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STATE OF DELAY: ARE OUTDATED CAPITAL POST-CONVICTION DEFENSE TACTICS UNDERMINING EFFECTIVENESS AND THE ATTORNEY-CLIENT RELATIONSHIP?

Lyle C. May[*]

In 2018, death row prisoner Scott Allen was ordered to undergo a psychiatric evaluation to determine whether he was competent enough to fire his appointed attorneys. The competency hearing was not ordered by Scott's counsel; rather, a superior court judge did so at the behest of an undisclosed third party. The problem was that Scott Allen had no history or symptoms of an intellectual disability or mental illness, nor was either a mitigatory claim in his appeal. The attorney-client conflict was triggered by Scott's pro se *effort to remove counsel after they ignored his lawful instructions to include potentially exculpatory evidence in an appellate brief. Exclusion of such information in the brief at the state level would find it procedurally barred in a federal habeas petition. This danger was reinforced by the U.S. Supreme Court's conservative majority ruling in* Shinn v. Ramirez*. The Court held that defendants bear responsibility for all attorney errors and cannot depend on federal courts to be fact finders when new evidence that should have been presented in state courts is raised in a habeas petition. This procedural bar prevents raising a claim of ineffective assistance of post-conviction counsel, creating a circumstance where defendants must be a check against less than diligent attorneys.*

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When capital defendants pursue due process in the course of their appeals, they often contend with attorneys who are only interested in their own agendas and defense strategies, interference from third parties that support defense counsel but not necessarily the interests of the defendant, federal courts hamstrung by Supreme Court rulings, and the "otherism" taught to attorneys in the 2003 American Bar Association ethical guidelines. Through this quagmire, capital defendants gamble life and freedom on the ability of their attorneys to avoid errors and pursue client interests. It is through this legal nightmare those who seek to overturn wrongful convictions must fight the status quo of delay.

INTRODUCTION

This Article focuses on the intersection of capital post-conviction appeals, ineffective assistance of counsel, capital defense strategies, and unacknowledged conflicts of interest between attorneys, their clients, and the organizations that guide them. The emphasis on guilt-innocence phase claims is meant to highlight the subtle bias of mitigation-centric capital defense, a bias that can pave the way for a fundamental miscarriage of justice. Mitigation implies guilt. For defendants that seek to prove their innocence, the time spent developing mitigatory evidence is frustrating and feels like a conflict of priorities. Ideally, defense attorneys should pursue what their clients want with the same zeal they would as if their own family member were facing a death sentence. Sometimes, though, an attorney's goals are not the client's goals. This article examines that tension and demonstrates how easily a lack of zeal becomes unconstitutional representation.

There is a common misconception that "delay" is either desired by every capital defendant, or necessary. Many attorneys assume—and have stated—that their primary goal is to avoid execution. For some death-sentenced prisoners, this is true, especially in states such as Oklahoma and Texas, where executions occur on a regular basis.[1]

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[1] *See Oklahoma Carries Out First of 11 Executions Scheduled for 2023*, DEATH PENALTY INFO. CTR. (Jan. 12, 2023), https://deathpenaltyinfo.org/news/oklahoma-carries-out-first-of-11-executions-scheduled-for-2023; *Death Row Information*, TEX. DEP'T OF CRIM. JUST.,

Yet, there are also people on death row who want their appeal reviewed without any unnecessary delay. Since *Furman v. Georgia*, *Georgia v. Gregg*, the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), and a number of other SCOTUS rulings, the procedural landscape of the death penalty has become a labyrinth of rules that make appealing a capital sentence and conviction a decades-long nightmare. While these appeals crawl through the courts, the prisoner is left to exist in often harrowing conditions that their legal representatives do not feel as pressure. When "delay" becomes a viable defense tactic and interferes with advancing one's appeal in court, it is especially stressful. The harder one pushes back against dilatory tactics, the more that the attainment of due process on death row feels like struggling against quicksand.

Extensive delays faced by death-sentenced prisoners can also obscure the effectiveness of counsel. Because time erodes the most zealous representation, avoiding execution becomes a one-size-fits-all defense that props up complacency and inaction on other legal claims. This outdated strategy has become more dangerous since the U.S. Supreme Court ruling in *Shinn v. Ramirez*. Justice Clarence Thomas, writing for the conservative majority, gutted the federal court's authority to safeguard the right to the effective assistance of counsel.[2] The Court overruled precedent established in *Martinez v. Ryan* and *Trevino v. Thaler*, holding that the defendant is at fault for any claim not raised during the state post-conviction proceedings, since "petitioner 'bears the risk in federal habeas for all attorney errors made in the course of representation.'"[3]

In response to an email query by the author of this Article, University Professor Emeritus at NYU Law School and noted attorney in *Furman v. Georgia*, Anthony Amsterdam said, in light of the *Shinn* ruling,

> If a prisoner has a state appellate or state post-conviction lawyer who is doing a poor job, then the prisoner does improve his or her chances of relief by filing complaints with the courts in which that

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https://www.tdcj.texas.gov/death_row/dr_executed_offenders.html (last visited Mar. 23, 2023).

[2] Shinn v. Ramirez, 142 S. Ct. 1718, 1728 (2022).

[3] *Id.* at 1733–35.

> attorney is representing him/her, by raising claims *pro se* and/or by requesting that the lawyer be replaced by another one. Conversely, if the lawyer is doing a good job, the same actions by the prisoner are self-damaging, even suicidal. The problem, of course, is that many prisoners do not have the legal training to determine whether their lawyer is doing a good job or a bad one.[4]

In the recent article *The Ghost of Furman Past and the Specter of Furman Future*, Amsterdam wrote about the "necessary work" defense teams should be doing; that those teams should ideally contain two qualified attorneys, an investigator, a mitigation specialist, and a trained psychological expert.[5] Also important is frequent communication with the client and a trusting relationship that helps counsel understand the client's needs, priorities, and wishes, and to "maintain the client's confidence in counsel's loyalty, support, and advice."[6] But, Amsterdam was referencing trial level advocacy. While this legal team standard at the post-conviction capital appeals stage is relatively new—with some death-sentenced prisoners clinging to one appellate attorney that rarely communicates—the "no-holds-barred litigation" against various elements of capital punishment is not new; it often seems to be the only thing in which some attorneys invest for their death row clients.[7]

Collateral attacks against a judgment take varying forms. One example is a petition for a writ of habeas corpus. For the purpose of

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[4] E-mail from Anthony G. Amsterdam, Univ. Professor Emeritus, N.Y.U., to Robert Johnson, Professor, Am. Univ. (Oct. 2022) (on file with author). Amsterdam responded to the following question: "In light of the Shinn ruling, is it incumbent upon every prisoner, all of whom bear the risk in federal habeas for all attorney errors made in the course of representation, to hold their attorneys accountable at every stage of the appellate process? For example: writing the court if a dispute arises, lodging complaints with the State Bar or ethics commission, and even attempting to fire counsel when they ignore a reasonable request for a particular legal strategy?"

[5] Anthony G. Amsterdam, *The Ghost of Furman Past and the Specter of Furman Future*, 43 AMICUS J.: FIGHTING FOR JUST. ON DEATH ROW, 10–11 (2022).

[6] *Id.* at 11.

[7] *Id.* at 10.

this Article, collateral attacks are generalized litigation challenging the constitutionality of the death penalty. Examples of that litigation include, but are not limited to, challenges to execution protocols, the way prosecutors across a county use peremptory strikes, or conditions of confinement. When collateral attacks are relied upon by under-resourced, thinly stretched attorneys who communicate poorly or who are patronizing, it is especially isolating and infuriating for capital defendants who want their appeal reviewed by the court. Though collateral attacks function through due process, when they subvert individual direct challenges to a judgment, they can also violate a defendant's right to due process. Post-conviction capital appeals are an adversarial obstacle course with complex procedures constraining attorney action. However, within that procedure is the defendant's right to be treated as an individual, not a member of a class.

This article analyzes and illustrates ineffective assistance of counsel ("IAC") at the trial and post-conviction level and how interests other than those of the defendant sometimes govern capital appeals. Examined is the state post-conviction appeal of death row prisoner Scott David Allen, who has dealt with ineffective attorneys while seeking to overturn his wrongful conviction. Part I, "Questions of Competency Versus Effectiveness," explores a competency hearing requested by an anonymous third party after Scott Allen attempted to fire appellate counsel for excluding potentially exculpatory information from a court filing. Part II, "Don't the Client's Wishes Rule?," covers some responses from a phone interview with Gretchen Engel, the director of the Center for Death Penalty Litigation ("CDPL"), who talked about the client's place in their post-conviction capital appeals. Also explored is a possible root of mitigation-centric capital defense: American Bar Association ("ABA") Guideline 10.5. Part III, "Inaction is Not a Defense Strategy," continues analysis of ABA Guideline 10.5 with comments from the director of the ABA Death Penalty Representation Project, Emily Olson-Gault. Part IV, "Collateral Attacks," explains the 2009 North Carolina Racial Justice Act, a law that was repealed in 2013, but not before 130 claims clogged the courts and made judges, prosecutors, and defense attorneys unwilling to move any capital appeals forward. Part V, "Conflicts of Interest," demonstrates how due process in capital appeals is viewed

as optional by courts that frequently lose track of cases for decades. This judicial inactivity is infectious, though funding for capital appellate counsel is a tiny fraction of the State's resources and by no means endless. Part VI, "AEDPA and the Ineffective Assistance of Counsel," examines development of the right to effective assistance of counsel, how ineffectiveness is defined, and limitations created by the 1996 Antiterrorism and Effective Death Penalty Act. Part VII, "When Conflicting Interests and Ineffective Counsel Meet," warns of the danger from the 2022 SCOTUS ruling in *Shinn v. Ramirez* and explains why this makes defendants more responsible than ever to speak out when their interests are not being met by counsel. There must be greater vigilance by defendants, but there also must be a different defense model and revisions to the ABA Guidelines if the current state of delay is to end.

