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## Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel

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**CHRONICALLY STRICKEN: A CONTINUING LEGACY OF  
INEFFECTIVE ASSISTANCE OF COUNSEL**

SANJAY K. CHHABLANI\*

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\* Assistant Professor of Law, Syracuse University College of Law. J.D. 1996, Yale Law School; B.A. 1992, University of Chicago. I would like to thank the editors of the Saint Louis University School of Law *Public Law Review* for their gracious solicitation of this Article to address the practical legacy of *Strickland v. Washington* and for their dedicated commitment to bringing this project to fruition. I would also like to thank Dean Hannah Arterian and the College of Law for the generous support of this project. This Article is dedicated to the memory of Wallace Fugate who I helped represent prior to his execution.

## INTRODUCTION

Wallace Fugate was represented at his capital murder trial by attorneys who made no objections at trial, conducted no independent pre-trial investigation, hired no experts or investigators, engaged in virtually no pre-trial motion practice, and failed to develop and present exculpatory and mitigating evidence. When questioned later about their knowledge of the law, one of these lawyers, who had not attended any capital defense training, was not able to name a single capital punishment decision rendered by the United States Supreme Court. The entire trial lasted less than two days and a half days. Wallace Fugate was executed in Georgia in 2002.

Unfortunately, Wallace Fugate did not suffer an unusual fate. Accounts from across the country speak to pervasive inadequate representation by attorneys at all phases of criminal proceedings. Failure to investigate. Failure to engage in pre-trial work. Failure to present evidence. Failure to challenge unconstitutional, illegal or improper conduct. These accounts also capture gross incompetence of attorneys representing the indigent. Sleeping lawyers. Disciplined and criminally prosecuted lawyers. Plainly inexperienced and untrained lawyers. Even competent and well-meaning attorneys crippled by overwhelming workloads and the lack of resources. These anecdotal reports have been corroborated year after year by reports and studies documenting the crisis in indigent defense programs.

It is under these circumstances that we mark the twenty-fifth anniversary of a key Supreme Court decision concerning the Sixth Amendment's right to effective assistance of counsel: *Strickland v. Washington*.<sup>1</sup> This Article, the first of a two-part series on the right to effective assistance of counsel, addresses the legacy of *Strickland*.<sup>2</sup> In Part I, the Article provides a brief account of the Court's effective assistance of counsel jurisprudence leading up to *Strickland*. In Part II, the Article catalogues the widespread inadequacies in representation and quality of counsel. Finally, in Part III, the Article concludes by discussing scholarly criticisms of *Strickland* and the recent shifts in the Court's effective assistance of counsel jurisprudence.

I. THE SUPREME COURT'S EFFECTIVE ASSISTANCE OF COUNSEL  
JURISPRUDENCE

While the text of the Sixth Amendment to the United States Constitution provides defendants the right to assistance by counsel in all criminal prosecutions,<sup>3</sup> the real measure of help it assures defendants remained

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1. *Strickland v. Washington*, 466 U.S. 668 (1984).

2. See Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. (forthcoming 2009).

3. U.S. CONST. amend VI.

unaddressed by the Supreme Court for over a century after the ratification of the Sixth Amendment in 1791. Indeed, for much of this time, the Sixth Amendment was understood merely to give defendants the right to have their privately retained counsel assist them in criminal proceedings.<sup>4</sup> It was not until the birth of the Court's modern constitutional criminal procedure jurisprudence, occasioned in the 1920s and 30s perhaps by the shocking and terrorizing legacy of lynchings and mob trials, that the Court began to address defendants' right to the meaningful assistance of counsel.<sup>5</sup>

In *Powell v. Alabama*, a seminal decision involving the Scottsboro boys, the Court held that the defendants' constitutional rights were violated by the trial court's appointment of counsel in such a manner as to preclude counsel from providing "effective and substantial aid" to the defendants.<sup>6</sup> While *Powell* shed some light on the Court's understanding of the right to counsel, it did not provide sufficient guidance as to what measure of assistance would qualify as "effective." Nor did the Court elaborate on the duties of counsel when it subsequently held that the Sixth Amendment's Counsel Clause gave indigent federal defendants the right to a court-appointed attorney.<sup>7</sup>

Beginning in the 1940s, however, the Court began to provide greater guidance about the scope of the right to effective assistance of counsel when it addressed a number of involving claims that defendants had been denied their

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4. See *Bute v. Illinois*, 333 U.S. 640, 661 n.17 (1948) ("It is probably safe to say that from its adoption in 1791 until 1938, the right conferred on the accused by the Sixth Amendment 'to have the assistance of counsel for his defense' was generally understood as meaning that in the Federal courts the defendant in a criminal case was entitled to be represented by counsel retained by him. . . . The Sixth Amendment was not regarded as imposing on the trial judge in a Federal court the duty to appoint counsel for an indigent defendant." (citation omitted)); *United States v. Van Duzee*, 140 U.S. 169, 173 (1891) (There is "no general obligation on the part of the Government . . . to . . . retain counsel for defendants or prisoners. The object of the [Sixth Amendment] was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the Government.").

5. See *Brown v. Mississippi*, 297 U.S. 278 (1936) (coerced confessions); *Norris v. Alabama*, 294 U.S. 587 (1935) (discrimination in juries); *Mooney v. Holohan*, 294 U.S. 103 (1935) (perjury); *Powell v. Alabama*, 287 U.S. 45 (1932) (counsel in capital cases); *Tumey v. Ohio*, 273 U.S. 510 (1927) (financially biased judge); *Moore v. Dempsey*, 261 U.S. 86 (1923) (mob-dominated trials). See also Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 764 (1991) ("The vast majority of the Court's first constitutional interventions in state criminal procedure involved the Jim Crow 'justice' Southern states meted out to black defendants."); Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2341 (1993) ("The meaning of due process developed rapidly between the two world wars.")

6. *Powell*, 287 U.S. at 53. The Court also held that the defendant's due process rights were violated by the trial court's failure to give defendants a meaningful opportunity to retain counsel. *Id.* at 71.

7. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

rights to effective assistance of counsel. For example, in *Avery v. Alabama*, the Court found no violation of Due Process in a state capital prosecution despite the fact that counsel had been appointed to the case a mere three days prior to trial and were denied a continuance to prepare for trial.<sup>8</sup> A couple of years later, in *Glasser v. United States*, the Court held that the Sixth Amendment's Counsel Clause entitled all defendants in federal court to effective assistance by counsel and found that this right had been denied to two former federal prosecutors charged with conspiracy when the trial court, despite being aware of a potential conflict of interest, had appointed the same attorney to represent both co-conspirators.<sup>9</sup>

Soon thereafter, in *White v. Ragen*, the Court held that a prima facie case of a violation of the defendant's right to effective assistance of counsel had been established by allegations that appointed counsel failed to confer with the defendant until they arrived at court for the trial, refused to work on the case until the defendant had some money, refused to call a single witness for the defense and had the defendant plead guilty.<sup>10</sup> Later that same year, in *Hawk v. Olson*, the Court similarly found that a prima facie case of a violation of the defendant's right to effective assistance of counsel had been established by allegations that the defendant was provided an insufficient opportunity to consult with his attorneys, that the attorneys tried to intimidate the defendant into pleading guilty, that the attorneys did not consult with the defendant about his defense and then proceeded to pick the jury and elicit testimony from witnesses.<sup>11</sup>

During the Warren Court years, the Court dealt with the right to effective assistance of counsel on a number of occasions. In its early years, the Court approached the right to effective assistance of counsel in a rather restrictive manner. In *Michel v. Louisiana*,<sup>12</sup> the Court accepted the state court's finding that one of the defendants was not denied effective assistance of counsel by his appointed attorney's failure to timely file a motion to quash the indictment on grounds that African-Americans had been improperly excluded from serving on the grand jury.<sup>13</sup> Notably, pointing to the fact that attorney was well-known in the community, had over fifty years of experience, and there were sound strategic reasons for not filing the motion to quash the indictment, the Court discounted the fact that the 77-year-old attorney allegedly was bedridden for several months because of illness.<sup>14</sup>

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8. *Avery v. Alabama*, 308 U.S. 444 (1940).

9. *Glasser v. United States*, 315 U.S. 60, 69–70 (1942).

10. *White v. Ragen* 324 U.S. 760 (1945).

11. *Hawk v. Olson*, 326 U.S. 271, 276–79 (1945).

12. *Michel v. Louisiana*, 350 U.S. 91 (1955).

13. *Id.* at 100–01.

14. *Id.*

During the later years of the Warren Court, the Court adopted a more robust view of the right to counsel. In its seminal decision in *Gideon v. Wainwright* incorporating the right to counsel, while the Court did not expressly address the issue of effective assistance of counsel, it found that a defendant who is not provided an attorney, and therefore lacking access to the special skill and training of a lawyer, cannot be assured of a fair trial in the adversary system.<sup>15</sup> This implied that counsel must provide clients with advice about substantive legal issues and the intricacies of criminal procedure and must serve as advocates, guiding clients in the strategic and tactical decisionmaking involved in the trials.<sup>16</sup>

The Warren Court's robust reading of the right to counsel was also reflected in its resolution of claims of ineffective assistance of counsel. In *Johnson v. United States* and *Ellis v. United States*, the Court found both that a district court must provide counsel for an indigent defendant who challenges the district court's certification that there are no meritorious issues for appeal and that such counsel must serve as an advocate for the defendant.<sup>17</sup> Similarly, in *Ferguson v. Georgia*, the Court granted relief to a defendant alleging denial of his right to counsel when, pursuant to a Georgia statute that prohibited defendants from testifying on their behalf under oath, the trial court barred the attorney from questioning the defendant.<sup>18</sup>

The Burger Court, on the other hand, while re-affirming defendants' Sixth Amendment right to effective assistance by counsel, appeared to view the right to counsel more restrictively. In *McMann v. Richardson*, for example, the Court rejected the defendants' efforts to vacate their guilty pleas on the grounds that, due to counsel's mistaken advice, they had pled guilty out of fear that their coerced confessions might be admitted against them at trial.<sup>19</sup> In doing so, the Court held that a guilty plea would be revisited only if it was based on something less than "reasonably competent advice."<sup>20</sup> The Court explained:

Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.

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

16. See Note, *Effective Assistance of Counsel for the Indigent Defendant*, 78 HARV. L. REV. 1434, 1435 (1964).

17. *Ellis v. United States*, 356 U.S. 674, 675 (1958); *Johnson v. United States*, 352 U.S. 565 (1957).

18. *Ferguson v. Georgia*, 365 U.S. 570, 596 (1961).

19. *McMann v. Richardson*, 397 U.S. 759, 761-64 (1970).

20. *Id.* at 770.

On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand, defendants facing felony charges are entitled to the effective assistance of competent counsel.

Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.<sup>21</sup>

That same year, in *Chambers v. Maroney*, the Court appeared to endorse the use of prejudice analysis in resolving claims of ineffective assistance of counsel.<sup>22</sup> After Chambers' first trial ended in a mistrial, he faced a second trial for which he met his appointed lawyer for the first time in a courthouse hallway on the morning of the trial.<sup>23</sup> On appeal, while Chambers claimed that the late appearance by counsel precluded effective representation at trial, the only specific mistake he claimed counsel made was failure to seek suppression of evidence.<sup>24</sup> In denying the defendant's claim, the Court determined, in part, that the use of the evidence seized from Chambers' home was harmless beyond reasonable doubt and so "the claim of prejudice from substitution of counsel was without substantial basis."<sup>25</sup> Only Justice Harlan questioned the Court's apparent adoption of a prejudice requirement.<sup>26</sup>

This is not to say that the Burger Court uniformly read the right to counsel restrictively. On the contrary, while *Chambers* appeared to signify the Court's view that an effective assistance of counsel claim ought to include some showing of harm to the defendant, the Court subsequently issued a number of opinions in which there was no such prejudice requirement. Specifically, in a series of cases in which the government had interfered with defense counsel's preparation or presentation of the case, the Court had granted relief without any showing that the defendants had been prejudiced.<sup>27</sup> The Court similarly

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21. *Id.* at 771.

22. See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 270–71 (1997).

23. *Chambers v. Maroney*, 399 U.S. 42, 53 (1970).

24. *Id.* at 53–54.

25. *Id.* at 54.

26. *Id.* at 60 (Harlan, J., dissenting).

