, 417 U.S. 600, 602 (1974).

¹³¹ *Id.* at 600.

¹³² *Scott v. Illinois*, 440 U.S. 367 (1979).

¹³³ *Id.* at 368.

¹³⁴ *Id.* at 373.

¹³⁵ *Nichols v. United States*, 511 U.S. 738, 746–47 (1994). However, in *Alabama v. Shelton*, the defendant, without a lawyer, was convicted of assault and sentenced to thirty days in jail, a sentence that was immediately suspended in lieu of two years of probation. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002). The Court held that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." *Id.* (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972)). The Court applied *Argersinger's* "'actual imprisonment' rule," concluding that a "suspended sentence is a prison term imposed for the offense of conviction." *Id.* at 662. Justice Scalia dissented, joined by Chief Justice Kennedy and Justice Thomas, disagreeing with the Court's decision, as there had been no actual imprisonment yet, and therefore no right to counsel. *Id.* at 674–75 (Scalia, J., dissenting).

¹³⁶ The right to counsel as a matter of due process becomes much less likely as the proceedings are attenuated from the criminal case. Thus, the Court has relied on the Due Process clause in proceedings that were not viewed as criminal. See *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (holding that counsel must be granted to indigent defendants at combined revocation and sentencing hearings). However, the Court

The right to counsel being somewhat well defined, the related determination of what was constitutionally required of that counsel also began to be more thoroughly developed, as described in the following section.

B. *Ineffective Assistance of Counsel Law Takes Shape*

In the early 1970s, the Court began measuring whether a criminal defendant had received constitutionally infirm representation of counsel based on whether the attorney's conduct was "within the range of competence demanded of lawyers in criminal cases."¹³⁷ Prior to that time,¹³⁸ the standard for ineffective assistance of counsel varied among the lower courts.¹³⁹ The low standards tolerated extreme misbehavior by counsel,¹⁴⁰ as long as the representation comported with

subsequently concluded that probation and parole revocation proceedings were not part of the criminal process, and, therefore, there was no Sixth Amendment right to counsel. *Gagnon v. Scarpelli*, 411 U.S. 778, 789–90 (1973). Similarly in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), the Court held there was no federal constitutional right to counsel for indigents seeking state habeas relief (which is a civil proceeding, not a criminal proceeding), *id.* at 555, and in *Murray v. Giarratano*, 492 U.S. 1 (1989), extended that rule even to death row inmates seeking collateral review *id.* at 7, 10. *See also* *Middendorf v. Henry*, 425 U.S. 25, 32, 42 (1976) (holding no right to counsel at summary courts even though defendant was exposed to the maximum punishment of thirty days' confinement and hard labor).

¹³⁷ *See Tollett v. Henderson*, 411 U.S. 258, 266 (1973) ("If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not 'within the range of competence demanded of attorneys in criminal cases.'" (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970))). *Tollett* was a federal habeas ineffective assistance of counsel action in which the Court explained that defense counsel's principal value is to be a "faithful representation of the interest of his client." *Id.* at 267–68. Three justices dissented from the majority opinion in *Tollett*. *Id.* at 258. Justice Marshall, on behalf of the dissenters, countered that:

"[F]aithful representation of the interest of his client," . . . means . . . that an attorney must consult with the client fully on matters of constitutional magnitude. Without such consultation, the representation of criminal defendants becomes only another method of manipulating persons in situations where the control over their lives is precisely what is at stake.

Id. at 272–73 (Marshall, J., dissenting) (internal citation omitted) (quoting *id.* at 268 (majority opinion)).

¹³⁸ Cases prior to this time included the so-called "*Brady* Trilogy" and *Tollett*. *See Tollett*, 411 U.S. at 265–67. The *Brady* trilogy consists of *Brady v. United States*, 397 U.S. 742 (1970), *McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970). *See Tollett*, 411 U.S. at 265–67 (referring to the *Brady*, *McMann*, and *Parker* cases, in which habeas petitioners alleged deprivation of constitutional rights preceding guilty pleas, as "the *Brady* trilogy").

¹³⁹ *See, e.g., Jones v. Huff*, 152 F.2d 14, 15 (D.C. Cir. 1945) (describing the standard as whether the trial proceedings "were a farce and a mockery of justice").

¹⁴⁰ *See* Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (2004) (describing misbehavior such as being "asleep, drunk, unprepared, or unknowledgeable" as passing constitutional scrutiny in ineffective assistance of counsel claims).

"fundamental fairness."¹⁴¹ Following cases such as *Brady* and *Tollett*, many courts embellished the competent counsel test of *Brady*,¹⁴² requiring further that the range of competence be within that of a fairly experienced criminal defense attorney or an attorney acting as a diligent and conscientious advocate.¹⁴³ Some lower courts began applying a "reasonably competent counsel" test, not only to pleas but also to trials.¹⁴⁴ Chief Judge Bazelon of the District of Columbia Circuit urged for a checklist approach setting forth the minimal competent duties that an attorney must perform.¹⁴⁵ Judge Bazelon's approach focused on the attorney's performance and permitted courts to review that performance without having to determine whether the attorney's acts or omissions affected the defendant's substantive rights.¹⁴⁶ Thus, prejudice would be established upon a showing of a substantial violation of the requirements provided in the test. The substantive standards that Bazelon urged closely paralleled those set forth in the American Bar Association (ABA) standards. His proposed requirements included: conferring with the client without delay and as reasonably necessary; eliciting matters of defense; discussing strategies and tactical choices fully; promptly advising the client of his or her rights; taking all steps necessary to preserve those rights; and conducting appropriate investigations, both factual and legal.¹⁴⁷ When the Supreme Court finally spoke to this issue in the now well-known case *Strickland v. Washington* discussed in the following section, the Court rejected Bazelon's checklist approach as well as his suggestion that prejudice need not be established.¹⁴⁸

In 1984 in the opinion *Strickland v. Washington*,¹⁴⁹ the Court defined the contours of the right to the effective assistance

¹⁴¹ "Fundamental fairness" was the due process standard used to determine whether an indigent defendant was entitled to assistance of counsel in state criminal trials. See discussion *supra* Section II.A.

¹⁴² See *Brady*, 397 U.S. at 757 (applying "competent counsel" inquiry in assessing whether defendant's guilty plea was voluntary and intelligently made).

¹⁴³ See *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973) (holding "defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate").

¹⁴⁴ See *id.* at 1202 & nn.17–20 (identifying jurisdictions where the "reasonably competent" counsel standard is applied even when accused proceeds to trial).

¹⁴⁵ David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 32 (1973).

¹⁴⁶ See *id.*; cf. *Strickland v. Washington*, 466 U.S. 668 (1984) (adopting proof of prejudice as part of the ineffective assistance of counsel calculus).

¹⁴⁷ See *DeCoster*, 487 F.2d 1197.

¹⁴⁸ See discussion *infra* Section II.B (discussing *Strickland*, 466 U.S. 668).

¹⁴⁹ Portions of the discussion in this section are adapted from Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1 (2002).

of counsel in trials and capital sentencing proceedings.¹⁵⁰ Washington was indicted for various crimes, including capital offenses.¹⁵¹ The State of Florida had appointed an experienced criminal defense lawyer to assist him in his defense.¹⁵² Against his lawyer's advice, Washington confessed and pleaded guilty to all charges pending against him, including the capital offenses.¹⁵³ Also against his lawyer's advice, he opted to be sentenced by the court instead of having an advisory jury preside over his capital sentencing hearing.¹⁵⁴ Washington's lawyer did very little investigation to uncover mitigating evidence to present at sentencing on his client's behalf.¹⁵⁵ His attorney argued instead against the imposition of the death penalty based on his client's remorse and acceptance of responsibility for the crimes.¹⁵⁶ The sentencing judge disagreed and sentenced Washington to death.¹⁵⁷ In a landmark decision, the Supreme Court held that Washington received constitutionally sound legal representation.¹⁵⁸ The Court emphasized that in order to give the process meaning, the Court must take the purpose of the Sixth Amendment—that of ensuring a fair trial—as the guiding principle.¹⁵⁹ In other words, the issue was not just whether the defendant received competent representation, but whether the trial was fair.¹⁶⁰ Writing for the majority of the Court,¹⁶¹

¹⁵⁰ See *Strickland*, 466 U.S. at 683, 690–91 (explaining that subject to only one exception, “the Court has never directly and fully addressed a claim of ‘actual ineffectiveness’ of counsel’s assistance in a case going to trial”).

¹⁵¹ *Id.* at 672 (explaining that “[b]y the date set for trial,” Washington had been indicted for “three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery”).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 672–73 (describing that although counsel spoke to Washington about his background and called Washington's wife and mother, he never followed-up with his family in an effort to meet with them, did not seek out character witnesses, did not request a psychiatric exam, and did not look for further evidence concerning Washington's character or emotional state).

¹⁵⁶ *Id.* at 673.

¹⁵⁷ *Id.* at 675.

¹⁵⁸ *Id.* at 701.

¹⁵⁹ *Id.* at 686. “The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Id.* “The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” *Id.* at 691–92.

¹⁶⁰ *Cf.* *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) (explaining that threat to a fair criminal trial is maximized when the defense fails to understand resources available to it).

¹⁶¹ *Strickland*, 466 U.S. at 671. Justice O'Connor's opinion was joined by Chief Justice Burger and Justices White, Blackmun, Powell, Rehnquist, and Stevens. *Id.* at 670. Justice Brennan filed a separate opinion, concurring in part and dissenting in part. *Id.* at 701. He dissented, as he did in all capital cases affirming a sentence of death,

Justice O'Connor defined the now well-known two-prong test for establishing whether a criminal defendant received constitutionally ineffective assistance of counsel: (1) whether counsel's performance was so deficient as to deprive the defendant of a fair trial and (2) whether the deficient performance prejudiced the defendant's case, which the Court defined as a "reasonable probability that, but for counsel's deficient performance, the outcome would have been different."¹⁶² An ineffectiveness claim can be defeated on either prong; both prongs need not be evaluated in disposing of a petitioner's claim.¹⁶³

Missing from the *Strickland* opinion is the soaring language of *Gideon* and previous decisions, such as the acknowledgment that a criminal defendant "requires the guiding hand of counsel at every step."¹⁶⁴ Instead, in *Strickland* the majority spoke to the difficulties of representation and the unfairness of judging a lawyer's conduct with hindsight, thereby requiring a strong presumption of a defense attorney's competence in representing a client, and even in the absence of competent representation, presuming a lack of prejudice. The

adhering to his view that "the death penalty is in all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments." *Id.* at 701 (Brennan, J., dissenting in part and concurring in part).

¹⁶² *Id.* at 694 (majority opinion). The fact that Washington's claim of ineffectiveness concerned the sentencing phase at his capital trial does not limit the effect of the Court's decision merely to the capital sentencing context:

A capital sentencing proceeding like the one involved in this case . . . is sufficiently like a trial in its adversarial format and in the existence of standards for decision . . . that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

Id. at 686–87. The *Strickland* standards apply in challenges to representation in habeas proceedings as well:

The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial . . . An ineffectiveness claim . . . is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Id. at 697–98.

¹⁶³ *See id.*

¹⁶⁴ *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932)); *see id.* at 344 ("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. . . . [L]awyers in criminal courts are necessities, not luxuries."); *McMann v. Richardson*, 397 U.S. 759, 771 (1970) ("[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.").

Strickland Court established its now well-known two-prong analysis to be applied in determining whether a criminal defense attorney provided unconstitutional representation, requiring proof of (1) deficient performance and (2) prejudice.

1. Deficient Performance

An ineffective assistance of counsel petitioner must establish that his defense attorney performed deficiently.¹⁶⁵ The Court defines deficient performance as failing to provide “reasonably effective assistance”—representation that falls “below an objective standard of reasonableness.”¹⁶⁶ “Counsel’s function is to assist the defendant,”¹⁶⁷ assuring that the “adversarial testing process work[ed] in the particular case.”¹⁶⁸ The Court refused to provide specific guidelines of reasonably effective assistance, but rather spoke of “reasonableness under prevailing professional norms.”¹⁶⁹ Discussing at length that there are innumerable ways to defend criminal defendants,¹⁷⁰ the Court was loath to set forth any set of rules for attorney conduct out of fear that specific guidelines would “interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.”¹⁷¹ For example, the Court appeared to suggest that an attorney’s strategic decisions are virtually unassailable, including investigative decisions and choosing a theory of defense.¹⁷² The Court instructed reviewing courts to be “highly deferential” in scrutinizing a criminal defense attorney’s performance.¹⁷³ Moreover, courts are to indulge a

¹⁶⁵ See *Strickland*, 466 U.S. at 687–88; see also *Maryland v. Kulbicki*, 136 S. Ct. 2, 5 (2015) (explaining that “reasonable competence” is guaranteed within meaning of right to counsel, but “perfect advocacy” is not).

¹⁶⁶ See *Strickland*, 466 U.S. at 687–88.

¹⁶⁷ *Id.* at 688.

¹⁶⁸ *Id.* at 690.

¹⁶⁹ *Id.* at 688. “The Sixth Amendment . . . relies . . . on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions.” *Id.* (citing *Michel v. Louisiana*, 350 U.S. 91, 100–01 (1955)).

¹⁷⁰ *Id.* at 687–90. “Even the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 689.

¹⁷¹ *Id.*; see, e.g., *Maryland v. Kulbicki*, 136 S. Ct. 2, 4 (2015) (ruling that defense counsel did not perform deficiently in failing to predict that comparative bullet lead analysis would become discredited because the reasonableness of counsel’s conduct is viewed as of the time of counsel’s conduct).

¹⁷² See *Strickland*, 466 U.S. at 690–91 (“Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.”); *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (“Under *Strickland*, ‘strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.’” (quoting *Strickland*, 466 U.S. at 690–91)).

¹⁷³ See *Strickland*, 466 U.S. at 691.

“strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,”¹⁷⁴ and petitioners are required to overcome this strong presumption that their attorney’s performance was a reasonable strategy under the circumstances.¹⁷⁵

The *Strickland* standard is insufficient in identifying constitutionally infirm counsel. Syed’s case is instructive. Consider *Strickland*’s deficient performance prong and Christina Gutierrez’s representation of Adnan Syed.¹⁷⁶ One of the biggest mistakes that Gutierrez made in representing Syed is that she failed to contact and investigate potential alibi witness, Asia McClain. Syed had told Gutierrez that McClain could testify that, at the time of Lee’s murder, Syed was with McClain in the school’s library, making it impossible for him to have killed Lee at the time the State alleged. Nonetheless, no one from Gutierrez’s office reached out to McClain.¹⁷⁷ In considering *Strickland*’s deficient performance prong, counsel’s investigatory decisions are to be given a “heavy measure of deference.”¹⁷⁸ However, since its ruling in *Strickland*, the Court has further explained that defense counsel is constitutionally required to investigate thoroughly any defense presented.¹⁷⁹ However, Gutierrez’s defense of Syed was difficult to follow; it was difficult to ascertain exactly what defense Gutierrez was choosing to present (or whether she did, in fact, choose to present a particular defense). Thus, Gutierrez’s failure to reach out to McClain would not amount to a failure to investigate thoroughly a defense she chose to present and would instead be characterized as an investigatory decision, a decision which is afforded that heavy amount of deference pursuant to *Strickland*. Therefore, her decision not to contact McClain would not amount to deficient performance pursuant to *Strickland*.¹⁸⁰ Similarly, regarding Gutierrez’s poor cross-

¹⁷⁴ *Id.* at 689.

¹⁷⁵ *Id.* “[C]ounsel is strongly presumed to have rendered adequate assistance.” *Id.* at 690.

¹⁷⁶ See discussion *supra* Part I (describing attorney Christina Gutierrez’s representation of Adnan Syed).

¹⁷⁷ See Memorandum Opinion II, *supra* note 1, at 12.

¹⁷⁸ See *Strickland*, 466 U.S. at 691 (“[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.”).

¹⁷⁹ See *Elmore v. Holbrook*, 137 S. Ct. 3, 7 (2016) (mem.) (Sotomayor, J., dissenting) (“[C]onstitutionally effective counsel must thoroughly investigate the defense he chooses to present.”); *Wiggins v. Smith*, 539 U.S. 510, 526 (2003).

¹⁸⁰ In fact, reviewing courts found that Gutierrez’s failure to investigate McClain’s potential alibi did not constitute deficient performance pursuant to *Strickland*. See Memorandum Opinion II, *supra* note 1, at 26.

examination of the prosecution's cell tower expert, whether and how a criminal defense attorney cross-examines a prosecution witness is generally considered a matter of strategy or tactic pursuant to *Strickland*. The Court has ruled "time and [time] again" that matters of strategy are virtually unchallengeable.¹⁸¹

However (and luckily), in response to Syed's most recent petition for post-conviction relief, the court ruled that Gutierrez's failure to cross-examine the cell tower expert adequately amounted to deficient performance in violation of *Strickland*. The court's decision in which it found deficient performance was somewhat (pleasantly) surprising because whether and the manner in which an attorney conducts cross-examination is most often considered a matter of tactic or strategy. As a tactical or strategical decision, such decisions are subject to the heavy measure of deference called for in *Strickland*. For whatever (fortuitous) reason, the court appears to have relaxed *Strickland's* deficient performance standard in granting Syed relief. Despite the Maryland Court's protestations, it is hard to conclude that anything other than *Serial* and the public interest resulted in the court finding that Gutierrez's conduct amounted to deficient performance in violation of *Strickland*.¹⁸²

2. Prejudice

In addition to establishing deficient performance, an ineffective assistance of counsel petitioner must also affirmatively prove that his attorney's deficient conduct prejudiced his case.¹⁸³ The defendant must show a reasonable probability that, but for counsel's deficient performance, the

¹⁸¹ *Elmore*, 137 S. Ct. at 8–9.

¹⁸² "Regardless of the public interest surrounding this case, the Court used its best efforts to address the merits of [Syed's] petition for post-conviction relief like it would in any other case that comes before the Court; unfettered by sympathy, prejudice, or public opinion." Memorandum Opinion II, *supra* note 1, at 59.

¹⁸³ See *Strickland*, 466 U.S. at 692. The Court recognized some circumstances in which a petitioner need not prove prejudice because prejudice may be presumed. See *id.* Per se instances of prejudice include instances of active or constructive denial of a lawyer altogether as well as "various kinds of state interference with [a lawyer's] assistance." *Id.* In these circumstances, a petitioner is not required to prove prejudice: "Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Id.* Similarly, although not an application of the per se prejudice rule, there is a "fairly rigid rule" of presumed prejudice when the criminal defense attorney operated under an impermissible conflict of interest. *Id.* Differing from the per se prejudice application, in the conflict of interest situation, "[p]rejudice is presumed only if the defendant demonstrates that counsel actively represented conflicting interests 'and that an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980)).

result of the proceeding would have been different.¹⁸⁴ A reasonable probability is a "probability sufficient to undermine confidence in the outcome."¹⁸⁵ The Court stated that when a petitioner challenges a conviction, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting [the petitioner's] guilt."¹⁸⁶ The petitioner must show that the decision reached in his case would "reasonably likely have been different absent the errors."¹⁸⁷ The Court requires reviewing courts to presume that the judge or jury acted in accordance with the law.¹⁸⁸

In evaluating *Strickland* prejudice in Syed's case, Syed would have had to establish that Gutierrez's failure to investigate the potential alibi witness or her failure to cross-examine the State's cell tower expert properly would have changed the outcome of the proceeding. Or, stated differently, the appropriate consideration is "the difference between what was actually presented at trial and what competent counsel could have presented."¹⁸⁹ Regarding the value of the alibi witness's testimony, the jury might have been convinced that Syed could not have been at the location of Lee's death, making it impossible to have committed the crime. Or not. At Syed's

¹⁸⁴ The Court has reminded prisoners over the years that there is a distinction between reasonably competent lawyering and what the Sixth Amendment *requires* of lawyers. *See, e.g.,* Chaidez v. United States, 133 S. Ct. 1103, 1112–13 (2013) (explaining *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

¹⁸⁵ *Strickland*, 466 U.S. at 695. Recognizing their strengths and weaknesses, the Court rejected a more likely than not standard as well as a preponderance of the evidence standard. *Id.* at 693–94. The Court based this prejudice prong analysis on similar tests for materiality of exculpatory information not disclosed to the defense by the prosecution and the materiality of testimony made unavailable to the defendant by the government's deportation of a witness. *Id.* at 698 (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872–74 (1982); *United States v. Agurs*, 427 U.S. 97, 104 (1976)).

¹⁸⁶ *Id.* at 695 ("When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.").

¹⁸⁷ *Id.* at 696. An important thing to recognize is that in *Strickland*, the Court emphasized that a showing of either lack of deficient performance or a lack of prejudice could defeat a claim of ineffective assistance of counsel. *Id.* at 697. The Court suggested that if a petitioner's claim could be defeated on either prong, for the sake of judicial efficiency, it should be defeated by just addressing the prong upon which the claim fails. *Id.* In Syed's situation, as discussed above, Syed's claim of deficient performance would likely have not prevailed. Therefore, reviewing courts would likely not even consider the prejudice requirement.

¹⁸⁸ *See id.* at 694–95. However, there are situations in which the Court has recognized that prejudice need not be shown to establish ineffective assistance of counsel. *See, e.g.,* *Mickens v. Taylor*, 535 U.S. 162, 162, 166 (2002) (explaining prejudice need not be proven "where assistance of counsel has been denied entirely or during a critical stage of the proceeding").

¹⁸⁹ *Elmore v. Holbrook*, 137 S. Ct. 3, 9 (2016) (mem.) (Sotomayor, J., dissenting) (citing *Rompilla v. Beard*, 545 U.S. 374, 393 (2005)).

trial, other evidence was presented to establish Syed's presence at the location of Lee's murder.¹⁹⁰ Therefore, it is not "reasonably likely" that the addition of the alibi testimony would have changed the result.

Similarly, in focusing on Gutierrez's cross-examination of the cell tower expert, a proper cross-examination might have led the jury to conclude that Syed was not present at the location of Lee's death. Or not. The testimony of the alibi witness or a proper cross-examination could have *possibly* led the factfinder to reach a different conclusion, but it is a more difficult question whether either was reasonably likely to lead the factfinder to reach a different result. In applying for post-conviction relief, without being able to establish that the result probably would have been different, Syed cannot satisfy the mandates of *Strickland's* prejudice standard. The *Strickland* standard is so difficult to satisfy that even cases in which it seems obvious that a defendant received what should be constitutionally infirm representation, the defendant is unable to satisfy its burdensome requirements. In fact, Justice Marshall's dissent in *Strickland* was quite prescient in predicting how "unhelpful" the majority's analysis would prove to be.¹⁹¹

C. *The Weakening of Effective Assistance of Counsel Law*

With impressive foresight, Justice Marshall skillfully criticized both prongs of the Court's new ineffective assistance analysis,¹⁹² complaining that the deficient performance standard is so malleable that it will eventually prove to be unhelpful.¹⁹³ In

¹⁹⁰ Memorandum Opinion II, *supra* note 1, at 26 ("Wild's testimony and Petitioner's cell phone records created the nexus between Petitioner and the murder.").

¹⁹¹ See *Strickland*, 466 U.S. at 706 (Marshall, J., dissenting). Justice Brennan concurred in the majority's opinion, but, adhering to his view that the death penalty always establishes a constitutional violation, dissented in the judgment. *Id.* at 701 (Brennan, J., concurring in part and dissenting in part). In concurring with the Court's opinion, Justice Brennan expressed his belief that the *Strickland* standards "will both provide helpful guidance to courts considering claims of actual ineffectiveness of counsel and also permit those courts to continue their efforts to achieve progressive development of this area of the law." *Id.* at 702. Agreeing with the Court that detailed rules for lawyer conduct was inappropriate, he stated his belief that "these standards are sufficiently precise to permit meaningful distinctions between those attorney derelictions that deprive defendants of their constitutional rights and those that do not." *Id.* at 703. "I am satisfied that the standards announced today will go far towards assisting lower federal courts and state courts in discharging their constitutional duty to ensure that every criminal defendant receives the effective assistance of counsel guaranteed by the Sixth Amendment." *Id.* at 706.

¹⁹² See discussion *supra* Part II (describing deficient performance and prejudice prongs of ineffective assistance of counsel claim).

¹⁹³ *Strickland*, 466 U.S. at 707–08 (Marshall, J., dissenting). Justice Marshall complained that the Court's instruction that criminal defense attorneys must act as a reasonably competent attorney is "to tell them almost nothing." *Id.* at 709.

objecting to the requirement of prejudice, he explained the difficulty that petitioners would face in proving whether a convicted defendant would have received a different result if represented by competent counsel.¹⁹⁴ Disapproving of the majority's strong presumption of lawyer competence, Justice Marshall cautioned against legitimizing convictions and sentences obtained by incompetent criminal defense lawyering.¹⁹⁵

Justice Marshall's words in dissent in *Strickland* were indeed prophetic. The test enunciated in *Strickland* is so onerous that for years few claimants prevailed in bringing an ineffective assistance of counsel claim.¹⁹⁶ Reviewing courts have routinely legitimized incompetent attorney conduct upon application of *Strickland*.¹⁹⁷ Over the last thirty years, this

¹⁹⁴ See *id.* at 710 ("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. . . . [I]t seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.").

¹⁹⁵ *Id.*

¹⁹⁶ See 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, 134 (2007) (explaining the *Strickland* standard as "virtually impossible" for petitioners to meet); Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); cf. Bruce A. Green, *Lethal Fiction: The Meaning of Counsel in the Sixth Amendment*, 78 IOWA L. REV. 433, 499–504 (1993) (arguing that "death row prisoner who suffered at the hands of an unqualified advocate often will be unable to satisfy the *Strickland* standard"). Indeed, in *Fretwell*, decided a few years after *Strickland*, the Court seemed to make a successful Sixth Amendment ineffective assistance of counsel claim nearly impossible. See *Lockhart v. Fretwell*, 506 U.S. 364 (1993). *Fretwell* seemed to engraft a third prong on *Strickland* requiring that even if a defendant satisfied *Strickland*'s two-prong test, he may not prevail until he shows that the trial was not reliable, that is, that he was not guilty. See *id.* at 372. This language seemed to make the right to effective assistance of counsel available only to factually innocent people. See Meredith J. Duncan, *Lafler and Frye: Strickland Revitalized?*, 25 FED. SENT'G REP. 144, 145 (2012) (explaining how the *Lafler* Court put to rest questions of whether Sixth Amendment protections are for those who may actually be guilty of the charged offense). Fortunately, in *Williams v. Taylor*, the Court ultimately retreated from *Fretwell*, and *Lafler* recognized that Sixth Amendment protections are to be afforded to all criminal defendants, without regard to whether they are actually innocent. *Williams v. Taylor*, 529 U.S. 362, 399 (2000).

¹⁹⁷ See, e.g., *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000) (rape defendant's attorney suffering from Alzheimer's disease); *Burnett v. Collins*, 982 F.2d 922, 930 (5th Cir. 1993) (aggravated robbery defendant's attorney with alcohol abuse problem); *Smith v. Ylst*, 826 F.2d 872 (9th Cir. 1987) (murder defendant's attorney suffering from mental illness); *Hernandez v. Wainwright*, 634 F. Supp. 241, 249 (S.D. Fla. 1986) (murder and robbery defendant's attorney drunk during trial and consulted with client without needed interpreter); *Berry v. King*, 765 F.2d 451, 454 (5th Cir. 1985) (first-degree murder defendant's attorney with drug addiction problem); see also Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—a Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. L. REV. 743 (1995) ("While trumpeting the necessity for effective assistance of counsel, the Supreme Court has made it difficult for defendants to establish ineffectiveness.").

standard has proven so difficult that even in the most egregious of cases, a criminal defendant has little chance of success in constitutionally challenging the poor legal representation he or she received.¹⁹⁸

As difficult as it is for prisoners to satisfy the mandates of *Strickland*, proving their improper imprisonment became all the more difficult when Congress enacted AEDPA, as explained in the following section.

