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## Validating the Right to Counsel

Brandon L. Garrett

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# Validating the Right to Counsel

Brandon L. Garrett\*

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## *I. Introduction*

How the Sixth Amendment right to counsel has grown. The Supreme Court’s 1963 decision *Gideon v. Wainwright*,<sup>1</sup> interpreting the Sixth Amendment right to counsel to obligate the state to provide indigent felony defendants with counsel,<sup>2</sup> is the only criminal procedure decision the Court considers as deserving the title of a “watershed” ruling because of the degree to which it effected a “profound” and “sweeping” change.<sup>3</sup> This Symposium celebrates it. Yet the fifty years since *Gideon* have been marked by rulings that have carried water for *Gideon*, including by extending its meaning, pushing the regulation of counsel’s

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

2. *See id.* at 334–36 (requiring that states provide indigent criminal defendants with counsel at criminal trial).

3. *Whorton v. Bockting*, 549 U.S. 406, 417–21 (2007) (comparing the weight of *Gideon* to that of *Crawford v. Washington*, 124 S. Ct. 1354 (2004)).

performance into other stages of the criminal process, redefining how postconviction litigation is structured, and affecting the interpretation of other criminal procedure rights. Conversely, while *Gideon* required that indigent defendants charged with a felony receive state-appointed counsel,<sup>4</sup> the quality of indigent defense has been widely deplored, and the regulation of the effectiveness of counsel has, from its inception, been a fraught postconviction intervention into problems of legal ethics and the constitutional fairness of criminal convictions.

The subsequent elaboration of the *Gideon* right was chiefly in the postconviction context, and that alone says much about what has happened since. It was in *Strickland v. Washington*,<sup>5</sup> more than twenty years after *Gideon*'s Trumpet sounded, that the Court cemented the principle that a defendant is entitled not just to a lawyer, but to a reasonably effective advocate.<sup>6</sup> The Court ruled, however, that a trial verdict should not be reversed even if the defense performed so unreasonably as to be constitutionally ineffective, so long as those failures did not materially prejudice the outcome.<sup>7</sup> The Court's ruling itself suggested that the entitlement to a reasonably effective advocate would be a thin one. The Court denied relief in the case and encouraged lower courts to conduct a harmless error-type inquiry into the effectiveness of counsel, rather than rule on the effectiveness of counsel.<sup>8</sup> Relief under *Strickland* tended to be confined to outright conflicts of interest or unusually disastrous errors by counsel.<sup>9</sup>

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4. *Gideon*, 372 U.S. at 334–36.

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

6. *See id.* at 685–87 (establishing the right to effective assistance of counsel).

7. *See id.* at 687 (establishing the prejudice prong of *Strickland*'s two-part test for proving effective assistance of counsel).

8. *See id.* at 693 (“Attorney errors come in an infinite variety and are as likely to be utterly harmless . . . . Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.”).

9. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 (1997) (“Defendants tend to win ineffective assistance claims only when their lawyers had a conflict of interest or made some discrete error of great magnitude.”).

The Court may not have predicted just how pervasive *Strickland v. Washington* claims would become. In this Article, I describe how ineffective assistance of counsel claims came to dominate and define federal habeas litigation, changed the structure of state postconviction rules in reaction to the new prominence of ineffective assistance of counsel claims at the federal level, and raised quite difficult questions for postconviction courts. Over time, ineffective assistance of counsel claims provided a sort of umbrella claim to examine a wide range of trial-related questions. More recently, additional types of errors have become the subject of regulation, creating new applications for ineffective assistance of counsel claims during habeas litigation. The Court extended the right to encourage provision of state postconviction counsel.<sup>10</sup> The right was quickly extended to apply to inadequate defense lawyering during plea bargaining,<sup>11</sup> and more recently the Court has expanded the analysis to make clear that the Sixth Amendment now applies to all “critical stages of a criminal proceeding.”<sup>12</sup>

As a result, the Sixth Amendment right to counsel has been transformed from a pretrial entitlement to a central—if sporadically enforced—means for regulating the entire criminal process. Despite, or perhaps because of, its mounting centrality to the Sixth Amendment *Gideon* right and more generally to the entire apparatus of criminal procedure, the *Strickland v. Washington* inquiry is notoriously malleable. It is not clear, even putting to one side how well the analysis is conducted, that judges rely on the appropriate factors when deciding whether errors by counsel were either constitutionally unreasonable, or, in fact, sufficiently prejudiced the outcome at trial. As William Stuntz put it well, “[b]oth kinds of prejudice are probably beyond judges’ capacity to determine accurately,” because “good data on

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10. See *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012) (holding “[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial”).

11. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (noting that because our criminal law system “is for the most part a system of pleas, not a system of trials,” the right to counsel must be extended to the plea bargain process).

12. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

the effects of different defense tactics do not exist.”<sup>13</sup> Indeed, I will develop how judges may do poorly even when evaluating subjects on which there is some good data, because of their reliance on suppositions about the impact of evidence on jurors that are implausible or have been called into question by social science research.

Could the approach towards judging effectiveness of defense counsel be “validated” by social science evidence, or at least be better informed by it? Does the Supreme Court’s test for assessing whether to remedy ineffective defense representation itself generate information about what it purports to examine? Apart from the validity of the method itself, is the test reliable in its application?<sup>14</sup> Quite a bit is known about some types of evidence, such as eyewitness evidence and confession evidence, and how they impact jurors. Not enough is known about what impact many other types of evidence have on a jury, much less how those types of evidence impact jurors when contaminated by attorney error, or when not presented at all due to a failure to investigate. Social science research has tended to focus on jury decisionmaking, and not enough has been done to research the role that lawyering plays during trials. Perhaps such research could place *Strickland v. Washington*, and harmless error more generally, on a stronger empirical footing. Nor has enough social science work been done to examine how criminal defendants might make decisions in plea negotiations (more work has been done on competence of defendants and on lawyering in juvenile cases)<sup>15</sup> in order to better analyze prejudice regarding collateral

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13. William J. Stuntz, *The Political Constitution Of Criminal Justice*, 119 HARV. L. REV. 780, 824 n.231 (2006).

14. On the term “validity,” see *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 n.9 (1993) (“[S]cientists typically distinguish between ‘validity’ (does the principle support what it purports to show?) and ‘reliability’ (does application of the principle produce consistent results?).”). Of course, inquiry into the effect of representation by counsel could also be an “unreliable” analysis. I focus here on whether the method of inquiry into the effectiveness of defense representation itself has valid underpinnings; does the test provide information about what it purports to examine?

15. See generally NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES (2002) (presenting five studies exploring the role of defense attorneys and the competence of defendants in juvenile cases). The MacArthur studies explore the perceptions of defense attorneys concerning clients’ competence and participation in decisionmaking during plea

consequences of a conviction and questions regarding likely outcomes had defense counsel advised the defendant more carefully regarding a plea offer from the prosecution.<sup>16</sup>

Part of the problem is that judges have developed ineffective assistance review in the context of postconviction review. The test for ineffective assistance of defense counsel is shot through with prejudice analysis, as well as with a set of artificial blinders: judgments that only certain types of failures by counsel will be regulated. Judicial deference to the “wide range of professional conduct,” is based on values including finality, legal ethics, and professional codes, as well as accuracy.<sup>17</sup> Bracketing such ethical and normative questions, insights from existing research suggest that improving the accuracy of plea bargaining and trial outcomes can best occur through development and documentation of more accurate evidence in the earlier stages of criminal investigations, and not through after-the-fact postconviction review, which will be sporadic, deferential, and perhaps not particularly accurate. I conclude, as others have long maintained, that to ensure at the front end that adequately trained and resourced counsel exist—rather than to try to assess failures after the fact—would be far more promising. Providing adequate resources for defense lawyers has been politically unpopular and practically intractable in many jurisdictions. However, identifying priorities for allocating resources to areas of need,

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negotiations, findings concerning attorney behavior, competence and responses of attorneys representing clients of doubtful competence during the plea bargaining process; examining role of competence in cases proceeding to a trial; debrief both attorneys and clients; and study insanity plea decisions. *Id.* For discussion of research concerning adjudicative competence of juveniles, see, for example, *id.* at 146–51 (reviewing literature).

16. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010) (declaring that prong one of *Strickland*—reasonable professional assistance—requires that attorneys advise their clients about the risk of deportation (a collateral consequence) when considering pleading guilty to a crime).

17. See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (ruling that the court’s examination of whether an attorney’s representation was professionally reasonable under the circumstances must be highly deferential); see also *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (“We have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” (internal quotations and citation omitted)).

including areas of potential error—validating *Gideon*—can help to prioritize resources to avoid serious miscarriages of justice. Social science research may help to identify ways to better train defense lawyers, inform discovery and other pretrial investigative practices, create standards for representation during plea bargaining, and evaluate expert evidence.<sup>18</sup> The defense bar has increasingly engaged with science and social science to improve standards for effective defense representation. Social scientists in turn might more closely study lawyering in pretrial stages of the criminal process—and over time, this may help to validate *Gideon*.

## II. *The Expanding Reach of Strickland v. Washington*

In the tradition of *Marbury v. Madison*,<sup>19</sup> major constitutional developments can come from decisions in which the Supreme Court denies relief to the party that seeks a novel constitutional remedy. The meaning of the Court's ruling may be less immediately apparent when the Court recognizes a constitutional claim for the first time but then denies relief. I will return to *Gideon*, the case whose fifty-year anniversary we celebrate in this Symposium. My primary subject is *Strickland v. Washington*, whose importance to the conduct of defense lawyers at criminal trials and the role of habeas corpus review was particularly unexpected, given the facts of the case and the Court's analysis of the role that counsel plays at a trial.

The defendant, David Leroy Washington, was charged with committing three murders.<sup>20</sup> He was not an ideal client, to put it mildly. He confessed to the police against his attorney's advice.<sup>21</sup> He then pleaded guilty, again contrary to his attorney's advice,

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18. See, e.g., DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 16 (2012) (providing overview of recommendations to rely on more “accurate and transparent evidence” permitting “the legal actors’ trust in the evidence and limit[ing] their ability to distort and hide it” and “narrowing the opportunities for both unjust prosecutions and frivolous defenses”).

19. *Marbury v. Madison*, 5 U.S. 137 (1803).

20. See *Strickland*, 466 U.S. at 672 (describing the charges against Washington).

21. *Id.*

and waived the right to a jury.<sup>22</sup> Perhaps discouraged by each of those decisions, his attorney put on a very thin sentencing case.<sup>23</sup> The attorney viewed his client as competent, and spoke only to family members without consulting an expert, seeking a psychiatric exam, or providing any witnesses at all, including character witnesses.<sup>24</sup> He did little more than ask for the judge's mercy and present his client's remorse.<sup>25</sup> Washington was sentenced to death.<sup>26</sup>

The Supreme Court held that the Sixth Amendment does not just guarantee an indigent defendant an attorney, or an attorney free from state interference, but that in order to safeguard the fairness of the trial, a defendant is also entitled to a minimally effective attorney.<sup>27</sup> The Court set out two prongs to the analysis. First, the Court held that to be constitutionally ineffective, the attorney's performance must deviate from a standard of "reasonableness under prevailing professional norms."<sup>28</sup> That standard relies on professional standards and practice as "guides" at least<sup>29</sup>—not on evidence concerning what errors in fact prejudice cases—although unreasonable performance is of the type that would hurt a client's case, and therefore prejudice is relevant to this first prong of the analysis as well. To the extent that the first prong looks at what happened in the defendant's case, after asking what the lawyer did and whether it comported with reasonable professional norms, the judge must then look at

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22. *Id.*

23. *Id.*

24. *See id.* at 673 (explaining how Washington's counsel performed deficiently).

25. *See id.* at 673–74 (reciting the events occurring during Washington's plea colloquy).

26. *Id.* at 675.

27. *Id.* at 685–86 (citing prior rulings such as *Geders v. United States*, 425 U.S. 80 (1976), *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970), and *Ferguson v. Georgia*, 365 U.S. 570, 593–596 (1961), which dealt with claims of state interference with performance of counsel, with the exception of *Cuyler v. Sullivan*, 446 U.S. 335 (1980), dealing with a conflict of interest, the Court had "never directly and fully addressed a claim of "actual ineffectiveness" of counsel's assistance in a case going to trial").

28. *Id.* at 716.

29. *Id.* at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.").

whether, given the context of the defendant's case, the decision to adopt a course of action was a reasonable strategic decision.<sup>30</sup> There is substantial deference to the reasonable strategic decisions a lawyer might have hypothetically made and a reluctance to second-guess decisions the lawyer did make.<sup>31</sup>

The second prong of the test focuses on whether failures of counsel—those so egregious as to be constitutionally unreasonable—are errors that materially or reasonably prejudiced the outcome at trial, such that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”<sup>32</sup> This approach was taken “[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”<sup>33</sup> By this time, the Court had already moved towards such a two-prong approach, recognizing in *Cuyler v. Sullivan*<sup>34</sup> in 1980 that outright conflicts of interest may impugn the entire course of representation, but that the court should nevertheless ask whether the conflict prejudiced counsel’s performance.<sup>35</sup> However, the interest in assuring that errors by counsel in fact affected the trial outcome did not support the first move: to “indulge a strong presumption” that attorneys’ conduct is within a “wide range” of permissible assistance.<sup>36</sup> The Court did not explain why that presumption should be a “strong” one, nor why a general presumption like that is necessary in the circumstance in which

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30. *See id.* at 689 (“The defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” (quoting *Michael v. Louisiana*, 350 U.S. 91, 101 (1955))).

31. *See id.* (“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.”).

32. *Id.* at 687.

33. *Id.* at 689.

34. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

35. *See id.* at 350 (“[T]he possibility of conflict is insufficient to impugn a criminal conviction. In order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer’s performance.”).

36. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

the attorney in fact did something highly prejudicial in a given case.<sup>37</sup>

This test would not be easy to satisfy; the error must be doubly unreasonable and prejudicial as to both the professional norms at the time surrounding representation in general and the actual impact on the defendant's case.<sup>38</sup> In Washington's case, the Court denied relief, emphasizing that "[t]he evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge."<sup>39</sup> Was there no reasonable probability that this evidence would have made a difference? Symptomatic of the malleability of the test, and its limited application, from 1984 until 2000, the Court did not recognize that failures to investigate mitigating evidence at sentencing in a death penalty case could constitute ineffective assistance of counsel.

In a series of decisions, beginning with *Williams v. Taylor*<sup>40</sup> in 2000, the Court has since emphasized the importance of presenting a mitigation case.<sup>41</sup> That change in approach tracked not just guidelines in professional associations, but a series of social science studies that documented the importance of developing mitigation evidence.<sup>42</sup> On the other hand, the Court

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37. *See id.* (failing to specifically discuss the necessity of a presumption condoning attorney conduct).

38. *See id.* at 690 ("The court must then determine whether . . . the identified acts or omissions were outside the wide range of professionally competent assistance. . . . [T]he court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.").

39. *Id.* at 699–700.

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

41. *See Rompilla v. Beard*, 545 U.S. 374, 380–81 (2012) ("This case, like some others recently, looks to norms of adequate investigation in preparing for the sentencing phase of a capital trial, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation."); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (stating that the Court must "focus on whether the investigation supporting counsel's decision not to introduce mitigation evidence of [the defendant's] background *was itself reasonable*"); *Williams*, 529 U.S. at 399 (validating the state trial judge's conclusion that the postconviction record should be allowed as mitigation evidence).