27. See Dripps, *supra* note 22, at 271–72 (discussing *Geders v. United States*, 425 U.S. 80 (1976) (counsel was not permitted to consult with defendant during overnight recess); *Herring v. New York*, 422 U.S. 853 (1975) (state statute authorized judge to dispense with closing argument at bench trial); *Brooks v. Tennessee*, 406 U.S. 605 (1972) (state statute requiring defendant testify first, or not at all, during defense case)).

granted relief without a showing of prejudice in a case involving counsel's conflict of interest.<sup>28</sup>

During this time, as the Court was developing its effective assistance of counsel jurisprudence, there were significant problems with the quality of representation being provided to defendants. As a report prepared by the President's Commission on Law Enforcement and Administration of Justice in 1968 noted:

The problem of personnel is at the root of most of the criminal justice system's problems. The system cannot operate fairly unless its personnel are fair. The system cannot operate swiftly and certainly unless its personnel are efficient and well-informed. The system cannot make wise decisions unless its personnel are thoughtful. In many places . . . more manpower is needed. Probably the greatest manpower need of all, in view of the increasing—and overdue—involvement of defense counsel in all kinds of cases, is for lawyers who can handle criminal cases.<sup>29</sup>

The National Legal Aid and Defender Association similarly concluded in a 1973 study:

[R]esources allocated to indigent defense services have been found grossly deficient in light of the needs of adequate and effective representation. Relatively few indigent defendants have the benefit of investigation and other expert assistance in their defense. Their advocates are overburdened, undertrained, and underpaid, and as recent studies have shown, the poor have as little confidence in such advocates, who are often hand-picked by the same authority which pronounces their sentence, as they do in the inherent fairness of the American criminal justice system.<sup>30</sup>

Chief Justice Warren Burger published an article reflecting the same concern.<sup>31</sup> He wrote:

Whatever the legal issues or claims, the indispensable element in the trial of a case is a minimally adequate advocate for each litigant. Many judges in general jurisdiction trial courts have stated to me that fewer than 25 percent of the lawyers appearing before them are genuinely qualified; other judges go as high as 75 percent. I draw this from conversations extending over the past twelve to fifteen years at judicial meetings and seminars, with literally hundreds of judges and experienced lawyers. It would be safer to pick a middle ground and accept as a working hypothesis that from one-third to one-

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28. *See id.* at 272 (discussing *Holloway v. Arkansas*, 435 U.S. 475 (1978)).

29. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 12–13 (1968).

30. Dripps, *supra* note 22, at 246 (citing NORMAN LEFSTEIN, *CRIMINAL DEFENSE SERVICES FOR THE POOR* 14 (1982)).

31. *Id.* at 247 n.15 (quoting Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *FORDHAM L. REV.* 227 (1973)).

half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation. The trial of a serious case, whether for damages or for infringement of civil rights, or for a criminal felony, calls for the kind of special skills and experience that insurance companies, for example, seek out to defend damage claims.<sup>32</sup>

Judge David Bazelon, the Chief Judge of the Court of Appeals for the District of Columbia Circuit, also wrote that “a great many—if not most—indigent defendants do not receive the effective assistance of counsel guaranteed them by the 6th Amendment.”<sup>33</sup> He added, “I have often been told that if my court were to reverse every case in which there was inadequate counsel, we would have to send back half the convictions in my jurisdiction.”<sup>34</sup>

The gross deficiencies in representation by counsel continued for years. A decade after the alarming articles by Chief Justice Burger and Judge Bazelon, Professor Norman Lefstein prepared a report for the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants in which he reviewed thirty-seven studies of indigent defense systems.<sup>35</sup> The report found:

Most of these studies were undertaken by consultants from outside the jurisdiction evaluated, and in virtually every instance the adequacy of funding, and the overall sufficiency of resources and defense services were principal concerns. . . . Taken as a whole, these evaluations of defense programs, consisting of more than 4,000 pages of reports, present an exceedingly depressing picture of insufficient defense financing. . . . Regardless of whether the study was conducted by NLADA, a private research organization, a bar association, or some other group, the message was the same: more funds are desperately needed to hire more lawyers and support staff, to reduce excessive caseloads, to compensate private lawyers adequately, and to provide for a host of other needs.<sup>36</sup>

It was in this crisis environment that the Court in 1984 finally expressly addressed the measure of assistance required of attorneys by the right to effective assistance of counsel.<sup>37</sup> Writing for the majority in *Strickland v.*

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32. *Id.* at 234.

33. *Id.* at 246 (citing David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973)).

34. *Id.*

35. Dripps, *supra* note 22, at 246 (citing LEFSTEIN, *supra* note 30).

36. *Id.*

37. The following year, the Court addressed defendants’ right to effective assistance of counsel in cases that are resolved by pleas rather than proceeding to trial. *See Hill v. Lockhart*, 474 U.S. 52 (1985). In *Hill*, the Court determined that while the *Strickland v. Washington* test was developed in the contexts of trials, the same two-part analysis was applicable to plea cases. *Id.* at 58. While the first prong was the same in both contexts—counsel had to provide reasonably competent assistance, the prejudice prong was slightly different: “[I]n order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that,

*Washington*, Justice O'Connor articulated a two-prong test for evaluating ineffective assistance of counsel claims that required a defendant to demonstrate both that counsel's performance "fell below an objective standard of reasonableness"<sup>38</sup> and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>39</sup> While the Court acknowledged the importance of the Sixth Amendment right to effective assistance of counsel, the Court stressed that the purpose of the right was to ensure a fair trial.<sup>40</sup> As such, the Court concluded that 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."<sup>41</sup>

As to the first prong of the test, the Court refused to go beyond a standard of "reasonableness under prevailing professional norms" in measuring attorney performance and rejected the categorical approach of establishing more specific guidelines as "not appropriate."<sup>42</sup> Advancing its implicit goal of protecting attorneys and the courts from a potential deluge of mostly meritless ineffective assistance claims,<sup>43</sup> the majority emphasized that:

Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the

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but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

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

39. *Id.* at 694.

40. *Id.* at 685–86.

41. *Id.* at 686. Although the case under consideration had arisen out of a capital sentencing proceeding instead of a "trial," the Court nevertheless applied the principle quoted above. The Court decided that Florida's capital sentencing proceeding, which had an adversarial format, standards governing the decision, and a role for counsel similar to counsel's role at trial, did not have to be distinguished from an ordinary trial. *Id.* at 686–87.

42. *Id.* at 688. While the Court mentioned that prevailing professional norms are reflected, for example, in the ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, DEFENSE FUNCTION (1979), it stressed that these kinds of standards are only guides to determining what is reasonable. *Id.* See *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (reiterating that ethical codes are only guides for determining "reasonable conduct").

43. See *Strickland*, 466 U.S. at 690 ("availability of intrusive post-trial inquiry into attorney performance . . . would encourage proliferation of ineffectiveness challenges"; counsel's performance and willingness to serve could be adversely affected; "intensive scrutiny of counsel and rigid requirements could dampen" counsel's ardor and "discourage acceptance of assigned cases"). See also *id.* at 713 (Marshall, J., dissenting) ("The only justification the majority itself provides for its proposed presumption is that undue receptivity to claims of ineffective assistance of counsel would encourage too many defendants to raise such claims and thereby would clog the courts with frivolous suits.").

evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."<sup>44</sup>

As to the second prong of the test, namely the requirement of prejudice, the Court held that it would be too easy in ineffective assistance of counsel claims for a defendant to show that counsel's unreasonable performance had some conceivable effect on the outcome of the proceeding.<sup>45</sup> Yet it also would be too difficult for the defendant to satisfy the strict "outcome-determinative" standard, which required proof that counsel's deficient conduct more likely than not altered the outcome of the case.<sup>46</sup> Thus, the Court adopted a modified outcome-determinative standard that slightly reduced the defendant's burden of proof: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>47</sup> It defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."<sup>48</sup> Finally, the Court advised lower courts that, instead of necessarily deciding the performance prong first, they should dispose of ineffectiveness claims on the ground of insufficient prejudice without "grading counsel's performance" whenever "it is easier" to do so.<sup>49</sup>

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44. *Id.* at 689 (emphasis added). As if its message to the lower courts was not sufficiently clear, the majority reiterated only one-page later that a court: (i) "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"; (ii) "must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance"; and (iii) "should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

45. *Id.* at 693.

46. *Id.* at 693–94. First, the Court listed the various "strengths" of the strict outcome-determinative standard: "it defines the relevant inquiry in a way familiar to courts"; "[it] reflects the profound importance of finality in criminal proceedings"; and "it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence." *Id.* at 693–94. It then refrained, apparently quite reluctantly, from adopting this strict standard because "[a]n ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." *Id.* at 694.

47. *Id.* at 694.

48. *Strickland*, 466 U.S. at 694. However, unlike in the performance inquiry, a particular judge's sentencing practices may not be considered in the prejudice inquiry because the assessment of prejudice "should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities towards harshness or leniency" but should instead "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Id.* at 695.

49. *Id.* at 697.

The same year the Court also decided *United States v. Cronic*.<sup>50</sup> The defendant in *Cronic* had been represented at a trial on mail fraud charges by a young lawyer who had a real estate practice and who had never previously tried a case before a jury.<sup>51</sup> This attorney had been given only twenty-five days to prepare the case for trial.<sup>52</sup> Reviewing these facts, the circuit court concluded that Cronic had been denied effective assistance of counsel not because the attorney committed any identifiable errors or omissions, but because the attorney's inexperience combined with his late entry into the case and other factors warranted an inference that his representation had been inadequate.<sup>53</sup> The Supreme Court rejected this analysis and held that it was only the rare case in which prejudice would be inferred.<sup>54</sup> Instead, in the majority of cases, the focus instead would be on whether the attorney provided effective "assistance."<sup>55</sup> In other words, the Court endorsed *Strickland's ex-post* review of an attorney's conduct rather than adopting an *ex-ante* inquiry into the attorney's qualifications.

## II. A TROUBLED LEGACY: THE COURT'S FAILURE TO ENSURE EFFECTIVE ASSISTANCE OF COUNSEL

The twenty-five years since the Court's decisions in *Strickland* and *Cronic* have failed to witness any significant improvement in the quality of representation being provided to indigent defendants. On the contrary, as several studies have reported, indigent defense continued to remain in a state of crisis.<sup>56</sup> A report prepared for the American Bar Association (ABA) just a few years after *Strickland* found that "[t]he long-term neglect and underfunding of indigent defense has created a crisis of extraordinary proportions in many states throughout the country."<sup>57</sup> The *American Lawyer* published an article that same year on indigent defense finding "serious problems that should disturb the conscience of every American concerned about equal justice."<sup>58</sup>

More recently, the ABA Standing Committee on Legal Aid and Indigent Defendants published a report concluding that "thousands of persons are

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50. *Id.* at 648.

51. *Id.*

52. *Id.*

53. *Strickland*, 466 U.S. at 648.

54. *Id.*

55. *Id.*

56. For a critique of a report by the National Center for State Courts that purported to show that indigent defense systems were performing effectively, see Dripps, *supra* note 22.

57. RICHARD KLEIN & ROBERT SPANGENBERG, *THE INDIGENT DEFENSE CRISIS* 25 (1993). An earlier report by a Special Committee of the American Bar Association found that "there is ample evidence that the quality of representation, particularly for the poor, is not what it should be." ABA, *SPECIAL COMM. ON CRIM. JUST., CRIMINAL JUSTICE IN CRISIS* 37 (1988).

58. Andy Court, *Is There a Crisis?*, *AM. LAWYER*, Jan./Feb. 1993, at 47.

processed through America's courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation . . ." and that "the fundamental right to a lawyer . . . effectively does not exist in practice for countless people across the United States."<sup>59</sup>

The discussion below catalogues the pervasive ineffective assistance of counsel that marks the criminal justice system across the country. In Section II.A., the Article discusses the inadequate assistance being provided at every stage of criminal proceedings: (1) during the plea process, (2) at trial, (3) during sentencing proceedings, and (4) during appellate proceedings. In Section II.B., the Article discusses the quality of counsel provided to indigent defendants, cataloging not only the incompetence of counsel, but also the systemic constraints that often cripple even competent counsel: these include (1) sleeping counsel, (2) counsel with racist attitudes, (3) counsel with disciplinary or criminal problems, (4) counsel with insufficient training or experience, (5) counsel with crushing caseloads, and (6) counsel with grossly inadequate resources. Finally, in Section II.C., the Article discusses the impact of these issues, focusing particularly on the impact on innocent persons, an issue that touches not only those who were improperly swept into the criminal justice system, but one that undermines the security of all citizens insofar as the actual perpetrators remain free to victimize others.

#### A. *Inadequate Assistance*

Numerous reports have documented widespread inadequacies in representation at trial and sentencing. One indicator of the pervasive nature of the problem of inadequate representation has been the fact that these shortcomings have been pronounced in capital cases, the very cases in which one might expect better representation because of the stakes involved. For example, the *National Law Journal* conducted an extensive study of capital cases in six Southern states that account for the vast majority of executions and found that capital trials are "more like a random flip of the coin than a delicate balancing of the scales" because defense counsel are too often "ill trained, unprepared . . . [and] grossly underpaid."<sup>60</sup> The study found that "capital trials often were completed in one to two days . . . [and] [t]he penalty phase, a capital trial's most important part, usually started immediately after a guilty

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59. ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE iv (2004) [hereinafter "GIDEON'S BROKEN PROMISE"].