III. WHAT *STRICKLAND* MADE DIFFICULT, AEDPA MADE WORSE

Any conversation addressing the difficulty prisoners face in securing post-conviction relief for ineffective assistance would be incomplete without a discussion of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).¹⁹⁹ As explained below, in enacting AEDPA, Congress more severely restricted the ability of the federal courts to consider habeas claims.²⁰⁰ *Strickland* claims may be brought either on direct or collateral appeal, depending on the requirements or procedures of the individual state. Nevertheless, the tough standards set forth in *Strickland* were made all the more difficult when Congress enacted AEDPA.²⁰¹

¹⁹⁸ See Blume & Neumann, *supra* note 196, at 134 (explaining *Strickland* standard barred nearly all claims of unconstitutional legal representation); see, e.g., *Muniz v. Smith*, 647 F.3d 619 (6th Cir. 2011) (holding defense counsel's nap during client's cross-examination did not constitute ineffective assistance of counsel because nap did not prejudice client's case); *Briones v. State*, 848 P.2d 966, 975–77 & nn. 11–12 (Haw. 1993) (rejecting *Strickland* and its progeny as having an unduly restrictive view of actions or omissions of counsel that constitute ineffective assistance and describing *Strickland* standard as “too burdensome for defendants to meet because it imposes a double burden upon defendants trying to show their counsel's ineffective assistance, resulting in a prejudice requirement almost impossible to surmount”).

¹⁹⁹ See generally 28 U.S.C. § 2254 (2012).

²⁰⁰ Courts have been quite tough in interpreting the requirements of AEDPA. See generally *Yackle*, *supra* note 7, at 330 (explaining how Supreme Court usually interprets AEDPA to disadvantage of habeas petitioners); see, e.g., *Woods v. Etherton*, 136 S. Ct. 1149 (2016) (per curiam) (“When the claim at issue is one for ineffective assistance of counsel . . . AEDPA review is ‘doubly deferential’ because counsel is ‘strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment . . .’ . . . In such circumstances, federal courts are to afford both the state court and the defense attorney the benefit of the doubt.” (internal citations omitted)); see also *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013) (explaining that the Court has refused to sanction decisions that would reflect negatively on a state court's ability to safeguard the federal constitution, “[e]specially where a case involves such a common claim as ineffective assistance of counsel under *Strickland*—a claim state courts have now adjudicated in countless criminal cases for nearly 30 years”).

²⁰¹ See, e.g., *Burt*, 134 S. Ct. at 16 (“AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.”). The *Burt* majority explained that AEDPA's standards are meant to be difficult to meet:

In order to appreciate the impact of AEDPA, one must understand the process for obtaining habeas relief. A habeas appeal is a collateral (rather than a direct) appeal. A collateral appeal is a civil proceeding in which a prisoner is afforded the opportunity to establish that his or her state conviction is in violation of law.²⁰² State collateral appeals challenging the validity of imprisonment assert state law claims and may present federal claims as well.²⁰³ Federal collateral appeals challenge the validity of imprisonment pursuant to federal law only. When a state prisoner’s conviction rests upon an independent and adequate state law ground, the common law has long provided that the federal courts will not consider the prisoner’s federal constitutional claim absent limited exceptions; the prisoner’s confinement may be validated on that adequate and independent state law ground.²⁰⁴ When there is no adequate and independent state law ground, at common law a federal court was permitted to consider on habeas the prisoner’s constitutional claim.²⁰⁵ However, AEDPA

“We will not lightly conclude that a State’s criminal justice system has experienced the ‘extreme malfuncio[n]’ for which federal habeas relief is the remedy.” *Id.* at 16 (alteration in original) (quoting *Harrington v. Richter*, 131 S. Ct. 770, 786–87 (2011)); see generally Nancy J. King, *Non-capital Habeas Cases After Appellate Review: An Empirical Analysis*, 24 FED. SENT’G REP. 308, 317 (2011) (describing the less than 1% grant of habeas relief post-AEDPA, a figure lower than the success rate pre-AEDPA); Michael M. O’Hear, *Not So Sweet: Questions Raised by Sixteen Years of the PLRA and AEDPA*, 24 FED. SENT’G REP. 223, 223 (2012) (describing AEDPA as “systemic failure” and explaining how AEDPA placed severe restrictions on prisoners’ ability to challenge the constitutionality of their imprisonment successfully).

²⁰² See *Trevino v. Thaler*, 133 S. Ct. 1911, 1916–17 (2013) (explaining historical importance of federal habeas as method for preventing person’s imprisonment in violation of federal constitution). “In general, if a convicted state criminal defendant can show a federal habeas court that his conviction rests upon a violation of the Federal Constitution, he may well obtain a writ of habeas corpus that requires a new trial, a new sentence, or release.” *Id.* at 1917.

²⁰³ In fact, Fourth Amendment claims may only be brought in state proceedings. See *Withrow v. Williams*, 507 U.S. 680, 682–83 (1993) (reaffirming that “when a State has given a full and fair chance to litigate a Fourth Amendment claim, federal habeas review is not available to a state prisoner alleging his conviction rests on evidence obtained through an unconstitutional search or seizure”); *Stone v. Powell*, 428 U.S. 465, 489–95 (1976) (“The question is whether state prisoners—who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review—may invoke their claim again on federal habeas corpus review. . . . [W]e conclude that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.”).

²⁰⁴ See *Trevino*, 133 S. Ct. at 1917 (explaining that state procedural default is typically independent, adequate state law grounds making federal habeas review inappropriate).

²⁰⁵ See *Coleman v. Thompson*, 501 U.S. 722, 729–30 (1991) (explaining history of Supreme Court not reviewing questions of federal law on habeas when the state court’s decision was based on independent and adequate state law grounds).

modified the standard by which federal courts may review prisoners' requests for collateral habeas relief.²⁰⁶

AEDPA now provides the means by which a federal court may grant habeas corpus relief to a person in the custody of a state.²⁰⁷ The requirements of AEDPA are onerous and challenging.²⁰⁸ As an initial matter, AEDPA codifies previously existing common law by providing that a prisoner cannot be granted federal habeas relief until he has exhausted all available state remedies.²⁰⁹ However, AEDPA additionally imposes new restrictions. For example, AEDPA provides that a federal court "shall not" grant a prisoner's habeas request unless the state law conviction was the result of a decision contrary to or an unreasonable application of clearly established federal law "as determined by the Supreme Court of the United States."²¹⁰ Moreover, AEDPA contains "twin" presumptions that are difficult to overcome:²¹¹ (1) any federal court considering a prisoner's habeas request must indulge a strong presumption that the state's factual determinations are correct,²¹² and (2) any federal reviewing court is required to presume that defense counsel's conduct was competent.²¹³ Prisoners are now required

²⁰⁶ See, e.g., *Coleman*, 501 U.S. at 726 (explaining respect federal courts owe states when reviewing federal habeas claims).

²⁰⁷ See generally 28 U.S.C. § 2254 (2012); see also *White v. Woodall*, 134 S. Ct. 1697, 1701–02 (2014) (describing AEDPA as a "provision of law that some federal judges find too confining, but that all federal judges must obey" and one that is difficult to meet).

²⁰⁸ See generally *O'Hear*, *supra* note 201, at 223 (describing adoption of AEDPA as "hardly exemplif[ying] Congress at its best" and describing AEDPA as hurriedly adopted and not subject to vigorous vetting).

²⁰⁹ See 28 U.S.C. § 2254(b)(1); cf. *Coleman*, 501 U.S. at 731 (explaining that the "Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims").

²¹⁰ 28 U.S.C. § 2254(d)(1); see, e.g., *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). AEDPA also provides for relief when the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). See, e.g., *Burt v. Titlow*, 134 S. Ct. 10 at 15 (2013) (reiterating "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance" (quoting *Wood v. Allen*, 558 U.S. 290, 293 (2010))).

²¹¹ See *Burt*, 134 S. Ct. at 19 (Sotomayor, J., concurring) (describing "twin presumptions" of AEDPA).

²¹² See 28 U.S.C. § 2254(e)(1); see *Burt*, 134 S. Ct. at 17. In *Burt*, the prisoner's defense counsel failed to acquire the file from client's immediate previous attorney before entering a guilty plea and accepted publication rights to his client's story in clear violation of the rules of professional responsibility. *Id.* at 13, 18. The Court, citing *Strickland*, ruled that the defendant did not receive the ineffective assistance of counsel because counsel is strongly presumed to have exercised reasonable professional judgment. See *id.*

²¹³ See, e.g., *Burt*, 134 S. Ct. at 18 (Sotomayor, J., concurring). (explaining that petitioner "bore the burden of overcoming two presumptions: that [her attorney] performed effectively and that the state court ruled correctly" (Sotomayor, J.,

to rebut the presumed correctness of the state’s factual findings by clear and convincing evidence.²¹⁴

In enacting AEDPA, Congress intentionally sought to limit habeas review in order to help ensure the finality of criminal convictions.²¹⁵ Since the passage of AEDPA, successful habeas petitions have decreased dramatically.²¹⁶ Despite the criticism of the legislation, federal courts have defended the legislation, citing concerns of comity and respect for state court decisions.²¹⁷ Further, the Supreme Court has explained that

concurring)). Of course, AEDPA’s requirement that federal reviewing courts must indulge a strong presumption that the state’s factual findings are correct is a codification of *Strickland*’s well-established competence inquiry. See *supra* notes 171–188 and accompanying text (discussing *Strickland* presumptions). AEDPA also contains a one-year statute of limitation. 28 U.S.C. § 2244(d)(1); see Jonathan Atkins et al., Essay, *The Inequities of AEDPA Equitable Tolling: A Misapplication of Agency Law*, 68 STAN. L. REV. 427, 427, 434 (2016) (explaining that with AEDPA, Congress employed for the first time a one-year statute of limitations which unjustly restricts habeas relief to prisoners who have been harmed by attorney errors).

²¹⁴ 28 U.S.C. § 2254(e)(1) provides:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1); see, e.g., *Burt*, 134 S. Ct. at 15 (2015) (explaining AEDPA’s imposition of highly deferential standard and the clear and convincing evidence standard in habeas cases); *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam). In *Woods*, the petitioner was convicted at trial of felony murder and armed robbery. *Woods*, 135 S. Ct. at 1378. Petitioner pursued an ineffective assistance of counsel claim because his trial attorney was not present in the courtroom for ten minutes during which time the prosecution presented testimony concerning the petitioner’s codefendants. *Id.* at 1375. The Court denied his request for habeas relief. *Id.* at 1378.

²¹⁵ *Woods*, 135 S. Ct. at 1376 (explaining that AEDPA’s standards are “intentionally difficult to meet”); *Burt*, 134 S. Ct. at 16 (describing AEDPA as a purposeful, formidable barrier to habeas relief); see also Atkins et al., *supra* note 213, at 432–34 (explaining how AEDPA proponents sought limits on federal habeas review to ensure finality of criminal convictions); O’Hear, *supra* note 201, at 223–25 (explaining AEDPA from inception was designed to make federal habeas claims more difficult to advance and opining that, in applying AEDPA, courts may have “created greater harshness than was plainly mandated by the statutes”).

²¹⁶ See Garrett, *supra* note 48, at 101 & n.173 (explaining in 2007 after the passage of AEDPA, there was only 1 successful habeas petition out of 284, far lower than 1% success rate pre-AEDPA).

²¹⁷ See *Trevino v. Thaler*, 133 S. Ct. 1911, 1917 (2013) (recognizing “the importance of federal habeas corpus principles designed to prevent federal courts from interfering with a State’s application of its own firmly established, consistently followed, constitutionally proper procedural rules”); *Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (explaining that federal habeas courts are “guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of the legal proceedings within our system of federalism”); *Coleman v. Thompson*, 501 U.S. 722, 730 (1991) (“In the habeas context, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism.”); see also *Woods*, 135 S. Ct. at 1376; *Burt*, 134 S. Ct. at 15 (describing state courts as adequate forums for vindication of federal rights because under dual sovereignty system, “state courts have inherent authority, and are thus presumptively competent, to adjudicate

AEDPA is a vote of confidence in favor of state courts that are presumed to know and follow federal law.²¹⁸ Federal reviewing courts may only overturn state decisions when there has been “extreme malfunctions” within the criminal justice system.²¹⁹

Imagine Adnan Syed’s case in the AEDPA context. As mentioned previously, the prosecution is currently appealing the recent grant of relief in favor of Syed, in which the Maryland court held that Syed received ineffective assistance of counsel. However, if the state were to succeed in its appeal and Syed apply for federal relief, AEDPA would prohibit any federal court from considering Syed’s claims of ineffective assistance of counsel, despite that a state court had previously found that Gutierrez provided ineffective assistance of counsel. Syed would have to satisfy the requirements of AEDPA in order to have a federal court consider his claim for ineffective assistance of counsel. However, to navigate the barriers of AEDPA successfully, after establishing that he raised his ineffective assistance of counsel claim in the state courts, Syed would need to prove that his conviction “was contrary to, . . . [or] an unreasonable application of clearly established federal law,”²²⁰ a much more difficult undertaking. The clearly established federal law would be *Strickland*, as Syed would be raising a violation of his Sixth Amendment right to the effective assistance of counsel.²²¹ Proving that his conviction was contrary to or an unreasonable application of *Strickland* would be challenging for at least two reasons. First, in evaluating the *Strickland* claim, AEDPA requires the federal reviewing court to indulge a strong presumption that the state court’s factual findings were correct, namely that Gutierrez provided competent representation or that Syed’s case was not prejudiced by her

claims arising under the laws of the United States” (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)).

²¹⁸ See *Woods*, 135 S. Ct. at 1376 (quoting *Woodford v. Viscio*, 537 U.S. 19, 24 (2002)).

²¹⁹ See *id.* (“Federal habeas review . . . exists as a ‘guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.’” (quoting *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011))).