I. Questions of Competency versus Effectiveness

Scott Allen, a capital appellant in North Carolina, told his attorneys that he was contemplating dropping his mitigation claims for an upcoming sentencing hearing in Montgomery County Superior Court. Scott wanted to forgo these sentencing issues because his only interest was in trial level IAC. His appellate attorneys, Michael Unti and Margaret Lumsden, could not convince him to accept the results of the sentencing hearing because the only sentencing relief available to death row prisoners in North Carolina is life imprisonment without the possibility of parole ("LWOP"), a fate worse than death and without the benefit of legal representation. As a result of this conflict, Scott's attorneys got the CDPL director, Gretchen Engel, to speak with Scott about accepting LWOP. He met with her and was even more adamant: it would be more difficult to advance his claim of innocence as a non-capital defendant.

Shortly after the meeting with the CDPL director, Scott's attorneys filed his Motion for Appropriate Relief ("MAR") brief, a state level appeal, in the Montgomery County Superior Court. They left out critical exculpatory information related to his IAC claim, instead focusing only on sentencing issues. Despite repeated requests from Scott to include this information and see a draft of the brief before it was filed, the attorneys ignored his lawful instructions and submitted the brief. Shortly thereafter, Scott wrote to Senior

Resident Superior Court Judge Vance Bradford Long and explained there were omission errors in the MAR brief, a document which he did not approve for submission to the court. He also wanted his counsel replaced because they continued to ignore his lawful instructions and did not effectively represent his interests.

After a few months, Scott learned that a competency hearing had been ordered by the court and that he would be required to talk with a state forensic psychologist who would determine if he was competent enough to make any decisions regarding the defense of his case. The competency hearing, usually reserved for defendants about to go to trial or be executed, was virtually unheard of for someone trying to defend themselves against the ineffectiveness of his attorneys during an appeal.

After the first letter to Judge Long, Scott followed up to make sure the court understood he did not wish to proceed *pro se*; rather, he just wanted legal representatives who acted in his interest. Both letters were treated as motions to the court. Psychiatric evaluation complete, Scott was brought before the Montgomery County courthouse for a competency hearing on December 19, 2018.[8] Judge Long began by reading Scott's letters into the record and then said the following:

> The first thing I want to try to be as—proceed as cautious as I can and truncate my comments as much as I can, Mr. Allen. But I will agree with you to this extent, I allowed other—not necessarily folks in the courtroom now but folks maybe in the [C]apital [D]efenders [O]ffice, the grand poobahs, to say that they felt like when you filed this motion, of course, it created some ripples in the water. It was their opinion that we needed to get a psychiatric evaluation and make sure that you had the competency to make decisions about your counsel. That's probably the safe procedure. I sort of went against my instincts which was to bring you down here into the courtroom and just have you tell us

[8] Transcript of Competency Hearing at 8–11, State v. Allen, 861 S.E.2d 273 (N.C. Dec. 19, 2018) (No. 115A04-3).

> what it is you were trying to do, which I think is what you would have liked. But we are where we are now.[9]

Scott took notes throughout Judge Long's discourse because he knew, at this highly unusual hearing, his interests were not the same as the attorneys or whoever set the competency evaluation in motion. Scott noted:

> As the judge is making the 'grand poobahs' comment, he is also gesturing with his hand to include the director of the CDPL, one Gretchen Engel, and several unidentified members of the Capital Defender's Office. Earlier this year [2018] my primary attorney warned me that Gretchen Engel, and other key people who defend capital cases, either had already approached the NC State Bar Association, or were devising a way to do so, with a set of hypothetical conditions in which they could offer legal arguments to the courts in order to remove any legal standing a defendant has to direct the path of their own case or appeal. By the judge stating what he did he seemed to confirm that this is true. Fortunately, my evaluation determined I am competent. Otherwise, the actions taken by the CDPL could have set a dangerous precedent for any future defendant wanting their own interests represented.[10]

Special Deputy Attorney General ("AG"), Nicholas G. Vlahos went over a brief procedural history of Scott Allen's case once Judge Long finished. The State's mental health expert was then called to the stand. While waiting for the doctor, Scott recalled Vlahos approaching the defense table for a word with his attorneys. Scott noted:

> I'm sitting between my attorneys when Vlahos asks them if they were going to object to the State's doctor finding me capable to proceed. It seemed to me that

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[9] *Id.* at 11. Judge Long's reference to the Capital Defenders Office is confusing because they exclusively cover capital trials, not appellate issues. It is possible the judge conflated them with the CDPL.

[10] Scott Allen, Competency Hearing Notes (Dec. 19, 2018) (unpublished) (on file with author).

> my attorneys had already been approached by the AG's office, or perhaps the CDPL or Capital Defender's Office too. As if they had been discussing this objection was a real possibility. The notion doesn't surprise me, more the openness in which the AG expressed this right in front of me, and then at the last second it was questioned, my attorneys actually looked at each other before declining.[11]

Despite the clear conflict of interest, Judge Long forced Scott to keep his attorneys, then dismissed any attempt to raise guilt-innocence issues. It would be nearly two years before Scott's attorneys withdrew from the case. New counsel was appointed: Olivia Warren, a new hire from Harvard Law School to the CDPL in October, 2019, and Thomas Maher, a former interim director of the CDPL and head of the Office of Indigent Defense Services ("IDS") in August, 2021. The new attorneys filed a writ of certiorari ("writ of cert") to the North Carolina Supreme Court. In the writ of cert, Scott's counsel asked the Court to review Judge Long's dismissal of the IAC claims asserted in the MAR brief and the information Scott wanted his previous representatives to include in the brief. That additional information is part of the reason the state Supreme Court determined Judge Long erred in summarily dismissing guilt-innocence phase IAC claims at the hearing.[12] The

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[11] *Id.*

[12] The "additional information" referenced here is an IAC claim that trial counsel failed to fully investigate, to impeach the integrity of an informant, or to call into question the use of Vanessa Smith as the only "eye witness" to the alleged capital offense. This same witness testified against Scott in a previous case. Vanessa Smith ultimately recanted in that case, stating that the DA, Garland Yates, and lead detective Barry Bunting, coerced Smith into lying about Scott Allen. Six years later, DA Yates used the same detective and unreliable informant in a capital trial against Scott Allen. Later, at the sentencing hearing awarded to Scott from claims in his MAR brief, Scott's appellate attorney Michael Unti, like the trial attorneys, refused to subpoena DA Yates or detective Bunting to testify about their prior use of Vanessa Smith's testimony against Scott Allen. Mr. Unti told Scott that his reason for refusing to call Yates to the stand was: "We will not dismantle a fellow member of the bar." The claim was unconscionable because Scott's co-chair attorney at trial, Pete Oldham, was aware of this relationship because he represented Scott in the 1994 case (which was not a murder case) when

Court ordered a full evidentiary hearing for those claims because "Allen [] presented assertions of fact which will entitle him . . . to relief . . . if resolved in his favor."[13]

It is unreasonable that a defendant must defend his own competency before the court because he asserted his right to include information in a MAR brief, then tried to fire his attorneys when they refused. Ordinarily, competency hearings occur when a defendant is obviously mentally ill, intellectually disabled, or both, to avoid execution or be found unfit to stand trial. Scott displayed no such symptoms and had no mental health history. In any legal proceeding, a close attorney-client relationship can defuse most misunderstandings, help counsel know the client's interests and carry them out as ably as possible under the law, or alert counsel to any mental impairment. When conflict erodes that relationship and the attorneys do not really know a client because their "zealous defense" is diluted by external interests, the one who suffers is never the lawyer. Those who bear the consequences of poor representation are defendants. Those consequences are death and imprisonment.

II. DON'T THE CLIENT'S WISHES RULE?

When asked about the *Shinn* ruling and how it impacts the attorney-client relationship, CDPL Director Gretchen Engel, in a phone interview with the author of this Article, replied that the defense community is appalled that clients will be less able to challenge ineffective assistance of counsel, stating: "[m]any of our death row clients went through the state post-conviction proceeding before creation of the IDS and Capital Defenders Office. Their appellate representation does not meet today's standards for a capital case."[14]

But the IDS and CDPL, even by today's standards, cannot guarantee effective representation, better training, organizational support, or newer (not necessarily better) case law. The organizational support can also be problematic. The CDPL, Capital

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Vanessa Smith recanted her testimony. *See* State v. Allen, 861 S.E.2d 273 (N.C. 2021) (No. 115A04-3).

[13] State v. Allen, 861 S.E.2d 273 (N.C. 2021).

[14] Telephone Interview with Gretchen Engel, Director, Ctr. for Death Penalty Litig. (Oct. 20, 2022).

Defenders Office, IDS, Appellate Defenders Office, and North Carolina Prisoner Legal Services each have attorneys who have cycled through one or more of the other organizations. These offices communicate with one another. This can be beneficial in providing support and feedback, overcoming difficult legal challenges, or pursuing litigation against laws that harm their clients. Ordinarily, such tight knit legal communities might not seem like a problem, but it can be when groupthink[15] occurs and "fresh ideas" grow outdated. Some attorneys in these organizations are at the higher level, have been doing this sort of legal work for decades, and maintain relatively archaic legal strategies, such as LWOP being a legal victory from death row. To the people who have spent the rest of their lives suffering in prison, it is not.