42. *See generally* Phoebe C. Ellsworth et al., *The Death Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984) (studying the value of

has emphasized that professional guidelines are not “inexorable commands with which all capital defense counsel ‘must fully comply.’”<sup>43</sup>

During that time, *Strickland v. Washington* had already taken on central importance in redefining criminal trial practice and postconviction review. Ineffective assistance of counsel claims are the most commonly litigated claims during postconviction proceedings.<sup>44</sup> One reason is a chameleon-like adaptability. They are umbrella claims that can broadly incorporate all sorts of theories about what went wrong at the criminal trial—just so long as those failures can be attributed to defense counsel. Given pervasive inadequacies in indigent defense in this country, such attribution can often quite plausibly be made. While perhaps aspirational, the American Bar Association has adopted far more detailed guidelines for the performance of defense lawyers in death penalty cases.<sup>45</sup> Of course, another reason for the ubiquity of such claims may be the deplorable state of indigent defense representation in many jurisdictions; nevertheless, relief is rare on ineffective assistance of counsel claims, just as relief is rare in criminal appeals and postconviction proceedings in general.

Moreover, the *Strickland v. Washington* standard colonized other areas of postconviction law, or rather, it reflected the Supreme Court playing the role of a habeas corpus boa constrictor, and tightening the standard for showing harmless

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due process guarantees upon people who are not allowed to serve on juries based on their opposition to the death penalty); Leona D. Jochnowitz, *How Capital Jurors Respond to Mitigating Evidence of Defendant’s Mental Illness, Retardation, and Situational Impairments: An Analysis of the Legal and Social Science Literature*, 47 CRIM. L. BULL. 839 (2011) (studying the legal and empirical literature regarding jury decision making).

43. *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (quoting *Van Hook v. Anderson*, 560 F.3d 523, 526 (6th Cir. 2009)).

44. See NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 28 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf> (stating that eighty-one percent of the capital cases included an ineffective assistance of counsel claim).

45. See Am. Bar Ass’n, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003).

error in several postconviction areas at the same time. The heightened showing of prejudice, the “reasonable probability” standard that was more demanding than that typically required to show an error not harmless, came to be extended to other contexts. The year after *Strickland v. Washington* was decided, the Court revisited the *Brady v. Maryland*<sup>46</sup> rule regarding suppression of exculpatory evidence, which had used the term “materiality,”<sup>47</sup> and in *United States v. Bagley*<sup>48</sup> adopted the *Strickland v. Washington* usage: “The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A ‘reasonable probability’ is a probability sufficient to undermine confidence in the outcome.”<sup>49</sup> This was part of a general approach in which the Court, by the late 1970s, increasingly focused on limiting reversals based on whether error sufficiently affected the outcome; *Strickland v. Washington* had in turn relied on *United States v. Agurs*,<sup>50</sup> a 1976 ruling regarding the scope of the *Brady v. Maryland* right by the Court.<sup>51</sup>

The Supreme Court then adopted that more stringent standard for all federal habeas proceedings when it revisited the harmless error standard in federal habeas corpus in *Brecht v. Abrahamson*.<sup>52</sup> As a result, the second “prejudice” prong of the standard became unexceptional once it was extended across the board—although state courts can adopt more defendant-friendly

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46. *Brady v. Maryland*, 373 U.S. 83 (1963).

47. *Id.* at 88 (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” (emphasis added)).

48. *United States v. Bagley*, 473 U.S. 667 (1985).

49. *Id.* at 682.

50. *United States v. Agurs*, 427 U.S. 97 (1976).

51. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (“[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . .” (citing *Agurs*, 427 U.S. at 104, 112–13)).

52. *See Brecht v. Abrahamson*, 507 U.S. 619, 630 (1993) (“Since our landmark decision in *Chapman v. California* [386 U.S. 18 (1967)], we have applied the harmless-beyond-a-reasonable-doubt standard in reviewing claims of constitutional error of the trial type.”).

versions of the standard, because they must generally follow a less strenuous pre-*Brecht* harmless error rule.<sup>53</sup>

Ineffective assistance litigation would reshape habeas corpus in unanticipated ways, including by fundamentally altering the relationship between state and federal habeas. While *Strickland v. Washington* claims are the claims petitioners most frequently assert during federal habeas proceedings, judges rarely grant relief on them.<sup>54</sup> The claims often cannot be asserted in state courts during direct appeals (as with *Brady* claims, they may require analysis of new evidence not introduced at the original trial, which many state courts do not permit on appeal)—making state habeas proceedings far more important to developing an adequate record.<sup>55</sup> As a result, other aspects of habeas corpus law were influenced by the litigation of ineffective assistance of counsel claims. States had to create postconviction procedures to accommodate the litigation of federal constitutional claims that could not readily be raised during direct appeals. The Supreme Court then elaborated procedural default rules requiring exhaustion of those state habeas procedures. The Court adopted a “cause and prejudice” exception to certain procedural failures and required a showing of independent constitutional ineffectiveness of counsel for a failure of counsel to constitute cause.<sup>56</sup>

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53. States have also adopted different approaches to the postconviction standard for IAC, and while they cannot adopt a standard that tolerates constitutional error, they may grant more expansive relief; a few states have done so by relaxing the prejudice requirement. See Jan Lucas, *A Cumulative Approach To Ineffective Assistance: New York's Requirement That Counsel's Cumulative Efforts Amount To Meaningful Representation: Supreme Court Of New York Appellate Division, Second Department*, 28 *TOURO L. REV.* 1073, 1083–86 (2012) (listing New York, Alaska, Oregon, Hawaii, and Massachusetts as states that have adopted a standard with a relaxed prejudice requirement).

54. See Joseph L. Hoffmann & Nancy J. King, *Rethinking the Federal Role in State Criminal Justice*, 84 *N.Y.U. L. REV.* 791, 811 (2009) (“A claim of ineffective assistance of counsel in trial or appellate proceedings was raised in about half of the 2,384 noncapital cases the Vanderbilt–NCSC study assessed. Only one of those claims was granted; that grant was later reversed.”).

55. See Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 *CORNELL L. REV.* 679, 682–83 (2007) (proposing that trial records be opened on appeal to permit litigation of trial attorney performance).

56. See *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (“[W]e think that the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded

More recently, the Supreme Court emphasized in *Cullen v. Pinholster*<sup>57</sup> the “doubly deferential” review under the AEDPA<sup>58</sup> and the *Strickland v. Washington* standard, and ruled that a federal court may not consider evidence of ineffective assistance that had not been previously developed during state habeas proceedings (even when there was no hearing conducted in state court).<sup>59</sup>

This cascade of unanticipated developments in turn placed greater pressure on the Supreme Court to ensure adequate process during state habeas litigation—leading to the result in last Term’s decision in *Martinez v. Ryan*<sup>60</sup> that a pro se petitioner does not waive a “substantial” ineffective assistance of trial counsel claim not brought in state postconviction proceedings.<sup>61</sup> In addition, although the Court has held that Fourth Amendment claims may not be raised during federal habeas corpus, the claim may be raised if it is *Strickland v. Washington* that brings such claims under its umbrella—making cognizable the failure of defense counsel to assert that underlying Fourth Amendment claim at trial.<sup>62</sup> The Sixth Amendment has in effect expanded the scope of habeas corpus, or at least partially undone its contraction.

The Sixth Amendment now “requires effective assistance of counsel at critical stages of a criminal proceeding” and not just at

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counsel’s efforts to comply with the State’s procedural rule.”).

57. See *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011).

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

59. See *id.* at 1403 (“Our review of the California Supreme Court’s decision is thus ‘doubly deferential.’” (citing *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1413 (2009))).