²²⁰ 28 U.S.C. § 2254(d)(1) (2012); see, e.g., *Rompilla v. Beard*, 545 U.S. 374, 380 (2005). AEDPA also provides for relief when the state court decision was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2); see, e.g., *Burt*, 134 S. Ct. at 15 (reiterating “a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance” (quoting *Wood v. Allen*, 558 U.S. 290, 293 (2010))).

²²¹ See, e.g., *Elmore v. Holbrook*, 137 S. Ct. 3, 8 (2016) (mem.) (Sotomayor, J., dissenting) (“The legal principles that govern claims of ineffective assistance of counsel (IAC) come from *Strickland v. Washington*, 466 U.S. 668 (1984), and were clearly established over a decade before Elmore’s trial.”). The reviewing court would apply *Strickland*’s two-prong test: deficient performance and prejudice.

deficient performance. In rebutting the strong presumption of competent representation, AEDPA requires Syed to present clear and convincing evidence that Gutierrez's representation was deficient. If Syed's clear and convincing evidence could overcome the strong presumption of competent representation, Syed would next have to establish that Gutierrez's deficient performance prejudiced his case. Again, AEDPA requires that federal courts indulge the strong presumption that the state's factual finding of no prejudice was correct. The difficulty of overcoming these strong presumptions and having to do so with clear and convincing evidence would be challenging, to say the least.

IV. RECENT HOPEFUL GLIMPSES OF THE (PREVIOUSLY FORSAKEN) VALUE OF *EFFECTIVE* COUNSEL

Despite the challenges of *Strickland* and AEDPA barriers, recent (and somewhat surprising) Supreme Court cases have noted the importance of the right to counsel,²²² and ineffective assistance of counsel petitioners have actually prevailed in their lawsuits.²²³ For example, in *Williams v. Taylor*,²²⁴ the petitioner confessed to homicide and "was convicted of robbery and capital murder."²²⁵ At his sentencing hearing, one of the petitioner's attorneys—a person whose sole responsibility was to protect petitioner's interests—devoted much time explaining to the jury how difficult it was to find a reason that would justify sparing his client's life.²²⁶ The attorney did not present evidence in mitigation of a death sentence,²²⁷ and the jury sentenced the petitioner to death.²²⁸ The petitioner filed for state habeas relief,²²⁹ and the same judge who had presided over his capital murder trial and sentencing hearing concluded that petitioner's trial attorneys

²²² See, e.g., *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("[T]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Indeed, the right to counsel is the foundation of our adversary system.").

²²³ See, e.g., *id.* at 1309; *Rompilla*, 545 U.S. at 374; *Wiggins v. Smith*, 539 U.S. 510, 510 (2003); *Williams v. Taylor*, 529 U.S. 362, 362 (2000); cf. *Hinton v. Alabama*, 134 S. Ct. 1081, 1081–83 (2014) (in which petitioner's claim was remanded to the lower court's determination of *Strickland*'s prejudice prong after the Court ruled that petitioner's trial attorney provided deficient performance in failing to seek additional funds to hire an expert witness because attorney had mistaken belief that available funding was capped).

²²⁴ *Williams*, 529 U.S. at 367.

²²⁵ *Id.* at 368.

²²⁶ *Id.* at 369 & n.2.

²²⁷ *Id.* at 369.

²²⁸ *Id.* at 370.

²²⁹ *Id.*

had indeed rendered ineffective assistance of counsel by failing to present mitigating evidence at sentencing.²³⁰ On appeal by the state, the Virginia supreme court reversed, ruling that petitioner failed to meet the prejudice prong of *Strickland*.²³¹

In a somewhat surprising decision, the U.S. Supreme Court granted petitioner's request for federal habeas relief,²³² ruling that he was entitled to relief because the Virginia supreme court's ruling was both contrary to and involved an unreasonable application of clearly established federal law, namely *Strickland v. Washington*.²³³ First, the Court ruled that the Virginia supreme court mischaracterized the appropriate applicable federal rule in that it incorporated *Lockhart v. Fretwell*²³⁴ into its reasoning rather than relying solely on *Strickland*.²³⁵ Second, the Court concluded that the Virginia supreme court failed to evaluate the totality of the available evidence in mitigation of petitioner's crime.²³⁶ In sum, the majority ultimately agreed with the Virginia state trial court that there "existed 'a reasonable probability that the result of the sentencing phase would have been different' if the jury had heard [the omitted mitigating] evidence."²³⁷

²³⁰ *Id.*; see *infra* Section V.C (recommending that judges report misconduct they witness).

²³¹ See *Williams*, 529 U.S. at 372 (concluding that "there was no reasonable probability that the omitted evidence would have affected the jury's sentencing recommendation . . . and that Williams had failed to demonstrate that his sentencing proceeding was fundamentally unfair").

²³² *Id.* at 391.

²³³ *Id.*; see discussion *supra* Part III (regarding AEDPA requirements, *inter alia*, that state ruling was contrary to and an unreasonable application of clearly established federal law as articulated by the Supreme Court). The justices disagreed over the appropriate application of habeas relief. *Williams*, 529 U.S. at 365–66. Justice Stevens wrote for the Court. *Id.* Justices Souter, Ginsburg, and Breyer joined in his opinion in its entirety. *Id.* Justices O'Connor and Kennedy joined in the part of his decision discussing the factual history of the case as well as the discussion of the appropriate application of *Strickland v. Washington*. *Id.* They did not join in Justice Steven's discussion of the application of the habeas statute, AEDPA. *Id.* Chief Justice Rehnquist and Justice Kennedy joined in Justice O'Connor's concurrence. *Id.* But for a footnote, Justice Scalia joined Justice O'Connor's concurrence as well. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, filed an opinion concurring in part and dissenting in part. See *id.*

²³⁴ *Lockhart v. Fretwell*, 506 U.S. 364 (1993).

²³⁵ *Williams*, 529 U.S. at 397.

²³⁶ See *id.* at 397–98.

²³⁷ *Id.* at 399. Chief Justice Rehnquist, joined by Justices Scalia and Thomas, disagreed that Williams was denied the right to the effective assistance of counsel. See *id.* at 419 (Rehnquist, C.J., concurring in part and dissenting in part). Chief Justice Rehnquist first disagreed that the Virginia Supreme Court had relied on *Lockhart v. Fretwell* in its decision. *Id.* at 417. Rather, Rehnquist claimed, the state court had appropriately relied on *Strickland v. Washington*. *Id.* at 417–18. Assuming without deciding that Williams's lawyers' conduct was unreasonable, the dissenting justices concluded that it was not unreasonable for the Virginia Supreme Court to conclude that Williams's case was not prejudiced. *Id.* at 418–19 (providing that it was not

The *Williams* case may signal a change. At a minimum, it provided hope for ineffective assistance of counsel petitioners where there had been little cause for hope in over thirty years. Three years after *Williams*, the Court decided *Wiggins v. Smith*, another opinion in which the prisoner prevailed in acquiring federal habeas relief.²³⁸ The petitioner in *Wiggins* was represented by two public defenders and, after a four-day bench trial, was found guilty of first degree murder, robbery, and theft.²³⁹ After *Wiggins* chose to be sentenced by a jury, one of the petitioner's attorneys informed the jury that it would hear evidence in mitigation of the offenses of conviction.²⁴⁰ Petitioner's counsel never presented such evidence, and the jury sentenced petitioner to death.²⁴¹ Denied relief in the state courts, *Wiggins* sought federal habeas relief. In another surprising decision, the Supreme Court granted relief.²⁴²

Justice O'Connor (the author of the majority's opinion in *Strickland*) wrote on behalf of the majority in *Wiggins*. Citing *Williams v. Taylor*²⁴³ as the proper application of the *Strickland* standards, the Court focused not on whether *Wiggins*'s attorneys should have presented a mitigation case, but rather on *Wiggins*'s attorneys' investigation regarding the reasonableness of introducing mitigating evidence.²⁴⁴ The Court

unreasonable for the Virginia Supreme Court to conclude that "a jury would not have been swayed by evidence demonstrating that petitioner had a terrible childhood and a low IQ"). Admittedly, *Williams* discussed *supra* and *Wiggins* discussed here create what is essentially a special type of ineffective assistance of counsel claim that pertains only to punishment phase claims in capital cases not just capital offenses. However, at least one author has argued that these recent Supreme Court cases should be applied to all criminal prosecutions. See *Smith*, *supra* note 4, at 537.

²³⁸ 539 U.S. 510 (2003).

²³⁹ *Id.* at 514–15.

²⁴⁰ *Id.* at 515–16.

²⁴¹ *Id.* at 516.

²⁴² See Mickenberg, *supra* note 5, at 326 (describing Court's decision in *Wiggins* as "surprise to almost everyone"); see also Blume & Neumann, *supra* note 196, at 135 (explaining *Strickland* standard barred nearly all claims of unconstitutional legal representation).

²⁴³ See discussion *supra* notes 231–246 and accompanying text.

²⁴⁴ See *Wiggins*, 539 U.S. at 523.

Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the constitutionally protected independence of counsel at the heart of *Strickland*. We base our conclusion on the much more limited principle that strategic choices made after less than complete investigation are reasonable only to the extent that reasonable professional judgments support the limitations on investigation . . . Counsel's investigation into *Wiggins*' background did not reflect reasonable professional judgment.

concluded that defense counsel's failure to investigate thoroughly was a result of inattention rather than reasoned strategic judgment and was, therefore, unreasonable.²⁴⁵ In applying *Strickland's* prejudice prong, the Court concluded that there existed a reasonable probability that the jury would have returned a sentence different than death.²⁴⁶ Justices Scalia and Thomas dissented.²⁴⁷ Complaining that the majority disregarded Wiggins's trial attorneys' testimony in reaching its conclusion that his attorneys' investigation was unreasonably incomplete,²⁴⁸ Justice Scalia also accused the majority of failing to respect state court factual determinations that have not been rebutted by clear and convincing evidence, which is, of course, the standard set by AEDPA.²⁴⁹

The majority's opinion in *Wiggins* is extraordinary.²⁵⁰ The *Wiggins* Court chastised the Maryland courts for applying the *Strickland* standards as if they are standards virtually impossible to overcome,²⁵¹ despite the fact that the Maryland court sought to apply *Strickland* as courts have routinely applied it for the two decades prior to its decision. *Wiggins* is promising, but the more intellectually honest approach would be to fashion a more workable and descriptive test for ineffective assistance of counsel.²⁵² Although encouraging (inasmuch as prisoners were granted relief and the seemingly insurmountable requirements of *Strickland* were deemed satisfied), both *Williams* and *Wiggins* still indicate that the current ineffective assistance standard is impotent and in need of modification.²⁵³

²⁴⁵ *Id.* at 534–35.

²⁴⁶ *Id.* “Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.” *Id.* at 537.

²⁴⁷ *Id.* at 538 (Scalia, J., dissenting).

²⁴⁸ *Id.*

²⁴⁹ *Id.* But see discussion *supra* Part III suggesting a change from AEDPA’s clear and convincing standard.

²⁵⁰ *Wiggins*, 539 U.S. at 557 (Scalia, J., dissenting).

²⁵¹ *Id.* at 526–27 (majority opinion) (The “‘strategic decision’ the state courts and respondents all invoke to justify counsel’s limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel’s conduct than an accurate description of their deliberations prior to sentencing.”).

²⁵² See *supra* Part IV (suggesting new standard for ineffective assistance of counsel claims).

²⁵³ See, e.g., *Hinton v. Alabama*, 134 S. Ct. 1081, 1090 (2014) (deciding only issue of whether attorney provided deficient performance, but remanding on the issue of prejudice); cf. Donald Gifford, *Introduction & Keynote Speakers to Symposium, Gideon—a Generation Later*, 58 MD. L. REV. 1333, 1333 (1999) (“To declare a legal right is one thing. To enact it in a meaningful way is quite another.”).

Even more encouraging than *Williams* and *Wiggins* is *Martinez v. Ryan*.²⁵⁴ In *Martinez*, an Arizona state prisoner was prohibited by state statute from asserting an ineffective assistance of counsel claim on direct appeal.²⁵⁵ On state habeas appeal, the prisoner, now represented by new counsel, did not raise an ineffectiveness claim.²⁵⁶ Subsequently, when seeking federal habeas relief—and represented yet again by new counsel—the prisoner argued for the first time that he received ineffective assistance of counsel at both the trial stage as well as on collateral appeal.²⁵⁷ The State sought to block his ineffectiveness claims on the ground that the trial stage claim was not presented in the state collateral proceeding, so it could not be considered by the federal court and that there was no right to effective assistance of counsel on collateral appeal.²⁵⁸ Justice Kennedy writing on behalf of the majority disagreed, explaining that if the federal courts denied the petitioner’s request for habeas relief, the claims were likely never to be considered by any court at any level.²⁵⁹ Harkening back to *Gideon*, the majority proclaimed “[t]he right to the effective assistance of counsel . . . is a bedrock principle to our justice system.”²⁶⁰ The majority so ruled over a scathing dissent,²⁶¹

²⁵⁴ *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

²⁵⁵ *Id.* at 1314.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 1314–15.

²⁵⁹ *Id.* at 1313, 1316–17.

²⁶⁰ *Id.* at 1317–18 (“Allowing a federal habeas court to hear a claim of ineffective assistance of trial counsel when an attorney’s errors (or the absence of an attorney) caused a procedural default in an initial-review collateral proceeding acknowledges, as an equitable matter, that the initial-review collateral proceeding, if undertaken without counsel or with ineffective counsel, may not have been sufficient to ensure that proper consideration was given to a substantial claim.”).

²⁶¹ In an extremely critical dissent joined by Justice Thomas, Justice Scalia argued that the majority’s ruling essentially authorized a prisoner to receive post-conviction effective assistance of counsel, despite the Court’s well-established precedent. *Id.* at 1321 (Scalia, J., dissenting). Justice Scalia began his dissent:

Let me get this straight: Out of concern for the values of federalism; to preserve the ability of our States to provide prompt justice; and in light of our longstanding jurisprudence holding that there is no constitutional right to counsel in state collateral review; the Court . . . abstains from holding that there is a constitutional right to counsel in initial-review state habeas. . . . Instead, . . . the Court holds that . . . failing to provide assistance of counsel, or providing assistance of counsel that falls below the *Strickland* standard, constitutes cause for excusing procedural default. The result, of course, is precisely the same.