There is a common belief amongst death-sentenced prisoners in North Carolina that CDPL attorneys primarily seek to prevent their clients from being executed. Claims of legal or actual innocence are treated with skepticism and deemphasized as a goal. If this is true, at a minimum it would be highly unethical, but enough IAC claims based on an attorney's failure to investigate have won relief in court that it is more than unethical.[16] When asked whether the CDPL maintains a policy of mitigation-centric defense work, director Engel claimed their attorneys practice zealous representation of capital clients:

> There is no universe where we sit around a table and discuss forgoing a claim to focus on sentencing. We go for the best we can do whether that is the guilt-innocence phase or sentencing. We work with

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[15] Groupthink is defined as "[t]he mode of thinking that persons engage in when concurrence-seeking becomes so dominant in a cohesive in-group that it tends to override realistic appraisal of alternative courses of action." Irving L. Janis, *Groupthink*, PSYCH. TODAY (1971), *reprinted at* https://agcommtheory.pbworks.com/f/GroupThink.pdf.

[16] *See* Strickland v. Washington, 466 U.S. 668, 691 (1984) (stating "Counsel has a duty to make reasonable investigations or to make a reasonable decision that a particular investigation is unnecessary"); Wiggins v. Smith, 539 U.S. 510, 522 (2003); Bobby v. Van Hook, 558 U.S. 4 (2009).

> whatever we have and of course try for a new trial, which is the best outcome.[17]

However, when Scott needed aggressive and zealous representatives who would attack guilt-innocence IAC claims the same way they did for mitigation, his attorneys refused and focused more on sentence reduction in a state where there have been no executions since 2006. When asked if the CDPL has a policy upon which it relies when attorney-client disputes rise to the level of a conflict of interest, director Engel replied that "case law governs a client's place."[18] When asked if pursuing a competency hearing would ever be a viable solution to that conflict, the CDPL director stated that "questions of competency arise in cases of mental illness and with regard to a sentence."[19]

These answers seem reasonable on the surface but do not align with Scott Allen's experience. If only the mentally ill and intellectually disabled are targets of competency hearings, did that mean Scott's attempt to fire counsel was labeled as mentally ill behavior by whomever initiated the competency hearing? Or was there something deeper at work? Capital defender Bradley A. MacLean wrote about "difficult clients" in a 2009 volume of the Tennessee Law Review. While addressing the need to develop a trusting attorney-client relationship, MacLean described the case of a mentally ill death row client and how empathy and teamwork can develop important mitigatory evidence.[20] Then, MacLean began citing sections of the ABA Guidelines that seem to contradict his defense methodology.[21] MacLean began with ABA Guidelines 10.5:

> Duty to investigate exists regardless of the expressed desires of a client. Nor may counsel "sit idly by, thinking that the investigation would be futile." Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure

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[17] Telephone Interview with Gretchen Engel, Director, Ctr. for Death Penalty Litig. (Oct. 20, 2022).

[18] *Id.*

[19] *Id.*

[20] Bradley A. Maclean, *Effective Capital Defense Representation and the Difficult Client*, 76 TENN. L. REV. 661 (2009).

[21] *Id.* at 665.

> of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.[22]

MacLean interpreted this as an exclusive focus on "all aspects of potential mitigation . . . ."[23] He appears to deemphasize several instances in which the ABA Guidelines call on counsel to communicate with the client on "all matters that might be reasonably expected to have a material impact on the case . . . ."[24] But, this strange emphasis is not just Maclean's. Rather, ABA Guideline 10.5 is the source: "the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that 'it must be assumed that the client is emotionally and intellectually impaired."[25]

The ABA Guidelines are taught to every law school student. They govern countless legal decisions. Their influence cannot be understated; nor can the damage such an assumption does by potentially instilling an implicit bias in thinking around capital defense strategies. Did this assumption prompt a group of attorneys to pursue an unnecessary competency hearing against a defendant asserting his right to assist in the defense of his case and determine its outcome? Scott Allen had no mental health history and displayed no symptoms of illness in thought or behavior. The only prompt for a court-ordered psychiatric evaluation, one that did not originate in the court, came from his decision to remove counsel after they ignored a reasonable and lawful instruction to include information in an appellate brief—potentially exculpatory information.

Some attorneys are inadequate at post-conviction capital appellate work. Most of the time, however, their work will not be seen as ineffective because the bar has been set so low—avoid execution—and because it rarely garners attention. When it does rise to the level of ineffective assistance of appellate counsel, proving it in court is a bar substantially higher than the mitigation-centric defense taught to attorneys doing capital defense work. Law

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[22] *Id.* at 666.

[23] *Id.*

[24] *Id.* at n.24.

[25] *Id.* at 667.

enforcement officers are trained in ways that increase their propensity to arrest, assault, and sometimes kill unarmed minorities.[26] Only in recent years has there been greater emphasis on the way that training instills implicit bias and leads to over policing of minority communities.[27] Capital defense work is similar. If attorneys are trained with an implicit bias towards people charged with capital crimes, and it manifests in too much focus on mitigation with not enough investigation in guilt-innocence issues, or in the dismissal of a client's wishes as "irrational" behavior, how can defendants ever receive effective representation?

Of course, capital defendants do not have the luxury of waiting for the ABA Guidelines to change in a way beneficial to their immediate appeals. Because of *Shinn v. Ramirez*, it is now more than ever incumbent upon every defendant—who bears the risk for all attorney errors and omissions of fact made in the course of representation—to hold their legal representatives accountable. For example, defendants can hold their legal representatives accountable by communicating disagreements with strategy, or, if an impasse is reached, lodging complaints with the State Bar, writing the appropriate court of jurisdiction, creating a physical record of the dispute, and, as a last resort, attempting to fire counsel. Scott did all of these things, as is his right, yet was given a psychiatric evaluation because it "created some ripples in the water."[28]

When asked what *Shinn* means with regards to the attorney-client relationship and carrying out a client's wishes, CDPL director Gretchen Engel replied that people sentenced to death are not monolithic in thought or behavior:

> Obviously there are different levels of education, experience, and mental illness. It's important to have qualified counsel research all claims. The idea that clients would ever have to be a check on counsel is very wrong. There is a whole body of law for self-representation, but there is no such thing as hybrid

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[26] *See* U.S. Comm'n on Civ. Rts, Police Use of Force: An Examination of Modern Policing Practices 101–130 (2018), *available at* https://www.usccr.gov/files/pubs/2018/11-15-Police-Force.pdf.

[27] *See id.* at 103–112.

[28] Transcript of Competency Hearing at 11–25, State v. Allen, 861 S.E.2d 273 (N.C. Dec. 19, 2018) (No. 115A04-3).

> counsel or where the client acts as an additional attorney who can determine legal strategy.[29]

Interestingly enough, the case that director Engel named as determining a "client's place"—*State of North Carolina v. Ali*—explains that, in fact, a client does have the ultimate authority in the strategic direction of his or her case. Regarding an "absolute impasse" between the attorney and client, *State of North Carolina v. Ali* held that "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control."[30]

The rule that the attorney must yield to the client on tactical decisions is neither uniformly accepted around the country nor strictly enforced in North Carolina. It can also create difficult ethical issues for attorneys in some circumstances. Generally, tactical decisions should be left to attorneys because they have the legal knowledge and training to know the best course of action. However, that training should never supersede the wishes of the client or cause a situation where the attorney takes an adversarial approach to a client, such as when he or she seeks to go around a client as if they represented an obstacle rather than a duty, or drags out an appeal and keeps the client on death row as a way to get them to settle for LWOP.

III. INACTION IS NOT A DEFENSE STRATEGY

ABA Guideline 10.5 outlines counsel's duty regarding communication, attorney-client rapport, and uncooperative clients.[31] It also provides commentary on "The Problem," which generalizes defendant mental faculties to encompass an entire class:

> Anyone who has just been arrested and charged with [a] capital [offense] is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make them

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[29] Telephone Interview with Gretchen Engel, Director, Ctr. for Death Penalty Litig. (Oct. 20, 2022).

[30] State v. Ali, 407 S.E.2d 183, 189 (N.C. 1991).

[31] *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases,* 31 HOFSTRA L. REV. 913, 1005–11 (2003).

> highly distrustful or impair their reason and perception of reality; they may be mentally retarded or have cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "it must be assumed that the client is emotionally and intellectually impaired."[32]

The ABA Guidelines, upon which attorneys build practical applications of legal strategy, presuppose that anyone charged with a capital crime is unlikely to comprehend the dire nature of the situation or effectively assist an attorney in development of legal claims. By attaching the phrase "complete denial in the face of overwhelming evidence" to a list of psychological impairments an attorney may encounter in a capital client, ABA Guideline 10.5 suggests that denial of guilt is itself a form of psychosis. It also fails to define "overwhelming evidence." Is a confession overwhelming evidence until later discredited? Eyewitness testimony until disproven? Other forms of junk science such as footprints, fingerprints, bite marks, lie detector tests, and even some DNA evidence have been used as "overwhelming" evidence against innocent people who were later exonerated—in some cases, after being executed.