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

61. See *id.* at 1320 (“Where, under state law, [IAC claims] must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial [IAC claim] if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.”).

62. See *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) (“[A] good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . .”).

trial.<sup>63</sup> Typically, appeals and habeas are waived in the vast majority of cases in which there is a plea bargain. Now habeas plays a greater role in plea bargained cases, because ineffective assistance of counsel doctrine plays a greater role in plea bargaining. As noted, the Supreme Court extended the test for evaluating adequacy of defense lawyering to plea bargaining in *Hill v. Lockhart*<sup>64</sup> in 1985, and then ruled that the analysis includes advice to clients concerning collateral consequences such as immigration consequences of a conviction in *Padilla v. Kentucky*<sup>65</sup> in 2010. The Court expanded the prejudice analysis in *Missouri v. Frye*<sup>66</sup> and *Lafler v. Cooper*<sup>67</sup> in 2012 to include the situation in which the issue is not incorrect advice concerning the plea, but ineffective assistance during the representation that led to the acceptance or rejection of the plea.<sup>68</sup> The Court noted in *Frye* that “[b]argaining is, by its nature, defined to a substantial degree by personal style.”<sup>69</sup> There may be difficult questions in defining the duties of defense counsel, apart from adequately communicating the terms of a plea offer, and difficult questions in assessing prejudice.<sup>70</sup> As a result, there may not be a flood of

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63. *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

64. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (“Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’” (quoting *McCann v. Richardson*, 397 U.S. 759, 771 (1970))).

65. *See Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (stating that counsel’s failure to inform a defendant of how a plea will affect his immigration status can be considered ineffective assistance).

66. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

67. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).

68. *See id.* at 1387 (“If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it.”); *Frye*, 132 S. Ct. at 1407 (“[P]lea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.”).

69. *Frye*, 132 S. Ct. at 1408.

70. The *Frye* Court emphasized that the “American Bar Association recommends defense counsel ‘promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney,’ and this standard has been adopted by numerous state and federal courts over the last 30 years.”

cases in which habeas relief is granted on ineffective assistance claims concerning plea bargaining.

A consistent theme is that even though the Sixth Amendment has been extended to regulate each “critical” stage in the criminal process, claims of Sixth Amendment violations are typically asserted during habeas proceedings, in which prejudice may be hard to show and relief is rare. Outside the postconviction process, ineffective assistance of counsel challenges are difficult to raise. The Court held prior to *Strickland v. Washington* that public defenders could not be sued as state actors,<sup>71</sup> making challenges to patterns and practices of ineffective assistance far more difficult; more indirect suits have largely failed, although systemic litigation has had some success in state courts.<sup>72</sup>

### III. Validating *Strickland v. Washington*

#### A. Jury Research

While the *Strickland v. Washington* analysis of the effectiveness of defense representation has expanded to cover all crucial aspects of the criminal process, this central form of regulation is administered chiefly postconviction, and without much attention to whether the identified errors are in fact of the type that prejudice outcomes in criminal cases. One reason may be that the analysis is not purely an outcome-driven prejudice analysis, but it also focuses on standards of professional performance and legal ethics. Even as to prejudice portions of the analysis, much could be improved. Perhaps professional and ethics standards could similarly be better informed in some respects by what actually influences decisionmaking.

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*Id.* (internal citation omitted).

71. See *Polk Cnty. v. Dodson*, 454 U.S. 312, 325 (1981) (deciding that “a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding”).

72. See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 416 (2007) (stating that the “Louisiana court used a method of aggregation . . . to address the persistent problem of inadequate indigent defense counsel, but at a different stage—aggregating criminal procedure rights asserted by criminal defendants before trial”).

What do we know about jury decision-making at criminal trials? Few scholars have conducted field studies, but there is the classic work of the Chicago Jury Trial Project, which surveyed jurors and judges after trials, and some subsequent field data surveying jurors concerning their deliberations.<sup>73</sup> Scholars have conducted empirical work on lay understanding of what the “beyond a reasonable doubt” standard means.<sup>74</sup> Scholars have conducted more empirical work on capital juries, using posttrial interviews with jurors as a way to learn more about what played a role in their decision-making.<sup>75</sup> Appellate and postconviction reversals of trial convictions can be studied for patterns of error, suggesting, for example, in capital cases, that there are higher reversal rates in cases involving juveniles and mentally ill defendants.<sup>76</sup> There has also been assessment of access to counsel and quality of representation at juvenile delinquency hearings.<sup>77</sup>

Using experimental techniques, social scientists have done far more to study criminal trials, focusing on the impact of different types of evidence and their presentation to jurors, as well as on jury decision-making. Social scientists conduct mock juror studies aiming to simulate juror deliberations, or study how

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73. See PAULA HANNFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? (2002), <http://www.ncjrs.gov/pdffiles1/nij/grants/199372.pdf>; HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966); SIMON, *supra* note 18, at 197–98; Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622 (2001).

74. See SIMON, *supra* note 18, at 195–97 (summarizing research, and noting more mixed and limited experimental research on the effect of standard of proof on verdict decisions).

75. See, e.g., William J. Bowers, *The Capital Jury Project: Rationale, Design and Preview of Early Findings*, 70 IND. L.J. 1043, 1043 (1995) (providing a general overview of the research project entitled the Capital Jury Project). For an overview of the research on capital sentencing, see SIMON, *supra* note 18, at 188–91.

76. See JAMES LIEBMAN ET AL., A BROKEN SYSTEM: PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT? 400–03 (2002), <http://www2.law.columbia.edu/brokensystem2/report.pdf>.

77. See generally CATHRYN CRAWFORD ET AL., ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2007), <http://www.law.northwestern.edu/legalclinic/cfjc/documents/ILAssessmentReport.pdf> (reporting findings of a comprehensive study of legal representation of juveniles in Illinois and making recommendations for improvement).

laypersons evaluate evidence.<sup>78</sup> Additional social science research has examined how lay jurors understand expert and scientific evidence. Studies have, for example, examined how laypeople do not understand much of the decades-old research on eyewitness identifications, and they may overvalue the confidence of eyewitnesses.<sup>79</sup> There is evidence that laypeople do not understand how false confessions can happen. It does not take social science to appreciate that “a confession is like no other evidence . . . ‘the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him.’”<sup>80</sup> Social scientists have documented how powerful confession evidence can be to jurors, despite the Supreme Court’s ruling that confession evidence can in theory be harmless, as well as powerfully impacting judges.<sup>81</sup> Studies have shown that laypeople do not always accurately evaluate certain types of forensic science evidence, while certain other types of exaggerated forensic claims may not overly prejudice jurors.<sup>82</sup>

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78. See Devine, *supra* note 73, at 626–27 (discussing several research studies on jury behavior).

79. See Sarah L. Desmarais & J. Don Read, *After Thirty Years, What Do We Know About What Jurors Know? A Meta-Analytic Review of Lay Knowledge Regarding Eyewitness Factors*, 35 LAW & HUM. BEHAV. 200, 209 (2011) (“Importantly, even if the majority of jurors hold the deemed correct opinion, such opinion may or may not be an adequate safeguard against [over belief] of eyewitness evidence.”).

80. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (quoting *Bruton v. United States*, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)).

81. Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 LAW & HUM. BEHAV. 27, 27–46 (1997) (finding that mock jurors would convict at higher rates in cases involving high-pressure involuntary confessions than in cases with no confession in evidence); D. Brian Wallace & Saul Kassin, *Harmless Error Analysis: How Do Judges Respond to Confession Errors*, 36 LAW & HUM. BEHAV. 5, 152 (2012) (describing results of study showing that judges found high-pressure coerced confession, though improperly admitted into evidence, to be highly probative of guilt, though also capable of evaluating whether error was harmful).