60. Stephen B. Bright, *The American Bar Association's Recognition of the Sacrifice of Fairness for Results: Will We Pay the Price for Justice?*, 4 GEO. J. ON FIGHTING POVERTY 183, 186 (1996).

verdict and lasted only several hours and, in at least one case, just fifteen minutes.”<sup>61</sup>

An ABA study similarly found that in Tennessee attorneys failed to offer mitigating evidence “in approximately one-quarter of all the death sentences affirmed by the Tennessee Supreme Court since the Tennessee legislature promulgated its current death penalty statute.”<sup>62</sup> A study by the Spangenberg Group reported that the “current practice and procedure in Tennessee regarding representation of indigent capital defendants falls short of virtually every standard explicated in the ABA’s Guidelines. . . .”<sup>63</sup> A review of eighty death sentences issued in Georgia, Mississippi, Alabama and Virginia between 1997 and 2004 found that “[i]n 73 of the 80 cases, defense lawyers gave jurors little or no evidence to help them decide whether the accused should live or die. The lawyers routinely missed myriad issues of abuse and mental deficiency, abject poverty and serious psychological problems.”<sup>64</sup> As one scholar observed, attorneys in capital cases “are often shockingly unqualified, unprepared, and unsupported”<sup>65</sup> and “the test of ineffective assistance of counsel in Georgia is said to be whether counsel can fog a mirror.”<sup>66</sup>

Not surprisingly, there have been similar reports of widespread inadequate representation in non-capital cases. For example, a study of indigent defense in New York City shockingly found that attorneys missed over forty percent of required court appearances, made few pretrial motions and viewed plea bargaining cases as a goal of the system.<sup>67</sup> The *New York Times* also looked at all 137 homicide cases in New York City that reached conclusion in 2000 and found that the court-appointed lawyers in nearly one-third of these cases spent less than one week preparing for the case.<sup>68</sup> The *Times* also found that counsel visited the scene of the crime in less than one-third of the homicide cases and failed to hire a private investigator in over sixty percent of the cases.<sup>69</sup> As discussed in greater length below, the problems of ineffective representation reflected in these accounts have arisen in every context of criminal

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61. *Carter Center Symposium on the Death Penalty*, 14 GA. ST. U. L. REV. 329, 379 (1998).

62. Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 792 (1997).

63. William P. Redick, Jr. et al., *Pretend Justice—Defense Representation in Tennessee Death Penalty Cases*, 38 U. MEM. L. REV. 303, 325 (2008) (citation omitted).

64. Stephen Henderson, *Defense Often Inadequate in 4 Death-Penalty States*, MCCLATCHY NEWSPAPERS, Jan. 16, 2007, available at <http://www.mcclatchydc.com/201/story/15394.html>.

65. Dripps, *supra* note 22, at 249–50.

66. *Id.* at 249 (citation omitted).

67. Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, Occasional Papers from the N.Y. Univ. Ctr. for Research in Crime and Justice, No. VI, (1989).

68. Jane Fritsch & David Rohde, *Legal Help Often Fails New York’s Poor*, N.Y. TIMES, Apr. 8, 2001, at A1.

69. *Id.*

prosecutions from pre-trial proceedings to trials, sentencing proceedings and appeals.

### 1. During the Plea Process

The problems of ineffective assistance are as prevalent in the plea process, which accounts for the resolution of an overwhelming majority of criminal cases, as in cases that go to trial. For example, on a single day in Greene County, Georgia, a report found that there were 116 defendants on the trial calendar, of whom sixty-three were represented by the sole contract defender.<sup>70</sup> The report found that of the “63 defendants, the cases of 17 were continued, three defendants failed to appear, and of the 43 remaining cases, 42 resulted in pleas and one in a trial.”<sup>71</sup> Many of the forty-two defendants who pled guilty were sentenced to prison.<sup>72</sup>

As one might assume from the sheer caseload:

During the proceedings, the contract defender exhibited little knowledge of the facts of the cases. For example, he did not know one client’s prior record before accepting a plea offer. He did not know that another client was mentally disabled until the client’s mother (who had also been represented by the contract defender that same day) provided this information to the judge.<sup>73</sup>

The report found that the representation was so lacking that “[a]t one point in the proceedings, the judge warned the contract lawyer that he must do a better job of making contact with his clients before coming to court.”<sup>74</sup> The admonishment, however, did not preclude the judge from accepting the guilty pleas and sentencing all forty-two defendants.<sup>75</sup>

On another occasion in the same county, the report found that the contract lawyer was responsible for representing ninety-four people on the trial docket who cumulatively were charged with over 200 offenses, some as serious as murder.<sup>76</sup> “The contract lawyer did not request any trials that day. All 94 cases were pled or continued. In the cases in which pleas were entered, a sentence was imposed without any advocacy regarding sentencing.”<sup>77</sup>

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70. SOUTHERN CENTER FOR HUMAN RIGHTS, “IF YOU CANNOT AFFORD A LAWYER . . .”: A REPORT ON GEORGIA’S FAILED INDIGENT DEFENSE SYSTEM 35 (2003), *available at* [http://www.schr.org/files/resources/jan\\_2003\\_report.pdf](http://www.schr.org/files/resources/jan_2003_report.pdf).

71. *Id.*

72. SOUTHERN CENTER FOR HUMAN RIGHTS, PROMISES TO KEEP: ACHIEVING FAIRNESS AND EQUAL JUSTICE FOR THE POOR IN CRIMINAL CASES 12 (2000), *available at* [http://www.schr.org/files/resources/indigent\\_rpt.pdf](http://www.schr.org/files/resources/indigent_rpt.pdf).

73. *Id.*

74. *Id.*

75. *Id.*

76. *See* SOUTHERN CENTER FOR HUMAN RIGHTS, *supra* note 70, at 35.

77. *Id.*

There have been numerous such reports of pervasive ineffective assistance in other jurisdictions.<sup>78</sup> Poor representation during the plea process, for example, was also documented in the ABA's recent report on indigent defense. The report noted that forty-two percent of indigent cases in a Mississippi county were resolved by a plea bargain on the first day that counsel met with the defendant, that is, most likely prior to any independent investigation by the attorney. The same report found that counsel in another Mississippi county did not even meet with their clients outside of court in over eighty percent of the cases.<sup>79</sup>

## 2. At Trial

Numerous reports, articles in journals and newspapers have catalogued the shocking representation being provided to indigent defendants in state courts across the country. For example, one of the attorneys who represented Wallace Fugate at his capital murder trial was so unfamiliar with the law that he was not able to name a single capital punishment decision rendered by the United States Supreme Court: he "had never heard of *Gregg v. Georgia*, the case that upheld the current death penalty law in Georgia, *Furman v. Georgia*, the decision that declared the death penalty unconstitutional in 1972, or any other case."<sup>80</sup> This attorney "admitted that he did not know the landmark U.S. Supreme Court cases, but said that was because he had never lost a death penalty case before. 'There was no reason for me to study something I didn't need,' he said."<sup>81</sup> Stephen Bright, the attorney representing Fugate in post-conviction proceedings, noted that this "is much like being treated by a doctor who has never heard of penicillin."<sup>82</sup>

As one might imagine, these attorneys provided Fugate shockingly inadequate assistance at the trial, one that lasted less than three days. At the guilt phase, the attorneys failed to make a single objection, failed to present critical exculpatory evidence—a manufacturing defect that made the gun susceptible to accidental discharge—corroborating the defendant's claim that

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78. See generally Stephen B. Bright, *Turning Celebrated Principles Into Reality*, 27 CHAMPION 6 (2003); Tara Harrison, *The Pendulum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel When Pleading Not Guilty at the Plea Bargaining Stage*, 2006 UTAH L. REV. 1185 (2006); Todd R. Falzone, Note, *Ineffective Assistance of Counsel: A Plea Bargain Lost*, 28 CAL. W. L. REV. 431 (1992).

79. GIDEON'S BROKEN PROMISE, *supra* note 59, at 16.

80. Bob Herbert, Op-Ed., *In America; Cheap Justice*, N.Y. TIMES, Mar. 1, 1998, § 4, at 15 (quoting Stephen Bright). See also Bill Rankin, *Ruling Upholds Capital Case*, ATLANTA J. CONST., Aug. 18, 2001, at H4; Bill Rankin, *Murder Case Botched, New Lawyers Say Courts*, ATLANTA J. CONST., Aug. 4, 1999, at B2; *A Lawyer Without Precedent*, HARPER'S MAG., June 1, 1997, at 24.

81. *Murder Case Botched*, *supra* note 80.

82. Herbert, *supra* note 80.

the gun had fired accidentally, this despite the judge's encouragement that they present a ballistics expert, and failed to introduce readily-available evidence showing key inconsistencies in the state's case, including a prior inconsistent statement to the police by the sole eyewitness.<sup>83</sup> At the penalty phase, at which the presentation of mitigating evidence lasted a mere twenty-seven minutes, the attorneys called only one out of the thirty-five suggested witnesses and failed to present compelling mitigating evidence, including his lack of prior criminal record, his military service, his service to the community, and his relations with friends and family.<sup>84</sup> While at least three of the jurors submitted sworn affidavits that they would have rejected the death penalty had they been made aware of the unrepresented evidence, Fugate, a carpenter by profession, was executed on August 16, 2002.<sup>85</sup>

Alex Williams was represented at his capital trial by a court-appointed attorney who when asked, in another capital case, to name any criminal law decisions with which he was familiar could name only two: "*Miranda* and *Dred Scott*." Not surprisingly, this attorney failed to challenge the composition of the jury venire despite the fact that, while African-Americans constituted over half of the county's population, they comprised less than a quarter of the venire.<sup>86</sup> The attorney conducted no investigation, presented only the pretense of a defense and did not present any mitigating evidence at the sentencing hearing that therefore lasted less than fifteen minutes.<sup>87</sup> As a result, the jury that sentenced Williams to death did not learn that Williams had been diagnosed as suffering from schizophrenia and had begun having hallucinations and hearing voices several months prior to the crime.<sup>88</sup> Nor did the jury hear about the repeated physical abuse that Williams had endured: when he was an infant, his mother often shook him hard; when he was a toddler, his mother struck him with cooking utensils, sticks, branches, and the spiked edge of her glass shoes; when he was a young adolescent, his mother and grandmother frequently beat him; during this time his mother also

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83. *Ruling Upholds Capital Case*, *supra* note 80. See also Editorial, *Death Penalty Unfair for Indigent*, ATLANTA J. CONST., July 23, 2002, at A11.

84. Stephen B. Bright, Editorial, *Judging from State's Latest Execution, the Price of Life is a 'Real' Lawyer*, ATLANTA J. CONST., Aug. 21, 2002, at A18. See also Editorial, *Stay of Execution the Right Thing*, ATLANTA J. CONST., June 19, 2002, at A11.

85. Regarding the possibility that federal courts would deny relief in this case, Palmer Singleton, an attorney for Wallace Fugate, said that "[t]his is the worst case yet to come out of Georgia because there wasn't even a semblance of advocacy by the lawyers. . . . If the federal court does not grant relief in this case, they've done more than close the courthouse door for prisoners, they've boarded it up." *Murder Case Botched*, *supra* note 80.

86. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1839 (1994).

87. ABA JUVENILE JUSTICE COMMITTEE, ALEX WILLIAMS—JUVENILE DEATH PENALTY, <http://www.abanet.org/crimjust/juvjus/williams.html> (last visited Aug. 1, 2009).

88. *Id.*

punished him with “bed restriction,” forcing him to remain on his bed for days, even weeks, completely isolated from others while receiving only one meal a day; his mother also forced him to stand naked outside of his house; and, his step father sexually assaulted him.<sup>89</sup> Williams, who served sixteen years on death row, committed suicide in prison nine months after his death sentence was commuted to life imprisonment in 2002.<sup>90</sup>

John Eldon Smith and Rebecca Machetti were sentenced to death for the same crime at separate trials held within a few weeks of each other. While Machetti’s attorneys challenged the composition of the jury venire in state court, Smith’s attorneys failed to do so because they were unaware of the Supreme Court decision prohibiting the systematic under-representation of women on jury venires. As a result, while Machetti won a new trial at which a properly-composed jury sentenced her to life imprisonment, Smith did not get relief and he was executed.<sup>91</sup>

Judges in a Georgia county repeatedly appointed an attorney who refused to raise a constitutional claim regarding the systematic under-representation of African-Americans in jury venires solely because he did not want to offend potential jurors and other members of the community. As a result, even though African-Americans constituted a third of the local population, several African-American defendants were tried on capital charges before all-white juries.<sup>92</sup>

James Messer, who was executed in Georgia in 1988, was represented by an attorney who made no opening statement, only cursorily cross-examined the state’s witnesses, made not a single objection, called no defense witnesses, and made a brief closing argument that emphasized the horror of the crime.<sup>93</sup> The attorney’s inadequate representation continued during the sentencing phase of the trial when the attorney failed to present vital mitigating evidence, including evidence of Messer’s severe mental impairment, his military service, his employment history, his church attendance, and his cooperation with police. The attorney, moreover, repeatedly hinted to the jury that the death penalty was the most appropriate punishment in the case.<sup>94</sup>

Juan Carlos Pichardo, who was convicted of murder in New York, was represented by court-appointed counsel who never visited him in jail prior to trial, meeting only in the courthouse during hearings.<sup>95</sup> The attorney failed to conduct any independent investigation of the crime and failed to retain the services of a private investigator, limiting his efforts to speaking with members

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89. *Id.*

90. *Id.*

91. Bright, *supra* note 86, at 1839–40.

92. *Id.* at 1857.

93. *Id.* at 1859–60.

94. *Id.* at 1859–60 nn. 49–50.

