South Carolina Law Review

Volume 63 | Issue 2 Article 7

Winter 2011

The Ineffective Assistance of Counsel Era

Tom Zimpleman

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

 Part of the Law Commons

Recommended Citation

Zimpleman, Tom (2011) "The Ineffective Assistance of Counsel Era," *South Carolina Law Review*: Vol. 63 : Iss. 2 , Article 7.
Available at: https://scholarcommons.sc.edu/sclr/vol63/iss2/7

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

THE INEFFECTIVE ASSISTANCE OF COUNSEL ERA

Tom Zimpleman*

I. ABSTRACT

Federal habeas corpus law, which concerns the intersection of federal criminal law and procedure, federal courts, and the division between federal and state sovereignty, has been the subject of one of the most dramatic doctrinal overhauls of the last thirty years from both legislative and judicial sources. Since the 1970s, the federal courts, using a variety of doctrinal tools, have created substantive and procedural restrictions on the ability of state prisoners to challenge their convictions in federal court, and Congress codified many of those restrictions and added a number of others with the passage of the Anti-Terrorism

---

*The author is a trial attorney with the Federal Programs Branch, Civil Division, of the U.S. Department of Justice. A.B., University of Chicago, 2003; J.D., Stanford Law School, 2008. The views expressed herein are solely those of the author and should not be taken to represent the views of the Department of Justice. Thanks to Robert Weisberg, Jeffrey Fisher, and Lawrence Marshall for helpful comments on earlier versions of this Essay.

Published by Scholar Commons, 2011

and Effective Death Penalty Act of 1996 (AEDPA).[1] Paradoxically, however, those efforts to restrict the availability of federal habeas corpus relief have not dramatically affected the number of habeas petitions filed in federal court, even when controlling for the growth of the prison population. After examining a number of empirical studies of habeas litigation in federal district courts, this Essay suggests that the resilience of habeas corpus as a way of challenging a state court conviction results largely from the use of ineffective assistance of counsel claims as a safety valve to otherwise harsh substantive and procedural barriers to habeas petitioners, even after the passage of AEDPA. This Essay further suggests that the federal courts have, in recent years, begun to eliminate the safety valve protections of ineffective assistance of counsel doctrine, and considers what impact this development may have on habeas corpus petitions in the future.

II. INTRODUCTION

The federal habeas corpus statute, 28 U.S.C. § 2254, allows state prisoners to challenge their detention on the grounds that their conviction or sentence is "in violation of the Constitution or laws or treaties of the United States."[2] Habeas claims derive from criminal procedural rights and other constitutional rights, rather than claims that are directly related to the jury's guilt or innocence determination—which is why habeas corpus and state post-conviction review are collectively known as collateral review.[3] Habeas is thus a form of constitutional litigation, but one whose remedy—generally an order to retry the defendant or change his sentence[4]—undoes the substantive outcome of criminal trials.

---

1. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

2. 28 U.S.C. § 2254(a) (2006).

3. Innocence is not irrelevant to habeas claims, but it matters only indirectly. A prisoner who wishes to proceed on procedurally defaulted claims can file a habeas petition on those claims if he can demonstrate that in light of new evidence "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1995); *see also* House v. Bell, 547 U.S. 518, 538 (2006) (determining that the meaning of the "more likely than not" standard used in *Schlup* "does not require absolute certainty about the petitioner's guilt or innocence"). Even if the petitioner can meet this threshold test, however, he must still demonstrate an independent constitutional violation in order to obtain habeas relief. *Schlup*, 513 U.S. at 317 (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)). The Supreme Court has presumed, without deciding, that a prisoner who is sentenced to death and can demonstrate actual innocence would present a violation of the prisoner's Eighth Amendment rights, Fourteenth Amendment rights, or both, on those facts alone, *see* Herrera v. Collins, 506 U.S. 390, 405–07, 417 (1993), but the Court has never had to issue a definitive holding on that question. *See* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2251 (2010) (citing United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923)).

4. *See, e.g.*, Morales v. Coyle, 98 F. Supp. 2d 849, 904 (N.D. Ohio 2000) (holding that the petitioner's sentence shall be reduced to a life sentence or the respondent shall conduct a new sentencing trial for petitioner).

At least, that is how the habeas statute is supposed to work. In reality, habeas corpus litigation now usually boils down to the question of whether or not a petitioner's lawyer was so blundering or incompetent as to have failed to serve as "counsel," as guaranteed by the Sixth Amendment.[5] The majority of petitions now present at least one claim of ineffective assistance of counsel,[6] almost always as a way of indirectly presenting some other constitutional issue.[7] A court faced with the question of whether a petitioner's lawyer was constitutionally effective is supposed to answer two questions: first, has the defense "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and, if the answer to that first question is yes, then second, has "the deficient performance prejudiced the defense" such that the result of the trial is unreliable.[8] Those two context-dependent questions yield results that are hard to generalize beyond the facts of a specific case—a problem that leads to results like those from the Supreme Court's 2009 term.[9] Facts matter quite a bit, and it is hard not to be sympathetic to a federal district court charged with determining, on the basis of a cold record and absent live testimony, whether a defense lawyer's performance was sufficient.

Further, because the writ of habeas corpus involves a federal court reversing a final conviction of a state court, habeas corpus litigation has always been politically and legally controversial. The Supreme Court's 1953 opinion in *Brown v. Allen* held that issues decided in state courts could be raised in federal habeas corpus petitions.[10] Ever since this case was decided, academics and judges have worried that such decisions would throw the courthouse doors open to all manner of jailhouse lawyers seeking to raise all kinds of dubious legal claims.[11] This process, in which criminal defendants would litigate a host of

---

5. *See* U.S. Const. amend. VI.

6. *See infra* Part III.

7. *See, e.g.*, Anne M. Voigts, *Narrowing the Eye of the Needle: Procedural Default, Habeas Reform, and Claims of Ineffective Assistance of Counsel*, 99 COLUM. L. REV. 1103, 1118 (1999) (stating that a claim for ineffective assistance of counsel is often a precondition for raising additional claims that petitioners otherwise would not be able to raise due to waiver or procedural default).

8. Strickland v. Washington, 466 U.S. 668, 687 (1984).

9. *Compare* Porter v. McCollum, 130 S. Ct. 447, 448 (2009) (per curiam) (holding that counsel did not meet the representation requirements set forth in the Sixth Amendment when counsel failed to introduce evidence of defendant's activities during the Korean War), *with* Bobby v. Van Hook, 130 S. Ct. 13, 16 (2009) (holding that counsel did meet the Sixth Amendment representation requirements regardless of their alleged failure to secure an independent mental-health expert and to object to certain reports containing damaging evidence).