In researching this project, the author of this Article wrote questions regarding ABA Guideline 10.5 that were ultimately sent to the Director of the ABA Death Penalty Representation Project, Emily Olson-Gault. Director Olson-Gault responded over e-mail to Professor John D. Bessler, answering these questions. When asked why the Guidelines had not been updated in twenty years, director Olson-Gault replied that "it's a combination of the fact that it takes several years to update the Guidelines and limitations on our resources, and that the 2003 Guidelines were written to be broad enough that they would continue to apply as law and science

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[32] *Id.* at 1007.

evolves."[33] In reference to the assumption in Guideline 10.5, director Olson-Gault claimed,

> It's not that defense counsel are raising harmful or baseless claims that their clients are impaired in some way, but rather that counsel fail to recognize the presence of these impairments do exist. So it makes sense to err on the side of caution and be on the lookout for these issues.[34]

Director Olson-Gault objected to the idea that the Guidelines say a denial of guilt should be treated as a mental impairment, stating:

> Nowhere do the Guidelines say that denial of guilt is a form of psychosis . . . And there's no need to provide a precise definition of what constitutes overwhelming evidence since we are not attempting to convict the client here but trying to make sure counsel is sensitive to the possibility that the client may have a different perception of what happened during the commission of a crime, even if the evidence of guilt appears to be objectively overwhelming.[35]

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[33] Email from Emily Olson-Gault, Director, ABA Death Penalty Representation Project, to John Bessler, Professor, Univ. of Baltimore (Jan. 2023) (on file with author).

[34] *Id.*

[35] *Id.* Following up with director Olson-Gault over the phone, I asked for clarification on why the ABA Guidelines have not been revised in such a long time. Director Olson-Gault reiterated the problem with limited resources, stating that the responsibility of those revisions would fall on the Death Penalty Representation Project and take away from their ability to find and provide capital representation. But the director also warned of the danger created by revising the Guidelines, a process that would require a vote by the ABA House of Delegates. The 2003 Guidelines received near unanimous support across a broad spectrum of legal actors in the judiciary, Attorney General's Office, and state bar associations across the country. The same would not necessarily happen again given current political divides; new guidelines would put previous Supreme Court rulings related to IAC claims at risk from a conservative Court that has no respect for precedent. Decisions in cases such as *Beard v. Rompilla* and *Wiggins v. Smith*, which are based on the 2003 ABA Guidelines emphasis on mental illness and intellectual impairment, could potentially be nullified and make it even harder to raise IAC claims.

Some prosecutors pursue death penalty cases when there is objectively little or no evidence. The State's case against Scott Allen, for example, was not "overwhelming" by any means. It relied almost entirely on the informant and codefendant, Vanessa Smith, and did not offer any fingerprint, DNA, or other physical or forensic evidence connecting Scott Allen to the crime scene.[36] Both the trial and North Carolina Supreme Court on direct appeal acknowledged these weaknesses in the State's case as "a joke."[37] The State is trying to convict and execute people charged with capital crimes. Definitions of whether evidence is objectively overwhelming matters to the court and should matter to attorneys representing clients on death row. Moreover, when law enforcement "errs on the side of caution" in the process of pulling over a motorist, a cell phone in hand can seem to be "objectively overwhelming evidence," even so that said LEOs use force within seconds. If a cell phone can look like a gun in broad daylight, it is because perceptions have been primed with stereotypes and assumptions. An attorney may not intend harm or raise baseless claims of mental impairment, but if their decision results in a death sentence, lost appeal, or LWOP, even if the court is allowed to define something as a "harmless error,"[38] there is no harmless outcome in that scenario.

The source of the assumption, at least in the ABA Guidelines, is an outdated study on juveniles sentenced to death in the 70s and 80s, conducted by Dorothy Otnow Lewis and published in the American Journal of Psychiatry in 1988.[39] This is well before modern neuroscience determined that adolescent brain development

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[36] Second Motion for Appropriate Relief, State v. Allen, 99-CRS-38188, 99-CRS-3820 Montgomery County Superior Court (N.C. 2022).

[37] *Id.*

[38] "Harmless Error" is defined as an error that does not affect a party's substantive rights or the case outcome. A harmless error is not grounds for reversal. Also termed a technical error; *error in vacuo*. Debate exists over what is and is not considered a "harmless" error. *Harmless Error*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[39] Dorothy Otnow Lewis, et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the U.S.*, AM. J. PSYCH. 584, 586, 587 (1988) (cited in *ABA Guidelines 10.5*).

continues into one's mid-twenties,[40] or the Supreme Court rulings in *Roper v. Simmons* and *Miller v. Alabama*.[41] More importantly, brain development is distinct from disability and impairment, a difference Guideline 10.5 fails to acknowledge.[42] The assumption in ABA Guideline 10.5 does not account for age, conditions of confinement, or even the likelihood that being threatened with execution causes mental illness (acute stress, anxiety disorders, severe depression) and would have nothing to do with the original offense in question.[43] That this faulty assumption is the starting point for any capital defender puts the defendant at greater risk for ineffective assistance of counsel.

Whether mentally ill, intellectually disabled, or neither, defendants deserve the benefit of the doubt from counsel: their cases should be investigated as if they are innocent, if that is what they maintain. Unfortunately, this does not always happen. In a 2008 empirical study by Brandon Garrett, from a group of 133 exonerees who sought relief on appeal, IAC claims accounted for twenty-nine percent of that number, ranking third alongside of prosecutorial misconduct.[44] From the entire study of 200 exonerees, twenty-two (eleven percent) were juveniles, and twelve (six percent) were intellectually disabled.[45] Though the Garrett study only includes defendants exonerated by post-conviction DNA testing from six states, does not include data from North Carolina (the state under consideration in this article), and is not comprehensive by any means, it does suggest that greater complexities are involved in

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[40] Marian Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE AND TREATMENT 449, 451 (2013), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/pdf/ndt-9-449.pdf ("It is well established that the brain undergoes a 'rewiring' process that is not complete until approximately 25 years of age.").

[41] Roper v. Simmons, 534 U.S. 551 (2005); Miller v. Alabama, 567 U.S. 460 (2012).

[42] MODEL CODE OF PROF'L RESPONSIBILITY, Guideline 10.5 (AM. BAR ASS'N 2003).

[43] *Id.*

[44] Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 88, 96 (2008).

[45] *Id.* at 66.

capital defense than a generalized focus on mental deficiency and mitigation.[46]

The complexity of capital appeals and consequences of failure demand greater attention from attorneys than a general focus on mental deficiency, mitigation, and "preventative defense." One particular example stands out as a cautionary tale for every attorney, whether the case is capital or not: Leon Brown and Henry McCollum, two intellectually disabled teenagers, were coerced into confessing to a crime they did not commit and were ultimately sentenced to death. It took thirty-one years before DNA evidence and other exculpatory information exonerated them, but in the meantime they suffered in prison even as they were counseled to accept LWOP in the face of "overwhelming evidence" and their consistent, vocal denials of guilt.[47]

For every criminal defendant not guilty of the charged crimes, this is the nightmare within a nightmare. It is bad enough to lose one's freedom, family, and life; to be stigmatized, isolated, and threatened with execution; it is worse still to be patronized and disbelieved by legal representatives trained to think a denial of guilt is a product of mental illness or intellectual disability, who see LWOP as a "win."

In many ways, the "easy win" mentality explains logic-defying capital sentences that stretch for decades. Dilatory defense tactics are correlated to mitigation-centric strategies that merely seek to keep a defendant alive regardless of level of culpability. The reasoning seems to be that as long as a given case is tied up in court and the client is likely to serve a life sentence anyway, there is no hurry to get them off of death row or push appellate claims: delay as a defense. While this makes tactical sense where the defendant is indeed truly guilty and the only sentence reduction available is LWOP, mitigation should be *a* goal, not *the* goal.

Sometimes inaction occurs at a particular "sticking point," like when an attorney "handles a matter with reasonable competence but then fails to take a critical step such as filing a pleading or appearing

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[46] *Id.* at 56–63.

[47] Lyle C. May, *Qualified Immunity: How Ordinary Police Work Tramples Civil Rights*, SCALAWAG MAG. (June 23, 2021), https://scalawagmagazine.org/2021/06/qualified-immunity/.

for a hearing."[48] In the case *In re Chapman*, the Illinois Supreme Court found that the "total abandonment of [a] client [is] not required for offense of neglect; failing to file appellate brief here constituted failure to pursue client matter with reasonable diligence."[49]

IV. COLLATERAL ATTACKS

Collateral attacks on North Carolina's death penalty, such as the North Carolina Racial Justice Act ("RJA"), have contributed to the legal limbo that appears to keep people on death row.[50] The RJA was ratified by the North Carolina General Assembly in 2009 and provided that "no person shall be subject to or given a sentence of death or be executed pursuant to any judgment that was sought or obtained on the basis of race."[51] The RJA allowed for a hearing at which a capital defendant could raise a pretrial or post-conviction RJA claim.[52] The burden of proof was on the defendant to establish that the decision to seek or impose the death sentence in the county, prosecutorial district, or judicial division was based on the race of the defendant, victims, and/or the peremptory challenges used during jury selection discriminated against potential black jurors.[53] Statistics or sworn testimony could be used as evidence for a finding of discrimination in the outlined criteria.[54]

When defendants meet the evidentiary burden of the RJA and it is not successfully refuted by the State, the maximum penalty allowable at trial will be LWOP.[55] Otherwise, if a capital appellant files an RJA motion, and in an evidentiary hearing proves the required elements, the death sentence shall be vacated and the

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[48] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS, 191 (Handbook Series Student Edition, West Group, 1986).