Id.; see also *Trevino v. Thaler*, 133 S. Ct. 1911, 1924 (2013) (Scalia, J., dissenting for reasons set forth in *Martinez*). That same year the Court decided *Chaidez v. United States*, 133 S. Ct. 1103 (2013), a case in which Justice Scalia joined the majority. *Id.* at 1105. The petitioner in *Chaidez* was denied collateral relief. *Id.* at 1106 (Although the petitioner did not seek federal habeas relief, the case is still instructive in the habeas

which complained that the majority's ruling was contrary to established precedent indicating that a prisoner is not entitled to the effective assistance of counsel on collateral appeal.²⁶² The majority described defense counsel's function as one of ensuring that the proceedings adjudicate guilt or innocence, while at the same time protecting the rights of the accused.²⁶³

The *Martinez* majority finely parsed the snares of AEDPA.²⁶⁴ The Court distinguished between a prisoner's *cause* for the procedural default of his habeas claim and the prisoner's *grounds* for the grant of federal habeas relief.²⁶⁵ As to the former (and at issue in *Martinez*), the Court held that AEDPA does not bar a prisoner from having a federal court consider attorney error during a collateral proceeding as a *cause* for procedurally defaulting on his federal habeas claim.²⁶⁶ As to the latter, the Court agreed that AEDPA bars a prisoner from asserting attorney error arising during collateral proceedings as *grounds* for granting federal habeas relief.²⁶⁷ Regarding whether *Martinez* could establish the *cause* for the procedural default of his habeas claim, the Court explained that the federal court could properly consider the ineffectiveness of

context.). Chaidez was not imprisoned at the time of her request for relief from the federal courts. *Id.* at 1106 & n.1. Because she was not imprisoned at the time she was seeking relief, a writ of habeas was improper. *Id.* She sought a writ of *coram nobis*, a writ providing a means of collaterally attacking a criminal conviction when the person is no longer in custody. *Id.* at 1106 & n.1 (explaining that parties agreed that any distinction between a writ of habeas corpus and a writ of *coram nobis* was insignificant issue before Court). Upon the advice of counsel, Chaidez pleaded guilty to two counts of mail fraud. *Id.* Under federal immigration law, her plea subjected her to mandatory deportation, a consequence about which her attorney failed to inform her. *Id.* Although *Padilla v. Kentucky* had previously held that the Sixth Amendment required a criminal defense attorney to advise clients about any risks of deportation arising from guilty pleas, the Court had not yet determined whether *Padilla* was retroactive, which was the issue in *Chaidez*. *Id.* A majority of the Court refused to grant relief to the petitioner, ruling that *Padilla* announced a "new rule" within the meaning of *Teague v. Lane* and thus was not retroactive. *Id.* at 1107–13.

²⁶² See *Martinez*, 132 S. Ct. at 1326 (Scalia, J., dissenting) (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989)); see also *Trevino*, 133 S. Ct. at 1919 (holding *Martinez* applies when state systemically affords no meaningful review of trial counsel on direct appeal). "[T]he Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." *Trevino*, 133 S. Ct. at 1921.

²⁶³ *Martinez*, 132 S. Ct. at 1317 (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). The majority also recognized that Arizona's deliberate decision to prevent direct appeal of prisoners' ineffective assistance of counsel claims significantly diminishes prisoners' ability to file such claims. *Id.* at 1318.

²⁶⁴ *Id.* at 1320–21.

²⁶⁵ *Id.* at 1320; cf. *Coleman v. Thompson*, 501 U.S. 722 (1991) (distinguishing application of independent and adequate state ground doctrine in federal habeas and upon direct appeal).

²⁶⁶ *Martinez*, 132 S. Ct. at 1320.

²⁶⁷ *Id.*

his post-conviction counsel because such consideration was not presented to establish that Martinez actually received ineffective assistance on appeal, but rather to establish the mistakes that caused his procedural default.²⁶⁸ Remanding the action to the lower court, the Court never reached the issue of the *grounds* for his requested habeas relief.²⁶⁹ The dissent's complaint that the majority disregarded established precedent disallowing a prisoner's right to effective counsel on habeas seems premature as the majority never reached that issue.

Because Adnan Syed's case is currently in the state courts, his case has not been (and may never be) considered by the federal courts. Although opinions such as *Williams*, *Wiggins*, and *Martinez* are positive indicators of the Court's willingness to (once again and in the spirit of *Gideon*) protect criminal defendants' right to the *effective* assistance of counsel, these cases likely will not benefit most ineffective assistance of counsel petitioners,²⁷⁰ including petitioners like Syed. It is conceivable that both *Williams* and *Wiggins* will be confined to the capital context. Syed is not a capital defendant. Similarly, both *Williams* and *Wiggins* may be confined to the sentencing stage of one's trial. Of course, Syed's attorney's errors did not occur at sentencing. Regarding *Martinez*, although a noncapital case, *Martinez* is a quite narrow ruling based on Arizona's particular procedural rule requiring that ineffective assistance of counsel claims be raised on collateral rather than direct appeal. No such procedural rule applies in Maryland, where Syed's case is. Likewise, Syed has raised his ineffective assistance of counsel claims in the state court, so *Martinez* would likely not be helpful. On the other hand, *Wiggins*, if not limited to the capital sentencing context, may prove more

²⁶⁸ *Id.* "To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Id.* at 1318.

²⁶⁹ *Id.* at 1313 (describing issue before Court as "whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding"). As to the alleged ineffectiveness of Martinez's trial counsel,

Martinez claimed [in his second notice of state post-conviction relief that] his trial counsel had been ineffective for failing to challenge the prosecution's evidence. . . . for example, that his trial counsel should have objected to the expert testimony explaining the victim's recantations or should have called an expert witness in rebuttal. Martinez also faulted trial counsel for not pursuing an exculpatory explanation for [incriminating evidence presented at trial].

Id. at 1314.

²⁷⁰ *Cf. King*, *supra* note 6, at 2431 (arguing that "*Martinez* will make little difference in either the enforcement of the right to the effective assistance of counsel or the provision of competent representation").

useful to Syed if he were to pursue federal habeas relief inasmuch as the *Wiggins* majority concluded that defense counsel's failure to investigate adequately amounted to ineffective assistance of counsel. In Syed's case, his attorney Christina Gutierrez similarly failed to investigate adequately. Although not especially helpful to Syed, *Williams*, *Wiggins*, and *Martinez* are important to ineffective assistance of counsel jurisprudence as they seem to signal a small, yet positive reshaping of existing *effective* assistance of counsel law.

The next section provides holistic suggestions on how criminal defense lawyering may be improved by changes at various levels of the criminal justice system—by the Supreme Court, by Congress, by jurists, by prosecutors, and by criminal defense attorneys.²⁷¹

V. EXCITING TIMES, BUT NOT ENOUGH

With the changing position of both the Court as well as societal attitudes toward the unjustly imprisoned, the time seems ripe to make holistic changes designed to ensure that a criminal defendant's constitutional right to the effective assistance of counsel is adequately protected.²⁷² More and more, there seems to be sympathy for the notion that the process of asserting one's constitutional rights should not be part of the punishment to which a prisoner is subjected.²⁷³ The following section will propose changes that may be implemented at various stages of the criminal justice system, all toward the goal of providing more robust Sixth Amendment protection. The suggested changes propose modifications at the Supreme Court level, the Congressional level, the judicial level, the prosecutorial level, and the defense level. Any one of the following suggestions would help to address the problems of poor representation of defense counsel in the criminal justice system, but enactment of all the following suggested improvements would be most ideal in correcting the wrongs of poor defense representation in criminal matters.

²⁷¹ Protection of criminal defendants by facilitating civil action against their negligent attorneys is a subject addressed in a previous piece. See Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 GA. L. REV. 1251 (2003).

²⁷² See generally O'Hear, *supra* note 201 (considering alternatives to federal courts in protecting prisoners' constitutional rights).

²⁷³ Cf. Brandon L. Garrett, Essay, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 396–97, 431–33 (2015) (evaluating DNA-driven exonerations of several prisoners, some who spent decades in prison, based on contaminated confessions and explaining how the criminal justice system itself contributed to prolonged sentences despite constitutional violations).

A. *At the Supreme Court Level, Strickland Should Be Revamped*

The system's method of evaluating the constitutionality of criminal defense lawyering needs to be enhanced.²⁷⁴ The Court should implement a new ineffective assistance of counsel standard by which courts consider whether a criminal defendant has received meaningful representation.²⁷⁵ The new standard should be flexible enough not to interfere with the independence of criminal defense counsel, and at the same time provide a more meaningful evaluation of criminal defense lawyering.²⁷⁶ The proposed test stems in part from decisions by the Supreme Court of Hawaii and the New York Court of Appeals.²⁷⁷ As discussed more fully below, whether one received ineffective assistance of counsel should not be established based on presumptions that defense counsel's conduct was reasonable,

²⁷⁴ See Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259, 1261 (1986) (arguing that the *Strickland* test "undermines the goal of the Sixth Amendment—[achieving] a just result . . . through a proper adversarial proceeding").

²⁷⁵ Some courts refusing to adopt *Strickland* standards, but instead willing to provide more protection for criminal defendants, speak of the Sixth Amendment right to the effective assistance of counsel in terms of "meaningful representation"—namely whether the law, the evidence, and the circumstances of a case taken together indicate that the legal representation was meaningful. See, e.g., *People v. Benevento*, 697 N.E.2d 584, 587 (N.Y. 1998); cf. Thurgood Marshall, *Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit*, 86 COLUM. L. REV. 1, 3 (1986) (declaring that the "severe rules the Court has adopted to assure that the trial is the 'main event' have been unaccompanied by measures to ensure the fairness and accuracy of that event" (footnote omitted)).

²⁷⁶ See *Strickland v. Washington*, 466 U.S. 668, 688–89 (refusing to create specific guidelines regarding reasonable attorney conduct out of concern that "[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions"); cf. *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (explaining that "while the *Strickland* test provides . . . guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis"); *Benevento*, 697 N.E.2d at 587 ("[T]he phrase 'effective assistance' is not, however, amenable to precise demarcation applicable in all cases.").

²⁷⁷ See, e.g., *Benevento*, 697 N.E.2d at 584; *Briones v. State*, 848 P.2d 966 (Haw. 1993). Rejecting the *Strickland* standard, Hawaii has adopted a "meaningful representation" standard in ineffective assistance of counsel claims. See *State v. Smith*, 712 P.2d 496, 500 (Haw. 1986) (explaining that the appropriate inquiry is "whether, [when] viewed as a whole, the assistance provided . . . [was] 'within the range of competence demanded of lawyers in criminal cases.'" (quoting *State v. Kahalewai*, 501 P.2d 977, 979 (Haw. 1972))). For example, a petitioner bringing an ineffective assistance of counsel claim in Hawaii must "show specific errors or omissions . . . reflecting counsel's lack of skill, judgment or diligence." *Briones*, 848 P.2d at 976 (omission in original) (quoting *State v. Antone*, 615 P.2d 101, 104 (Haw. 1980)); see also *Benevento*, 697 N.E.2d at 586 (also applying meaningful representation standard and explaining that giving effective representation "generally means [providing] . . . 'reasonably competent services . . . devoted to the [defendant's] best interests'" (quoting *People v. Ortiz*, 76 N.Y.2d 652, 655–56 (N.Y. 1990))).

but rather should be based on an analysis of whether a lawyer's objectively unreasonable conduct substantially impaired the client's potentially meritorious defense.

1. Eliminate *Strickland* Presumptions

The Court should eliminate the “strong presumption” that defense counsel’s conduct was reasonable.²⁷⁸ In the words of Justice Marshall in his *Strickland* dissent, “[t]o afford attorneys more latitude, by ‘strongly presuming’ that their behavior will fall within the zone of reasonableness, is covertly to legitimate convictions and sentences obtained on the basis of incompetent conduct by defense counsel.”²⁷⁹ In a system that routinely tolerates poor lawyering as the norm, there is no reason for presuming, in a case challenging the constitutionality of that lawyering, that the lawyer’s conduct was reasonable.²⁸⁰ There is even less justification for indulging a *strong* presumption of reasonableness²⁸¹ or even worse a “doubly deferential standard of review.”²⁸²

²⁷⁸ See discussion *supra* Section II.B.1 (explaining *Strickland*'s strong presumption of reasonable professional assistance).

²⁷⁹ *Strickland*, 466 U.S. at 713 (Marshall, J., dissenting); see also discussion *supra* Section II.C (discussing Justice Marshall's dissent in *Strickland*).

²⁸⁰ See Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 641 (1986) (explaining that *Strickland*'s requirement that deference be given to attorney's conduct undermines the adversary system); see generally Duncan, *supra* note 149 (explaining how system's inability to hold criminal defense attorneys accountable at any level—constitutional, civil, and disciplinary levels—has resulted in unacceptably low quality criminal defense lawyering); Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67 (2002) (arguing per se prejudice should be established when attorney sleeps during trial and should trigger new trial); Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 148 (2001) (discussing case of Betty Lou Beets and explaining that her lawyer operated under impermissible conflict of interest in that he could have been a life-saving witness for her because he had previously represented her and knew that she did not kill her husband for the purpose of acquiring insurance money).

²⁸¹ See Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 691–92 (2003) (discussing Montana Supreme Court's decision in *In re Mental Health of K.G.F.* in which court refused to apply *Strickland* in challenge to quality of counsel in involuntary commitment proceeding, claiming that *Strickland* was lacking because its linchpin—“reasonable professional assistance” . . . ‘cannot be presumed in a proceeding that routinely accepts—and even requires—an unreasonably low standard of legal assistance and generally disdains zealous, adversarial confrontation’” (quoting *Strickland*, 466 U.S. at 689; *In re Mental Health of K.G.F.*, 29 P.3d 485, 492 (Mont. 2001))).