10. Brown v. Allen, 344 U.S. 443, 500 (1953), *superseded by statute*, Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

11. Academic opinion on the issue often takes two forms. One view urges that habeas corpus review be foreclosed, absent some failure in state corrective process or evidence that the petitioner is actually innocent. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 459 (1963) (no review unless state corrective process is inadequate); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*,

guilt–innocence issues in the state courts before raising constitutional issues in the federal courts, would lead to criminal trials best described, to borrow a word from Judge Posner, as "multiphasic."[12] Phase one would be the state court trial, which would determine the guilt or innocence of the accused, and the state court of appeals, which would review the jury's factual determinations and at least some of the constitutional claims.[13] Phase two would be the state post-conviction proceedings and the federal habeas corpus review, which would review the constitutional claims arising from a petitioner's state court proceedings.[14] Depending upon exhaustion requirements, phase two could conceivably involve several rounds of federal court proceedings.[15]

Since at least the late 1970s, proponents of broad federal review of state court criminal convictions have rapidly lost ground. Proponents of finality—those who push for very limited review or no review—have prevailed, at least as a matter of doctrine.[16] Federal courts have imposed all sorts of restraints on prisoners' ability to file habeas corpus petitions, for example, by making compliance with state law procedural default rules a requirement for federal jurisdiction.[17] However, the available evidence suggests that these efforts have not addressed the actual number of petitions filed by state prisoners. The filing rate of petitions jumped in the early 1960s—the period in which the Supreme Court created the most lenient procedural requirements for habeas petitions—

---

38 U. CHI. L. REV. 142, 142 (1970) (no review unless petitioner can provide evidence of actual innocence). Another view encourages courts to continue reviewing constitutional claims in habeas petitions, and often encourages federal courts to begin considering freestanding claims of innocence. *See, e.g.*, Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 108 (1993) (encouraging courts to use a "two-track" approach in which courts would "grant habeas relief whenever a petitioner could show either (1) a constitutional violation . . . coupled with a reasonable probability of an unjust outcome . . . or (2) an unreasonable denial of a constitutional claim on the merits by the state courts"); Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 310 (1994) (urging federal courts to begin considering freestanding claims of innocence). Still, a third view argues that habeas jurisdiction is essentially irrelevant in light of the small number of petitions filed and the even smaller number of successful petitions. *See* Daniel J. Meltzer, *Habeas Corpus Jurisdiction: The Limits of Models*, 66 S. CAL. L. REV. 2507, 2524–26 (1993). This view suggests that resources expended on habeas corpus litigation could best be spent on other areas of criminal adjudication. *See id.* at 2526–27.

12. McKeever v. Israel, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J., dissenting).

13. *Id.*

14. *Id.* Judge Posner also discusses Phase three, a phase involving § 1983 lawsuits complaining of mistreatment or neglect by prison officials, and Phase four, a phase involving claims against the prisoner's lawyers and judges complaining of violations of his civil rights. *See id.*

15. *See* ROGER A. HANSON & HENRY W.K. DALEY, NAT'L CTR. FOR STATE COURTS, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 14 (1995) (reporting many different types of habeas corpus petitions that are raised with some frequency).

16. *See* Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (holding that review is limited to the record of the state court that adjudicated the claim on the merits).

17. *See, e.g.*, Murray v. Carrier, 477 U.S. 478, 497 (1986) (refusing to allow habeas review of a procedurally defaulted discovery claim absent a showing of cause and prejudice).

peaking at about 9,000 petitions a year in 1970.[18] The filing rate leveled off in the 1970s, then jumped again in the early 1980s, reaching about 11,000 filings in 1990.[19] Prisoners were filing these petitions despite a decade of efforts to limit their access to federal courts. Indeed, Congress's most recent effort to restrict access to federal courts, AEDPA,[20] which imposed a series of procedural hurdles on habeas petitions and changed the standard under which courts reviewed them,[21] actually resulted in an *increase* in the number of petitions filed by state prisoners, even after adjusting for the growth in the prison population during those years.[22]

While those efforts failed to reduce the number of habeas petitions filed in federal courts, they did succeed in reshaping the nature of federal habeas corpus. The procedural default rules and the deferential standards of review adopted by federal judges and mandated by Congress in AEDPA conflated the state court and federal court review of constitutional issues with only one real exception: claims that a petitioner's counsel was constitutionally ineffective in the previous state proceedings.[23] The substance of post-conviction petitions has thus come to revolve around the performance of a petitioner's trial counsel, claiming that at some stage of the pre-trial, trial, or appeal process, counsel failed to make a critical argument respecting a petitioner's rights and thus failed to meet the Sixth Amendment's floor for adequate performance.[24]

To see why this is so, consider some recent scenes from the Supreme Court's habeas corpus decisions. On January 19, 2011, the Court issued a pair of unanimous decisions in *Harrington v. Richter*[25] and *Premo v. Moore*,[26] two federal habeas corpus cases from the Ninth Circuit, in which the petitioner had successfully obtained the writ of habeas corpus by alleging ineffective assistance of counsel.[27] In *Harrington*, the longer of the two opinions, the Court took the

18. VICTOR E. FLANGO, STATE JUSTICE INST., HABEAS CORPUS IN STATE AND FEDERAL COURTS 9 (1994).

19. *Id.* at 10 fig.1.

20. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

21. § 107(a) (codified at 28 U.S.C. §§ 2261–2266 (2006)).

22. JOHN SCALIA, U.S. DEP'T OF JUSTICE, PRISONER PETITIONS FILED IN U.S. DISTRICT COURTS, 2000, WITH TRENDS 1980-2000 NCJ 189430, at 7 (2002) (estimating that AEDPA resulted in one additional habeas corpus filing per month for every 3,400 state prison inmates).

23. *See, e.g.*, Harrington v. Richter, 131 S. Ct. 770, 787 (2011) (reviewing petitioner's claim of ineffective assistance of counsel).

24. *See, e.g.*, Porter v. McCollum, 130 S. Ct. 447, 453 (2009) (per curiam) (citing Wiggins v. Smith, 539 U.S. 510, 534 (2003)) (holding that petitioner's counsel was deficient for failing to investigate and present mitigating evidence at trial).

25. 131 S. Ct. 770 (2011).

26. 131 S. Ct. 733 (2011).

27. *Harrington*, 131 S. Ct. at 783; *Premo*, 131 S. Ct. at 738–39 (citing Moore v. Czerniak, 574 F.3d 1092, 1095 (9th Cir. 2009)).

time to address—in "unusually strong language"[28]—the Ninth Circuit's approach to issuing the writ.[29] The Court stated:

> The writ of habeas corpus stands as a safeguard against imprisonment of those held in violation of the law. Judges must be vigilant and independent in reviewing petitions for the writ, a commitment that entails substantial judicial resources. Those resources are diminished and misspent, however, and confidence in the writ and the law it vindicates undermined, if there is judicial disregard for the sound and established principles that inform its proper issuance.[30]

In *Premo*, the Court's message to the lower courts was less direct, but perhaps more consequential. The theme was not the danger of judicial disregard of legal principles, but instead the high degree of deference—phrased variously as "substantial deference," "latitude," and a court's "limited role" in searching only for "manifest deficiency" in the performance of counsel[31]—due to the decisions of trial counsel when evaluating an ineffective assistance of counsel claim.[32] Counsel must be given the freedom to make strategic decisions, the Court reasoned, lest "ineffective-assistance claims that lack [the] necessary foundation . . . bring instability to the very process the inquiry seeks to protect."[33]

The Supreme Court is not always so resistant to habeas corpus petitions, however, as the Court's previous term reveals. In *Porter v. McCollum*,[34] the petitioner prevailed. The Court found that Porter's counsel had not offered the sort of representation required by the Sixth Amendment because he had not investigated the possibility that Porter, a Korean War veteran, suffered from post-traumatic stress disorder.[35] The jury might have been swayed by that evidence if it had been offered, and may have reached a different sentence.[36]

---

28. John Elwood, *The Supreme Court Today: Strong Words on Habeas*, THE VOLOKH CONSPIRACY (Jan. 19, 2011, 1:32 PM), http://volokh.com/2011/01/19/the-supreme-court-today-strong-words-on-habeas.