[49] In re Chapman, 448 N.E.2d 852, 854 (Ill. 1983); *see also, id.*

[50] North Carolina Racial Justice Act., 2009 N.C. SESS. L. 464 § 15A-2010 (repealed 2013).

[51] *Id.*

[52] *Id.* at § 15A-2012.

[53] *Id.* at § 15A-2011.

[54] *Id.*

[55] *Id.*

defendant resentenced to LWOP.[56] The RJA applied retroactively to any capital defendant who filed within the one-year deadline.[57] Approximately 130 death-sentenced prisoners filed RJA claims within a year.[58] Only four RJA claims were reviewed by the Cumberland County Superior Court, with the defendants receiving LWOP, before the Republican-controlled North Carolina General Assembly fully repealed the law in June 2013.[59] The four prisoners who won relief were placed back on death row pending the resolution of litigation over the law.[60]

From North Carolina's last execution in 2006 until the June 2013 RJA Repeal, twenty-five death-sentenced prisoners received appellate relief: fifteen received LWOP, five were resentenced to parole-eligible life terms, one person was released with time served on a lesser charge, and four people were exonerated.[61] Between the 2013 RJA Repeal and the end of its litigation in 2020 in *State v. Ramseur*,[62] six people were resentenced to LWOP, one awaited a new trial, one was resentenced to a numbered term, one was released after the District Attorney ("DA") dropped the charges, and one person was exonerated through the N.C. Innocence Inquiry Commission.[63]

It would be inaccurate to blame a sixty percent decrease in capital post-conviction appellate relief solely on the basis of RJA litigation. The complexity of the appellate process should not be understated. The delay and inaction can also be attributed to the

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[56] *Id.*

[57] *Id.*

[58] *See* Melissa Boughton, *NC Supreme Court: Racial Justice Act Repeal Cannot Be Applied Retroactively*, THE PULSE (June 5, 2020), https://pulse.ncpolicywatch.org/2020/06/05/nc-supreme-court-racial-justice-act-repeal-cannot-be-applied-retroactively/#sthash.b6Q9nv7v.dpbs.

[59] Repeal of Racial Justice Act, 2013 N.C. SESS. L. 154 § 5(a).

[60] *See* Boughton, *supra* note 58.

[61] *People Removed from Death Row Since North Carolina's Death Penalty Was Reinstated in 1977*, N.C. DEP'T OF ADULT CORR., https://www.dac.nc.gov/divisions-and-sections/prisons/death-penalty/list-removed-death-row (last visited Mar. 23, 2023).

[62] State v. Ramseur, 843 S.E.2d 106 (N.C. 2020) (holding that the Racial Justice Act could not be applied retroactively after its repeal).

[63] *People Removed from Death Row Since North Carolina's Death Penalty Was Reinstated in 1977*, *supra* note 58.

AG's Office, State Supreme Court, and county DAs who were in no hurry to process appellate claims. This may have had the benefit of putting off executions, but it should not have completely stalled the appellate process. When various death row prisoners asked their attorneys why their appeals were not moving, common replies were that the courts would not hear any claim until the RJA litigation had been resolved, or the more patronizing "What's your hurry? No news is good news."

In the two years since the Supreme Court ruled in *State v. Ramseur* that previously filed RJA claims could proceed, none have been processed. Is the RJA, for all the hype that it is intended to balance historic racial injustice in capital jury selection, really just a net lengthening mechanism tying up courts and attorneys and keeping people on death row? CDPL director Gretchen Engel denies that this is the case, claiming that some attorneys are attending hearings, others working on briefs or filing motions, but all are doing their job.[64]

An impromptu survey conducted by the author of this Article questioned forty-four of North Carolina's 138 death sentenced prisoners and found that: eleven of forty-four had no attorney communication between 2019 and year's end 2022; three had counsel whom they had never met since appointment by the IDS prior to the pandemic; two had not been in communication with anyone on their legal team in two years; and two prisoners had not been contacted by one of two assigned counsel in over a decade.[65] All respondents had active appeals in the state or federal courts. According to Wolfram's Modern Legal Ethics, some counsel may be in the grip of "a pathology of extreme inaction similar to abandoning a client," a pattern repeated in cases where "a client will have an initial interview with such a lawyer, and the lawyer does

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[64] Telephone Interview with Gretchen Engel, Director, Ctr. for Death Penalty Litig. (Oct. 20, 2022).

[65] Surveyed respondents were kept anonymous in the collection of this data. All respondents have been incarcerated for an average of twenty-two years on death row. The following questions were asked: (1) How many attorneys do you have?; (2) What stage of the appellate process (court of jurisdiction) are you in?; (3) Are you in communication with both attorneys or a mitigation specialist? If not, what is the length of time since your last communication by phone, letter, or visit?

little or nothing to advance a client's interests . . . and fails entirely to communicate with the client."[66]

V. CONFLICTS OF INTEREST

Against a backdrop of delay and inaction, after fifteen years on death row, Scott Allen's push to get in court and have his claims heard resulted in an unusual competency hearing that exemplifies IAC and judicial apathy. Judge Long pontificated on the latter point during the hearing:

> I had a case, an MAR claim, heard in 2006. The last time I saw Mr. Widehouse (an appellate attorney), I said whatever happened to that case. He said "I don't know." I guess it's still sitting on somebody's desk in the Supreme Court. I don't know. I don't know where it is. I asked Gregson [Randolph County's DA] what happened to it. He said "I don't know." Now the ruling took a little while but they've had it for ten years anyway. It's been up there since 2008 or something like that. I don't know what's going on.[67]

What was "going on" is that the system of checks and balances that ensure constitutional rights are upheld for defendants in North Carolina lacked federal oversight and accountability. What was "going on" is that the very people whose job it is to know where an appeal is, some of whom are elected officials, could not have cared less about violating due process or their oaths as officers of the court.

The competency hearing was to determine if Scott had the mental capacity to assist in the defense of his appeal and fire his attorneys. Even after he was found competent, Judge Long forced Scott to keep the attorneys with whom he had a clear and stated conflict of interest. In *Wheat v. United States*, the Supreme Court held that when a court is notified of even a potential conflict of interest involving a client's counsel, the court must take steps to

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[66] CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 191 (Handbook Series Student Ed., West Group, 1986).

[67] Transcript of Competency Hearing at 36, State v. Allen, 861 S.E.2d 273 (N.C. 2021) (No. 115A04-3).

determine whether the conflict warrants new counsel.[68] Furthermore, if the court is notified of the conflict and takes no action, it has committed an "Honest Service" violation, a criminal act.[69] Assistant AG Vlahos argued that Scott did not, as an indigent defendant on appeal, have a right to choose his counsel—an idea expanded upon in *Shinn v. Ramirez*, where the Court held that appellants do not have a right to counsel.[70] However, Vlahos' argument contradicts North Carolina General Statutes, stating that indigent defendants are entitled to counsel equal in representation "as if counsel had been privately retained by the indigent person."[71] Privately retained counsel is more likely to carry out a client's lawful instructions because their continued employment by the client depends on it. Indigent defendants lack that leverage and are usually passive, excluded observers of the case and its outcome. In North Carolina, capital defendants such as Scott Allen experience the additional problem of third-party agencies receiving more communication with their legal representatives than they do.[72]

The Supreme Court has held that a conflict of interest is likely to be found any time a defendant is represented by a lawyer hired and paid by a third party.[73] A conflict of interest is likely to result when the same branch of government prosecuting a defendant appoints, pays for, and controls a defendant's lawyer through a third party,[74] where counsel neglects the defense of one defendant over another (such as RJA claims over previously filed appeals),[75] and

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[68] Wheat v. United States, 486 U.S. 153, 160–61 (1988); *see also* Wood v. Georgia, 450 U.S. 261 (1981) (holding that a new revocation hearing with untainted legal counsel must be held where there is an actual conflict at the time of probation revocation); Mickens v. Taylor, 535 U.S. 162 (2002) (holding that a petitioner must establish that a "conflict of interest adversely affected his counsel's performance").

[69] KELLY PATRICK RIGGS, INEFFECTIVE ASSISTANCE OF COUNSEL: OVERCOMING THE INEVITABLE 5 (FreeBird Publishing, 2019).

[70] Transcript of Competency Hearing at 54, State v. Allen, 861 S.E.2d 273 (N.C. 2021) (No. 115A04-3).

[71] N.C. GEN. STAT. ANN. § 7A-450 (2022).

[72] *See* OFF. OF INDIGENT DEF. SERVS., SAFEGUARDING JUSTICE: STRATEGIC PLAN 2021-2023 (2021), https://www.osbm.nc.gov/media/882/open.

[73] RIGGS, *supra* note 66, at 15.

[74] Wood v. Georgia, 450 U.S. 261, 268–71, 273 (1981).

[75] United States v. Marshall, 448 F.2d 1169, 1190–94 (9th Cir. 1973).

when appellate counsel is responsible for significant delay handling an appeal.[76] The Supreme Court has also acknowledged the importance of independent defense counsel in effective representation.[77] As has the ABA, which holds that "public defense should be independently funded."[78]

In 2000, the North Carolina General Assembly enacted the Indigent Defense Services Act, which created the IDS.[79] As an organization, the IDS believes independent attorneys are essential to the adversarial system and ensures the poor are given representation "independent from political influence and subject to judicial supervision in the same manner and to the same extent as retained counsel."[80] The IDS oversees and coordinates funding for attorneys at the CDPL (capital appeals), Capital Defenders Office (capital trials), Appellate Defenders Office (federal appeals), NC Prisoner Legal Services (all other non-capital post-conviction work and prison litigation), and public defender offices throughout North Carolina.[81] As the budgetary medium between the NC Administrative Office of the Courts and indigent defense counsel, it seems unrealistic that IDS can be wholly "independent from political influence," especially when it reports to the chairs of the House of Representatives and Senate Appropriations Committees and Subcommittees on Justice and Public Safety.[82] The biennial report submitted by the IDS covers a number of items related to the volume and cost of cases handled in each district by assigned counsel or public defenders and "actions taken by the IDS to

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[76] Mathis v. Hood, 937 F.2d 790, 795–96 (2d Cir. 1991).