95. Fritsch & Rohde, *supra* note 68.

of the defendant's family. As a result, he failed to interview two critical eyewitnesses who undermined the state's case.<sup>96</sup> At trial, the attorney made several significant missteps in cross-examining the state's witnesses, eliciting damaging information, and permitted the defendant to testify without counseling him about the potential problems with doing so. As a judge later found, the attorney demonstrated "regrettable ignorance of basic principles of criminal law."<sup>97</sup> When the case was assigned to a Legal Aid attorney for appeal, the trial counsel's errors were uncovered and the defendant won a new trial at which he was later acquitted.<sup>98</sup>

Pamela Perillo was tried in 1984 on capital murder charges.<sup>99</sup> The attorney appointed to represent her turned out to have a close relationship to the state's key witness, the co-defendant in the case. The attorney had not only previously represented the state's witness, but he had befriended her and had attended her wedding.<sup>100</sup> This conflict, which was not disclosed to Perillo, appeared to have affected the attorney's performance on the case—when the witness testified, the attorney failed to ask the witness questions that would undermine her credibility or expose ulterior motives for testifying.<sup>101</sup> While Perillo was denied relief in both state and federal courts, the federal court reopened the case after the attorney faced disciplinary charges for lying to another client and in connection with which the attorney reportedly said that "there are times you cannot be truthful with a client."<sup>102</sup> After Perillo was granted relief by the federal court, the district attorney chose not to pursue the death penalty and Perillo pled guilty to a lesser charge.<sup>103</sup>

### 3. At Sentencing

In addition to inadequate assistance at trial, there have also been widespread accounts of inadequate representation in sentencing proceedings. For example, Billy Mitchell, who was executed in Georgia in 1987, was represented by an attorney who failed to investigate and present any mitigating evidence at the sentencing proceeding. Instead, the attorney decided to forgo any inquiry into mitigating evidence because he thought that he held an "ace in the hole," an unproven legal theory about the nature of the notice required regarding aggravating factors, a theory later rejected by the court. The post-

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96. *Id.*

97. *Id.*

98. *Id.*

99. TEXAS DEFENDER SERVICE, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 87–88 (2000), available at <http://www.texasdefender.org/state%20of%20denial/Chap6.pdf>.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

conviction record revealed that had the trial attorney conducted an investigation, he would have found numerous compelling witnesses willing to testify in addition to relatives and friends, including a former prosecutor, a city council member, a professional football player, a bank vice president, and several teachers and coaches.<sup>104</sup> These witnesses would have provided compelling mitigating evidence. Mitchell, who grew up in economically challenging circumstances, took care of eleven siblings while his mother worked and, even before going to high school, worked to help support his family. Despite these challenges, he did well at school, serving as the captain of the football team, as a boy scout and as a member of the student council. After his parents divorced when he was sixteen, Mitchell got into trouble, attempting a robbery. During the six-month incarceration for this offense, Mitchell suffered repeated homosexual rape. The severe depression that resulted from this repeated brutalization led to significant physical and behavioral changes, culminating in a convenience-store robbery and killing soon after his release.<sup>105</sup>

Horace Dunkins was sentenced to death in Alabama despite his attorney's failure to investigate and present evidence about his mental retardation. After learning about Dunkins' mental retardation from newspaper reports after trial, one juror said she would not have voted for the death penalty had she been made aware of this information at the time of the trial. Dunkins was executed.<sup>106</sup>

Gary Etheridge, who was convicted of capital murder in Texas, was represented at trial by court-appointed counsel who presented no argument or evidence in the punishment phase of the trial. Had trial counsel conducted an adequate investigation, he would have found a wealth of mitigating evidence. For instance, growing up, Etheridge had been abused by his drunken father, had witnessed his mother's suicide attempts and drug dependence, had suffered a head injury, and had been hospitalized after being raped by his older brother. Etheridge had been raped again as an adult while serving an unrelated prison sentence. Finally, a psychological evaluation had concluded that, unless Etheridge was under "states of extreme provocation or intoxication," there was no significant risk of future dangerousness. Etheridge was executed in 2002.<sup>107</sup>

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104. Bright, *supra* note 86, at 1860.

105. Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 248-49 (1991).

106. Bright, *supra* note 62. *See also* Bright, *supra* note 86, at 1837.

107. *See* TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS 36-38 (2002), available at <http://www.texasdefender.org/chapters.pdf>. The inadequate representation provided to Etheridge at trial was compounded by the inadequate representation provided to him in post-conviction proceedings. The lawyer appointed to represent him in those proceedings had graduated from law school only two years before. This was his first appointment to a capital case; he had never been

Paul Colella, who was sentenced to death in Texas in 1992, was represented at trial by a court-appointed attorney who had never before represented a capital defendant.<sup>108</sup> The inexperience of the attorney, who was meagerly compensated and denied co-counsel, became all too evident at the penalty phase of the trial when he repeatedly invoked rules of evidence that did not apply to capital sentencing proceedings.<sup>109</sup> In addition, although he was aware of Colella's history of mental illness, the attorney neither investigated this history nor requested the court for expert assistance.<sup>110</sup> Had the attorney conducted an investigation, he would have also uncovered other mitigating evidence, such as the fact that Colella had been raised in abject poverty, had been in classes for the emotionally disabled since the beginning of his education, had attempted suicide several times before he was ten years old, and had brain damage.<sup>111</sup>

In addition, Kenneth Ransom's court-appointed attorney failed to investigate and present mitigating evidence.<sup>112</sup> Had the attorney conducted even a minimal investigation and collected government child welfare records, he would have received a 500-page file that documented how Ransom had been taken away from his mother because of constant physical abuse, which included whippings with extension cords that left permanent U-shaped bruises on his back and limbs.<sup>113</sup> Ransom was executed in 1997.

Similarly, Joseph Stanley Faulder's court-appointed attorney also failed to investigate and present mitigating evidence.<sup>114</sup> The attorney testified that he failed to do so because he did not know that Texas procedure allowed for the presentation of such evidence at sentencing.<sup>115</sup> Had the attorney conducted an investigation, he would have found that Faulder had suffered brain damage after falling out of a moving car as a child, an accident that split open his head on both sides.<sup>116</sup> The attorney also would have found additional mitigating evidence of good conduct in prison, good relationships with family, friends and employers and evidence that he had saved the life of an accident victim by

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lead trial counsel in a murder case, had never tried a capital murder case in any capacity and had never been counsel of record in the appeal of a murder or capital murder conviction. Nor had counsel ever before filed a state or federal writ of habeas corpus as lead counsel in any type of case. Not surprisingly, counsel failed to raise meritorious claims of ineffective assistance of trial counsel. His failure to do so led to later courts refusing to hear this claim or to consider the wealth of mitigating evidence that was present. *Id.*

108. *See id.* at 16; TEXAS DEFENDER SERVICE, A STATE OF DENIAL, *supra* note 99, at 96.

109. *See* TEXAS DEFENDER SERVICE, A STATE OF DENIAL, *supra* note 99, at 96.

110. *Id.*

111. *Id.*

112. *Id.* at 96–97.

113. *Id.*

114. *See* TEXAS DEFENDER SERVICE, A STATE OF DENIAL, *supra* note 99, at 97.

115. *Id.*

116. *Id.*

driving her to the hospital in the middle of a blizzard.<sup>117</sup> Faulder was executed in 1999.

Jesus Romero's court-appointed attorney likewise did not investigate or present mitigating evidence at the penalty phase.<sup>118</sup> Instead, the attorney only made the following argument to the jury: "You are an extremely intelligent jury. You've got that man's life in your hands. You can take it or not. That's all I have to say."<sup>119</sup> The jury, not surprisingly sentenced Romero to death and he was executed in 1992. Had the attorney conducted an investigation into mitigating evidence, he would have found evidence of a violent, abusive childhood and Romero's intoxication at the time of the crime.<sup>120</sup>

Aubrey Dennis Adams' trial attorney failed to object to the trial judge's repeated instructions to the jury that the sentencing determination was not their responsibility and was not on their consciences or on their shoulders, because the judge could do whatever he wanted.<sup>121</sup> This instruction, given ten times to the jury, was erroneous because although Florida statutes permitted the judge to override the jury's sentencing recommendation, the instruction stated that the jury was considered the "conscience of the community" and that its views had to be given great weight by the judge.<sup>122</sup> Adams' attorney also failed to raise the issue on appeal. As a result of his attorney's inaction, Adams was denied relief and was executed despite the fact that the instructions were constitutionally impermissible.<sup>123</sup>

Lawrence Branch, sentenced to death in Mississippi, was represented by an attorney who did not present vital evidence of mental retardation. The attorney "had been given a report that showed his client was diagnosed as mentally retarded at age 5, with an IQ of 68. The report also showed that Branch had flunked three grades in school. His lawyer threw away the report, thinking it wasn't relevant."<sup>124</sup>

Robin Lovitt was represented on appeal by Kenneth Starr, the former Solicitor General and Independent Counsel, and his death sentence was commuted to life without parole by Governor Warner on the eve of execution.<sup>125</sup> At trial, Lovitt had been represented by attorneys who failed to investigate and present mitigating evidence. Had the attorneys investigated their client's background, "they would have discovered a nightmare. Lovitt's

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117. *Id.*

118. *See id.* at 97.

119. TEXAS DEFENDER SERVICE, A STATE OF DENIAL, *supra* note 99, at 97.

120. *Id.*

121. *Carter Center Symposium on the Death Penalty*, *supra* note 61, at 341.

122. *Id.*

123. *Id.*

124. Henderson, *supra* note 64.

125. Michael D. Shear & Maria Gold, *Warner Commutes Death Sentence*, WASH. POST, Nov. 30, 2005, at A1.

parents were drug dealers who beat their kids, forced them to help package and distribute narcotics, and had wild parties during which guests took turns molesting the children.”<sup>126</sup>

#### 4. In Appellate Proceedings

The problems of inadequate representation at trial and sentencing have also been reported in the context of appeals. For example, Larry Gene Heath’s appellate counsel filed a brief in the Alabama Supreme Court that included only a single page of argument, distinguishing the sole case it cited. The attorney, who failed to appear at oral argument in the Alabama Supreme Court, had filed a six-page brief on the same issue in the lower appellate court. As the court of appeals later found, the attorney could have raised several meritorious claims about the trial judge’s denial of a change of venue, his denial of sixty-seven challenges for cause of potential jurors, and his failure to prohibit the prosecutor from making adverse inferences about Heath’s assertion of his Fifth Amendment rights. These claims notwithstanding, Heath was executed in 1992 after the court of appeals found the representation to not be prejudicial.<sup>127</sup>

There have also been numerous accounts of attorneys appointed to represent indigent defendants in post-conviction proceedings who have provided inadequate representation. In Florida, a Florida Supreme Court justice said that court-appointed private attorneys in post-conviction proceedings have provided “the worst lawyering I’ve seen.”<sup>128</sup> The justice noted that some of these attorneys “have little or no experience in death penalty cases,” do not raise the right issues, are unable to respond to questions at oral argument, are unfamiliar with what the record shows, and lack a good understanding of death penalty jurisprudence.<sup>129</sup> The justice noted that this poor lawyering contributed to judicial inefficiency.

[These lawyers] allege 10 issues or more, sometimes 20 issues. They take a shotgun approach. Of those 20 issues, 19 are totally baseless. For us to wade through the morass of baseless claims takes a lot of work for the justices and eventually leads to a lot of inefficiencies in the process. . . . That takes a lot of time that we can be spending on civil cases, on other criminal cases on important issues.<sup>130</sup>

Claims of inadequate representation in post-conviction proceedings have been well-documented in Texas. Toronto Patterson, for example, was a juvenile when charged with capital murder in Texas and was represented by an

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126. Henderson, *supra* note 64.

127. Bright, *supra* note 86, at 1861.

128. Marc Caputo, *Justice Blasts Lawyers over Death Row Appeals*, MIAMI HERALD, Jan. 28, 2005, at 1B.

129. *Id.*

130. *Id.*

attorney who filed a mere six-page petition on his behalf.<sup>131</sup> The attorney raised no extra-record claims, presented no extra-record materials, failed to raise Patterson's juvenile status, and did not file a motion for discovery.<sup>132</sup> Nevertheless, Patterson was executed in 2002.

Napoleon Beazley, who similarly had been convicted of a crime committed while he was a juvenile, was appointed a former law clerk of the appellate court who had never represented a death row client and one who had never represented any client at all.<sup>133</sup> This lawyer was appointed for Beazley at a time when the Board of Directors of the Texas Criminal Defense Lawyers' Association had adopted a resolution encouraging its members not to seek appointment to capital cases because the state habeas system had been rendered a "meaningless farce" by the appellate court.<sup>134</sup> The lawyer appointed to Beazley's case was appointed to six capital cases within three days of leaving his position at the appellate court.<sup>135</sup> The factual investigation that was done in Beazley's case—a mere eighteen hours worth—occurred within two weeks of the filing date.<sup>136</sup> Records indicate that the attorney read the investigator's reports—the only factual investigation in the case—on the same day that he also did "final preparation of [the] writ application."<sup>137</sup>

The petition for writ of habeas corpus contained only four record-based claims, two of which were repeated from the direct appeal.<sup>138</sup> The state did not bother to reply to the record-based claims.<sup>139</sup> Had the state habeas lawyer conducted any meaningful investigation, nine available issues could have been discovered and raised in the initial petition. For example, one of the jurors in the all white jury who harbored deep racial prejudice against blacks stated one juror appeared to have been a long-time employee of one of the victim's business partners, a fact not revealed during jury selection.<sup>140</sup> Counsel also missed the state's suppression of evidence favorable to Beazley regarding the testimony of his co-defendants.<sup>141</sup> The prosecution had denied the existence of a plea agreement with the two co-defendants in the case and had allowed them to falsely testify at trial. The district attorney's office had agreed that they would not pursue the death penalty against the co-defendants in exchange for

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131. See TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107, at 15.

132. *Id.*

133. See *id.* at 34–36.

134. *Id.*

135. *Id.*

136. TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107.

137. *Id.*

138. *Id.* at 34–36.