29. *Harrington*, 131 S. Ct. at 780.

30. *Id.*

31. *Premo*, 131 S. Ct. at 741–42 (citing Lockhart v. Fretwell, 506 U.S. 364, 372 (1993); Strickland v. Washington, 466 U.S. 668, 689 (1984)).

32. *Id.* (citing *Lockhart*, 506 U.S. at 372; *Strickland*, 466 U.S. at 689).

33. *Id.* at 741.

34. 130 S. Ct. 447 (2009) (per curiam).

35. *Id.* at 453. The Court explained:

> Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.

Id. at 455 (footnotes omitted).

36. *Id.* at 448.

Accordingly, the Court reversed the Eleventh Circuit and threw out Porter's death sentence.[37]

While the Supreme Court is not always so resistant, it is not exactly welcoming either. In another case, *Wood v. Allen*,[38] the petitioner lost in a 7-2 decision. The Court found that Wood's counsel had not been constitutionally ineffective for not investigating or presenting evidence that he was mentally retarded and thus, under Supreme Court precedent,[39] was not eligible for the death penalty.[40] Wood's counsel made a strategic decision not to pursue further mental evaluations after reading through an initial evaluation prepared by an expert witness and finding nothing promising.[41] Because counsel, working under the pressures of a capital trial and sentencing proceeding, had decided to devote their time to pursuing other arguments, the Supreme Court would not second guess counsel's efforts by finding counsel constitutionally deficient.[42] Accordingly, the Supreme Court refused to throw out Wood's death sentence.[43]

Those were not the only cases from the 2009 term in which the Supreme Court dealt with the Sixth Amendment's guarantee of effective assistance of counsel. Very early on in the term, the Court issued a per curiam opinion reversing the Sixth Circuit's holding that a petitioner's counsel was constitutionally ineffective for not meeting the American Bar Association's (ABA) standards for capital defense counsel.[44] The Court had reversed a pair of death sentences between 2000 and 2005 because a habeas petitioner's lawyer failed to adhere to the ABA's standards; the Sixth Circuit's error, however, was in tossing out the death sentence due to the defense counsel's failure to meet an ABA standard that was not in effect at the time of the trial.[45]

---

37. *Id.* at 456. The Court denied Porter's petition for certiorari insofar as his petition challenged his conviction for murder. *Id.* at 448 n.1.

38. 130 S. Ct. 841 (2010).

39. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits the execution of the mentally retarded).

40. *Wood*, 130 S. Ct. at 844, 851.

41. *Id.* at 850–51. The case had initially presented a more interesting question, whether a state court's earlier finding that Wood's counsel made a strategic decision not to pursue further mental evaluations was a factual finding that needed to be reasonable in light of the evidence presented, or whether it was a factual determination that would stand unless Wood could rebut it with clear and convincing evidence and whether there is a difference those two standards. *See id.* at 848. The Court declined to address that issue because it found that even under Wood's proposed reading of the habeas statute the state court had not committed an error warranting habeas relief. *See id.* at 849.

42. *See id.* at 851.

43. *See id.*

44. Bobby v. Van Hook, 130 S. Ct. 13, 15, 17 (2009).

45. *Id.* at 16–17, 19 (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES § 10.7, Comment, at 81, 83 (rev. ed. 2003); 1 ABA STANDARDS FOR CRIMINAL JUSTICE § 4-4.1, at 4-53, 4-55 (2d ed. 1980)) (contrasting the ABA standards in effect in 1985 with those in effect as of 2003 and finding the latter to be much more expansive). The Court's discussion of the objective standards that a federal court should use to judge the performance of a defense lawyer attracted less press attention than Justice Alito's

Building off of these and other cases, this Essay argues that the last twenty-five years of habeas corpus litigation, since the Supreme Court's decision in *Strickland v. Washington*, and especially the fifteen years since the passage of AEDPA, should be regarded as the ineffective assistance of counsel era in federal habeas litigation. This resulted from the combination of three factors: (1) the malleability of ineffective assistance of counsel arguments, which can sweep in any other kind of substantive claim, (2) the timing of ineffective assistance claims, which, because they almost always require additional fact finding, can be presented for the first time in a post-conviction proceeding, and, perhaps the most important factor, (3) the legal profession's unique regard for the role of defense attorneys and the importance of corrective process, which caused reformers to impose all sorts of procedural and doctrinal burdens on petitioners but leave open the possibility for relief if a prisoner's defense counsel had been deficient. Ineffective assistance of counsel became the safety valve built into various efforts to reduce the number and frequency of habeas petitions or to otherwise reform the process.

This Essay also suggests that the ineffective assistance of counsel era is now coming to an end. While the Supreme Court may grant the occasional petition from an inmate like George Porter, Jr., the petitioner in *Porter v. McCollum*, those cases will be the very rare exception.[46] Habeas litigants never enjoyed particularly favorable odds in federal court, but within the last five years, the Supreme Court has used a number of doctrinal tools, some derived from AEDPA and others from the Court's own jurisprudence, to close the safety valve. However, as with most habeas reforms, narrowing the remedy for ineffective assistance of counsel probably will not do much to reduce the number of habeas petitions. We can still expect prisoners to file as many petitions as before, but with the ultimate chance of success now further reduced.

Part III of this Essay presents the empirical support for the premise that ineffective assistance of counsel has swamped all the other available claims in federal habeas corpus litigation and discusses the doctrinal changes in federal habeas litigation that brought about the change. Part IV offers a few explanations as to why courts and legislators would make it increasingly more difficult to obtain habeas relief on other sorts of claims while leaving ineffective assistance of counsel as a relatively broad and inviting avenue for relief. Part V examines the various ways in which the Supreme Court has recently narrowed

---

concurrence, which suggested that the lower courts should not pay special attention to the ABA standards at all. *See id.* at 20 (Alito, J., concurring). Justice Alito stated:

> It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination.

Id.

46. For a contemporaneous effort to parse the Supreme Court's death penalty jurisprudence from the 2009 term, see Linda Greenhouse, *Selective Empathy*, N.Y. TIMES (Dec. 3, 2009, 9:11 PM), http://opinionator.blogs.nytimes.com/2009/12/03/selective-empathy/.

the ineffective assistance of counsel exception, while discussing two cases that might demonstrate the opposite point, *Padilla v. Kentucky*, an ineffective assistance of counsel case involving the collateral consequences of criminal plea bargains,[47] and *Martinez v. Ryan*, a case for which certiorari was granted for the October 2011 term, involving the right to effective assistance of counsel in the context of ineffective assistance of counsel claims also presented in a state collateral review process.[48] Parts IV and V are thus the real doctrinal meat of this Essay, although hopefully part of the point is that in habeas corpus litigation, even more so than in other kinds of constitutional litigation, doctrine seems to be determined more by the psychology of the profession and political and social pressures than by analytical precision or a priori commitments.