82. See, e.g., Jonathan J. Koehler, *When Are People Persuaded by DNA Match Statistics?*, 25 LAW & HUM. BEHAV. 493, 493–513 (2001) (“Research with non-DNA statistical evidence showed that, in general, people attach less weight to the statistical evidence than would seem appropriate, and are insensitive to variations in the diagnosticity of the statistical evidence.” (citations omitted)); Dawn McQuiston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear*, 33 LAW & HUM. BEHAV. 436, 436 (2009) (“Qualitative testimony was more damaging to the defense than quantitative testimony, conclusion testimony

Saul Kassin and others have more recently developed how evidence in a case is related, and for example, confessions may also result in “a chain of confirmation biases” that affect investigators, perceptions of other evidence in the case, and postconviction review.<sup>83</sup>

### *B. Postconviction Judging*

To what extent has social science impacted postconviction judging? Postconviction analysis of effectiveness of attorney performance is predictably deferential. Judges may deny relief when defendants raise challenges to the misuse of such central forms of evidence—including when relief is denied by making claims about what the jury might have concluded that are based on speculation. Judges assessing claims postconviction may simply not always be in a position to accurately assess what impact failures of counsel had on the trial. To be sure, one can find decisions emphasizing failures of counsel to challenge central evidence, like forensics.<sup>84</sup> Yet one can also find examples in which courts acknowledge a failure to challenge central evidence in the prosecution case, but nevertheless finding any error to have been insufficiently prejudicial.<sup>85</sup> Postconviction judges, for example, may view the demeanor of a witness as something that only the jurors could accurately weigh. In some instances, as with

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increased the defendant’s culpability ratings when findings were presented quantitatively, and expressing limitations of forensic science had no appreciable effect.”).

83. See Saul Kassin, *Why Confessions Trump Innocence*, 67 AM. PSYCHOL. 431, 441 (2012) (stating that “false confessions, once taken, arouse a strong inference of guilt, thereby unleashing a chain of confirmation biases that make the consequences difficult to overcome despite innocence”).

84. See, e.g., *Richey v. Bradshaw*, 498 F.3d 344, 362 (6th Cir. 2007) (“The scientific evidence of arson was . . . fundamental to the State’s case. Yet Richey’s counsel did next to nothing to determine if the State’s arson conclusion was impervious to attack.”); *Dugas v. Coplan*, 428 F.3d 317, 332 (1st Cir. 2005) (finding “failure to thoroughly investigate the ‘not arson’ defense and seek expert assistance cannot be classified as a conscious, reasonably informed tactical decision”).

85. See, e.g., *Johnson v. United States*, 860 F. Supp. 2d 663, 751 (N.D. Iowa 2012) (“Moreover, cumulative determination of deficient performance, standing alone, would provide no basis for relief, because prejudice must also be proved.”).

eyewitness testimony, it may be quite to the contrary; demeanor may mislead jurors and create a barrier to accurate fact-finding.

There is little evidence that postconviction judges rely on the social science literature on jury decision-making to reach their results. Such research is very rarely cited in such judicial rulings.<sup>86</sup> As Jason Solomon puts it, “courts rarely rely on actual social science research about the effects of different kinds of evidence, argument, or instructions on jurors.”<sup>87</sup> (One exception from the Supreme Court was Justice Souter’s dissent in *Strickler v. Greene*,<sup>88</sup> citing social science evidence on the role of counsel in capital mitigation trials.)<sup>89</sup>

My work on postconviction *Strickland v. Washington* litigation has focused on the unusual but striking experiences of persons later exonerated by DNA testing. Those innocent people brought ineffective assistance of counsel claims in large numbers, as do most postconviction litigants. Almost one-third of the first 250 people exonerated by DNA brought such claims, of those who had written decisions during their appeals and postconviction proceedings.<sup>90</sup> They rarely succeeded.<sup>91</sup> Some even failed to obtain

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86. Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court’s Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 331 (2002) (“There is little suggestion . . . that appellate judges conducting harmless error review inform their review with insight derived from [substantial literature on jury decisionmaking].”).

87. Jason Solomon, *Causing Constitutional Harm: How Tort Law Can Help Determine Harmless Error in Criminal Trials*, 99 NW. U. L. REV. 1053, 1071 (2005).

88. *Strickler v. Greene*, 527 U.S. 263 (1999).

89. See, e.g., *id.* at 305 (Souter, J., dissenting) (citing William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1486–96 (1998)).

90. See BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 205 (2011) [hereinafter, GARRETT, CONVICTING THE INNOCENT] (“Ineffective assistance of counsel is one of the most frequently raised claims during postconviction proceedings, and 32% of these DNA exonerees (52 of 165 cases) asserted that their trial was unfair because their defense lawyer was inadequate.”); see also Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 76 (2008) (examining “data regarding evidence supporting . . . wrongful convictions, including the interaction of multiple types of evidence”).

91. See GARRETT, CONVICTING THE INNOCENT, *supra* note 90, at 206 (stating that of the fifty-two who asserted such claims, only four earned reversals). Those four were Ron Williamson, in which trial counsel failed to show he was

relief when their complaint was that their trial lawyer failed to seek DNA testing.<sup>92</sup> One would think that those claims would be particularly straightforward ineffective assistance of counsel claims. However, judges held that the DNA would not have made a difference—of course it did, and when they later managed to obtain the DNA, it cleared them.<sup>93</sup> Many failures of counsel were never litigated. Only fourteen exonerees made claims regarding failures of their lawyers to challenge forensic evidence.<sup>94</sup> Yet invalid forensic evidence with outright inaccuracies was presented in a vast number of trials, and more often than not, the defense lawyers failed to even ask a single question in their cross-examination addressing the errors forensic analysts made on the stand.<sup>95</sup> Interestingly, far more exonerees obtained reversals on claims related to prosecutorial or police misconduct, including *Brady v. Maryland* violations, than they did on *Strickland v. Washington* claims.<sup>96</sup>

Making for particularly dark anecdotes, some of the exonerees who had no success raising ineffective assistance claims received now-notoriously poor assistance. For example, Jimmy Ray Bromgard was represented in Montana by a lawyer nicknamed “Jailhouse John Adams,” due to his reputation for his clients being convicted, and who failed to hire any investigators or experts, made no motions to suppress, offered no opening statement, did not prepare his client to testify (getting his name wrong) and failed to file an appeal. Bromgard lost his ineffective assistance of counsel claims.<sup>97</sup> Years later, after his exoneration,

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mentally incompetent to stand trial and that another man confessed to the crime, among a series of failures, and the related cases of Paula Gray, William Rainge, and Dennis Williams, all represented by the same lawyer, who failed to move to suppress a range of central evidence, and was later disbarred for conduct in another case. *Id.*

92. See *id.* at 206–07 (stating that only one of four ineffective assistance of counsel claims received a reversal when counsel failed to ask for DNA testing).

93. See *id.* at 207 (“The DNA testing could have potentially proven [the defendants’] innocence, as it later did.”).

94. *Id.*

95. *Id.*

96. See *id.* at 207–08 (stating that ten of twenty-one exonerees received a reversal based in part on prosecutorial misconduct, which included claims of unjustly prejudicial argument and *Brady v. Maryland* claims).