139. *Id.*

140. *Id.*

141. TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107.

their testimony against Beazley.<sup>142</sup> In affidavits, both co-defendants admitted to lying at trial and stated that they had been told to “make Napoleon look as bad” as possible to the jury.<sup>143</sup> They further swore that Beazley had not actually planned the crime beforehand and had been extremely remorseful after the crime.<sup>144</sup> The false testimony of these two contributed greatly to the jury’s finding of Beazley’s “future dangerousness,” a requirement for a death sentence in Texas.<sup>145</sup> This finding otherwise had little or no support. Mitigation witnesses, including church members, teachers, fellow students and other members of the community described a respectful, decent teenager whose involvement in this crime seemed completely out of character.<sup>146</sup> Beazley was executed in 2002.<sup>147</sup>

The appointment of a former court clerk in Beazley’s case was not an isolated phenomenon. Rather, a study found that Texas judges often appointed counsel for indigent defendants who were personal friends, law school friends, campaign contributors or attorneys who the judges were aware needed the cases for income.<sup>148</sup> Moreover, nearly half of the judges reported that their peers sometimes appointed counsel who had a reputation for moving cases, irrespective of the quality of representation they provided.<sup>149</sup> Finally, over two-thirds of judges in Texas reported that their court coordinators—which is a case manager position requiring no legal training—sometimes influenced their appointment decisions.<sup>150</sup>

### B. *Deficient Counsel*

The problems of inadequate representation noted above are exacerbated by the nature of counsel being appointed to represent indigent defendants.<sup>151</sup> A review of death cases in Virginia, Alabama and Mississippi by *McClatchy Newspapers* found that “poor legal representation is a result of official policy. The states pay no more than a pittance to help lawyers defend their clients, and

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142. *Id.*

143. *Id.* at 34–36.

144. *Id.*

145. *Id.*

146. TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107, at 34–36.

147. *Id.*

148. *See* TEXAS DEFENDER SERVICE, A STATE OF DENIAL, *supra* note 99, at 79.

149. *Id.*

150. *Id.*

151. The issues discussed here do not include the distinct problem of a state’s failure to appoint counsel, a problem that too arises far too frequently. For example, a county in Georgia for years did not provide legal representation for indigents facing misdemeanor charges, but instead gave them a form containing a waiver of rights and plea of guilty to sign. *See* Bright, *supra* note 62, at 788 (citation omitted).

none requires that well-trained attorneys handle death cases.”<sup>152</sup> As one observer noted:

The Supreme Court has never explicitly stated what level of competence is required to satisfy the Sixth Amendment’s right to counsel, instead inviting state and local bar associations to come up with their own standards. But the local bars have been notoriously unwilling to challenge the performance of their bad-egg members.<sup>153</sup>

Consider, for example, the case of Gregory Wilson. The judge presiding over Wilson’s capital trial had difficulty finding a lawyer willing to represent Wilson because a Kentucky statute limited compensation for defense counsel in capital cases to \$2,500.<sup>154</sup> The judge ultimately posted a notice in the courthouse asking any member of the bar to take the case, pleading “PLEASE HELP. DESPERATE.” Two attorneys responded to the notice and both were appointed to represent Wilson. There were troubling signs from the outset. The contact telephone number that lead counsel gave to Wilson turned out to be that for a local bar. The lawyer, who did not have an office, practiced out of his home, in a setting not unlike the bar—in plain sight, he displayed a Budweiser beer sign. This home office had been the target of a recent police search, one that had led to the discovery of stolen property. Nor could Wilson take comfort in the second attorney—he had no felony trial experience. Despite Wilson’s repeated requests for alternate qualified counsel, the judge refused and trial proceeded with these two attorneys. As one might expect, the attorneys provided problematic representation. The lead counsel was not present for much of the trial and cross-examined only a few witnesses, including one witness whose direct testimony he missed because he was out of the courtroom.<sup>155</sup> Wilson was sentenced to death.

As discussed below, Wilson’s case is not unusual. Instead, courts have appointed lawyers with significant problems, ones that have often led to disciplinary actions or criminal charges. Courts have also appointed attorneys who lacked adequate training or experience. They have also appointed attorneys who lacked basic resources necessary to represent their clients or who were not adequately compensated. As a result of these systemic

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152. Henderson, *supra* note 64.

153. Alan Berlow, *Lose That Lawyer*, SLATE, June 3, 2008, available at <http://www.slate.com/id/2192831>.

154. “When the head of the local indigent defense program suggested that this compensation was insufficient, the judge suggested that the indigent defense program rent a river boat and sponsor a cruise down the Ohio River to raise money for the defense.” Stephen B. Bright, *Glimpses at a Dream Yet to be Realized*, 22 CHAMPION 12, 64 (1998).

155. *Id.* (Wilson’s habeas corpus petition was denied by the Sixth Circuit). See *When Things Turn Ugly, Really Ugly*, CAPITAL DEFENSE WEEKLY, Jan. 29, 2008, available at <http://www.capitaldefenseweekly.com/blog/?p=2758>).

problems, courts have appointed attorneys who have been incapable of serving in a meaningful way as “counsel” for indigent defendants.

### 1. Sleeping Attorneys

Perhaps one of the more notorious examples of deficient counsel involves sleeping lawyers.<sup>156</sup> Joe Frank Cannon, a Texas attorney known for getting through trials as fast as “greased lightning,” has been repeatedly appointed by judges to represent indigent defendants despite his propensity for falling asleep during trial. Not surprisingly, ten of Cannon’s clients have been sentenced to death, one of the largest numbers among Texas attorneys. During one such case, that of Calvin Burdine, Cannon fell asleep during the state’s case on several occasions. As one might expect, Cannon’s case file contained only three pages of notes. Cannon similarly slept during Carl Johnson’s capital trial. While Burdine ultimately won relief in the Fifth Circuit,<sup>157</sup> Johnson was executed.<sup>158</sup>

George McFarland, who was sentenced to death in 1992, was represented at trial by two attorneys.<sup>159</sup> The first, John Benn, was retained by McFarland; he was a 72-year-old attorney who had not tried a capital case in two decades. The second, Sanford Melamed, was appointed by the court. The trouble at trial began fairly early on. As a newspaper reported, “Benn began nodding off during jury selection and his sleeping got worse as the trial wore on. A *Houston Chronicle* account written on one of the last days of the trial described Benn with his head rolled back on his shoulders, his mouth agape.”<sup>160</sup> Benn later explained his sleeping by saying that he found the trial “boring.”<sup>161</sup> Benn’s sleepiness was arguably not offset by Melamed’s presence—not having tried a case before, Melamed admitted to feeling overwhelmed; in addition, he apparently had a poor relationship with McFarland who was suspicious of a lawyer appointed by the very state that sought to take his life.<sup>162</sup>

The state’s case “lacked the pieces of evidence frequently found in capital murder cases”—there was no physical evidence tying McFarland to the crime

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156. See Meredith Duncan, *The (So-Called) Liability of Criminal Defense Attorneys*, B.Y.U. L. Rev. 1, 7 n.36 (2002) (listing examples of sleeping attorneys).

157. Quite unbelievably, the initial panel in the Fifth Circuit actually denied Burdine’s claim, finding that he had failed to demonstrate that when Cannon fell asleep he did so during an important part of the trial.

158. Bright, *supra* note 62, at 789.

159. See James Kimberly, *Single Witness Central to Appeal; Death Row Inmate Asserts Innocence*, HOUS. CHRON., June 15, 2003, at A1. See also TEXAS DEFENDER SERVICE, A STATE OF DENIAL, *supra* note 99, at 89–91.

160. Kimberly, *supra* note 159.

161. John Makeig, *Asleep on the Job?: Slaying Trial Boring, Lawyer Says*, HOUS. CHRON., Aug. 14, 1992, at A35.

162. Kimberly, *supra* note 159.

and there was no confession from McFarland.<sup>163</sup> Instead, only two state witnesses offered testimony directly implicating McFarland. One, McFarland's nephew, testified that McFarland was carrying a lot of money in the days after the murder and admitted participating in the robbery with two other men.<sup>164</sup> During the trial, however, it was revealed that this witness had been paid \$900 for his CrimeStoppers tip and had received leniency in his own robbery case in exchange for his testimony.<sup>165</sup> Not surprisingly, jurors appear to have placed more significant weight on the second witness.<sup>166</sup> This person, a customer at the scene of the crime, testified that she saw McFarland commit the crime. Due to the attorneys' failure to adequately contest the state's case, however, the jury was not made aware of the fact that the original description of the shooter was significantly different from what McFarland looked like.<sup>167</sup> McFarland remains on Texas' death row.

Sleeping attorneys do not appear to be an exclusively Southern phenomenon. Dale Tippins, who was convicted on drug charges in Rockland County, New York, had been represented at trial by a "court-appointed attorney, Louis Tirelli, [who] was found to be sleeping during portions of his trial."<sup>168</sup> The court refused to apply a *per se* rule of ineffectiveness for sleeping attorneys and instead determined that the impact of counsel's sleeping had been minimal<sup>169</sup> and that counsel had provided meaningful representation.<sup>170</sup>

## 2. Attorneys with Racist Attitudes

Besides sleeping lawyers, the instances of inadequate representation have sometimes been intertwined with issues of attorneys' racist attitudes. As of 1995, "[i]n at least five capital cases in Georgia, the accused were referred to with racial slurs by their own lawyers at some time during the court proceedings."<sup>171</sup> These attorneys not only perform a disservice to their clients, but intolerably corrupt the judicial process. In many of these instances, the defendants might well have been better served if their racist attorneys had simply been asleep.

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163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. Kimberly, *supra* note 159.

168. *People v. Tippins*, 173 A.D.2d 512, 512–13 (N.Y. App. Div. 1991).

169. *Id.* at 514.

170. The court found that "defense counsel vigorously cross-examined the People's witnesses, delivered opening and closing arguments which were consistent with his entrapment defense, raised appropriate objections, made appropriate motions and presented four defense witnesses, including the defendant." *Id.* at 513.

171. Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433 (1995).

Curtis Osborne, for example, was executed in 2008<sup>172</sup> after having been represented by an attorney who “barely lifted a finger to defend him.”<sup>173</sup> The attorney failed to investigate and present mitigating evidence, including mental health evidence, despite Osborne having borderline mental retardation and despite there being indicators of mental illness in the court-ordered competency evaluation.<sup>174</sup> Moreover, the attorney not only “rejected appointment of a second attorney to help with Osborne’s defense, which the ABA and all serious death penalty litigators say is essential if a capital murder defendant is to receive a fair trial,” but allegedly decided not to spend much money on Osborne’s defense because he felt that “little nigger deserves the chair.”<sup>175</sup>

Wilburn Dobbs, who had been sentenced to death in Georgia after a trial that lasted a mere three days and at which his attorney presented no mitigating evidence, “was referred to at his trial as ‘colored’ and ‘colored boy’ by the judge and defense lawyer. . . .”<sup>176</sup> The attorney, whose grandfather was apparently a slave owner, “stated that he uses the word ‘nigger’ jokingly.”<sup>177</sup> A federal district court, describing the attorney’s views, noted that the attorney said that “blacks are less educated and less intelligent than whites,” and that “integration has led to deteriorating neighborhoods and schools.” The attorney also “referred to the black community in Chattanooga as ‘black boy jungle,’” and “strongly implied that blacks have inferior morals by relating a story about sex in a classroom.”<sup>178</sup>

### 3. Attorneys with Disciplinary or Criminal Problems

There have been widespread reports in the literature of courts having appointed attorneys with significant problems, problems that have often led to disciplinary actions and even criminal charges.<sup>179</sup> For example, Joe Lee Guy, who had served as a lookout during a robbery, was sentenced to death while the two defendants who actually committed the murder received life sentences.<sup>180</sup> This disparate outcome is perhaps due to the attorney appointed

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172. Rhonda Cook, *Georgia Executes 2nd Man*, ATLANTA J. CONST., June 4, 2008, at D1.

173. Berlow, *supra* note 153.

174. *Id.*

175. *Id.* While the attorney had died before this allegation surfaced, a prior client and a local attorney corroborated the charges that the attorney had racist views. *Id.* In fact, when the attorney had once been confronted with such allegations, he had not denied using slurs. *Id.*

176. Bright, *supra* note 171, at 44–46.

177. *Id.*

178. *Id.*

179. In far too many cases, attorneys representing indigent defendants appear to have done so while addicted to alcohol or drugs. See Duncan, *supra* note 156, at 8 n.38 (listing examples of addicted attorneys).