III. THE PREVALENCE OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS IN HABEAS CORPUS LITIGATION

Habeas litigants make ineffective assistance of counsel claims more frequently than any other type of claim.[49] Indeed, habeas litigants make ineffective assistance of counsel arguments so frequently that those claims have largely eclipsed any other assertion of a deprivation of constitutional rights.[50] This was not always the case. Ineffective assistance of counsel claims have begun to dominate habeas corpus litigation only within the last thirty years, a development that has resulted from changes to criminal procedure doctrine itself, as well as changes to the criminal justice system as a whole.[51]

A. The Statistical Prevalence of Ineffective Assistance of Counsel Claims

Empirical studies of federal habeas corpus have been few and far between, but those studies that have been done point to a clear trend: the number of ineffective assistance of counsel claims has grown steadily, and as such claims have become more and more prevalent, claims about other constitutional deprivations have fallen by the wayside in federal habeas corpus litigation.[52] In a study examining petitions filed in federal court between the years 1973 to 1975, the most popular claim, made by litigants in 40% of cases, was that of a "due process" violation, a catch all category that might include any manner of

47. Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).

48. Martinez v. Schriro, 623 F.3d 731, 733 (9th Cir. 2010), *cert. granted sub nom.*, Martinez v. Ryan, 131 S. Ct. 2960 (2011).

49. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 114 (2008).

50. Ellen Kreitzberg & Linda Carter, *Innocent of a Capital Crime: Parallels Between Innocence of a Crime and Innocence of the Death Penalty*, 42 TULSA L. REV. 437, 449 n.73 (2006).

51. *See* Voigts, *supra* note 7, at 1110–13.

52. *See* FLANGO, *supra* note 18, at 10 fig.1 (showing the increasing trend in the filings of habeas petitions); HANSON & DALEY, *supra* note 15, at 14 (showing ineffective assistance of counsel issues as the subject of a large majority of habeas corpus petitions).

evidentiary, trial, or pre-sentencing ruling.[53] The study demonstrated that habeas litigants alleged ineffective assistance of counsel in only 16% of cases at this time.[54] Sentencing violations formed the basis of the petition in 14% of cases, and speedy trial claims in 13% of habeas cases in the study.[55]

The same researchers then examined federal habeas petitions filed between 1979 and 1981.[56] In the meantime, the Supreme Court had issued its opinion in *Wainwright v. Sykes*,[57] a decision that created the procedural default doctrine for habeas litigants.[58] That doctrine requires, in short, that if litigants make a claim in federal court that they failed to raise either on direct appeal in state court or, if such proceedings are available in a state post-conviction proceeding, then they would have to demonstrate "cause" for the default and "prejudice" from the resulting failure of the state court to consider the claim.[59] Cause and prejudice supplanted the more permissive "deliberate bypass" standard of *Fay v. Noia*,[60] a standard that allowed habeas litigants to raise new claims in a petition so long as the state could not show that the petitioner had sandbagged by holding off on making the claim in state court for strategic reasons.[61] Because some claims lend themselves more readily to a cause and prejudice analysis than others—for instance, a due process claim barred by state law or a claim that the prosecution suppressed exculpatory evidence in violation of the rule in *Brady v. Maryland*,[62] and withheld it for years—some claims were bound to become more prevalent in the era of cause and prejudice than they had been before. Commentators

---

53. Richard Faust, Tina J. Rubenstein & Larry W. Yackle, *The Great Writ in Action: Empirical Light on the Federal Habeas Corpus Debate*, 18 N.Y.U. REV. L. & SOC. CHANGE 637, 680 tbl.2 (1991). While this survey was one of the more intensive empirical studies conducted of habeas corpus petitions, one should hesitate before comparing it too readily to other studies since the researchers examined petitions in only one jurisdiction, the Southern District of New York. *Id.* at 668.

54. *Id.* at 680 tbl.2.

55. *Id.*

56. *Id.* at 677–80 tbl.2.

57. 433 U.S. 72 (1977).

58. *See id.* at 87.

59. *Id.* at 86–87 (footnote omitted) (citing Francis v. Henderson, 425 U.S. 536 (1976)).

60. *See id.* at 87–90 (citing Fay v. Noia, 372 U.S. 391 (1963), *overruled by Wainright*, 433 U.S. at 72).

61. *Fay*, 372 U.S. at 439. The Court stated:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits—though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default.

Id.

62. 373 U.S. 83, 87 (1963) ("[T]he 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.").

predicted that habeas petitioners would make ineffective assistance of counsel claims more often under the cause and prejudice standard because collateral review was the natural time to raise such claims, and because any number of other waived or defaulted constitutional claims could form the basis of an ineffective assistance of counsel claim.[63]

To some extent, the later empirical study of habeas corpus petitions bore out these predictions. Due process claims were still the most frequent and federal petitioners raised them in 49% of all cases.[64] The number of petitioners alleging ineffective assistance of counsel jumped markedly from 16% in the first survey to 29% in the second survey.[65] Next in popularity were claims alleging a search and seizure violation, 17% of petitions, sentencing violations, 14% of petitions, and challenges to the validity of guilty pleas, 13% of petitions.[66]

The next broad empirical survey of habeas petitions was conducted in 1995 by the National Center for State Courts.[67] The intervening years had built on the procedural limitations that the Court started with *Wainwright v. Sykes*.[68] The Supreme Court had already issued a decision barring federal habeas litigants from raising search and seizure claims in post-conviction petitions,[69] as well as barring litigants from receiving the benefit of "new rules" issued after their direct appeals had been exhausted or their time for filing an appeal had run out.[70] Meanwhile, the Court proceeded to widen the doctrine of procedural default, going so far as to hold in the early 1980s that the doctrine would extend to claims not raised in state court that bore on the factual innocence of the petitioner.[71] Moreover, the Court began to acknowledge that it would not construe an attorney's failure to recognize the factual basis of a claim as sufficient to satisfy the cause prong of the cause and prejudice test, nor would it consider an attorney's simple failure to make a claim, despite seeing the factual

---

63. *See* Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 509 n.187 (1978) ("If trial counsel has inexcusably failed to raise a viable claim, the habeas applicant can always assert a denial of the constitutional right of effective assistance of counsel."); James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 478 (1977) ("[I]t appears that if the defendant shows ineffective assistance of counsel which would otherwise result in a forfeiture of a federal claim, the ineffectiveness will normally qualify as cause under *Sykes*, allowing the federal habeas corpus court to reach the merits of the underlying federal claim.").

64. Faust, Rubinstein & Yackle, *supra* note 53, at 680 tbl.2.

65. *Id.*

66. *Id.*

67. HANSON & DALEY, *supra* note 15. This survey examined habeas petitions in eighteen federal judicial districts, located in nine different states; together, the districts accounted for about half of all habeas petitions filed in the United States. *Id.* at iv–v.