97. See *id.* at 165–66.

he did obtain a large settlement in a civil suit, and Montana would finally create a state public defender's office.<sup>98</sup> That said, these examples from DNA exoneration cases merely confirm what observers have been saying for years, calling the *Strickland v. Washington* test a malleable "foggy mirror" test, under which any living breathing lawyer will do, and relief may be denied even in death penalty cases in which lawyers literally fell asleep at trial or presented no meaningful case.<sup>99</sup>

Should judges so readily find error harmless, particularly as to error by counsel relating to evidence with a strong factual or emotional impact? Judges in the postconviction context typically say they cannot judge the credibility of witnesses. Yet some expressions by witnesses are particularly suspect—for example, the self-reported confidence of an eyewitness testifying on the stand at trial and pointing out the defendant, who is not hard to identify sitting next to the defense lawyer. Meanwhile, trials may tend to involve closer cases, in which the evidence is closer, and in which jurors may be more prone to rely on potentially biasing factors.<sup>100</sup> Jurors may look at some evidence holistically and based on narratives—the ability of defense lawyers to provide a counter-narrative, such as by developing an alibi or an account of third-party guilt, may also be important in ways not understood by postconviction judges.<sup>101</sup>

Can curative instructions compensate for errors by counsel? Perhaps sometimes, but it is far less likely when instructions ask jurors to somehow ignore prejudicial evidence that they heard.<sup>102</sup>

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98. See *id.* at 165–66 (discussing Bromgard's case).

99. See 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, 1852 (1994) ("The vice president of the Georgia Trial Lawyers Association once described the simple test used in that state to determine whether a defendant receives adequate counsel as 'the mirror test.' 'You put a mirror under the court-appointed lawyer's nose, and if the mirror clouds up, that's adequate counsel.'").

100. See SIMON, *supra* note 18, at 168–69 (discussing factors that complicate the jury's fact-finding task).

101. See Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 519–57 (1991) (discussing the juror as a "sense-making information processor who strives to create a meaningful summary of the evidence available that explains what happened in the events depicted through witnesses, exhibits, and arguments at trial").

102. See David A. Sklansky, *Evidentiary Instructions and the Jury as Other*,

Perhaps judges should take more account of social science work examining when such instructions are effective and when they are not—then again, perhaps judges sitting postconviction are no better at disregarding the prejudicial evidence admitted at trial than the jurors may have been.<sup>103</sup> Perhaps handling postconviction review differently under the existing standard—with the meaning of “prejudice” informed by social science—would be too much to expect of judges, who may be affected by the same cognitive biases as jurors, and perhaps additional ones, such as confirmation bias, when they view a cold written record after a conviction. Yet as discussed next, one does see judges making more use of social science, not postconviction, but to regulate the pretrial criminal investigation process.

### *C. Two Prongs at Cross-Purposes?*

Social science evidence may be a double-edged sword and it may raise still more troubling questions about the impact of lawyering on jurors. Defense lawyers may be expected to use cross-examination or other techniques that will in fact be quite powerful to a jury—and that will be powerful because they obscure the truth, create more uncertainty in the witness, arouse emotional responses, introduce seeming inconsistencies, and the like. Then again, such tactics may backfire and suggest to jurors that the defense has no strong case of its own.<sup>104</sup> What weight should judges place on research concerning trial tactics—or do

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65 STAN. L. REV. 407, 409 (2013) (arguing that “evidentiary instructions probably do work, but imperfectly, and better under some conditions than others; and, second, that we probably could get along fine without trusting in evidentiary instructions, and certainly without believing that they work flawlessly”). Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 LAW & HUM. BEHAV. 469, 469–92 (2006) (reporting that judicial instruction to ignore inadmissible evidence does not necessarily eliminate the impact of this evidence).

103. Barbara A. Spellman, *On the Supposed Expertise of Judges in Evaluating Evidence*, 156 U. PA. L. REV. PENNUMBRA 1, 1–9 (2007), <http://www.pennumbra.com/responses/03-2007/Spellman.pdf>.

104. Dan Simon discusses these features of cross-examination and other strategies by lawyers during criminal trials. See SIMON, *supra* note 18, at 170–74, 180–83.

they perhaps have it right to simply presume that tactical decisions deserve great deference and leave it to the practitioners to study and develop tactics? How about research surrounding other factors that affect persuasion? If it is true that jurors also place great weight on “superficial persuasive devices,” as Dan Simon terms them, such as the demeanor, appearance, tone, and other aspects of the defense lawyer, perhaps far more so than on whether the lawyer makes a motion to suppress or an argument in closings<sup>105</sup>—should judges make any use of that social science?

If the defense lawyer failed to make eye contact with the jury, was longwinded and boring, never cracked a smile, and had a persistent cough—and that may have outweighed the sound law and evidence the lawyer marshaled at trial—should there ever be a *Strickland v. Washington* claim? Those are matters of trial “strategy” or matters within the wide range of professional performance that the Court sensibly finds not to be of constitutional significance. Those are matters in which we might not care to intrude, personal style and characteristics of the defense lawyer. We would not want to regulate professionals in that manner (would we, for example, want to insist as a constitutional matter that lawyers dress in a conservative, or gendered way, to suit the local jury pool?). Yet if one cared purely about the accuracy of trial outcomes, such “superficial,” but quite prejudicial, forms of persuasion and lawyering could be potentially important. Regardless, it may turn out that such matters of style and expression, even when they do matter, cannot be readily regulated through improved procedures, whereas research can identify other more concrete procedures that can improve outcomes.

The ineffective assistance test is at war with itself. There may be quite prejudicial conduct that is currently treated as a matter of strategy or reasonable within norms of professional practice. There may be outright violations of professional norms or outright wrong strategies that do not prejudice the outcome at trial. Professional standards and legal ethics may trump accuracy. There are sound normative reasons why courts have

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105. See *id.* at 170 (stating that jurors are affected by superficial persuasion devices such as emotional appeals, metaphors, irony, rhetorical questions, humor, and the likeability of the speaker, each of which has little to do with the accuracy of the information).

limited their focus to only certain categories of failures of counsel. However, they may have erred too far in limiting relief to chiefly dramatic across-the-board failures of counsel, conflicts of interest, breakdowns during capital sentencing, and extreme failures to communicate during plea bargaining.

Judges might broaden the lens with some more confidence, informed by social science. Judges may be understandably reluctant to define additional areas of concern—but having more social science research to identify areas of prejudice that strongly affect jurors may make it far easier to then decide whether as a constitutional matter, judges should be concerned if lawyers fall short.

#### IV. Validating *Gideon v. Wainwright*

Judges and social scientists have opposite tendencies, perhaps. Judges may be most reluctant to overemphasize accuracy during trials. They do not readily revisit trial verdicts, and may be particularly deferential to finality of judgments, lawyers' professional practice norms, customary evidentiary rules, and trial judge discretion concerning evidentiary rulings. Judges may be more open to regulating accuracy pretrial, however. One leading recent example is the New Jersey Supreme Court's decision in *State v. Henderson*,<sup>106</sup> which provides a detailed social science framework for regulating eyewitness identifications, and among other things, calls for detailed jury instructions that provide a roadmap to defense lawyers, prosecutors, and judges for what issues should be litigated in any case involving an eyewitness.<sup>107</sup>

Social scientists may have the opposite tendency. Social scientists are perhaps too focused on improving the accuracy of trials, not on professional roles of lawyers or plea bargaining settlements without any trial. One limitation of the entirety of

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106. *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

107. *Id.* at 919–22 (advocating for a “revised framework [that allows] all relevant system *and* estimator variables to be explored and weighted at pretrial hearings where there is some actual evidence of suggestiveness; and . . . enhanced jury charges to help jurors evaluate eyewitness identification evidence”).

existing social science research is its focus on evidence and jury decision-making. Jury confidentiality has prevented much study of deliberation of actual jurors.<sup>108</sup> Yet there are very few trials of any kind in the U.S., including criminal trials. Not only, as Barbara Spellman and Frederick Schauer have developed,<sup>109</sup> has the role of judges been underexamined by social scientists, but the roles of other key figures in our system of justice have been underexamined. Lawyers have not been adequately studied, with the main exception, as noted, of studies of lawyering regarding issues of competence and juveniles.<sup>110</sup> The role of lawyers in shaping the evidence at trial—and particularly the role of defense counsel investigating evidence as part of the defense case, such as alibi evidence and supportive character witnesses—has not been sufficiently studied.