180. See TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107, at 38–40.

to represent Guy. At the time he was appointed to be Guy's counsel, this attorney had already been disciplined two times by the state bar. In addition, he was addicted to drugs and alcohol—although he claimed to be sober at the time of Guy's trial, the attorney had been an alcoholic for over fifteen years and had occasionally used cocaine and methamphetamines around the time of the trial.<sup>181</sup> In fact, several persons who worked with the attorney on this case provided sworn affidavits that they personally witnessed the attorney abusing drugs and alcohol at the time of the trial.<sup>182</sup> The attorney's secretary even stated that she personally participated in cocaine use with the attorney as they were on their way to the trial.<sup>183</sup> An investigator assisting the attorney on the case corroborated this account, observing that the attorney often drank excessively during the time of the trial and was "very drunk" in the middle of the penalty proceedings.<sup>184</sup> As a result of the secretary's reporting this matter to the state bar, the attorney was ordered to undergo monthly psychological counseling, attend Alcoholics Anonymous and/or Narcotics Anonymous, submit to random drug testing, and suspended his law license (although it permitted him to continue practicing on probationary status).<sup>185</sup>

Guy was not the only Texas defendant to be represented by an ethically-challenged attorney. Henry Watkins Skinner was represented by a Texas attorney who had previously served as the local district attorney and who had, during that time, personally prosecuted Skinner for other crimes on two different occasions; this attorney had resigned as the local district attorney in the midst of an investigation into his handling of seized drug money and had subsequently pled guilty to a misdemeanor.<sup>186</sup> At Jose Ernesto Medellin's trial, his attorney "called no witnesses" and "[a]t the penalty phase of the trial, which lasted two hours, the lawyer put on only one expert witness, a psychologist who had never met Mr. Medellin."<sup>187</sup> At the time of the trial, this attorney "had been suspended from law practice for ethical violations."<sup>188</sup>

Anthony Ray Westley, who was executed in Texas during Governor George Bush's administration, was represented by an attorney who was arrested in the courtroom during jury selection and charged with contempt of

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181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107, at 38–40.

186. Paul Duggan, *Justice Takes a Nap*, SEATTLE TIMES, May 21, 2000, at A3.

187. See Linda Greenhouse, *Supreme Court to Hear Case of Mexican on Death Row*, N.Y. TIMES, Dec. 11, 2004, at A12 (defense lawyer's license suspended at time of trial for ethics violations).

188. *Id.*

court for failing to file pleadings in an earlier capital client's appeal.<sup>189</sup> Frances Newton was executed in Texas in 2005 despite having been represented by an attorney at trial whose failure to conduct an independent investigation was evident from his not being able to name a single person he had interviewed on his client's behalf; this attorney "has been repeatedly disciplined by the State Bar of Texas, and now is disqualified from handling capital murder cases."<sup>190</sup>

These accounts of indigent defendants in Texas being represented by attorneys who faced disciplinary action do not represent an isolated problem. Nearly one in four inmates on death row in Texas reportedly were represented by court-appointed counsel who were disciplined for professional misconduct at some point in their careers, a rate nearly 800% greater than the rate at which lawyers in Texas were generally disciplined.<sup>191</sup> Indeed, the state bar grievance procedures themselves have apparently proved ineffective in protecting defendants from inadequate representation: at least thirteen death row inmates in Texas were represented in post-conviction proceedings by court-appointed attorneys who were publicly disciplined by the state bar and who nevertheless have been appointed to multiple cases and remain eligible for additional appointments.<sup>192</sup>

Nor were these problems limited to capital cases in the Lone Star State. Georgia, for example, executed John Young in 1985 despite his having been represented by an attorney addicted to amphetamines and other drugs during trial. Young's attorney, moreover, was distracted at that time by difficulties with his marriage, child custody issues, his relationship with a lover, and his family business. As a result, the physically and emotionally drained exhausted attorney did not adequately prepare for trial and Young was sentenced to death. A few weeks after the trial, Young met the attorney in the county jail, not in his capacity as Young's lawyer, but as a fellow inmate—the attorney had been sentenced after pleading guilty to state and federal drug charges.<sup>193</sup>

Jeffrey Devan Leonard, who had been sentenced to death and whose sentence was later commuted to life without parole by the governor, had been represented at trial by an attorney who was "disbarred and indicted on a perjury charge for claiming he had handled four death-penalty cases before Leonard's. In fact, he had no experience as a lead attorney in a capital case

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189. Duggan, *supra* note 186. Judge Harold DeMoss of the Fifth Circuit Court of Appeals dissented from the denial of relief to Westley, noting that if the court-appointed attorney's inadequate performance in the case did not satisfy the *Strickland* test, then "there is no such animal as an 'ineffective counsel' and we should quit talking as if there is." TEXAS DEFENDER SERVICE, A STATE OF DENIAL, *supra* note 99, at 95–99.

190. *Executed Without a Fair Trial*, AUSTIN AM. STATESMAN, Sept. 16, 2005.

191. *Quality Of Justice*, DALLAS MORNING NEWS, Sept. 10, 2000.

192. TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107, at 48.

193. Bright, *supra* note 86, at 1859.

and surrendered his law license earlier this year in a deal with prosecutors that ended the perjury case.”<sup>194</sup>

Defendants in other states too have been represented by attorneys facing disciplinary issues. A *National Law Journal* study found that attorneys who represented death row inmates in six Southern states were disbarred, suspended, or otherwise disciplined at a rate that was 300% to 4,600% higher than the discipline rates for other lawyers in those states.<sup>195</sup> In Illinois, about one out of every eight persons sentenced to death over a period of more than twenty years was represented by an attorney who was either disbarred or suspended prior to or after the trial.<sup>196</sup> In Kentucky, twenty-five percent of death-row inmates were represented at trial by attorneys who have since been disbarred or resigned to avoid disbarment.<sup>197</sup> In Louisiana, two out of the three persons executed between 1999 and 2004 were “represented by attorneys no longer allowed to practice law, according to the Louisiana Office of Disciplinary Counsel. One of the lawyers was disbarred after being found to have participated in a laundry list of improper behavior involving several cases. The other lost his license because of mental health problems.”<sup>198</sup> An earlier study had found that thirteen percent of the defendants executed in Louisiana had been represented by lawyers who had been disciplined, a rate sixty-eight times as great as that for the state bar as a whole.”<sup>199</sup>

In North Carolina, at least sixteen death row inmates, including three who were executed, were represented by attorneys who, either prior to or after their representation of the condemned defendants, had been disbarred or disciplined for unethical or criminal conduct.<sup>200</sup> In Tennessee, at least thirty-nine lawyers, many of whom had been later convicted of crimes including theft, bank fraud, concealment of stolen money, tax evasion and obstruction of justice, had represented defendants in capital cases, had been disciplined by the state and the death sentences were affirmed in most of these cases, even where the misconduct was directly related to the case.<sup>201</sup> In Washington state, about one

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194. Stephenie Steitzer & Tom Loftus, *Fletcher Pardons 84 on Last Day*, LOUISVILLE COURIER J., Dec. 11, 2007, at A1.

195. Michael Tigar, *Lawyers, Jails, and the Law's Fake Bargains*, MONTHLY REVIEW, July-Aug. 2001, at 29, available at <http://www.monthlyreview.org/0701tigar.htm>.

196. Ken Armstrong & Steve Mills, *Inept Defenses Cloud Verdict*, CHI. TRIB., Nov. 15, 1999, at 1.

197. Debra Cassens Moss, *Death, Habeas and Good Lawyers: Balancing Fairness and Finality*, 78 A.B.A. J. 83, 83 (Dec. 1992).

198. Mark Ballard, *Louisiana Death Penalty Examined*, THE ADVOCATE, Nov. 29, 2004.

199. John Holdridge, *Gideon's Dream has Proven Elusive for Many Poor Defendants*, CONN. L. TRIB., Mar. 17, 2003, at 6.

200. Ames Alexander et al., *Uncertain Justice: The Death Penalty on Trial*, CHARLOTTE OBSERVER, Sept. 9, 2000, at 1A.

201. John Shiffman, *Troubled Lawyers Still Allowed to Work Death Cases*, TENNESSEAN, July 25, 2001, at 1A.

of five of the over eighty inmates who faced execution over a period of two decades were represented by lawyers who had been, or were later, disbarred, suspended or arrested, a rate more than 2,000% higher than the state's overall disbarment rate for attorneys.<sup>202</sup>

Finally, attorneys who face disciplinary and other significant problems have also been appointed to represent indigent defendants in post-conviction proceedings. The court-appointed attorney for Gregory Demery subsequently had his law license suspended for five years.<sup>203</sup> The attorney filed an exceedingly brief petition on Demery's behalf that only tenuously identified a single claim. The same lawyer had been appointed to represent Anthony Medina in his post-conviction proceedings and filed a petition re-writing several claims that had been previously denied on direct appeal; he also filed this petition late, resulting in its dismissal.<sup>204</sup> The same lawyer also represented Gerald Casey in post-conviction proceedings, filing a mere eleven-page habeas application that only raised record-based claims.<sup>205</sup> While Demery and Medina remain on death row in Texas, Casey was executed in 2002.<sup>206</sup>

While Demery, Medina and Casey's attorney was disciplined after being appointed to their cases, Leonard Rojas was appointed an attorney in post-conviction proceedings who had already been disciplined twice and had received two forty-eight month probated suspensions from the practice of law by the Texas State Bar.<sup>207</sup> The lawyer was still on probation at the time of his appointment and continuously throughout the representation of Rojas.<sup>208</sup> His discipline problems included neglecting a legal matter, failing to completely carry out the obligations owed to his clients and having a psychological impairment materially impairing his fitness to represent his client.<sup>209</sup> Fourteen days after being appointed to represent Rojas, the state bar disciplined the attorney for a third time.<sup>210</sup> Despite these violations, counsel was deemed "qualified" and filed a fifteen-page petition raising thirteen claims for relief. All were record-based claims, twelve of which were procedurally defaulted for

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202. Lise Olsen, *Uncertain Justice*, SEATTLE POST-INTELLIGENCER, Aug. 6, 2001, at A1.

203. TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107, at 17–18.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 18–19.

208. TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107, at 10.

209. *Id.*

210. *Id.*

not having been raised on direct appeal.<sup>211</sup> Rojas was executed in Texas in 2002.<sup>212</sup>

#### 4. Attorneys with Insufficient Training or Experience

Besides representation by attorneys facing disciplinary action and criminal charges, there have been repeated accounts of defendants being represented by counsel who have inadequate training or experience. Judges have appointed attorneys who have never tried a case before to represent defendants in capital cases.<sup>213</sup> A study of homicide cases in Philadelphia found that judges appointed many attorneys to capital cases based on criteria not related to legal ability, such as political connections, and that the resulting quality of appointed attorneys was so poor that “even officials in charge of the system say they wouldn’t want to be represented in Traffic Court by some of the people appointed to defend poor people accused of murder.”<sup>214</sup>

There have been accounts, moreover, from across the South of courts appointing inexperienced counsel in capital cases. In Alabama, for example, a judge refused to relieve counsel even when they filed a motion to be relieved of the appointment because they had inadequate experience in defending criminal cases and considered themselves incompetent to defend a capital case.<sup>215</sup> In Georgia, a newly admitted member to the bar was appointed to represent a capital defendant on appeal by a judge she had met two days earlier when she accompanied her employer to a divorce proceeding; a second attorney was appointed to assist only after she asked for help.<sup>216</sup> In Louisiana, an attorney specializing in oil and gas work was appointed to represent a defendant in a capital case; it was his first criminal case of any type.<sup>217</sup>

Ernest Willis was defended at his 1987 capital trial by two court-appointed attorneys, neither of who had any experience representing defendants in capital cases.<sup>218</sup> In fact, one of the attorneys had only recently stopped working for the district attorney who was prosecuting Willis.<sup>219</sup> The two attorneys spent fewer than three hours consulting with Willis prior to trial, conducted only a minimal cross-examination of the state’s witnesses, and failed to call any of the numerous character witnesses who had been willing to testify on Willis’

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211. *Id.*

212. DAVID CARSON, TEXAS EXECUTION INFORMATION CENTER, LEONARD ROJAS (2002), <http://txexecutions.org/reports/288.asp>.

213. Bright, *supra* note 86, at 1856.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Carter Center Symposium on the Death Penalty*, *supra* note 61, at 379.

218. *See* TEXAS DEFENDER SERVICE, A STATE OF DENIAL, *supra* note 99, at 95.

219. *Id.*

behalf.<sup>220</sup> Not surprisingly, the jury convicted and sentenced Willis to death. This was despite the fact that the state had a weak circumstantial case—even the district attorney had given himself no more than a ten percent chance of obtaining a conviction prior to the trial—with no physical evidence linking Willis to the crime, no eyewitnesses and no confession.<sup>221</sup> The lead attorney in Willis' case surrendered his law license in 1997 after being convicted of a cocaine charge and went to work as a law clerk for the district attorney in Willis' case who, by this time, had moved on to private practice.<sup>222</sup>

There have also been numerous instances in which courts have appointed inexperienced and unqualified attorneys to represent defendants in post-conviction proceedings. For example, Johnny Joe Martinez, who was executed in 2002, was given a court-appointed attorney who had never previously handled any capital post-conviction matters.<sup>223</sup> The attorney never spoke with Martinez and the five-page petition he filed did not bring before the court reportedly compelling mitigating evidence that had been omitted at the original trial.<sup>224</sup> Anthony Graves, similarly appointed counsel in Texas, had been out of law school for only three years.<sup>225</sup> This attorney reportedly “failed to conduct an adequate investigation and missed compelling evidence of Graves’s innocence, including the statement of a witness who admitted he lied when he implicated Graves at the trial.”<sup>226</sup> Despite the absence of any physical evidence linking him to the crime, and despite the fact that the witness who implicated Graves in the crime admitted at his own execution that Graves was innocent, Graves remains on death row in Texas.<sup>227</sup>

The problem posed by the appointment of inexperienced counsel is often compounded by the corresponding refusal to appoint experienced counsel. Georgia trial judges, for example, have repeatedly refused to appoint attorneys in capital cases who had successfully won new trials for their clients in post-conviction proceedings despite the fact these attorneys were experienced and familiar with the case.<sup>228</sup> While the Georgia Supreme Court reversed these rulings in several cases, trial judges have continued this practice.<sup>229</sup>

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220. *Id.* at 96.