68. For an overview of changes to habeas corpus during this time, see Robert Weisberg, *A Great Writ While It Lasted*, 81 J. CRIM. L. & CRIMINOLOGY 9 (1990).

69. *See* Stone v. Powell, 428 U.S. 465, 469, 481–82 (1976).

70. *See* Teague v. Lane, 489 U.S. 288, 295–96 (1989).

71. *See* Engle v. Isaac, 456 U.S. 107, 129 (1982) (refusing to limit the doctrine to cases where the constitutional error did not affect the truthfinding function of the trial).

basis for it, as constituting cause and prejudice.[72] The Court closed another loophole in the procedural default doctrine by requiring that habeas petitioners exhaust state remedies for *all* claims presented in a habeas corpus petition,[73] and prevented them from using subsequent petitions to raise new claims, or at least made clear that claims made in a subsequent petition would be subject to the cause and prejudice test.[74] Further, the Court held that federal district courts could evaluate all claims in a habeas petition under a harmless error standard—even those claims that, on direct appeal, a court evaluates under a "harmless beyond a reasonable doubt" standard.[75]

Once again, changes in the doctrine underlying federal habeas corpus litigation had effects on the substance of the claims made by habeas corpus petitioners. The summary tabulation of petition characteristics in the 1995 study revealed some of the ways habeas litigants responded to the new doctrinal barriers. In 25% of habeas corpus petitions, litigants alleged some form of ineffective assistance of counsel, making it by far the most frequent claim in federal habeas corpus litigation at that time.[76] Trial court errors, such as erroneous evidentiary rulings, were the next most frequent claim, although they comprised only 15% of the prisoners' petitions.[77] Claims of Fourteenth Amendment and Fifth Amendment violations—encompassing due process violations suffered by state and federal prisoners and self-incrimination violations—were made in 14% and 12% of petitions, respectively.[78] Petitioners raised Sixth Amendment claims, aside from ineffective assistance, Eighth Amendment claims, and prosecutorial misconduct claims in less than 10% of petitions in the survey.[79] Meanwhile, *Stone v. Powell* had its intended effect[80]—petitioners made Fourth Amendment claims in only about 5% of the petitions in the study.[81] The remaining Fourth Amendment petitions are puzzling, although it is possible that the lag was due to the lack of a "full and fair" opportunity to litigate certain Fourth Amendment claims prior to or just after *Stone v. Powell*,[82] or that the claims may have been *Kimmelman* claims, where petitioners convert a Fourth Amendment violation into a Sixth

72. *See* Murray v. Carrier, 477 U.S. 478, 486–87 (1986) ("[T]he mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.").

73. Rose v. Lundy, 455 U.S. 509, 510 (1982).

74. *See* McCleskey v. Zant, 499 U.S. 467, 489, 493 (1991).

75. *See* Brecht v. Abrahamson, 507 U.S. 619, 622–23 (1993) (citing Chapman v. California, 386 U.S. 18, 24 (1967); Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

76. *See* HANSON & DALEY, *supra* note 15, at 14.

77. *Id.*

78. *Id.*

79. *Id.* Sixth Amendment claims, other than ineffective assistance petitions, comprised 7% of the petitions, Eighth Amendment claims comprised 7% of the petitions, and prosecutorial misconduct claims comprised 6% of the petitions. *Id.*

80. *See supra* text accompanying note 69.

81. HANSON & DALEY, *supra* note 15, at 14.

82. *See* Stone v. Powell, 428 U.S. 465, 481–82 (1976).

Amendment violation by alleging that trial counsel was ineffective for failing to move for the suppression of illegally seized evidence.[83]

Shortly after the 1995 survey was released, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996,[84] which once more changed the landscape of federal habeas corpus.[85] Much more could be said about the alterations that AEDPA made to the criminal justice system, but among other changes, the statute had the effect of enshrining the procedural default doctrine through a provision requiring habeas litigants to exhaust state remedies before filing a petition in federal court.[86] AEDPA also changed the standard of review for purely legal claims, requiring that federal judges defer to the legal conclusions of state court judges unless those determinations "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States,"[87] or "was based on an unreasonable determination of the facts in light of the evidence presented."[88] AEDPA thus requires habeas petitioners to first submit the claim in their petitions to a state court, either on direct appeal or through a state post-conviction proceeding, before submitting a petition to a federal district court.[89] The federal district court may then review whether the state court's decision was contrary to federal law, an unreasonable application of an otherwise correct interpretation of the law, or a correct application of the law based on an unreasonable interpretation of the underlying facts.[90] The big change, in other words, is that federal district courts may no longer engage in de novo review of constitutional claims in habeas petitions; they must instead look for something like plain error—a standard akin to that used on direct appeal, rather than one used in a truly collateral proceeding.[91] If the petitioner's constitutional claim rests on a mixed question of law and fact, such as a finding that hearsay testimony introduced against a defendant was a co-conspirator's

---

83. *Kimmelman* claims take their name from *Kimmelman v. Morrison*, 477 U.S. 365 (1986), which established that counsel's failure to make a suppression motion for obviously inadmissible evidence may constitute constitutionally inadequate assistance. *Id.* at 375.

84. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as 28 U.S.C.§ 2254).

85. *See generally* Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997) (discussing the legislative history of AEDPA).

86. AEDPA § 104(1) (as codified in 28 U.S.C. § 2254(b)(1)(A) (2006)). However, this provision does not prevent a judge from denying a petition on the merits, even if the petitioner has failed to exhaust state court remedies. *See id.* (as codified in 28 U.S.C. § 2254(b)(2) (2006)). Petitioners who fail to file a direct appeal of their conviction may have their claims dismissed by the district court for failing to exhaust state remedies, even if the petitioner filed a post-conviction petition. *See* O'Sullivan v. Boerckel, 526 U.S. 838, 848 (1999).

87. AEDPA § 104(3) (as codified in 28 U.S.C. § 2254(d)(1)).

88. AEDPA § 104(3) (as codified in § 2254(d)(2)).

89. AEDPA § 104(1) (as codified in § 2254(b)(1)).

90. AEDPA § 104(3) (as codified in § 2254(d)(1)–(2)).

91. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 29–30 (5th ed. 2005) (citing § 2254(d)).

declaration, then federal courts apply a similarly deferential standard.[92] The district court will use the state court's finding on this question unless there is no finding, the finding is unreasonable, or the state court made the finding while applying an improper legal standard.[93] If the petitioner failed to develop the facts underlying a claim in state court, the petitioner cannot obtain an evidentiary hearing absent a showing that "the claim relies on either a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," or relies on "a factual predicate that could not have been previously discovered through the exercise of due diligence."[94] Additionally, the petitioner must show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[95] This last provision requires a showing that the factual predicates of a properly preserved claim demonstrate the innocence of the petitioner even before the district court holds an evidentiary hearing.