²⁸² See, e.g., *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) (reversing petitioner's ineffective assistance of counsel claim because Sixth Circuit failed to apply AEDPA's “doubly deferential standard of review,” which requires a federal reviewing court to “give[] state court and defense attorney benefit of doubt”); see *supra* Part III (explaining AEDPA).

Indulging a strong presumption of competent lawyering unnecessarily tilts the scales against the prisoner.²⁸³ In determining the constitutionality of legal representation, the scales should not be tilted in favor of either party—not the prisoner and not the government. The purpose of ineffective assistance of counsel law is not to facilitate a finding of incompetent lawyering; neither should it be about hindering a finding of constitutionally infirm lawyering. An ineffective assistance of counsel claim should be about determining whether a criminal defendant’s constitutional rights were violated, a determination that should be made without one side benefitting from presumptions.

It is unclear why criminal defense counsel, who are notoriously overworked, understaffed, and often work for less than seventy dollars an hour, should be presumed to have performed competently in representing their clients.²⁸⁴ Recognizing a presumption of criminal defense attorney competence is not supported by current well-documented realities of criminal defense law practice.²⁸⁵ Many criminal defendants (and almost all indigent defendants) are represented by public defenders or appointed counsel, who—through no fault of their own—are shamefully understaffed and overworked, so much so that recently, at least one public defender office has had to refuse cases of needy defendants due to a lack of resources.²⁸⁶

²⁸³ The current *Strickland* deficient performance examination is similar to a tort negligence standard, as it requires counsel’s conduct to be “reasonable.” However, a tort defendant enjoys no presumption of competent conduct in a negligence action. Rather, in a negligence action, it is the plaintiff who must establish the standard of conduct as well as prove that the defendant’s conduct fell below that standard. Similarly, a lawyer, the subject of an ineffective assistance of counsel claim, should not enjoy a presumption of competent lawyering.

²⁸⁴ See, e.g., ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, THE MISSOURI PROJECT: A STUDY OF THE MISSOURI PUBLIC DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS (2014), http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/lr_sclaid_5c_the_missouri_project_report_authcheckdam.pdf [<https://perma.cc/BFH8-NLR7>] (finding excessive defense counsel workloads contributing to ineffective assistance of criminal defendants).

²⁸⁵ See *id.*

²⁸⁶ See, e.g., *ACLU Suing New Orleans, State of Louisiana over Public Defender Shortage*, GREATER BATON ROUGE BUS. REP. (Jan. 15, 2016), <https://www.businessreport.com/article/aclu-suing-new-orleans-state-louisiana-public-defender-shortage> [<https://perma.cc/VB3T-U59U>] (describing chronically underfunded public defender system as “constitutional crisis”); Jesse Coburn, *Maryland Public Defenders Juggle Heavy Caseloads; Critics Say Indigent Clients Suffer*, BALTIMORE SUN (Aug. 20, 2016), <http://www.baltimoresun.com/news/maryland/investigations/bs-md-public-defender-caseloads-20160819-story.html> (describing understaffed and underfunded public defender systems across country); Mori Rothman, *Wait List Grows as Public Defenders Refuse Cases in New Orleans*, PBS NEWSHOUR (May 1, 2016), <http://www.pbs.org/newshour/bb/wait-list-grows-as-public-defenders-refuse-cases-in-new-orleans/> [<https://perma.cc/YA3L-P24Q>].

Moreover, counsel who are appointed to represent criminal defendants are woefully undercompensated. A recent study revealed that appointed counsel across thirty states were compensated at an average rate of less than sixty-five dollars per hour.²⁸⁷

The elimination of presumptions in ineffective assistance of counsel determinations would still protect a wide range of tactical or strategic choices that a criminal defense attorney may have employed, choices that should be properly protected from constitutional challenge.²⁸⁸ However, the burden of establishing that the defense attorney's decisions were a matter of strategy or tactic would be placed on the government rather than on the prisoner,²⁸⁹ and strategic choices must be proven reasonable.²⁹⁰ Criminal defense performance would need not be errorless. The prisoner would still have to prove that the attorney's conduct fell outside of a range of reasonably acceptable lawyer conduct.²⁹¹ However, the prisoner would not have to disprove unnecessary, unfounded presumptions. Elimination of the presumptions will allow the state and the prisoner to start on level footing in analyzing whether the prisoner's Sixth Amendment rights were violated.

²⁸⁷ See JOHN P. GROSS, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, GIDEON AT 50: A THREE-PART EXAMINATION OF INDIGENT DEFENSE IN AMERICA, PART I, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS, A 50-STATE SURVEY OF TRIAL COURT ASSIGNED COUNSEL RATES 8 (2013).

²⁸⁸ See, e.g., *State v. Smith*, 712 P.2d 496, 501 (Haw. 1986) (explaining that attorney must be permitted "broad latitude to make on-the-spot strategic choices" and that "matters presumably within the judgment of counsel, like trial strategy, 'will rarely be second guessed by judicial hindsight'" (quoting *State v. McNulty*, 588 P.2d 438, 446 (Haw. 1978))); *People v. Benevento*, 697 N.E.2d 584, 587 (N.Y. 1998) (ruling that counsel's performance should be evaluated objectively "to determine whether it was consistent with strategic decisions of a 'reasonably competent attorney'").

²⁸⁹ Thus, in applying this standard, strategic or tactical actions with an obvious bent toward benefitting a defendant's case will not be subject to challenge. As the Supreme Court of Hawaii has explained, "[s]pecific actions or omissions alleged to be error but which had an obvious tactical basis for *benefitting* the defendant's case will not be subject to further scrutiny. . . . If, however, the action or omission had no obvious basis for benefitting defendant's case," further scrutiny of the ineffective assistance of counsel claim will be appropriate. See *Briones v. State*, 848 P.2d 966, 976 (Haw. 1993).

²⁹⁰ The Court in *Wiggins* took this position, finding that the attorneys' failure to investigate was not reasonable given the circumstances. See *Wiggins v. Smith*, 539 U.S. 510, 534–35 (2003); *Smith*, 712 P.2d at 500 (explaining that a defense attorney's representation will not be "judged ineffective solely by hindsight"); *Benevento*, 697 N.E.2d at 587 ("[C]ounsel's efforts should not be second-guessed with the clarity of hindsight to determine how the defense might have been more effective.").

²⁹¹ See *Smith*, 712 P.2d at 500 (explaining that meaningful representation standard does not require that a lawyer's representation be errorless). "The Constitution guarantees the accused a fair trial, not necessarily a perfect one." *Benevento*, 697 N.E.2d at 587.

Consider Christina Gutierrez's representation of Adnan Syed.²⁹² Gutierrez failed to contact and investigate potential alibi witness Asia McClain. She also failed to cross-examine the cell tower expert properly. Gutierrez's performance in conducting her investigation must be afforded, pursuant to *Strickland*, a "heavy measure of deference."²⁹³ Similarly, whether and the manner in which she conducted cross-examination is considered a tactical or strategic decision, which *Strickland* provides, is virtually unchallengeable.²⁹⁴ Luckily for Syed, as explained previously, the court effectively relaxed *Strickland's* presumption of deference standard as courts most commonly apply it.²⁹⁵ History indicates that most courts would not have so concluded.

2. Replace *Strickland* Prejudice

The next change to the current ineffective assistance of counsel calculus should be to replace *Strickland's* prejudice prong with an "impairment of meritorious defense" analysis. Instead of the prejudice standard of *Strickland*, an ineffective assistance of counsel petitioner will need to prove that his lawyer's unreasonable representation "resulted in either the withdrawal of or substantial impairment of a potentially meritorious defense."²⁹⁶ A meritorious defense is one that would have been likely to succeed or one that addressed the substance or essence of the prosecution's case. This impairment of meritorious defense analysis would differ from the prejudice prong of *Strickland* in several important respects. After first determining whether counsel's conduct was objectively unreasonable without the benefit of presumptions, the petitioner would need to establish that the lawyer's unreasonable conduct *possibly* impaired a potentially meritorious defense to which the petitioner was entitled. Unlike the current *Strickland* prejudice standard, the petitioner would not be required to prove a standard analogous to a tort standard, i.e., that but for his counsel's error, the result of the proceeding would have been

²⁹² See discussion *supra* Part I (describing attorney Christina Gutierrez's representation of Adnan Syed).

²⁹³ See *Strickland v. Washington*, 466 U.S. 668, 691 (1984) ("[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.").

²⁹⁴ See *id.* at 690–91.

²⁹⁵ See *supra* Section II.B.1.

²⁹⁶ See, e.g., *Briones v. State*, 848 P.2d 966, 976 (Haw. 1993); see also *Smith*, 712 P.2d at 500.

different.²⁹⁷ The meritorious defense analysis would not require the petitioner to prove that his lawyer's conduct *actually* prejudiced his defense, nor would it be necessary for the petitioner to establish that his lawyer's conduct *probably* prejudiced his defense.²⁹⁸ Rather, the relevant inquiry would be whether the lawyer's unreasonable conduct possibly impaired a potentially meritorious defense to which the petitioner was entitled. Admittedly, the science of predicting how any given proceeding would have turned out if things had gone differently is inexact at best. Thus, requiring a petitioner to prove that his proceeding would have been different is to require him to prove what is, in most cases, not provable. Alleviating a petitioner from proving the unprovable redirects the focus of an ineffectiveness claim to one where the aim is to uncover constitutionally harmful defense lawyering rather than providing relief to only those few prisoners who are able to prove that which is very difficult to prove.²⁹⁹ This new impairment of meritorious defense standard recognizes the difficulty of predicting the precise effect that any event or lack thereof might have had on the factfinder as the current prejudice standard requires.³⁰⁰ By instead applying the impairment of meritorious defense standard, what becomes important is the recognition that counsel's unreasonable behavior interfered with a meritorious defense.³⁰¹ Or, stated differently, what becomes important is whether the criminal defendant's representation was meaningful. Representation by one not acting as a lawyer is equivalent to a defendant having

²⁹⁷ In tort law, causation in fact is established by proof that defendant's negligent conduct *probably* resulted in the harm about which the plaintiff complains. See, e.g., *People v. Benevento*, 697 N.E.2d 584, 588 (N.Y. 1998) (emphasizing that an ineffectiveness claim is "ultimately concerned with the fairness of the process as a whole rather than its particular impact on the outcome of the case" and concluding that "whether defendant would have been acquitted of the charges but for counsel's errors is relevant, but not dispositive under the State constitutional guarantee of effective assistance of counsel").

²⁹⁸ See, e.g., *Briones*, 848 P.2d at 977.

²⁹⁹ For Vivian Berger's argument that, rather than *Strickland's* prejudice test, the Court should embrace a harmless error standard that would properly place on the state the burden of proving the result would not have been different, see Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—a Dead End?*, 86 COLUM. L. REV. 9, 96 (1986).

³⁰⁰ See, e.g., *State v. Aplaca*, 837 P.2d 1298, 1308 (Haw. 1992) ("Although we, as an appellate court, cannot predict the exact effect these prospective witnesses would have had on the trial court's assessment of [the victim's and the defendant's] credibility, we firmly believe that such testimony could have had a direct bearing on the ultimate outcome of the case.").

³⁰¹ As such, it operates as an irrebuttable presumption of prejudice. As the Hawaii Supreme Court has recognized, "Violation of an accused's constitutional right to effective assistance of counsel warrants the *irrebuttable* presumption of prejudice." *Briones*, 848 P.2d at 978.

no lawyer at all, in the same manner as Clarence Gideon had no lawyer.

Consider Adnan Syed's situation again if applying the proposed impairment of meritorious defense standard. Analyzing whether Christina Gutierrez's unreasonable representation resulted in either withdrawal of or substantial impairment of a potentially meritorious defense would likely lead a reviewing court to conclude that Syed received ineffective assistance of counsel. The testimony of the alibi witness Asia McClain, attesting to Syed's presence at the library and not at the murder scene, at a minimum addressed the essence of the prosecution's case against Syed, resulting in substantial impairment of a meritorious defense. Likewise, competent cross-examination also would have likely proven to result in a successful defense, as the prosecution's theory of the case against Syed was in large part based on the unreliable cell tower testimony proffered at his trial.

Eliminating the current *Strickland* presumptions of competence and replacing *Strickland's* prejudice prong with an impairment of meritorious defense analysis will provide several benefits. First, this more meaningful ineffective assistance of counsel analysis will result in more capable lawyers protecting the rights of criminal defendants.³⁰² The difficulty that a criminal defendant encounters in proving a *Strickland* claim has adversely impacted the quality of the criminal defense bar on the whole by contributing to the system's inability to hold criminal defense attorneys accountable for incompetent representation.³⁰³ Second, improving the means by which the system evaluates the constitutionality of criminal defense lawyering will increase the public's confidence in the criminal justice system.³⁰⁴ The Court has repeatedly articulated that a purpose of the Sixth Amendment guarantee of the right to counsel is to create confidence in the criminal justice system. However, the current level of criminal defense lawyering is so low that too often there is a discernable gap between the legal representation for criminal defendants and legal representation

³⁰² Of course, there are other means of improving the quality of criminal defense lawyering. See, e.g., Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974 (1992) (advocating fee awards for defendants who prevail in criminal cases as means of attracting more highly qualified counsel).

³⁰³ See generally Duncan, *supra* note 149 (explaining how system's inability to hold criminal defense attorneys accountable at any level—constitutional, civil, and disciplinary levels—has resulted in unacceptably low quality criminal defense lawyering).

³⁰⁴ See Klein, *supra* note 280 (proposing *Strickland's* deference to attorneys and preoccupation with ends rather than means undermines the adversary system).

on behalf of the government. While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither should our courts be respected while they continue to validate trials in which essentially unarmed prisoners are sacrificed to gladiators.³⁰⁵ Establishing an ineffective assistance of counsel standard that provides a more meaningful analysis of acceptable criminal defense lawyering will have a positive impact in that criminal defendants will be more ably defended and public confidence in the criminal justice system will increase.³⁰⁶

There may also be a concern that adoption of the new standard would prove to be too expensive because heightening the standard by which to measure ineffective assistance of counsel claims would result in more petitioners bringing claims. It is true that a heightened chance of success may increase the number of cases brought. Although increased costs within the legal system may be a legitimate cause for concern, what is more of a cause for concern is the cost of lost faith in the criminal justice system. Further, there is a high cost to be paid for the pervasive attitude that the rights of the criminally accused are not worthy of true protection.³⁰⁷ Nonetheless, to borrow from *Powell v. Alabama*, any concerns of increased expense should be outweighed by ensuring the constitutional rights of criminal defendants.³⁰⁸ The preservation of the integrity of our justice system depends on such a concession.