221. *Id.*

222. *Id.*

223. See TEXAS DEFENDER SERVICE, LETHAL INDIFFERENCE, *supra* note 107, at 31, 34.

224. *Id.* at 31–32.

225. See *id.* at 29.

226. *Id.*

227. *Id.* at 28–29.

228. Bright, *supra* note 86, at 1856.

229. *Id.*

### 5. Attorneys Overburdened with Crushing Caseloads

The quality of representation provided to indigent defendants has also been undermined by the heavy workload imposed on counsel. A public defender in New Orleans, for example, represented 418 defendants during a seven-month period, leading his clients to enter guilty pleas at the arraignment itself in 130 cases.<sup>230</sup> In Georgia, attorneys in the Fulton County Public Defender program, which serves defendants in Atlanta, were assigned an average of 530 felony cases every year in addition to extraditions, probation revocations, and commitment and special hearings.<sup>231</sup> As a consequence, attorneys often resolve their client's cases upon their very first meeting with the clients; as one public defender described disposing of the cases of seventeen indigent defendants, "I met 'em, pled 'em and closed 'em—all in the same day."<sup>232</sup> In Tennessee, assistant public defenders were reported to have been handling close to a thousand cases a year each.<sup>233</sup>

Some lawyers have been offended by the limitations imposed by these crushing workloads. One lawyer wrote a letter in the state bar journal publically chronicling his own poor representation of Leslie Dale Martin, who was executed in Louisiana in 2002, pointing to his inexperience, his failure to prepare for trial and his overwhelming workload at the time.<sup>234</sup> Many lawyers who have objected to this system of criminal practice, which has come to be known there as "slaughterhouse justice," however, have not fared well.<sup>235</sup> For example, when a lawyer, carrying a caseload of 122 despite closing 476 cases in ten months, asserted her ethical obligation to limit her caseload, she was berated by the trial judge, her request was denied and she was later demoted to juvenile court by the director of her office.<sup>236</sup>

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230. *Id.* at 1851. The Louisiana Supreme Court finally responded, finding that the excessive caseloads and insufficient resources precluded the public defender's office from providing their clients effective assistance of counsel. *Id.*

231. *Id.* at 1850–51.

232. *Id.*

233. Editorial, *State Grossly Underpays its Criminal Attorneys*, TENNESSEAN, Feb. 12, 2006, at 26A.

234. David J. Williams, *Regarding the Trial of Leslie Dale Martin*, LA. B.J., Aug./Sept. 2002 ("On March 30, 1992, I was appointed to represent Martin. Exactly six weeks later, over our vigorous protest that we were not prepared, the trial began and Martin was convicted and sentenced to death. Neither of Martin's two attorneys had any experience or training in handling this type of case. In addition, the caseload of the lead counsel was such that he only had time to read through the file once before trial. We hired a psychiatrist to examine Martin for the penalty phase. We thought that the case would be continued because the psychiatrist had not examined Martin before the trial began. Instead, the trial judge ordered the trial to begin and the psychiatrist to examine Martin at night when the trial went on during the day. Other than hiring the psychiatrist, we had not done any preparation whatsoever for the penalty phase.").

235. Bright, *supra* note 86, at 1850–51.

236. *Id.*

## 6. Attorneys Lacking Adequate Resources

The quality of representation provided to indigent defendants, moreover, has also been undermined by the failure to provide counsel necessary resources. “Mounting a proper defense in a capital case requires methodical research; deep, probing interviews; and intricate planning and strategizing. The hours can stretch into the thousands; the bills easily can reach six figures.”<sup>237</sup> Lack of access to proper resources, however, remains a critical problem.<sup>238</sup>

A public defender in New Orleans, for example, received no investigative support in “routine cases” because the three investigators in the public defender’s office were responsible for more than 7,000 cases per year; nor were funds for expert assistance available to the attorney.<sup>239</sup> An attorney appointed to represent a capital defendant in Alabama was granted only \$500 for expert and investigative expenses in a case where he was confronted on the other side with three prosecutors and an array of law enforcement agencies and expert witnesses.<sup>240</sup> While the attorney later testified that he would have hired experts if it were a civil case because the failure to do so would have constituted malpractice, the \$500 limit led him to forego such assistance in the criminal case.<sup>241</sup> As he explained:

Without more than \$500, there was only one choice, and that is to go to the bank and to finance this litigation, myself, and I was just financially unable to do that. It would have cost probably in excess of thirty to forty thousand dollars, and I just could not justify taking those funds from my practice, or my family at that time.<sup>242</sup>

The quality of representation provided to indigent defendants has been further undermined by the failure to properly compensate appointed counsel. In some other instances, courts have failed to compensate indigent defense counsel at all.<sup>243</sup> There have also been reports of appointed counsel not being paid for months or years after they provided the representation or having their

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237. Henderson, *supra* note 64.

238. Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1438–39 (1999) (Klein noted that Professor Charles Ogletree, Jr., who served as the Reporter to the Committee formed by the Judicial Conference of the United States, “subsequently observed that there was a great deal of testimony from public defenders ‘who explained how their inability to provide effective assistance of counsel was a direct result of the inadequate resources made available to them under federal law.’”) (citing Charles Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS., Winter 1995, at 81, 86).

239. Bright, *supra* note 106, at 788.

240. Bright, *supra* note 86, at 1847–48.

241. *Id.*

242. *Id.*

243. Bright, *supra* note 62, at 788.

applications for compensation arbitrarily reduced by judges or other officials.<sup>244</sup>

In many other instances, while courts have compensated attorneys, the rates of compensation have been dismally low.<sup>245</sup> For example, while attorneys appointed to defend capital cases in Philadelphia were paid an average of over \$6,000 per case,<sup>246</sup> compensation for counsel in Alabama was limited to \$1,000 for out-of-court work.<sup>247</sup> As a result, two attorneys who had spent 246.86 and 187.90 hours respectively on out-of-court work were paid the equivalent of \$4.05 and \$5.32 per hour for their efforts.<sup>248</sup> And, while compensation in Kentucky was limited to \$2,500 in capital cases,<sup>249</sup> lawyers in Mississippi capital case were only paid \$1,000 dollars and reimbursed for their overhead expenses.<sup>250</sup> In New Jersey, court-appointed counsel were paid \$30 per hour for in-court work and \$25 per hour for out-of-court work.<sup>251</sup> Court-appointed lawyers in New York City were reportedly paid \$40 per hour for work in-court and \$25 per hour for work out-of-court, the second-lowest rate in the nation.<sup>252</sup> While court-appointed attorneys in Tennessee non-criminal cases were paid up to \$225 and \$350 per hour, those who were appointed to represent capital defendants were paid only \$60 to \$100 per hour, depending on the procedural status of the case.<sup>253</sup> Similarly, lawyers in parts of rural Texas received no more than \$800 to handle a capital case.<sup>254</sup> A study in Virginia, moreover, found that after overhead expenses were taken into account, the attorney representing an indigent defendant in a capital case was paid at an effective rate of \$13 per hour.<sup>255</sup>

Appellate counsel too are often poorly compensated. In New York, while private counsel charged clients \$15,000 to \$50,000 for appeals, court-appointed counsel were often paid a \$1,200 standard statutory fee, permitting a maximum of 30 hours of work at \$40 per hour.<sup>256</sup> The court-appointed lawyer

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244. *Id.*

245. See Stephen B. Bright, *Georgia Beggars Indigent Defense*, FULTON COUNTY DAILY REPORT, Jan. 24, 2008, at 4 (“There is mounting pressure to sacrifice constitutional principles to political cost and considerations, to treat defense lawyers as fungible, and to try to get by with what little money the Legislature provides, no matter how grossly insufficient it is.”).

246. Bright, *supra* note 86, at 1853.

247. *Id.*

248. *Id.*

249. *Id.*

250. Bright, *supra* note 62, at 788.

251. Fritsch & Rohde, *supra* note 68.

252. *Id.*

253. Redick et al., *supra* note 63, at 334.

254. Bright, *supra* note 86, at 1853; Bright, *supra* note 62, at 818–19.

255. Bright, *supra* note 86, at 1853.

256. Jane Fritsch & David Rohde, *For Poor, Appeals are Luck of the Draw*, N.Y. TIMES, Apr. 10, 2001, at A1.

representing Jovani Garcia spent about 250 hours on the appeal, and the resulting \$1,200 paycheck amount to less than \$5 per hour.<sup>257</sup>

When attorneys have challenged these abysmally low rates of compensation, they have not fared well. For example, when a lawyer in Georgia who had been appointed to a capital case submitted his first billing statement to the judge for approval, the judge told him that he was spending too much time on the case; the judge later summarily replaced this lawyer with a another one and the defendant was ultimately sentenced to death.<sup>258</sup> In Virginia, where compensation in felony cases was limited to \$305 in cases where the punishment was less than 20 years and \$845 in cases where the punishment was more than 20 years, an attorney who challenged these limits was removed from the case by the circuit judge; and, another judge announced at calendar call that any attorney raising a similar challenge would be removed from the list of appointed counsel.<sup>259</sup>

Not surprisingly, these low rates of compensation have a direct bearing on the quality of representation being provided to indigent defendants. As the Director of the ABA's Death Penalty Representation Project noted, "I can say with confidence that . . . [w]e are seeing the same kinds of egregiously bad lawyering that we saw 10 or 15 years ago, for a variety of reasons, including inadequate funding."<sup>260</sup> The *New York Times*, for example, conducted a long investigation into the provision and performance of appointed counsel in New York City and found that appointed counsel were paid at rates that actively discourage them from spending enough time on cases.<sup>261</sup> One lawyer, for example, earned about \$125,000 one year by handling sixteen hundred cases; due to this immense workload, he did not confer with clients, did not return client phone calls and did not prepare or file necessary motions, focusing instead on working out quick plea bargains.<sup>262</sup> "Most good lawyers do not work for \$4 an hour or even \$20, \$50 or \$100 an hour. Lawyers paid so little cannot afford to spend the time required to conduct interviews, investigations and negotiations, and defend cases at trials."<sup>263</sup>

As one Virginia prosecutor observed, "you get what you pay for."<sup>264</sup> He noted that when one takes a look at the list of attorneys appointed to represent indigent defendants, one finds very few experienced attorneys because they

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257. *Id.*

258. Bright, *supra* note 86, at 1857.

259. Bright, *supra* note 62, at 788.

260. Shaila Dewan, *Releases from Death Row Raise Doubts Over Quality of Defense*, N.Y. TIMES, May 7, 2008, at A1 (quoting Robin Maher).

261. Jane Fritsch & David Rohde, *For the Poor, a Lawyer with 1,600 Clients*, N.Y. TIMES, Apr. 9, 2001, at A1.

262. *Id.*

263. Bright, *supra* note 62, at 788.

264. *Id.*

cannot afford such work. Instead, “you either have very inexperienced attorneys right out of law school for whom any money is better than no money . . . [o]r you have people who are really bad lawyers who can’t make a living except off the court appointed list.”<sup>265</sup>

*C. Consequences of Inadequate Assistance and Deficient Counsel*

The shockingly inadequate representation chronicled above represents the evisceration of a critical constitutional safeguard of individual liberty. Many of the defendants provided deficient assistance by often deficient counsel have been executed. Others, while lucky to not lose their lives, have spent long terms in prison. The often disparate nature of representation provided to indigent defendants as compared to those who can afford the services of good counsel undermines faith in the fair operation of the judicial process, opening the door to criticism such as:

The dream of Gideon has not been realized. If we are not going to do something about this, we ought to sandblast the words “equal justice under law” from the front of the Supreme Court building. And we ought to just say that our system of justice is like the sky box at the stadium, or membership in the country club—available only to people who can afford it.<sup>266</sup>

The inadequate representation and deficient counsel have also created an unacceptable risk of innocent persons being convicted and sentenced. For example, Jimmy Ray Bromgard, who was convicted of the brutal rape of an eight-year-old girl in Montana, was released after serving fifteen years in prison when DNA testing exonerated him.<sup>267</sup> During the trial, Bromgard’s attorney, a lawyer who had contracted with the county to defend all indigent defendants for a flat fee, conducted no investigation, gave no opening statement, failed to challenge the victim’s in-court identification, failed to object to unfounded testimony by the state’s expert about hair evidence in the case, and failed to prepare a closing argument.<sup>268</sup>

Gary Nelson, who was released after serving eleven years on death row, had been represented at his capital trial in Georgia by a sole practitioner who had never tried a capital case and who was compelled to represent Nelson by himself after the trial judge denied his request for co-counsel.<sup>269</sup> This court-appointed attorney, who was struggling with financial problems and a divorce, was paid at a rate of only \$15 to \$20 per hour and was not provided funds for an investigator.<sup>270</sup> The attorney failed to effectively challenge the

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265. *Id.*

266. Herbert, *supra* note 80.

267. GIDEON’S BROKEN PROMISE, *supra* note 59, at 15.

268. *Id.*

269. Bright, *supra* note 86, at 1838.

270. *Id.*

circumstantial case against Nelson, including questionable forensic evidence, delivered a closing argument that was merely 255 words long, and was later disbarred for other reasons.<sup>271</sup> Nelson was released when *pro bono* counsel in post-conviction proceedings discovered not only that the hair found on the victim's body, which the prosecution expert had linked to Nelson, lacked sufficient characteristics for microscopic comparison, but that the Federal Bureau of Investigation had previously examined the hair and found that it could not validly be compared.<sup>272</sup>

Frederico Martinez-Macias, who was sentenced to death in Texas, was represented at his capital trial by a court-appointed attorney who was paid only \$11.84 per hour.<sup>273</sup> The attorney failed to present an available alibi witness, relied upon an incorrect assumption about a key evidentiary point without doing the research that would have corrected his erroneous view of the law, and failed to interview and present witnesses who could have rebutted the state's case.<sup>274</sup> After *pro bono* counsel in post-conviction proceedings properly investigated the case and developed facts about his innocence, Martinez-Macias won federal habeas corpus relief; and when a grand jury refused to re-indict him, he was released after having spent nine years on death row.<sup>275</sup>

These anecdotal accounts do not represent isolated instances of innocent persons falling through the cracks. Instead, post-conviction DNA testing has conclusively exonerated many defendants<sup>276</sup> and a common denominator running through the unjust conviction cases is a shoddy defense at trial.<sup>277</sup> The Innocence Project notes that "[a] review of convictions overturned by DNA testing reveals a trail of sleeping, drunk, incompetent and overburdened defense attorneys, at the trial level and on appeal."<sup>278</sup> This has led a scholar to conclude that if one had to make a single reform in the criminal justice system that "would do more than any other plausible policy to reduce the frequency of false convictions[,] . . . [t]hat reform is making sure that every defendant has the effective assistance of counsel."<sup>279</sup>

A number of Supreme Court Justices have indicated a genuine awareness of the role of inadequate representation has played in the cases where innocent persons have been convicted. Justice John Paul Stevens observed that the "recent development of reliable scientific evidentiary methods has made it

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271. *Id.*

272. *Id.*

273. *Id.* at 1838–39.