Surely, a change in the procedure for habeas corpus petitions, coupled with a substantive change in the standard of review applied to those petitions, would result in some pronounced changes to substantive habeas corpus claims. That is precisely what happened. The National Center for State Courts conducted the most recent empirical study of federal habeas corpus claims in 2007, the first study of its kind since AEDPA was passed.[96] Confirming the trend of the last thirty years, the researchers found that ineffective assistance of counsel was far and away the most frequently raised claim in federal habeas corpus litigation. Litigants asserted ineffective assistance in 81% of all habeas petitions in capital cases, raising it in thirty of thirty-three successful petitions, and in 50% of all habeas petitions in noncapital cases, raising it in only two of seven successful petitions.[97] Petitioners challenged evidentiary rulings, including *Kimmelman* claims of ineffective assistance, in 46% of all capital petitions and 20% of all noncapital petitions.[98] Petitioners challenged the sufficiency of the evidence supporting the conviction or offered new evidence of innocence in 26% of all capital cases, and in ten of thirty-three successful petitions, and in 19% of noncapital habeas petitions, including two of seven successful petitions.[99]

In contrast to the ineffective assistance of counsel claims, litigants challenged the conduct of prosecutors more frequently than before the passage of

92. *Id.* at 30–31.
93. *Id.*
94. 28 U.S.C. § 2254(e)(2)(A).
95. § 2254(e)(2)(B).
96. NANCY J. KING ET AL., NAT'L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf.
97. *Id.*
98. *Id.* at 29.
99. *Id.* at 28–30.

AEDPA, but not nearly as often as they challenged the conduct of defense attorneys. Forty-eight percent of habeas petitions in capital cases and 10% of habeas petitions in noncapital cases challenged improper prosecutor comments.[100] Forty-three percent of capital cases and 13% of noncapital cases also raised a *Brady* claim about lost or undisclosed evidence.[101] Finally, petitioners challenged guilty pleas more frequently in noncapital petitions (15%) than in capital petitions (4%), a result that is probably attributable to the fact that the vast majority of capital sentences occur after jury trials and not after guilty pleas.[102]

The three surveys discussed all used slightly different methodologies, and only the final survey from 2007 looked at all judicial districts, rather than a single district or a representative sample of districts.[103] It is difficult to make generalizations on the basis of the data presented in the three studies, especially since the surveys were separated by a number of years and there are not sufficient data to provide complete trend lines. But, the available evidence justifies the conclusion that over the last thirty years, ineffective assistance of counsel has become the dominant claim in federal habeas corpus litigation.

B. The Many Types of Ineffective Assistance

It is impossible to discuss the frequency of ineffective assistance of counsel claims without also discussing the many forms that such a claim can take. Indeed, over the years, ineffective assistance of counsel has not only come to dominate in terms of numbers, but it has come to dominate habeas corpus doctrine as well—turning into a legal claim spanning nearly all aspects of the trial and appellate processes, and some limited aspects of the state post-conviction process, while also sweeping in other conceivable legal claims. Ineffective assistance of counsel is, in short, not just a popular claim in federal habeas corpus, but a truly vertiginous one as well. There are as many ways to be ineffective as there are lawyers and defendants in the criminal justice system.[104]

While the right to an effective advocate at trial is likely the right that most immediately springs to mind when one imagines the Sixth Amendment right to counsel, the right to counsel now extends to all critical stages of a proceeding.[105] Accordingly, the Sixth Amendment right to effective counsel begins, at least theoretically, sometime before jury selection and continues through the

---

100. *Id.* at 30.

101. *Id.* Originally, petitioners made *Brady* claims in cases where the prosecutor had suppressed exculpatory evidence, but the doctrine has now been expanded to include police and other members of the prosecution and law enforcement teams. *See* Kyles v. Whitley, 514 U.S. 419, 438 (1995).

102. KING ET AL., *supra* note 96, at 30.

103. *See supra* notes 53, 67, 96 and accompanying text.

104. HERTZ & LIEBMAN, *supra* note 91, collects a number of examples of successful habeas petitions alleging ineffective assistance of counsel.

105. *See* United States v. Cronic, 466 U.S. 648 (1984).

exhaustion of direct appeals.[106] The drunken appointed counsel who cannot show up to the courthouse sober or stay awake through the trial is the stereotypical ineffective counsel.[107] But in the case law, ineffective assistance is evergreen. Before trial, it can take many forms. It can be established by an attorney's forfeit of legal claims, such as counsel's failure at voir dire to challenge for cause a juror who offered statements of partiality.[108] Or it can consist of counsel's failure to move for the dismissal of an untimely indictment on state law grounds.[109] It can also consist of an attorney's investigative failures. For example, counsel's inability or unwillingness to conduct a basic pretrial investigation, whether that involves interviewing eyewitnesses or exploring alibi testimony, may constitute ineffective assistance.[110] Needless to say, defense counsel that fails to notify the court of plans to present an alibi defense also offers ineffective assistance.[111]

At trial, defense counsel can be ineffective for committing to a poor defense strategy,[112] or for failing to investigate and present an alternate defense.[113]

---

106. *See* Evitts v. Lucey, 469 U.S. 387, 397 (1985) (recognizing the right to effective assistance of counsel on appeal); Mitchell v. Mason, 325 F.3d 732, 744 (6th Cir. 2003) (finding that petitioner was effectively denied counsel when his lawyer spent a total of six minutes meeting with him prior to jury selection and the start of trial); Appel v. Horn, 250 F.3d 203, 217 (3d Cir. 2001) (concluding that standby counsel was constitutionally ineffective for failing to conduct an independent investigation into petitioner's competency to stand trial prior to pretrial competency hearing).

107. *See, e.g.*, Haney v. State, 603 So. 2d 368, 378 (Ala. Crim. App. 1991) (citing court appointed counsel for contempt for being intoxicated during the trial), *aff'd sub nom.*, Ex parte Haney, 603 So. 2d 412 (Ala. 1992).

108. *See, e.g.*, Miller v. Webb, 385 F.3d 666, 674–75 (6th Cir. 2004) (holding that trial counsel's failure to challenge a juror for cause after the juror made a statement that she thought she could be fair, but immediately qualified the statement with a statement of partiality, was "objectively unreasonable").

109. Young v. Dretke, 356 F.3d 616, 629–30 (5th Cir. 2004).

110. *See* Soffar v. Dretke, 368 F.3d 441, 473–74 (5th Cir.) (holding that failure of a capital murder defendant's counsel to interview surviving victim who had given exculpatory statements constituted ineffective assistance), *amended on reh'g in part*, 391 F.3d 703 (5th Cir. 2004); Riley v. Payne, 352 F.3d 1313, 1325 (9th Cir. 2003) (holding that failure to interview or call a key witness who would have corroborated defendant's testimony as it related to a affirmative defense constituted ineffective assistance); Anderson v. Johnson, 338 F.3d 382, 394 (5th Cir. 2003) (holding that the failure to investigate and interview a crucial eyewitness constituted ineffective assistance); Holmes v. McKune, 59 F. App'x 239, 254 & n.15 (10th Cir. 2003) (holding that the failure to interview or call an alibi witness constituted ineffective assistance).

111. *See, e.g.*, Clinkscale v. Carter, 375 F.3d 430, 444–45 (6th Cir. 2004) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)) (holding that because counsel failed to file notice of alibi defense until three days before trial, despite the fact that a defense investigator uncovered at least three alibi witnesses beforehand, defendant received ineffective assistance of counsel).