[77] RIGGS, *supra* note 66, at 26.

[78] Mark Pickett, *The Importance of Public Defender Independence Amid Crisis*, AM. BAR ASS'N (Feb. 3, 2023), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2023/winter/mportance-public-defender-independence-amid-crisis/.

[79] N.C. GEN. STAT. § 7A-498.2 (2000).

[80] OFF. OF INDIGENT DEF. SERVS., *supra* note 69, at 5.

[81] N.C. GEN. STAT. § 7A-498.7–498.8 (2000).

[82] *See* North Carolina Office of Indigent Defense Services, *Our Values*, https://www.ncids.org/about/our-values/ (last visited Mar. 23, 2023); N.C. GEN. STAT. § 7A-498.2–498.3, 498.9 (2000).

improve cost effectiveness and quality of indigent defense, including the capital case program."[83]

In 2020, under new leadership, the IDS began reforming the way it pays and appoints counsel to indigent defendants in a two year "Strategic Planning Process."[84] As part of this reformation, the IDS noted in its 2021-2022 Annual Report that it had "increased oversight of expensive capital post-conviction cases to provide safeguards against unexpected costs," which meant reduced funding in a number of capital cases that were "inactive" in the courts, yet still had attorneys billing for hours.[85] This "budget cut," as it was explained to some capital clients, targeted billing for phone calls accepted from clients on death row, visits, and any unnecessary activity that did not advance a given appeal in the courts.[86] Under the Strategic Planning Process Performance Measure 1.2, the IDS sought to "track spending and demand to ensure that allocated resources are spent in a manner that allows [the] IDS Commission to restore rates if appropriations are made available for this purpose."[87]

To understand the significance of the IDS refusing to compensate counsel who are not showing substantive activity on a case (e.g. court appearances, filed briefs, interviews, and investigatory work with retained experts), the House and Senate Standing Committee Chairs approved an appropriation of $136 million for the 2021-2022 fiscal year and $138 million for the 2022-2023 fiscal year, increases of $10 million per year compared to the previous biennium.[88] The amount seems substantial, but it underfunds indigent defense counsel for tens of thousands of criminal defendants facing trial or appealing a conviction and sentence throughout the state of North Carolina. To contextualize

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[83] N.C. GEN. STAT. § 7A-498.9 (2000).

[84] OFF. OF INDIGENT DEF. SERVS., *supra* note 69, at 3.

[85] *See* OFF. OF INDIGENT DEF. SERVS., ANNUAL REPORT ON THE COMMISSION ON INDIGENT DEFENSE SERVICES (Mar. 2022), https://www.ncids.org/wp-content/uploads/2022/05/IDS_Annual_Report_FY21_2022_03_15.pdf.

[86] *See id.*

[87] OFF. OF INDIGENT DEF. SERVS., *supra* note 69, at 8.

[88] Michael Tartaglia & Kourtney Kinchen, *2021 Year in Review*, SIXTH AMEND. CTR. (Feb. 24, 2022), https://sixthamendment.org/2021-year-in-review/ ("North Carolina Indigent Services received a $136 million appropriation . . .").

that amount, consider that the Durham County Commission passed an annual budget for the 2022-2023 fiscal year of nearly $794 million, with $30 million alone funding the construction of a youth confinement facility.[89] The amount provided for public defense was a pittance; the reduction in funds for attorneys billing to communicate with clients on death row an attempt to tighten the belt and put attorneys on notice they would no longer be rewarded for dilatory tactics. The relationship between the quality of representation received, and who funds that representation, should be clear to everyone involved. It is misguided to think the quality of defense provided to indigent defendants—rooted in access to resources, time, and practical applications of the law—is equal to the defense provided to former elected officials and other white collar criminal defendants. As Alabama death row exoneree Anthony Ray Hinton expressed in his book *The Sun Does Shine*, "capital punishment means those without capital get punished."

VI. AEDPA AND THE INEFFECTIVE ASSISTANCE OF COUNSEL

The 1996 AEDPA virtually eliminated the federal judiciary's ability to hear and redress state court decisions that violate the federal constitution.[90] The congressional intent behind AEDPA was to reduce delays in capital appeals by imposing numerous restrictions on federal review of state convictions and sentences.[91] Some central provisions include a one year deadline to file a habeas corpus petition, a strict limit on federal courts to hear new factual evidence, and a deferential standard of review that requires federal

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[89] DURHAM COUNTY N.C., APPROVED BUDGET FY 2022-23, https://www.dconc.gov/home/showdocument?id=37639 (last visited Mar. 23, 2023).

[90] Lincoln Caplan, *The Destruction of Defendants' Rights*, THE NEW YORKER (June 21, 2015), https://www.newyorker.com/news/news-desk/the-destruction-of-defendants-rights (quoting RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (6th ed. 2011)).

[91] CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 294 (2016).

courts to assume state court decisions to be correct.[92] Though the initial impact of AEDPA increased executions nationwide, a decade later they dropped to pre-AEDPA levels.[93] Limiting the law's success were complicated procedural doctrines that courts were required to sort through and the fact that many capital case delays are caused by state court procedures; adjusting federal court procedures does not address those delays.[94]

Delays in state courts sometimes manifest in an appellate brief that neither the judge, prosecution, nor defense know where it is or why it has yet to be decided upon, as Judge Long related to Scott Allen during his unusual competency hearing. Delays can also be a result of defense counsel's attempt to stretch a client's appeal out and avoid execution, or an indication of ineffectiveness. By the time a state level appeal has run its course, if all claims are denied and the relief sought is not granted by the superior, district, or state supreme courts, the defendant has one year from the final state court decision to file a federal habeas petition (under 28 U.S.C. § 2244) to seek a federal review of those state court decisions.[95] For the petition to be valid, all remedies available in state courts must be exhausted, and there must be no state level corrective process available or special "circumstances [that] exist that render such a process ineffective to protect the rights of the applicant."[96]

For there to be a chance that the federal court will consider a habeas petition, there must be a federal constitutional violation.[97] Those most likely to impact a defendant are Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment violations. The most common federal habeas claim is the ineffective assistance of counsel, which is a Sixth Amendment violation that will always be considered by the courts.[98]

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[92] Antiterrorism, and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

[93] STEIKER & STEIKER, *supra* note 88, at 138.

[94] 28 U.S.C. § 2254; *id.* at 139.

[95] 28 U.S.C. § 2244.

[96] 28 U.S.C. § 2254.

[97] *Id.*

[98] RAYMOND E. LUMSDEN, THE HABEAS CORPUS MANUAL 46 (2019).

In *United States v. Cronic*, the Court made its first attempt to clarify the Sixth Amendment's right to counsel by establishing the "effective assistance of counsel."[99] The Court held that prejudice applies when "counsel fails to subject the prosecutor's case to meaningful adversarial testing," where counsel is denied during a critical stage of the proceedings, or when there is state interference with counsel's assistance.[100] The Court determined that the adversarial process demands that counsel act as the defendant's advocate and render the "effective assistance of counsel" to ensure the due process right to be heard in state and federal courts.[101]

After *Cronic*, courts were flooded with IAC claims, which prompted the Supreme Court to limit them. In *Strickland v. Washington*, the Court required that IAC claims meet a two-prong test: (1) an attorney's performance was below professional standards and (2) the attorney's client was prejudiced by that deficiency.[102] In other words, counsel's decision making cannot be attributed to legal strategy, and these poor decisions must be a proximate cause of the conviction and/or sentence. The following, ultimately successful, IAC claims are examples that relate to Scott Allen's experiences with trial and appellate counsel. The cases cited were decided in the Fourth Circuit Court of Appeals, which has federal jurisdiction over North and South Carolina, Virginia, West Virginia, and Maryland.

1. Counsel renders IAC when they fail to fully investigate evidence or a particular defense.[103] In *United States v. Mason*, trial counsel was ineffective for failing to investigate evidence that would have impeached the government's key witness.[104]

2. Counsel may render IAC when they fail to investigate witnesses.[105] In *Hoots v. Allsbrook*, the court held that counsel must

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[99] United States v. Cronic, 466 U.S. 648, 658–59 (1984).

[100] BRANDON SAMPLE & ALISSA HULL, THE HABEAS CITEBOOK: INEFFECTIVE ASSISTANCE OF COUNSEL, 16 (Susan Schwartzkopf ed., 2nd ed. 2016).

[101] RIGGS, *supra* note 66, at 14.

[102] *Id.* at 16 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

[103] United States v. Mason, No. 12-6101, 2012 WL 1997700, at *818–19 (4th Cir. 2012).

[104] *Id.* at 818.