³⁰⁵ Cf. *Betts v. Brady*, 316 U.S. 455, 476–77 (1942) (Black, J., dissenting); see also DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN LEGAL JUSTICE SYSTEM* 129 (1999) (explaining although criminal justice system will never achieve perfect equality between rich and poor, “the current system does little more than place a veneer of legitimacy on a system that is patently inadequate and unjust”).

³⁰⁶ This is not to suggest that all criminal defense lawyering is poor; it is not. Most members of the criminal defense bar practice law honorably and competently. See Stephen B. Bright, *Turning Celebrated Principles into Reality*, *CHAMPION*, Jan./Feb. 2003, at 6 (recognizing those who have proudly and capably defended the criminally accused).

³⁰⁷ Cf. Nunn, *supra* note 197, at 803 (discussing disturbing fact that in many jurisdictions, public defenders are paid much less than prosecutors and declaring that such a disparity is “justified only if one thinks that defense work is somehow less important”).

³⁰⁸ The *Powell* Court stated:

It is true that great and inexcusable delay in the enforcement of our criminal law is one of the grave evils of our time. Continuances are frequently granted for unnecessarily long periods of time, and delays incident to the disposition of motions for new trials and hearings upon appeal have come in many cases to be a distinct reproach to the administration of justice. The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense. To do that is not to proceed promptly in the claimed spirit of regulated justice but to go forward with the haste of the mob.

B. At the Congressional Level, Remove AEDPA Barriers

Prisoners are understandably not the most sympathetic players within the criminal justice system. As a result, prisoners often have very little political muscle.³⁰⁹ When AEDPA was enacted, there was widespread hostility toward crime and criminals generally.³¹⁰ Nonetheless, the enactment of AEDPA is particularly unfair.

First, AEDPA's requirement that the state law conviction be the result of a decision contrary to or an unreasonable application of clearly established federal law "as determined by the Supreme Court" is unduly restrictive. Rather than requiring *clearly* established law as determined by the Supreme Court, AEDPA should be amended to substitute "established federal law" instead and eliminate the requirement that the law be previously determined by the Supreme Court. One of the problems with requiring it to have been determined previously by the Supreme Court is that Court may never hear some claims, as the Court is not required to grant certiorari on direct appeals. For example, in considering Adnan Syed's situation, unless the United States Supreme Court has granted certiorari on direct appeal on a case with virtually identical ineffective assistance of counsel claims, a federal reviewing court would likely not be permitted pursuant to AEDPA to entertain his petition because there would not be clearly established law as determined by the Supreme Court.

Second, AEDPA's twin presumptions should be eliminated. When a prisoner seeks to establish ineffective assistance of counsel, *Strickland* already requires proof of deficient performance and prejudice, proof that must be established in the face of *Strickland's* "strong presumption" of competent performance and presumption of no prejudice. AEDPA's twin presumptions further impose the "strong presumption" that the state's facts are correct as well as the presumption that defense counsel's conduct was competent. Taken together, these presumptions make proving ineffective assistance of counsel virtually unattainable. Coupled with AEDPA's requirement that any rebuttal of the presumption of

Powell v. Alabama, 287 U.S. 45, 59 (1932).

³⁰⁹ See generally O'Hear, *supra* note 201, at 224 ("[P]risoners seem poorly positioned to resist becoming the target of symbolic legislation through which politicians can express their disapproval of crime and criminals.").

³¹⁰ See generally *id.* (highlighting enactment of AEDPA and Prison Litigation Reform Act (PLRA), restricting prisoners' ability to recover monetary and injunctive relief for constitutional violations within same month).

the correctness of the state factual findings must be made by clear and convincing evidence is bewildering when one considers that the inquiry is determining whether a person's constitutional rights have been violated. It has moved to apparent antipathy regarding whether constitutional rights are valued or have been violated. For example, in Syed's case, if the state were to succeed in its current appeal, Syed would have a very difficult time overcoming the barriers put in place by AEDPA in an effort to have a federal court review the constitutionality of his lawyer's representation.³¹¹ With the elimination of AEDPA, Syed would be in a better position to have a federal court consider his constitutional claims of ineffective assistance of counsel.³¹² The application of AEDPA goes beyond being unsympathetic to the plight of prisoners. AEDPA's twin presumptions, as well as the requirement that the prisoner rebut the correctness of state's factual findings by clear and convincing evidence, should be eliminated.

Historically, habeas review of prisoners' claims has been important and vital to our criminal justice system.³¹³ Inasmuch as AEDPA severely restricts the ability of prisoners to receive federal habeas review, at least one commentator has indicated that Congress may have overstepped its authority in enacting AEDPA.³¹⁴ AEDPA should be amended, if not outright repealed. This suggestion to abolish AEDPA may be viewed by some as idealistic. However, proposals to amend the criminal justice system, such as reducing mandatory minimums and easing barriers to reentry, have recently received bipartisan support.³¹⁵

³¹¹ Cf. Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1, 15–16 (2016) (explaining that the rate of federal habeas review post-AEDPA has dropped from 37% to 14%).

³¹² See *id.* at 14 (describing how, since the passage of AEDPA, “federal habeas cases are increasingly decided on procedural grounds and more petitioners are precluded from filing”); see also King, *supra* note 201, at 317 (describing the less than 1% grant of habeas relief post-AEDPA, a figure even lower than the success rate pre-AEDPA).

³¹³ See, e.g., John H. Blume et al., *In Defense of Noncapital Habeas: A Response to Hoffmann and King*, 96 CORNELL L. REV. 435, 471–79 (2011) (explaining importance of federal habeas review as protection to prisoners whose constitutional rights have been violated); Justin F. Marceau, *Challenging the Habeas Process Rather than the Result*, 69 WASH. & LEE L. REV. 85, 89–91 (2012) (explaining importance of federal habeas review as safeguard to constitutional criminal procedure).

³¹⁴ See, e.g., Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 VA. L. REV. 753 (2013) (explaining Congress may have overstepped its authority by enacting AEDPA and essentially stripping federal court's jurisdiction to review habeas claims). *But cf.* Lindh v. Murphy, 521 U.S. 320 (1997) (favorably discussing Congressional intent regarding recent amendments to AEDPA).

³¹⁵ See, e.g., Russell Berman, *Can the Senate Reform Criminal Justice?*, ATLANTIC (Oct. 2, 2015), <http://www.theatlantic.com/politics/archive/2015/10/will-criminal-justice-actually-be-reformed/408538/> [<https://perma.cc/5BNF-X5TE>]; Laura Barrón-López, *Senators Breathe New Life into Criminal Justice Reform Bill, Unveil Changes*,

This suggestion to remove the barriers of AEDPA is not too far afield from these recent trends and is likewise a worthwhile endeavor designed to improve the criminal justice system.

C. *At Judicial Level, Report Attorney Misconduct*

Judicial codes of ethics require judges to report lawyer misconduct.³¹⁶ Yet empirical evidence indicates that judges who witness attorney misconduct in their courtrooms often fail to report the misconduct to disciplinary or other appropriate authorities.³¹⁷ Of course, failure to report attorney misconduct in the criminal defense context can have devastating outcomes, particularly when it comes to protection of a criminal defendant's constitutional rights.³¹⁸ The disciplinary process is underutilized as a means of improving competent legal representation.³¹⁹ Yet the disciplinary system is an ideal place to impact the lawyering of specifically identified offenders positively and quickly.³²⁰

Judges who witness poor criminal defense lawyering are often in the best position to effect change in the quality of lawyering in the courtroom.³²¹ Jurists are in a position to recognize poor and unacceptable lawyering and should not be reluctant in reporting.³²² Because there may be negative

HUFFINGTON POST (Apr. 28, 2016), http://www.huffingtonpost.com/entry/senators-criminal-justice-reform_us_57227d46e4b01a5ebde52012 [<https://perma.cc/Q7E3-SWXE>].

³¹⁶ See, e.g., MODEL CODE OF JUDICIAL CONDUCT r. 2.15(B) (AM. BAR ASS'N 2007) (providing that a "judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority").

³¹⁷ See Michael S. McGinniss, *Sending the Message: Using Technology to Support Judicial Reporting of Lawyer Misconduct to State Disciplinary Agencies*, 2013 J. PROF. LAW. 37, 51 (2013) (explaining that it is common for courts not to report lawyer misconduct to disciplinary agencies); Judith A. McMorro et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1435 (2004) (explaining that judges do not report attorney misconduct as often as they should).

³¹⁸ See McGinniss, *supra* note 317, at 83 (explaining that attorney misconduct must be reported by judges to disciplinary bodies to protect public).

³¹⁹ See Duncan, *supra* note 149 (describing disciplinary system as safeguard against poor criminal defense lawyering).

³²⁰ For instance, the impact could be removal by disbarment or suspension in extreme cases or supervision and mentoring in appropriate cases.

³²¹ See McGinniss, *supra* note 317, at 54 (positing judges have an "institutional advantage as sources for . . . reporting [attorney] misconduct); see generally Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537 (2009) (explaining how jurists are well-situated to report attorney misconduct).

³²² In my opinion, reasons why jurists may not report witnessed misconduct may vary widely and include political considerations, cronyism, reputational concerns, and the reality that criminal law practice often occurs within a small universe of lawyers, all of whom have face-to-face encounters with each other frequently.

consequences associated with reporting lawyer misconduct—especially for an elected official—judges may not carry out the mandates of their ethical codes.³²³ Nonetheless, judicial reporting of poor criminal defense lawyering is essential to improve the quality of criminal defense lawyering.³²⁴ Improving the quality of criminal defense lawyering is the best way to protect the Sixth Amendment rights of criminal defendants.

D. At Prosecutorial Level, Jurisdictions Should Enact Open-File Legislation

At the prosecutorial level, jurisdictions should (1) enact open-file legislation, if they have not already done so, and (2) provide constant ethics training for all members of their prosecutorial staff. The enactment of open-file legislation as well as ongoing prosecutorial ethical training will result in further protection of the rights of criminal defendants.

First, nationwide implementation of open-file legislation will lead to more competent criminal defense lawyering.³²⁵ Open-file statutes permit the defense in criminal cases to access all nonprivileged information that the prosecution and other policing agencies have in their files, or over which they have control, pertaining to a defendant's case. Approximately one-third of the states—including Arizona, California, Florida, Massachusetts, New Jersey, Illinois, Michigan, North Carolina, Ohio, Pennsylvania, and Texas—have implemented relatively broad discovery rules, some modeled after the American Bar Association's ethical standards for prosecutors.³²⁶ Texas's

³²³ Cf. Greenbaum, *supra* note 321, at 559 (explaining why judges do not currently take their reporting functions of attorney misconduct seriously enough).

³²⁴ See generally Greenbaum, *supra* note 321, at 559 (suggesting various means by which to encourage judicial reporting of serious lawyer misconduct); McGinniss, *supra* note 317 (proposing database reporting system of lawyer misconduct).

³²⁵ See Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files*, THE CHAMPION, May 2013, at 26, <https://www.nacdl.org/Champion.aspx?id=28476> [<https://perma.cc/V5V9-XZSV>] (explaining that full and total access to prosecutorial files will lead to more effective and zealous advocacy of criminal defendants).

³²⁶ See, e.g., FLA. R. CRIM. P. 3.220(b)(1) (“[T]he prosecutor shall . . . disclose to the defendant . . . a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant . . . [and] the statement of any [such] person . . . [plus other information such as that which] has been provided by a confidential informant . . . whether there has been any electronic surveillance . . . reports or statements of experts . . . and any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant.”); N.C. GEN. STAT. ANN. § 15A-903(a)(1) (West 2012) (“Upon motion of the defendant, the court must order: The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.”); ARIZ. R. CRIM. P. 15.1 (“[T]he

legislation clearly requires prosecutors to share certain case material with the defense, including police reports and witness statements.³²⁷ The authors of Texas’s legislation emphasized that the purpose of the act was to prevent wrongful convictions with the hope being that such open-file discovery would ensure that each criminal defendant would be guaranteed the constitutional right to an appropriate defense.³²⁸

prosecutor shall make available to the defendant [names and addresses of witnesses, all statements of the defendant, all law enforcement reports, information about experts, any tangible items prosecutor intends to use at trial, informant information] within the prosecutor’s possession or control.”); MASS. R. CRIM. P. 14 ([T]he prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy [statements by the defendant, grand jury minutes, any exculpatory facts, witness information, law enforcement reports] at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor’s direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor’s office or have done so in the case.”); CAL. PENAL CODE § 1054.1 (West 2017) (“The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [t]he names and addresses of persons the prosecutor intends to call as witnesses at trial; [s]tatements of all defendants; [a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged; [t]he existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial; [a]ny exculpatory evidence; [r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.”); N.J. R. CRIM. P. 3:13-3 (“[T]he prosecutor shall, at the time of the plea offer is made, provide defense counsel with all available relevant material that would be discoverable at the time of indictment.”); ILL. SUP. CT. R. 412 (providing for broad discovery upon defense motion); MICH. R. MCR 6.201 (providing for broad discovery upon request of defendant); OHIO R. CRIM. P. 16 (providing for broad discovery “[u]pon receipt of a written demand for discovery by the defendant”); PA. R. CRIM. P. 573 (providing for relatively broad discovery “on request by the defendant”); TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2015) (“[A]s soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of any offense reports, any designated documents, papers, written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.”); *see also* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WISC. L. REV. 541, 577 (2006) (indicating Arizona, Massachusetts, and North Carolina have moved toward broadening criminal discovery); Klinkosum, *supra* note 325, at 27.