112. *See* White v. Godinez, 301 F.3d 796, 802 (7th Cir. 2002) (holding that counsel was ineffective because he committed to a losing strategy without adequately consulting client); Rios v. Rocha, 299 F.3d 796, 805–06 (9th Cir. 2002) (holding that client received ineffective assistance of counsel because counsel failed to reasonably investigate client's case prior to selecting a defense strategy).

Counsel can be ineffective for failing to move for the suppression of key evidence, a *Kimmelman* claim,[114] or for failing to investigate a key piece of evidence.[115] Counsel may be considered ineffective in the presentation of the defendant's case, for example, by presenting a witness who opens the door to questioning about a defendant's previous convictions,[116] or by presenting a weak, poorly investigated alibi defense.[117] Then, of course, there are instances where defense counsel is simply per se ineffective, usually because counsel has done something so egregiously incompetent that it casts the whole trial into doubt; for example, sleeping during the presentation of the State's case.[118] Likewise, at the penalty phase, ineffective counsel might reject a favorable plea deal because of a misunderstanding of the applicable sentencing law[119] or make an unfavorable plea for the same reason.[120] If the defendant's guilt was determined after a jury trial, ineffective counsel at the penalty stage could consist of counsel's failure to investigate mitigating factors in the sentencing determination.[121] Finally, counsel may simply proclaim in summation at the penalty phase that the defendant is "a worthless man. . . . [I] hate my client."[122]

The list of possible errors by counsel extends to the appeal stage, where a finding of ineffectiveness can stem from a failure to appeal errors in the trial phase,[123] the sentencing phase,[124] or the appeal itself.[125] And this leaves out the

---

113. Jennings v. Woodford, 290 F.3d 1006, 1016 (9th Cir. 2002) (holding that counsel was constitutionally inefficient due to a failure to investigate and present a defense based on the client's mental health history).

114. *See* Northrop v. Trippett, 265 F.3d 372, 378 (6th Cir. 2001) (citing Kimmelman v. Morrison, 477 U.S. 365, 382–83 (1986)).

115. Maxwell v. Mahoney, 198 F.3d 254, at *1 (9th Cir. 1999) (unpublished table decision).

116. Miller v. Anderson, 255 F.3d 455, 459 (7th Cir.), *vacated on other grounds*, 268 F.3d 485 (7th Cir. 2001).

117. Johnson v. Baldwin, 114 F.3d 835, 840 (9th Cir. 1997).

118. Tippins v. Walker, 77 F.3d 682, 690 (2d Cir. 1996).

119. *See* Magana v. Hofbauer, 263 F.3d 542, 550 (6th Cir. 2001).

120. *See, e.g.*, Miller v. Straub, 299 F.3d 570, 580–81 (6th Cir. 2002) (holding that counsel's failure to realize that pleading guilty to obtain a juvenile sentence permitted the government to appeal and seek a harsher sentence was incompetent representation).

121. *See* Boyde v. Brown, 404 F.3d 1159, 1176 (9th Cir.), *amended on reh'g*, 421 F.3d 1154 (9th Cir. 2005); Lewis v. Dretke, 355 F.3d 364, 366–67 (5th Cir. 2003) (per curiam).

122. Horton v. Zant, 941 F.2d 1449, 1462–63 (11th Cir. 1991) ("Given [counsel's] failure to present mitigating evidence and his unfortunate comments, clearly there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984))).

123. *See* Richey v. Mitchell, 395 F.3d 660, 682 (6th Cir. 2005) (holding that defendant's appellate counsel was ineffective because he failed to raise ineffectiveness based on the trial counsel's failure to challenge the sufficiency of the state's evidence).

124. *See* Mapes v. Tate, 388 F.3d 187, 192–93 (6th Cir. 2004) (holding that defendant's appellate counsel was ineffective because he failed to raise a meritorious claim of instructional error).

125. *See* Harris v. Day, 226 F.3d 361, 362 (5th Cir. 2000) (holding that defendant's appellate counsel was ineffective because he wrote an *Anders* brief that failed to identify the issues raised in

cases where ineffectiveness is presumed because of a conflict of interest between the counsel and another participant in the trial, usually a defendant.[126]

By now the picture is clear—ineffective assistance of counsel doctrine gives state prisoners an impressively large number of possible errors to raise in their federal habeas corpus petitions and courts can grant relief for an error at almost any stage of the trial process.

Ineffective assistance of counsel doctrine also stretches to include other areas of criminal procedure doctrine so that a *possibly* meritorious claim, if not presented at all or presented poorly by defense counsel, may then become the basis for an ineffective assistance of counsel claim. The Supreme Court's decision in *Kimmelman v. Morrison*[127] illustrates how this process of envelopment works. After the respondent in *Kimmelman* was convicted of rape, he filed a federal habeas corpus petition arguing that his counsel was ineffective for his failure to file a suppression motion against a damning piece of evidence that the police had seized from his home.[128] The Supreme Court's opinion spent almost no time evaluating the competence of the respondent's attorney.[129] The central issue in the case was, instead, whether the respondent was truly prejudiced by his attorney's failure to file a motion to suppress.[130] If the respondent had brought this claim as a straightforward Fourth Amendment claim, the Court would have dismissed the case pursuant to *Stone v. Powell*.[131] And, in fact, the case almost surely would not have reached the Supreme Court or received more than a perfunctory review by the federal court of appeals in that

---

the appeal); Roe v. Delo, 160 F.3d 416, 420 (8th Cir. 1998) (holding that defendant's appellate counsel was ineffective because he failed to request plain error review of an issue raised on appeal).

126. *See, e.g.*, Harris v. Carter, 337 F.3d 758, 762, 764 (6th Cir. 2003) (holding that defendant's counsel was presumably ineffective because counsel previously represented a witness for the prosecution); Ruffin v. Kemp, 767 F.2d 748, 752 (11th Cir. 1985) (holding that defendant's counsel was presumably ineffective because counsel simultaneously represented a codefendant and solicited testimony from each defendant against the other).

127. 477 U.S. 365 (1986).

128. *Id.* at 368–69, 371. The evidence was a bed sheet that the state's experts testified contained stains and hair sample evidence linking Morrison to the victim in the case. *Id.* at 370. Morrison's attorney objected to the introduction of the sheet at trial, but failed to comply with a New Jersey court rule requiring attorneys to make all suppression motions within thirty days of the indictment. *Id.* at 368–69. Morrison's attorney did not comply with the procedural rule because he was unaware that the police had seized the sheet; he was apparently unaware of the seizure of the bed sheet because he had not conducted any pretrial discovery. *Id.*

129. *See id.* at 383–87 (discussing attorney competence in Part III-A of the *Kimmelman* majority opinion—spanning a total of four pages).

130. *See id.* at 387–91. Counsel's failure to conduct pretrial discovery in *Kimmelman* resulted from the decision to investigate the credibility of witnesses, rather than to look into the possibility that the state would use scientific evidence at trial. *Id.* at 385–86. The Court simply held that the defense attorney could not defend this decision because "such a complete lack of pretrial preparation puts at risk both the defendant's right to an 'ample opportunity to meet the case of the prosecution' and the reliability of the adversarial testing process." *Id.* at 385 (quoting Strickland v. Washington, 466 U.S. 668, 685 (1984)).