[105] Hoots v. Allsbrook, 785 F.2d 1214, 1221 (4th Cir. 1986).

ordinarily "investigate possible methods for impeaching prosecution witnesses."[106]

3. Counsel may render IAC when they fail to call, secure, or subpoena witnesses.[107] In *Griffin v. Maryland Correctional Adjustment Center*, counsel's failure to call an alibi witness was ineffective assistance where the crux of the state's case came down to the credibility of witnesses.[108] The court there stated that "tolerance of tactical miscalculations is one thing, fabrication of tactical excuses is quite another."[109]

4. Counsel may render IAC by failing to consult with the client about an appeal or file an appeal as instructed.[110] In *Frazer v. South Carolina*, the court found that ineffective assistance occurs where counsel failed to consult with defendant regarding an appeal and the defendant expressed an interest and intent to pursue an appeal.[111]

5. Counsel may render IAC because of a conflict of interest.[112] In *Gilbert v. Moore*, the court held that a petitioner claiming IAC must demonstrate counsel represented interests that "'diverge[d] with respect to a material fact or legal issue or to a course of action.'"[113]

As important as any individual IAC claim is, echoing the Supreme Court in *Williams v. Taylor*, the North Carolina Supreme Court found "cumulative errors" in Scott Allen's trial representation.[114] Some attorney errors are not enough by themselves to meet the two-pronged Strickland test, but if a number of those errors occur, a pattern of deficient performance can meet the "cumulative prejudice doctrine."[115] Citing a unanimous Court of Appeals panel conclusion, the North Carolina Supreme Court noted

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[106] *Id.*

[107] Griffin v. Warden, Maryland Correctional Adjustment Center, 970 F.2d 1355, 1358 (4th Cir. 1992).

[108] *Id.* at 1358–59.

[109] *Id.* at 1359.

[110] Frazer v. South Carolina, 430 F.3d 696, 701 (4th Cir. 2005).

[111] *Id.* at 707.

[112] Gilbert v. Moore, 134 F.3d 642, 652 (4th Cir. 1998).

[113] *Id.* (quoting Cuyler v. Sullivan, 446 U.S. 335, 356 n.3 (1980)).

[114] State v. Allen, 861 S.E.2d 273, 304–05; *see also* Williams v. Taylor, 529 U.S. 362, 396–98 (2000).

[115] *Allen*, 861 S.E.2d at 282–83, 304–05.

that "because [IAC] claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel."[116]

Evidence of IAC must be raised on direct appeal from trial, during state level collateral review—the MAR in North Carolina—or through a writ of cert to the state supreme court. AEDPA requires all evidence to be developed in state courts for the habeas petition to be reviewed with any sincerity by the federal circuit court of appeals.[117] If this standard is not met, the claims will be procedurally defaulted.[118]

The only exceptions to the AEDPA procedural default for new evidence are when (1) it was impossible for that evidence to have previously been developed and (2) it is a claim of actual innocence.[119] The Court uses a "fundamental miscarriage of justice" doctrine as a standard for overcoming the AEDPA procedural default on claims not developed in state courts.[120] A defendant must prove that (1) a fundamental miscarriage of justice will occur if the federal court allows the state court decision to stand, and (2) that the claim stands on its own merits.[121] If, for example, the sole witness of a murder came forward to recant her testimony, with the original testimony being the primary evidence against the capital appellant, this recantation would likely reach the high standard of a fundamental miscarriage of justice if the federal court did not allow for a hearing on the matter. For actual innocence claims, the Court held in *Herrara v. Collins* that actual innocence must be based on an independent constitutional ground to be cognizable.[122]

In *Martinez v. Ryan*, the Court opened a new way for defendants to overcome the AEDPA procedural default, specific to IAC claims.[123] Known as the "*Martinez* exception," the Court ruled that, under state law,

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[116] *Id.* at 304–05.

[117] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, §2254(d)(1)–(2) (1996).

[118] McQuiggin v. Perkins, 569 U.S. 383, 386–87 (2013).

[119] *Id.*

[120] *Id.* at 384, 392–94.

[121] *Id.*

[122] Herrara v. Collins, 506 U.S. 390, 400 (1993).

[123] Martinez v. Ryan, 566 U.S. 1 (2012).

> claims of ineffective assistance of trial counsel had to be raised in an initial review collateral proceeding ("IRCP"), a procedural default would not bar a federal habeas court from hearing a substantive claim of IAC at trial if, in the IRCP, there was no counsel or counsel in that proceeding was ineffective.[124]

The *Martinez* exception was an acknowledgment by the Court that defendants have a right to the effective assistance of counsel at every stage of the criminal legal process. The bar for federal relief on a post-conviction appellate claim was still high under the *Martinez* exception, but it addressed the problem created by the AEDPA procedural default for any claim not developed in state court first.[125] Because an IAC claim is unlikely to be raised by trial attorneys—and sometimes appellate attorneys get it wrong too—*Martinez* provided a safeguard to the defendant's Sixth Amendment right to the effective assistance of counsel.[126]

Ten years later, the Supreme Court's conservative majority did an about-face, eliminating the *Martinez* exception in *Shinn v. Ramirez*, by holding that federal courts may not conduct an evidentiary hearing or otherwise consider evidence of ineffective assistance of appellate counsel unless it had previously been raised in state courts.[127] Unfortunately, the Court reinforced the AEDPA problem with *Shinn*.

Scott Allen's trial counsel failed to investigate and reveal information that would have impeached the credibility of the state's key witness against him or investigate methods for impeaching that witness. When Scott instructed appellate counsel to include this in his MAR brief, they ignored him and filed the brief anyway.[128] This

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[124] RIGGS, *supra* note 66, at 317.

[125] *Martinez*, 566 U.S. 1.

[126] *Id.*

[127] Shinn v. Ramirez, 142 S. Ct. 1718, 1739 (2022).

[128] MAR Claims 2, 3, and 4, State v. Allen, 861 S.E.2d 273 (N.C. 2021) (No. 115A04-3). This information comes from conversations with Scott Allen about the problems he had with appellate counsel, the competency hearing, and grievances written to the State Ethics Commission and State of North Carolina Judicial Standards Commission, both of which responded to his claims by stating that he had to win his IAC claim in court for it to be of interest to them. The catch-22 was not lost on Scott, who said: "I was at a loss as to who to get help from.

ineffective assistance of appellate counsel could have cost Scott Allen his ability to raise potentially exculpatory information before the Fourth Circuit Court of Appeals. The competency hearing was a botched attempt to undermine Scott's right to assist in the defense of his appeal, demonstrating a clear conflict of interest for any attorney adhering to advice rendered by the entity responsible for that hearing. But it went to Scott's advantage. Even though counsel was not removed as requested, they eventually stepped aside. Once replaced, new counsel filed a writ of cert, appealing Judge Long's dismissal of the hearing and the information that had been left out of Scott's MAR brief. The IAC evidence had finally been preserved on the state record, to be addressed by the North Carolina Supreme Court. The State Supreme Court found a number of the IAC claims, which, if proven true, would likely meet the two-prong *Strickland* test for IAC. They ordered a full evidentiary hearing for the IAC claims.[129] Even if the state court denies Scott relief, he will have met the high standard created by AEDPA and affirmed in *Shinn*. If Scott's appellate counsel failed to meet that standard, his trial level and post-conviction IAC claims would have been procedurally defaulted in a habeas petition. No one but Scott Allen would suffer the consequences of his attorney's mistakes.

VII. When Conflicting Interests and Ineffective Counsel Meet

Shinn v. Ramirez was a revenge ruling penned by conservative Justice Clarence Thomas, who is the remaining dissenter on the bench from *Martinez v. Ryan*. It would be naïve to think the current decisions by the conservative majority of the Supreme Court are anything other than legal analyses twisted with partisanship, or that the courts in general are disconnected from, and unaffected, by politics. The same holds true of every elected position within the criminal legal system. Conservative Justices Scalia and Thomas

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North Carolina Prisoner Legal Services would provide none. I'm also aware that certain advice cannot be given to a person currently represented on appeal. What option does that leave any indigent death row defendant when their attorneys continuously ignore their lawful instructions? After filing a grievance with the North Carolina State Bar, they denied me so much as a filing number."

[129] *See* State v. Allen, 861 S.E.2d 273 (N.C. 2021) (No. 115A04-3).

dissented when the Court allowed for the *Martinez* exception to the AEDPA procedural default.[130] A decade later, conservative Justices Thomas, Alito, Gorsuch, Barrett, Roberts, and Kavanaugh struck down the *Martinez* exception in *Shinn*.[131]

This political influence plays out in state courts too. The North Carolina Supreme Court was a four to three Democratic majority when it granted Scott Allen a full evidentiary hearing that would allow presentation of evidence that proves ineffective assistance of trial counsel at the guilt-innocence phase. A year later, the North Carolina Supreme Court holds a five to two Republican majority. It is no secret that conservative Republican justices commonly erode the rights of pre-trial and post-conviction defendants. Had Scott's writ of cert gone before the current North Carolina Supreme Court, it is unlikely he would have been granted a new hearing. Why?

Writing the dissent for the three conservative Republican Justices on the Court, Justice Phil Berger Jr. complained that the North Carolina Supreme Court's liberal majority makes Scott's trial attorneys seem "grossly incompetent and ill-equipped to handle a murder trial."[132] Responding to the court's acknowledgment of Scott's valid IAC claims, Justice Berger, in sarcastic outrage, unwittingly makes the case for a conflict of interest that contributed to the IAC provided by Scott's trial attorney, Carl W. Atkinson.[133] At times paraphrasing and quoting Atkinson's testimony in Scott's 2018 evidentiary hearing, Justice Berger describes what is indeed an attorney who was out of his depth and ultimately given faulty advice by other attorneys representing the CDPL:

> Atkinson testified at the evidentiary hearing related to the sentencing phase that he frequently consulted with the Center for Death Penalty Litigation about the defendant's case. Atkinson stated that his purpose in "dealing with the Center for Death Penalty Litigation was to get any help [he] could in addressing [defendant's] case." Atkinson discussed potential experts with the capital defenders and

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[130] *Martinez*, 566 U.S. at 18–30 (Scalia, J. dissenting).