³²⁷ Cf. Prosser, *supra* note 326, at 598–99 (arguing that “[p]olice reports should be made available to defense counsel at the defendant’s first court appearance” and “[s]upplemental police reports should be provided . . . as they are created”).

³²⁸ S.B. 1611, 83d Leg., Reg. Sess. (Tex. 2013) (Sponsor’s Statement of Intent) (“Every defendant should have access to all the evidence relevant to his guilt or

Some district attorney's offices nationwide have policies of being more forthcoming in criminal discovery, even though such policies are not enacted legislatively.³²⁹ However, it is important that states adopt *legislation* rather than merely having in place a policy of allowing defense counsel access to files. Legislation mandating open files will lead to consistency and eliminate the need for the use of prosecutorial discretion in determining defense attorneys' access to nonprivileged information about their cases.³³⁰ For instance, *Brady v. Maryland* and its progeny mandate that prosecutorial authorities disclose to the defense all material, exculpatory information. However, the initial determination regarding whether information constitutes *Brady* material is left to the discretion of prosecutors. Requiring prosecutors to don a defense lawyer's hat to determine whether information might be helpful to the defense is an exploration at which some prosecutors are ill equipped. Perhaps, as a result, *Brady* violations still constitute a pervasive problem within the criminal justice system.³³¹ Enacting open-file legislation will remove the need for prosecutorial

innocence, with adequate time to examine it. A defendant who understands the extent of the evidence against him can make an informed decision to plead.”).

³²⁹ See, e.g., 3A TRIAL HANDBOOK FOR ARKANSAS LAWYERS § 79:8 (2013–2014 ed.) (“Many prosecutor’s offices in Arkansas maintain an open file policy in lieu of complying with formal discovery under ARK. R. CRIM. P. 17.1 to 17.5 Defense counsel should move for discovery even when there is an open file policy in case some material was not delivered by the police to the prosecutor.”). Unfortunately, a recent federal proposal to require open file discovery failed. See Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2 (2012). On the federal side, in 2012 the U.S. Senate proposed a bill to give federal criminal discovery laws a facelift by expanding federal prosecutors’ duties to disclose favorable evidence and by eliminating the requirement that only material or exculpatory information be disclosed. The act would have required federal prosecutors to disclose information “that may reasonably appear to be favorable to the defendant . . . with respect to: (A) the determination of guilt; (B) any preliminary matter before the court before which the criminal prosecution is pending; or (C) the sentence to be imposed.” *Id.*; see *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding prosecutors must disclose evidence to defense only when it is “material either to guilt or to punishment”). In effect, the proposed legislation would have brought prosecutors’ statutory obligations in line with their ethical obligations as provided by the American Bar Association Model Rules of Professional Conduct. See MODEL RULES OF PROF’L CONDUCT r. 3.8(d) (AM. BAR ASS’N 2011) (requiring prosecutors “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal”). Though the proposed legislation died in committee, the requirement was designed to apply both to information already in the prosecution’s “possession, custody, or control” and to information known to the prosecutors or that would be discovered “by the exercise of due diligence.” S. 2197 § 2.

³³⁰ Open-file *legislation*, as contrasted with an open-file *policy*, is imperative so that the procedures or policies in place do not vary from jurisdiction to jurisdiction.

³³¹ See Klinkosum, *supra* note 325.

discretion. Instead, the relevant inquiry will merely be whether the information is privileged or not.

Another benefit of adopting open-file systems will be the preservation of criminal defendants' resources. Defense counsel will no longer presumably have to make multiple requests for information from the prosecuting authorities, allowing their resources to be directed elsewhere. In a system where prosecuting authorities most often outweigh that of the defense, enacting a system which will, in the long run, preserve scarce defense resources is critical. After all, the criminal justice system should not be a test of who has the most resources and who has the best lawyers.³³² A transparent prosecutorial office will aid criminal defense attorneys in the preservation of their resources, thereby allowing them to provide adequate representation to their clients. Again, as mentioned earlier, many criminal defense attorneys are overworked and undercompensated. Every effort to preserve scarce defense resources will benefit their clients.

Open-file systems will further ensure that justice is done and that prosecutors are ministers of justice, not mere advocates for the government.³³³ Unfortunately, too often prosecutors concern themselves with seeking convictions rather than pursuing justice.³³⁴ A prosecutor's primary responsibility is not necessarily to convict, but rather to see that justice is carried out, and part of that responsibility requires prosecutors to ensure that defendants are afforded the due protections of the law.³³⁵

In addition to open-file systems, prosecutors will benefit from constant instruction on their unique role within the criminal justice system and the ethical obligations associated with their role. Unlike other attorneys, in representing their clients, prosecutors are to serve the overarching goal of seeing that

³³² See *supra* Part I (discussing resources attorney Christina Gutierrez expended arguing with prosecution in Adnan Syed's case).

³³³ See, e.g., MODEL RULES PROF'L CONDUCT r. 8.3 cmt. 1 (AM. BAR. ASS'N 1983); see also STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 3-1.2(c) (AM. BAR ASS'N 1993) ("The prosecutor is an administrator of justice, an advocate, and an officer of the court.").

³³⁴ Cf. STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION standard 3-1.2(c) (AM. BAR ASS'N 1993) ("The duty of the prosecutor is to seek justice, not merely to convict.").

³³⁵ *Id.* at standard 3-3.11, commentary ("This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons."). Certainly, prosecutorial incentives to convict, such as increases in pay and promotions based on their conviction rates, should be eliminated.

justice is done.³³⁶ Their job—before reaching the courtroom and while in the courtroom—is to ensure the fairness of the judicial process. Unlike other trial attorneys, prosecutors cannot be single-mindedly devoted to “the win.” Rather, their advocacy on behalf of the government carries with it the mandate that they ensure that the defendant’s rights are protected. When prosecutors forget that their job is not to be merely adversarial, they run the risk of trampling (intentionally or unintentionally) on a defendant’s rights. A way to prevent prosecutors from forgetting to pursue that justice is to require continuous ethical training—at least annually, if not more often—as a reminder of their special responsibilities as prosecutors.

In considering Adnan Syed’s case, if the prosecuting authorities had had more of an eye on their special ethical obligation to ensure fairness of the judicial process and their responsibilities to protect a criminal defendant’s rights, they presumably would have been more forthcoming with Gutierrez’s requests for information, such as the primary witness Jay Wild’s statements and the victim’s autopsy report. Gutierrez was placed in a position of having to use her finite resources and time demanding that the prosecutors comply with reasonable requests for information. As a result, not only were precious defense resources expended but precious judicial resources were also unnecessarily expended. Presumably, Syed’s attorney Christina Gutierrez would have been able to redirect her resources to prepare Syed’s defense adequately.

E. At Defense Bar Level, Fund Public Defender Offices on Par with Prosecution

It is well known that public defender offices nationwide are understaffed and underfunded.³³⁷ Public defenders need more resources to do their jobs properly.³³⁸ It is important to the protection of criminal defendants that public defender offices receive funding that puts them at parity with prosecutorial resources. After firing Gutierrez for her poor

³³⁶ See, e.g., MODEL RULES PROF’L CONDUCT r. 3.8, cmt. 1 (AM. BAR ASS’N 2014) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

³³⁷ See, e.g., Alex Stuckey, *In Missouri, Public Defenders Describe Mountains of Work, Low Pay*, ST. LOUIS POST-DISPATCH (Oct. 19, 2015), http://www.stltoday.com/news/local/crime-and-courts/in-missouri-public-defenders-describe-mountains-of-work-low-pay/article_c46b8f10-4f97-5a19-932e-c4c229a3b722.html [<https://perma.cc/JF3N-3DBJ>] (describing funding for Missouri public defenders as “at its lowest level in four years”).

³³⁸ See Mickenberg, *supra* note 5, at 327 (explaining system needs to ensure criminal defense attorneys have “skills, money, and resources to do the[ir] job properly”).

representation at his trial, Syed was represented by a public defender at his sentencing.³³⁹ One of the complaints that Syed had about Gutierrez was that she refused to notify the court of new information regarding three alibi witnesses, including Asia McClain, who averred that she was with Syed at the time the state alleged that Lee was murdered.³⁴⁰ After the firing of Gutierrez, the public defender assigned to represent Syed met with him only briefly and did not bring this new alibi witness information to the attention of the court.³⁴¹ Likely not having the time to delve more deeply into the particulars of Syed's situation, the public defender merely advised Syed to express remorse for his crime and plead for the mercy of the court³⁴² rather than, for example, arguing in a motion for a new trial that a new trial should be granted based on newly discovered evidence that a primary alibi witness, Asia McClain, was never contacted by Syed's previous trial counsel.³⁴³

Syed's experience with his public defender is not unusual in Maryland³⁴⁴—or in many other jurisdictions. A properly funded public defender office presumably could have made a real difference in his case, as the public defender would have provided Syed with at least the attention his case deserved at that stage of the proceedings—an attorney who would have had time to review the case and properly determine that the new alibi witness evidence should have at least been presented to the court prior to imposing a sentence.

Increased funding of public defender offices would presumably lead to increased staffing. Increased staffing would lead to more reasonable caseloads for each attorney working in the public defender system. More reasonable caseloads would, at a minimum, hopefully lead to an increase in the amount of time an attorney would be able to spend on each client's case.

³³⁹ See CHAUDRY, *supra* note 15, at 179–80.

³⁴⁰ See *id.* at 177–179.

³⁴¹ See *id.* at 180–83.

³⁴² See *id.*

³⁴³ See MD. R. CRIM. PROC. 4-331 (allowing for a motion for new trial in criminal matter to be filed in Maryland within ten days of verdict); see, e.g., *State v. Devers*, 272 A.2d 794, 802 (Md. 1971) (explaining that a principal ground for granting a motion for new trial includes newly discovered evidence); *Yorke v. State*, 556 A.2d 230, 234–35 (1989) (explaining that standard for determining whether defendant was entitled to new trial on basis of newly discovered evidence is whether the evidence may well have produced a different result).

³⁴⁴ See, e.g., Coburn, *supra* note 286.

CONCLUSION

What currently passes for adequate criminal defense representation is unacceptable. *Strickland's* influence has certainly contributed to this sad reality.³⁴⁵ However, *Strickland's* influence is not solely responsible for the poor quality of criminal defense attorneys.³⁴⁶ Problems exist at virtually every level of the criminal justice system that must be corrected and, when corrected, will improve criminal defense lawyering overall.³⁴⁷ Until recently, Adnan Syed was just another casualty of the criminal justice system's toleration of poor defense lawyering. Without the vast publicity his case received, there was little chance that Syed could have secured the post-conviction relief he was recently granted. Even though he has had to wait almost twenty years for relief—and as of this writing remains in prison awaiting a new trial—social media and public attention have made Syed a lucky man indeed. However, luck should not be required.

It is important to remember that the American criminal justice system is premised on the notion that it is better for ten guilty people to go free than for one innocent person to be imprisoned.³⁴⁸ Unfortunately, the Court's constant reference to Sixth Amendment protections as being closely intertwined with the preservation of the criminal process as a fair and just system is difficult to reconcile with its position that the Sixth Amendment guarantees do not serve the purpose of improving the quality of criminal defense lawyering.³⁴⁹ For purposes of the Sixth Amendment, the necessity of a criminal defense lawyer³⁵⁰ and the goal of a fair trial³⁵¹ are too interrelated to exclude from consideration the *quality* of that criminal defense attorney.³⁵²

³⁴⁵ See discussion *supra* Part II (explaining how the Court's decision in *Strickland v. Washington* adversely affected quality criminal defense lawyering).

³⁴⁶ See discussion *supra* Part III (describing how AEDPA negatively impacted prisoners' abilities to acquire post-conviction relief successfully).

³⁴⁷ See discussion *supra* Part V (suggesting changes at various levels of justice system which will improve criminal defense lawyering overall).

³⁴⁸ See 4 WILLIAM BLACKSTONE, COMMENTARIES *358 (“[F]or the law holds that it is better that ten guilty persons escape than that one innocent suffer.”).

³⁴⁹ See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (stating that “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation”).

³⁵⁰ See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“[L]awyers in criminal courts are necessities, not luxuries”).

³⁵¹ See *Strickland*, 466 U.S. at 686.

³⁵² See Nunn, *supra* note 197, at 744–56 (“We like to consider the criminal trial, with its adversarial process, as one of the great institutions of abstract justice. But the American criminal justice system is a sham. . . . [T]he criminal trial is flawed because it is not adversarial (or at least not as adversarial as it should be).”).

In the words of the Court: "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."³⁵³ And as stated recently by Justice Sotomayor, "whatever flaws do exist in our system can be tolerated only by remaining faithful to our Constitution's procedural safeguards."³⁵⁴

If, as the Court has stated, one of the purposes of the presence of a criminal defense attorney is to maintain a balance between governmental prosecuting authorities and the criminally accused, then the *quality* of the defense attorney must play an important role in the equation.³⁵⁵ Insisting upon, encouraging, and enabling *quality* criminal defense lawyering will not only help restore the public's faith in the criminal justice system, but more importantly, it will better protect criminal defendants' Sixth Amendment right to truly *effective* assistance of counsel.³⁵⁶

³⁵³ United States v. Cronin, 466 U.S. 648 (1984) (internal citations omitted) (footnotes omitted).

³⁵⁴ Elmore v. Holbrook, 137 S. Ct. 3, 9 (2016) (mem.) (Sotomayor, J., dissenting).

³⁵⁵ See *Gideon*, 372 U.S. at 344 ("Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. . . . 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."); Nunn, *supra* note 197, at 751 ("The purpose of the defendant's trial rights is to place the defendant on an even footing with the prosecution so that he or she might be a more effective adversary to the prosecution.")

³⁵⁶ A statement that Justice Harlan made in his concurring opinion in *Gideon* is equally applicable here: "To continue a rule which is honored by this Court only with lip service is not a healthy thing and in the long run will do disservice to the federal system." *Gideon*, 372 U.S. at 351 (Harlan, J., concurring).