274. Bright, *supra* note 86, at 1838–39.

275. *Id.*

276. Dripps, *supra* note 22, at 259.

277. *Id.* at 260–61.

278. THE INNOCENCE PROJECT, BAD LAWYERING, <http://www.innocenceproject.org/understand/Bad-Lawying.php> (last visited Aug. 1, 2009).

279. Dripps, *supra* note 22, at 261.

possible to establish conclusively that a disturbing number of persons who had been sentenced to death were actually innocent,” a situation that Justice Stevens notes “most dramatically illustrate[s]” the consequences of failing to provide adequate representation to indigent defendants.<sup>280</sup> Justice Sandra Day O’Connor too voiced concerns about the role of inadequate representation by counsel in capital cases during a 2001 speech delivered at a meeting of the Minnesota Women Lawyers, noting that “[a]fter 20 years on the high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country.”<sup>281</sup> She further added that “as the rate of executions have increased, problems in the way which the death penalty has been administered have become more apparent . . .” and that “[p]erhaps most alarming among these is the fact that if statistics are any indication, the system may well be allowing some innocent defendants to be executed.”<sup>282</sup> Earlier that year, Justice Ruth Bader Ginsburg voiced similar concerns about the quality of representation in supporting a proposed moratorium on executions in Maryland.<sup>283</sup>

It bears noting, however, that the problem of innocent persons being convicted raises concerns beyond the manifest injustice done to those who have been wrongfully convicted and the violation of the precept that it is better to let ten guilty persons go free than to convict one innocent person. The conviction of an innocent person is accompanied by the concurrent failure to apprehend and convict the actual perpetrator of the crime, leaving that person free to commit additional crimes. Indeed, in a large number of the cases of persons exonerated by DNA, the actual perpetrator went on to commit serious offenses, ranging from theft to assault, rape and murder.<sup>284</sup> Moreover, the continued freedom experienced by the actually guilty perpetrators undermines the deterrence goals of criminal law. Not only are those persons not individually deterred, but any third persons aware of the actual perpetrator’s evasion of guilt—whether they be friends, family or acquaintances—too are less deterred because the data shows that the single biggest factor having a

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280. Bright, *supra* note 62, at 791.

281. Ken Armstrong & Steve Mills, *O’Connor Questions Fairness of Death Penalty; Justice Rethinking Laws She Shaped*, CHI. TRIB., July 4, 2001, at 1.

282. *Id.*

283. *Id.*

284. See Innocence Project, Fact Sheet, <http://www.innocenceproject.org/content/351.php#> (last visited Aug. 1, 2009). See also Locke E. Bowman, *Lemonade Out of Lemons: Can Wrongful Convictions Lead to Criminal Justice Reform?*, 98 J. CRIM. L. & CRIMINOLOGY 1501, 1502 (2008) (“In some cases, with police, prosecutors, and the courts focused on the wrong person, the guilty perpetrator has remained free and has committed subsequent serious crimes that might have been prevented.” (citations omitted)).

bearing on the deterrence value of the law is not the magnitude of the punishment, but the likelihood of apprehension.<sup>285</sup>

### III. EPILOGUE

Given the pervasive, shockingly poor representation provided by counsel, and the enormous toll that has exacted not only on defendants but also the criminal justice system at large, it is fair to characterize the Court's approach to the right to effective assistance of counsel in *Strickland* as fundamentally wanting. *Strickland* in fact has been subject to withering criticism by scholars. Scholars have argued that *Strickland* has created an almost "insurmountable hurdle for defendants claiming ineffective assistance"<sup>286</sup> and has "foster[ed] tolerance of abysmal lawyering."<sup>287</sup> Indeed, they have lamented "the degree of *Strickland's* damage to the rule of law, expressed in doctrines carefully developed over years, the quantity of unjust, even fatal, consequences fostered in individual cases, and the disservice done to the very essence of the relationship between attorney and client. . . ."<sup>288</sup>

Some of this criticism has been directed toward *Strickland's* performance prong. Scholars have criticized this aspect of the *Strickland* analysis for failing to inquire *ex ante* whether "the defense is institutionally equipped to litigate as effectively as the prosecution,"<sup>289</sup> improperly emphasizing conduct sufficient with "prevailing professional norms,"<sup>290</sup> and unsoundly creating the "strong presumption" of counsel's reasonableness.<sup>291</sup>

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285. See, e.g., Phillip J. Cook & Jens Ludwig, *Principles for Effective Gun Policy*, 73 *FORDHAM L. REV.* 589, 604 (2004) ("Deterrence research suggests that crime is generally more responsive to changes in the perceived likelihood of punishment, than to changes in the severity." (citation omitted)); Michael D. Hintze, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 *COLUM. HUM. RTS. L. REV.* 395, 406 (1993) ("The deterrence value of a given punishment is much more dependent on the likelihood of its being imposed and carried out rather than its severity." (citation omitted)); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 *VA. L. REV.* 1, 86 n.305 (2002) ("One of the things we do know about deterrence is that it increases more with the likelihood of sanction than with the severity of it." (citation omitted)).

286. See Martin C. Calhoun, Note, *How to Thread the Needle: Toward a Checklist-based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 *GEO. L.J.* 413, 427 (1988).

287. See William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 *WM. & MARY BILL RTS. J.* 91, 94 (1995). See also Duncan, *supra* note 156.

288. Geimer, *supra* note 287, at 97.

289. Dripps, *supra* note 22, at 243. See also Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 *IOWA L. REV.* 433, 505 (1993) (arguing that the *Strickland* test fails to provide adequate counsel in the first place).

290. See Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 *COLUM. L. REV.* 9, 82 (1986) (arguing that Justice O'Connor's concerns about handcuffing defense counsel are unpersuasive and "[a]ppropriately rigorous professional

Much criticism has also been directed toward *Strickland*'s prejudice requirement. Scholars have criticized this aspect of the *Strickland* analysis for overemphasizing innocence<sup>292</sup> and sacrificing the means of procedural safeguards for the ends of reliable trials.<sup>293</sup> They have noted that ironically the prejudice prong is perhaps the most difficult to show in the very cases where counsel's conduct was the most egregious<sup>294</sup> and have argued that, by allowing reviewing court's to deny relief without ever assessing counsel's performance,<sup>295</sup> it disserves the public and the legal profession by failing to provide clear examples of unacceptable lawyering and not making "clear that such shoddy performances will not be ignored or glossed over."<sup>296</sup> Finally, some scholars have noted that the difficulties presented by the prejudice prong are heightened in capital cases because the determination of sentence involves the jury's subjective judgments, an exercise difficult to replicate on appeal based on a cold record.<sup>297</sup> They have also observed that reviewing courts often tend to conflate the guilt and punishment phases by mischaracterizing the purpose of mitigating evidence and misapplying the standard for showing ineffective assistance during the punishment phase.<sup>298</sup> Some have gone so far as to argue that *Strickland* produces arbitrary reviews in capital cases, contravening the Eighth Amendment.<sup>299</sup>

It bears noting that while there certainly are external factors, such as inadequate funding, crushing workloads and lack of resources, that contribute to the crisis in the defense function, the doctrinal framework set forth in *Strickland* has a role in explaining even these problems. For example, the

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standards for appraising counsel's conduct should not discourage the type of attorney one wants to attract from accepting in forma pauperis assignments").

291. See Duncan, *supra* note 156, at 21–24 (arguing that *Strickland*'s presumptions are too burdensome).

292. See *id.* at 19.

293. See generally 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 (1986).

294. See, e.g., Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1467 (1999).

295. See Duncan, *supra* note 156, at 20 ("[M]any ineffectiveness cases are dispensed with based on lack of prejudice to the defendant's case, without discussing counsel's deficient performance." (citations omitted)); Calhoun, *supra* note 286, at 458 app. finding that in 1988, circuit courts reviewing ineffective assistance claims considered deficient performance in only 54% of the cases).

296. See Duncan, *supra* note 156, at 6, 21.

297. See Jeffery Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 169 (2001).

298. See *id.* at 170.

299. See generally Amy R. Murphy, Note, *The Constitutional Failure of the Strickland Standard in Capital Cases Under the Eighth Amendment*, 63 LAW & CONTEMP. PROBS. 179 (2000).

absence of *ex ante*, meaningful guidance about the specific obligations of counsel combined with the powerful presumptions of competence and reasonableness have allowed jurisdictions to severely under-fund defense systems. Had *Strickland* imposed more robust obligations on counsel, jurisdictions would have been compelled to provide more adequate funding or face the prospect of appellate courts reversing convictions.

Perhaps recognizing the continuing widespread inadequate assistance being provided to indigent defendants, particularly in capital cases, the Supreme Court in recent years has taken a more robust approach to the performance prong of the *Strickland* test. First, the Court held in *Williams v. Taylor* that the defendant's attorney had provided constitutionally deficient assistance in failing to adequately prepare for the defendant's death penalty sentencing hearing.<sup>300</sup> In an opinion authored by Justice O'Connor, who had authored the majority opinion in *Strickland* that was rather dismissive of the ABA Standards, the Court cited to the ABA Standards for Criminal Justice in emphasizing counsel's duty to conduct an independent and adequate investigation.<sup>301</sup>

Three years later, in *Wiggins v. Smith*, the Court once again found that an attorney had provided constitutionally deficient assistance.<sup>302</sup> Here too the Court embraced the ABA Standards in determining the inadequacy of the attorney's investigation and preparation for the sentencing phase of a capital trial.<sup>303</sup> Soon thereafter, in *Rompilla v. Beard*, the Court also found that a capital defendant's attorney had provided deficient assistance by failing to adequately investigate and present evidence at the penalty phase proceedings.<sup>304</sup> As in the prior cases, the Court repeatedly looked to the ABA Standards in evaluating counsel's performance.<sup>305</sup> As some scholars have surmised, these cases perhaps mark the Court's willingness to re-visit the standards-based approach suggested by Justice Marshall in his prescient dissenting opinion in *Strickland v. Washington*.<sup>306</sup>

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300. *Williams v. Taylor*, 529 U.S. 362 (2000).

301. *Id.* at 396.

302. *Wiggins v. Smith*, 539 U.S. 510 (2003).

303. *Id.*

304. *Rompilla v. Beard*, 545 U.S. 374 (2005).

305. *Id.* at 387.

306. *Strickland v. Washington*, 466 U.S. 668, 706–09 (Marshall, J., dissenting). *See also* John H. Blume & Stacey D. Neumann, "It's Like *Deja Vu* All Over Again": *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127 (2007) (observing that the Court might be moving towards adopting the standards-based approach suggested by Judge Bazelon of the D.C. Circuit Court in 1973).

## CONCLUSION

Pervasive inadequate representation by counsel has rendered practically meaningless a critical constitutional safeguard of individual liberty. It has also contributed to the conviction of innocent persons and the accompanying failure to convict the actual perpetrators, persons who remain free to commit additional crimes and whose continued liberty undermines efforts to deter crime. While these problems prevailed before the Court recognized a constitutional right to effective assistance of counsel, they have continued to plague society unabated. Indeed, it has been painfully clear that the doctrinal framework created by the Court in *Strickland v. Washington* has in important ways exacerbated these problems. The twenty-fifth anniversary of *Strickland* marks an opportune time for the Court to revisit its effective assistance of counsel jurisprudence and remedy its deficiencies by disentangling and re-framing the right to effective assistance of counsel.<sup>307</sup>

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307. See Chhablani, *supra* note 2 (tracing *Strickland's* doctrinal limitations to the entanglement of the Sixth Amendment with the Due Process clause and offering an alternate, disentangled construction of the right to effective assistance of counsel).