Still more important, there is very little social science studying the vast bulk of cases resolved through plea bargaining—in marked contrast to a far larger literature on settlement in civil cases and the role of lawyers, in which the monetary stakes on either side may make for more readily quantified units of analysis.<sup>111</sup> Plea bargaining raises fascinating questions about what actually affects defendant decisions whether to accept a plea. Criminal law scholars have long explored the practical dynamics of plea bargaining and debated

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108. This may be changing. See Barbara Spellman & Frederick Schauer, *Law and Social Cognition*, in HANDBOOK OF SOCIAL COGNITION (D. Carlston ed.) (forthcoming 2013) (manuscript at 17–18), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2000806](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000806).

109. *Id.*

110. See *supra* note 15 and accompanying text.

111. See, e.g., Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 2 (1996) (discussing the prevalence of settlement in civil litigation); Samuel R. Gross & Kent D. Syverud, *Getting To No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 322 (1991) (examining settlement negotiations and outcomes by considering the social and economic context of litigation); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997) (discussing how lawyers and litigants evaluate law suits); Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 129–42 (1994) (examining social science research to explore why and when litigants settle suits); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 116–18 (1996) (discussing litigation from an economical perspective).

whether prosecutorial discretion, sentencing rules, defense incentives, and other institutional features produce optimal or fair or accurate results.<sup>112</sup> Scholars such as Stephanos Bibas, Richard Birke, Alafair Burke, and Rebecca Hollander Blumoff have increasingly connected social science research on cognitive bias and heuristics to the practice of plea bargaining and suggested that a range of factors might have important effects on plea bargaining, including incomplete information, time discounting, risk preferences, framing during negotiation, and group motivation of lawyers, among others.<sup>113</sup>

Very little research has studied the complex process of plea bargaining directly—a complicated and time-consuming endeavor

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112. See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932–34 (1983) (discussing several deficiencies in the plea bargaining process); Oren Bar-Gill & Oren Gazal Ayal, *Plea Bargains Only for the Guilty*, 49 J.L. & ECON. 353, 353 (2006) (“By restricting the permissible sentence reduction in a plea bargain, the law can preclude plea bargains in cases with a low probability of conviction.”); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2472 (2004) (discussing prosecutorial motivations for obtaining plea bargains); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1117 (2008) (arguing that “inaccurate guilty pleas are merely symptomatic of errors at the points of arrest, charge, or trial”); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1992 (1992) (discussing a prohibition on mandatory minimum sentences); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1913–17 (1992) (discussing whether the norm of expanded choice justifies enforcement of plea bargains); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 37 (2002) (discussing plea bargaining as a “zero sum” tradeoff).

113. See Bibas, *supra* note 112, at 2520 (discussing the susceptibility of lawyers to heuristics and biases); Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 208 (proposing hypotheses attempting to reconcile the rate of guilty pleas and the principle of loss aversion); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593 (2006) (discussing the probability that prosecutors fall prey to cognitive failures); Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 165 (2007) [hereinafter Hollander-Blumoff, *Social Psychology*] (discussing “why the rational actor paradigm in plea bargaining may not capture the reality of the negotiation between prosecutor and defense counsel, and why lawyers may not be likely to lessen the effects of cognitive bias and heuristics”); Rebecca Hollander-Blumoff, Note, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 121–25 (1997) [hereinafter Hollander-Blumoff, *Getting to “Guilty”*] (exploring the intersection of plea bargaining with contemporary negotiation theory).

to be sure, but more work is beginning to be done, and more can be done.<sup>114</sup> The field work by Milton Heumann is still a landmark in the area,<sup>115</sup> but there have been persistent bar association reports describing overburdened defense lawyers and thin representation during plea bargaining.<sup>116</sup> There is every reason to think that empirical work and experimental psychology can tell us more about the plea bargaining process.<sup>117</sup> Studies could further examine each of the social and psychological factors that scholars have suggested might play an important role in plea bargaining, such as: the extent to which clients are risk-preferring or -averse,<sup>118</sup> the role that incomplete information plays, and the extent to which lawyers shape clients' understanding of the implications of features of a plea bargain. There is a vast social science literature on cognitive bias and heuristics, beginning with the groundbreaking work of Daniel Kahneman and Amos Tversky.<sup>119</sup> The roles such biases play in

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114. See Vanessa A. Edkins, *Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All?*, 35 LAW & HUM. BEHAV. 413, 416 (2011) (studying the role of race by surveying practicing defense attorneys and noting "a dearth of prior empirical research looking at the factors that affect plea negotiations"); see also Kenneth S. Bordens, *The Effects of Likelihood of Conviction, Threatened Punishment, and Assumed Role on Mock Plea Bargaining Decisions*, 5 BASIC & APPLIED SOC. PSYCHOL. 59, 59 (1984) (discussing how multiple variables affect decisions to accept or reject plea bargains).

115. See generally MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978).

116. See, e.g., AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE, A REPORT ON THE AM. BAR. ASS'N'S HEARINGS ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS* 17 (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) (discussing the effects that overburdened attorneys have on quality representation).

117. Hollander-Blumoff, *Getting to "Guilty," supra* note 113, at 124 (citing empirical studies to demonstrate that prosecutors bluff "when evidence against a defendant is weak or deficient").

118. See Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123, 123 (1995) (investigating "whether there are group differences in the relative responsiveness to changes in the certainty and severity of punishment").

119. See, e.g., Daniel Kahneman & Amos Tversky, *Conflict Resolution: A Cognitive Perspective*, in BARRIERS TO CONFLICT RESOLUTION 45, 45 (Kenneth J. Arrow et al. eds., 1995) (exploring "some implications for conflict resolution of a

the plea bargaining context should be studied far more. They could deeply inform prosecutors and defense lawyers and judges.

Additional work could study how development of evidence in early stages of criminal cases affects plea bargaining. The roles of lawyers could be studied. If evidence strength plays a role in plea bargaining,<sup>120</sup> do defense lawyers properly assess the strength of evidence and do they have enough information to do so? Do defense lawyers, for example, sufficiently understand what can potentially cause a false confession, and the role that interrogation procedures play in producing accurate and false confessions?<sup>121</sup> Do defense lawyers properly understand expert evidence, or forensic science evidence—and does the presence of that evidence tend to alter defense strategies—and if so, how? More targeted studies could examine questions of *Strickland v. Washington* “prejudice” in the context of what advice lawyers should give to clients considering particular types of plea bargains. For example, studies could be done of noncitizens: would they take a plea knowing that it would have potentially severe immigration consequences?

Perhaps we could avoid difficult procedural analysis in the postconviction context. Perhaps social science evidence could not only help us to assess failures of counsel after the fact, but also suggest ways to deliver effective representation before the fact. Social science evidence is often thought of as helping to frame evidence for a jury (including using experts and jury instructions), but it is also influential in developing procedures to

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particular cognitive analysis of individual decision making”); Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237, 237 (1973) (exploring “the rules that determine intuitive predictions and judgments of confidence and contrast[ing] these rules to normative principles of statistical prediction”).

120. See Greg M. Kramer et al., *Plea Bargaining Recommendations by Criminal Defense Attorneys: Evidence Strength, Potential Sentence, and Defendant Preference*, 25 BEHAV. SCI. & L. 573, 575–85 (2007) (studying the effects of evidence strength, potential sentences, and defendant preferences on plea bargaining strategies employed by criminal defense attorneys).