[131] *Shinn*, 142 S. Ct. at 1739.

[132] State v. Allen, 861 S.E.2d 273, 300 (N.C. 2021) (Berger, J. dissenting).

[133] *Id.* at 300–01.

> Atkinson testified that "Every time I needed a recommendation of that nature, I went to the Center for Death Penalty Litigation." According to Atkinson, the Center for Death Penalty Litigation "basically believed that [defendant was] likely to be convicted" and that the attorneys should focus on mitigation at sentencing.[134]

Atkinson was a trial attorney who had never tried a capital case before Scott Allen—which he admitted before a jury was even seated or the case fully investigated. CDPL attorneys told him to focus on mitigation.[135] That focus led Atkinson to neglect an alibi witness, a recantation, credibility issues with the State's primary witness, and an argument for malicious prosecution by the District Attorney's Office.[136] Tina Fowler, the alibi witness, met with Scott's trial attorneys several times, informing them that Scott was asleep on her couch at the time when the State alleges the murder occurred.[137] Despite having that information, Atkinson never called Tina Fowler to testify.[138] As indicative of Atkinson's ineffectiveness as this is, the attorney also knew the State's star witness recanted her testimony in a letter to Scott and that the same prosecutor-detective-witness was involved in a previous criminal charge against Scott Allen, which was dropped because the same witness recanted then too:

> Q: Did you discuss with your co-counsel the use of the 1994 recantation of Vanessa Smith in the church break-in cases in which she originally accused Scott Allen?
>
> A: That came up and it was discussed at some point in time. I don't recall exactly when it was. And Pete [Oldham], it was vague in his memory, but he talked to me about it and told me about it.

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[134] *Id.*

[135] Transcript of MAR Hearing at 694–700, State v. Allen, File No. 99CRS3818, 3820 (N.C. Feb. 15, 2018).

[136] *Id.* at 694–700.

[137] *Id.* at 695–97.

[138] *Id.* at 697.

Q: Was that one of the reasons why the overwhelming strategy that you and Pete developed for trial was aimed at the credibility of Vanessa Smith as a prosecution witness?
A: I'm sure that came into play. And what—well, that's all.
Q: Mr. Atkinson, do you recall who the DA was in the 1994 time period when the church break-in cases were prosecuted?
A: I imagine—I think it was probably still Garland Yates, but I don't know—I think he was. I don't know.
Q: Do you have personal knowledge of who the chief investigating officer was in those break-in cases?
A: For some reason, Barry Bunting comes to mind, but.
Q: It's true Garland Yates was the DA and Lieutenant Bunting was the chief investigating officer in the 1994 or the 2003 trial of Scott Allen for the murder of Chris Galley; is that true?
A: Correct.
Q: It was the same team for the prosecution in both cases; is that correct?
Mr. Vlahos: Objection.
A: (Atkinson) Assuming my recollection of Garland Yates—
The Court: I'll take judicial notice that Garland Yates was the elected DA from December of 1980 until four years ago, whenever that was, three years ago.
Q: Did Scott ever express to you his reluctance to involve other people to help with his defense for fear that they too would also be charged with something?
A: Yes.
Q: Did Tina Fowler ever express any fear about being charged with something if she appeared in Scott's defense?
A: I vaguely recall her mentioning that in our conversation.

> Q: Were you ever made aware of any letters that Vanessa Smith sent to Scott while he was in detention in which she proclaims both of their innocence?
> A: Say that again, sir?
> Q: Are you aware of any letters written to Scott Allen from Vanessa Smith in which she proclaimed that both of them were innocent?
> Mr. Vlahos: I'm going to object unless he has personal knowledge.
> Mr. Unti: Well, I'm asking if he is aware of the letters.
> The Court: You can answer.
> A: Yes.
> Q: Did you consider using those letters in the trial of Mr. Allen?
> A: I'm sure we considered it, Mr. Unti, but I do not know why we elected not to, other than that we didn't believe that we was [*sic*] going to have a method of getting them into evidence. That's something that seems to come to mind, because at the time we didn't have any – we had been told that Scott was not going to testify.
> Q: The only way you could have gotten them into evidence would have been – in your case in chief, would have been for Mr. Allen to take the stand; is that correct?
> A: Yes.
> Q: Could you have used them in your cross-examination of Vanessa Smith?
> A: Now that's a possibility, yes. That could have been done.
> Q: Your Honor, I have no further questions for the witness.[139]

What could have led an inexperienced capital trial attorney, who was *not* inexperienced as an attorney in general, to leave out such critical exculpatory information like an alibi witness, recantation by

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[139] *Id.* at 697–700.

the State's star witness and malicious prosecution by the DA? Ineffectiveness only partly explains Atkinson's decision making. As Justice Berger emphasized from that same testimony by Atkinson, the attorney repeatedly sought advice from the CDPL and Capital Defenders Office, advice that either Atkinson ignored or it was as ineffective as he was.

What would have led Mr. Unti to exclude the above testimony by Carl Atkinson from the MAR brief? This egregious omission of so much exculpatory information does not seem accidental. When confronted about this by Scott Allen at a visit, Mr. Unti never responded. He simply walked out of the visit. It was at that point Scott attempted to fire his attorneys. The attempted firing of Michael Unti and Margaret Lumsden, stated Judge Long at Scott's competency hearing, "created some ripples" in the sedentary pond where the status quo of capital defense strategy is wholly ineffective and appears to have been a contributing factor to at least one death sentence.[140] If this is true, and capital defense tactics are keeping people on death row for increasing amounts of time and even undermining trial attorneys' ability to defend their clients, where does this leave the majority of death row defendants still represented by CDPL attorneys?

CONCLUSION

Avoiding execution is only a successful outcome if the client perceives it that way; after all, it is not the attorney who serves the sentence. Even then, avoiding execution is never the endgame. Some arguments presented in this Article have been around since the right to counsel and the guarantee of indigent defense. The problems surrounding IAC have been exacerbated by the removal of federal judicial oversight, first through the AEDPA, then through *Shinn v. Ramirez*. IAC claims will exist as long as there is no accountability by the courts for attorneys who provide constitutionally deficient assistance, and as long as other attorneys are unwilling to hold their colleagues to a higher standard. Ineffectiveness will also continue as long as our adversarial criminal

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[140] Transcript of Competency Hearing at 11, State v. Allen, 861 S.E.2d 273 (N.C. Dec. 19, 2018) (No. 115A04-3).

legal system overburdens and underfunds public defense. If there was one method that could reduce the possibility of IAC and fundamental miscarriages of justice, it might be centered around more holistic strategies.

As a capital defendant who experienced ineffective assistance of trial counsel that led to a wrongful conviction and subsequent incarceration on North Carolina's death row for the last twenty-four years, I understand the difficulties of communicating my interests and frustrations to attorneys. I know that sometimes the client's interests can take a back seat. That is why it is important for defendants to learn as much about the criminal legal system as they can—to be taken seriously by our legal representatives when our interests do take a back seat. While I do not possess formal legal training beyond a paralegal certificate and some advanced paralegal courses, I know enough to recognize that the Supreme Court will hold me accountable for my attorney's mistakes. That is the true danger of *Shinn v. Ramirez* and the AEDPA. The unfortunate reality for many people in prison and on death row is that even with access to basic legal knowledge, their appeals will fail because the criminal legal system was not designed for them to succeed.

Holistic defense strategies include a dynamic legal team focused on every aspect of a defendant's life, with interdisciplinary skill sets to ensure that no leads are left uninvestigated. In the holistic defense model, attorneys and social or psychological experts are able to meet client needs across a broad spectrum of issues so the attorney is able to focus more on which evidence and legal arguments best meet the interests and needs of the client.[141] In capital cases this might mean allowing mitigation and psychological experts to independently research the defendant's background, then later meet with the attorney to discuss the relevance of discovered information for trial or appeals. More importantly, holistic defense can curtail the need to rely on third party influence while keeping in communication with the client about developments and outcomes. This communication can extend into the community where the client is from or where he or she may be released, leveraging the

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[141] THE CTR. FOR HOLISTIC DEF., THE HOLISTIC DEFENSE TOOLKIT, https://www.apainc.org/wp-content/uploads/2017/08/Holistic-Defense-Toolkit.pdf (last visited Mar. 23, 2023).

community's support in the pursuit of plea arrangements with the prosecution.[142]

Maybe a more holistic approach could have helped Scott Allen. If only every indigent defendant received effective representation by fully resourced attorneys who see them as people rather than labels or the stigma of a crime—attorneys who do not ignore their client's wishes. Unfortunately, many people in prison receive less than effective representation. Because this is a fact, and the defendant is held liable for attorney errors, defendants must stay vigilant to prevent fundamental miscarriages of justice. Sometimes going so far as to challenge an attorney's ability to handle a case. Oversight of third-party organizations that govern or instruct defense attorneys and a revised set of ABA Guidelines would also help. But ideally, we all seek an end to conveyor belt defense strategies that keep people in a constant state of delay, waiting for justice and the fulfillment of the promise in the Sixth Amendment.

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[142] *Id.*