121. See Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 4 (2010) (discussing the typical chain of events surrounding a wrong confession). For a study of self-reported false guilty pleas, see Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas Among Offenders with Mental Illness*, 34 LAW & HUM. BEHAV. 79 (2010).

investigate legal cases in the first instance and to guide government actors. For example, in the eyewitness context, social science evidence has revolutionized the ways that line-ups are done, improving the accuracy of eyewitness identifications, better documenting the procedures, and providing information that counsel can far more effectively make use of when representing a client.<sup>122</sup> What made *Gideon* a watershed right was its focus on providing an entitlement at the time of felony charging, rather than establishing criminal procedure regulations for conduct of attorneys and other actors farther downstream. We can try to improve the *Strickland* analysis, and make more accurate assessments of whether inadequate defense counsel sufficiently prejudiced the outcome at trials or during plea bargaining. However, we could also better allocate resources on the front end to improve defense access to evidence and investigative resources at the time of trial. Doing just that has been the focus of habeas reform proposals for some time—and such proposals have been ignored for just as long.

Perhaps more productive would be to learn from the specific deficiencies in the postconviction process and identify areas of error—validating *Gideon*—to help at least to prioritize resources to avoid the most serious miscarriages of justice. Darryl Brown has suggested that defense resources must be (and are) inevitably rationed in a world of limited defense resources—perhaps that rationing can itself be validated.<sup>123</sup> Lisa Griffin has developed ways that narratives at trial may impact the reliability of jury decisionmaking and has explored a range of mechanisms that could counter certain types of narrative bias.<sup>124</sup> I have previously suggested that litigation pretrial, of the sort brought in state court challenges to indigent defense inadequacies, might avoid

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122. See, e.g., Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451, 453 (2012) (discussing the impact on social science research on eyewitness identification).

123. See Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 810 (2004) (discussing the consequence of rationing criminal defense funding).

124. See Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 315–25 (2013) (exploring means by which “trial mechanics—from discovery obligations through appellate review of evidentiary errors—might counterweigh certain kinds of narrative bias”).

postconviction barriers and focus more directly on the primary needs of defense lawyers to adequately represent their clients.<sup>125</sup>

Such efforts may run into a series of other constitutional criminal procedure rulings by the Court, not directly related to ineffective assistance of counsel claims, but which may handicap defense counsel. For example, defense lawyers may have their hands tied behind their backs when trying to understand and explain powerful but technical forensic evidence to a jury. The Court has recognized only very limited rights of indigent defendants to nonlawyer assistance. Indigent defense lawyers may have scant resources to investigate their cases. Further, experts, more expensive still than investigators, may be difficult to come by. In *Ake v. Oklahoma*<sup>126</sup> the Court recognized that psychiatric assistance is crucial in a case revolving around an insanity defense.<sup>127</sup> The Court has only “held open” the possibility of an entitlement to other types of experts, including forensic experts.<sup>128</sup> Postconviction challenges to failures to appoint experts or failures to challenge government forensic experts may be a fruitless avenue. Far more direct would be a *Gideon*-type entitlement to broader expert assistance. Perhaps additional research on the impact of forensic testimony on jurors and the role that experts can play might play some role in developing such an entitlement. Responding to an increasingly understood need, some cutting edge public defenders are starting to create specialist positions for lawyers who work on forensics-related litigation. In addition, scientific efforts to improve the validity and reliability of forensics, and provide scientific standards for crime laboratories themselves, may also have the benefit of giving

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125. See Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CALIF. L. REV. 383, 398 (2007) (discussing the effectiveness of pretrial litigation).

126. *Ake v. Oklahoma*, 470 U.S. 68 (1985).

127. See *id.* at 84 (holding that “when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist . . .”).

128. See *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (“Given that petition offered little more than undeveloped assertions that the requested assistance [of a criminal investigator, a fingerprint expert, and a ballistics expert] would be beneficial, we find no deprivation of due process in the trial judge’s decision.”).

defense counsel more information about what forensic analysis actually means, and improving the quality of the representation.

Of course, apart from reducing information asymmetry during negotiations, broader discovery inexpensively empowers counsel and perhaps reduces the need to secure investigative assistance. Improved discovery could play a particularly useful role during plea bargaining. A plea bargain can currently be conditioned on waiving the right to view *Brady* material that the prosecution would be constitutionally obligated to show to the defense at trial.<sup>129</sup> Perhaps access-to-courts arguments can also support entitlements, for example, to underlying forensic reports, or broader “open-file” type access to police reports and other such documents well before any criminal trial.<sup>130</sup>

A series of scholars, including myself, Darryl Brown, and Dan Simon, have described a change in focus from adversarial procedures towards more accurate investigations of criminal cases. Perhaps the next generation of *Gideon* litigation will focus on providing the tools that defense lawyers need to challenge unreliable evidence.<sup>131</sup> We need validated performance measures for defense lawyering—not to overly quantify the difficult, case-specific work that lawyers must do—but to better understand what resources we need to improve the accuracy and fairness of the system. As discussed, it is in pretrial development of evidence that one sees judges increasingly make use of social science evidence—as social scientists increasingly do work of direct

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129. See *United States v. Ruiz*, 536 U.S. 622, 623 (2002) (“Although the Fifth and Sixth Amendments provide, as part of the Constitution’s ‘fair trial’ guarantee, that defendants have the right to receive exculpatory impeachment material from prosecutors, . . . a defendant who pleads guilty foregoes a fair trial as well as various other accompanying constitutional guarantees.” (internal citation omitted)).

130. See *Mayer v. Chicago*, 404 U.S. 189, 190–92 (1971) (discussing the right to transcript in misdemeanor criminal case); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (noting a right for indigent defendant to receive a transcript of criminal trial required for appeal). *But see* *Draper v. Washington*, 372 U.S. 487, 495 (1963) (noting that the *Griffin* requirement may be flexible, and “[a]lternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant’s contentions arise”).

131. See Darryl K. Brown, *The Decline of Defense Counsel and Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1590 (2005) (discussing generally the “constraints of defense counsel”).

relevance to lawyers. Ineffective assistance of counsel litigation may change as a result.

### V. Conclusion

Fifty years after *Gideon* called it into a more organized existence, there are many challenges facing the indigent defense bar. As we know from available data, but still have difficulty imagining, each year public defenders represent a vast number of clients, over six million indigent defendants, and court-appointed lawyers represent still more.<sup>132</sup> Avoiding wrongful convictions and unfair outcomes in serious cases, much less run of the mill petty cases, is only one of the many challenges indigent defense counsel face, given crushing caseloads and scant resources. That said, the resources to adequately evaluate ubiquitous forms of forensic evidence, obtaining adequate discovery before entering plea bargains, and other procedures, could improve results within existing resource constraints. Further, the *Strickland v. Washington* test is internally inconsistent—and underexamined. More information about what attorney conduct is actually prejudicial to clients' interests could help to assess whether that conduct should be constitutionally regulated.

It is a comfortable armchair task for a lawyer to imagine ambitious scientific research agendas, suggesting this or that could be studied, without having to actually conduct challenging empirical research projects. That said, the lawyer's wish list might include a long list of studies sketched out here, which focus more on the roles of lawyers and clients during plea bargaining, together with what makes for "effective" counsel at criminal trials, including based on pretrial investigative work. Even if judges did not take note of such research, increasingly data-driven public defender offices could use such research to better represent their clients. Such a body of knowledge might not lead to a watershed development of constitutional law, but there is nothing wrong with incremental change. While there may never again be a case like *Gideon*, the drama of a first-time

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132. LYNN LANGTON & DONALD J. FAROLE, JR., PUBLIC DEFENDER OFFICES, 2007—STATISTICAL TABLES (2009), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf>.

constitutional ruling may eventually be eclipsed by careful contributions of lawyers, judges, scientists, and policymakers. Perhaps if lawyers look more to social science research and if social scientists look more to the roles played by lawyers, real improvements to the quality of criminal justice can result.