131. 428 U.S. 465 (1976).

situation. The state of New Jersey picked up on this disparity and urged the Court to lift the Sixth Amendment veil from the respondent's claim, and to dismiss it as a Fourth Amendment claim that was inappropriate for collateral review.[132]

The majority of the Court, however, took the view that, regardless of the underlying claim, the respondent was making a Sixth Amendment claim and his Sixth Amendment right to counsel included counsel's failure to litigate claims that would have otherwise been barred on collateral review.[133] Justice Brennan, writing for the majority, conceded that the bed sheet seized from the respondent's apartment was pretty reliable evidence of his guilt, but held that such considerations about the reliability of the evidence were irrelevant to the concerns about the integrity of the adversarial process that underlie the right to counsel.[134] The majority was divided over this question. Justice Powell wrote separately in order to emphasize his belief that the case did not settle "[t]he more difficult question [of] whether the admission of illegally seized but reliable evidence can ever constitute 'prejudice.'"[135] However, Justice Brennan's emphasis on the adversarial process in the majority opinion suggests that it can, although the "prejudice" at issue in *Kimmelman*-type cases is a strange sort of prejudice.[136] A defense attorney's failure to move to suppress probative, incriminating evidence is not prejudicial in that such a failure in and of itself throws the result of the trial into doubt. Rather, the defense attorney's failure to make a suppression motion is prejudicial to the defendant because an embarrassingly obvious blunder like the failure to make a basic pretrial motion, or the failure to undertake discovery, taints every other decision made by that attorney. It demonstrates a real risk that the adversarial process had broken down and that any corrective process growing out of that trial could not be trusted to have identified other constitutional deficiencies with the defendant's conviction.

Other cases highlight the same idea, that allegations of ineffective assistance of counsel raise concerns about the adversarial process in the courts below, and

---

132. *See Kimmelman*, 477 U.S. at 374–75.

133. *See id.* at 378–79. Justice Brennan offered two arguments for this holding in the majority opinion. First, because ineffective assistance claims are generally reserved for collateral review, barring claims like Morrison's on the basis of *Stone v. Powell* would deprive criminal defendants of a chance to vindicate their right to counsel. *Id.* at 377–78. Second, *Stone* rested on a determination that the state should not have to bear the burden of exclusion when the time of the exclusionary remedy was so greatly removed from the illegal conduct of the police, and the deterrent value of exclusion was minimal. *Id.* at 379. The Court could not make such a determination with respect to ineffective assistance of counsel, however, and the state should bear the burden of any breakdowns in the adversarial process. *Id.* Note, however, that both arguments assume that the right to counsel encompasses the right to have counsel make any applicable pretrial suppression motions, and that the failure to do so makes the subsequent conviction an illegitimate "cost" borne by the defendant.

134. *Id.* at 379–80 (citing Evitts v. Lucey, 469 U.S. 387, 394 (1985); United States v. Cronic, 466 U.S. 648, 655–56 (1984)).

135. *Id.* at 391 (Powell, J., concurring).

136. *See id.* at 379 (citing *Stone*, 428 U.S. at 490).

so the normal presumptions about finality and the reliability of corrective processes no longer apply. Consider what the Eleventh Circuit Court of Appeals held in *Davis v. Secretary for the Department of Corrections*.[137] In *Davis*, defense counsel failed to preserve the petitioner's *Batson* challenge by renewing his objection before the start of trial.[138] When Davis raised the *Batson* issue on appeal, the appellate court noted that the objection was "well taken," but declined to address it because the issue had not been properly preserved for appeal.[139] Davis then filed a state post-conviction petition raising, among other issues, his counsel's ineffectiveness in failing to preserve the *Batson* issue.[140] After the state court rejected Davis's post-conviction petition, Davis filed a federal habeas corpus petition alleging ineffective assistance of counsel.[141] While the district court rejected Davis's petition, the Eleventh Circuit Court of Appeals vacated that decision and remanded the case.[142] The appellate panel held, likely because Davis's attorney had raised a contemporaneous objection to the prosecutor's use of peremptory challenges, that there was no indication of a strategic reason for counsel to drop the *Batson* issue before the jury was sworn in.[143] The court concluded that there was "a reasonable probability that the Florida Third District Court of Appeal would have reversed Davis's conviction had trial counsel preserved a *Batson* challenge."[144] Consequently, Davis was entitled to relief, even though the federal court of appeals could go no further than to say that relief was *possible* had the issue been properly preserved.[145] Ineffective assistance of counsel doctrine thus swept in part of the doctrine behind *Batson* claims, in that Davis had to show he had a meritorious claim, but he did not need to show that his claim was certain to prevail on appeal. The Eleventh Circuit Court of Appeals had to apply a lower standard to Davis's *Batson* claim as filtered through ineffectiveness doctrine than it would have applied if the issue was preserved and raised directly.

Ineffective assistance of counsel doctrine has swept in doctrines beyond *Batson* claims. In *Washington v. Hofbauer*,[146] the Sixth Circuit Court of Appeals granted relief to a petitioner whose attorney failed to object to prosecutorial

---

137. 341 F.3d 1310 (11th Cir. 2003).

138. *Id.* at 1312 (citing Davis v. State, 710 So. 2d 723, 724 (Fla. Dist. Ct. App. 1998) (per curiam)). A *Batson* challenge, named for the Supreme Court's decision on the issue in *Batson v. Kentucky*, 476 U.S. 79 (1986), allows a defendant to challenge a prosecutor's use of peremptory challenges in a racially discriminatory manner. *See id.* at 89. Under Florida law, defense counsel must renew a *Batson* challenge before the jury is sworn in to preserve the issue for appeal. *See Davis*, 341 F.3d at 1312 n.3 (citing Joiner v. State, 618 So. 2d 174, 175–76 (Fla. 1993)).

139. *Id.* (quoting *Davis*, 710 So. 2d at 724) (internal quotation marks omitted).

140. *Id.*

141. *Id.*

142. *Id.* at 1313, 1317.

143. *Id.* at 1314 n.7.

144. *Id.* at 1317.

145. *See id.*

146. 228 F.3d 689 (6th Cir. 2000).

misconduct.[147] In *Flores v. Demskie*,[148] the Second Circuit granted relief to a petitioner whose counsel failed to challenge the prosecutor's failure to comply with a statute requiring disclosure of witnesses' prior statements.[149]

The rise of ineffective assistance of counsel claims is not merely a question of numbers, but also a question of doctrine. Habeas petitioners are not only raising claims of ineffective assistance of counsel more frequently than they raise any other claim, courts are also finding ineffective assistance of counsel throughout the criminal adjudication process and are using the doctrine to address constitutional violations that may not otherwise entitle a petitioner to relief. Ineffective assistance of counsel doctrine thus reaches almost any error that the defense attorney can make, plus almost any error that the judge or prosecutor can make, if unaddressed.

There are two possible ways of understanding this area of legal doctrine. The first is to suggest that prisoners are merely latching onto ineffective assistance of counsel claims in order to get around procedural default rules. In order to have a claim to raise in a habeas petition, prisoners blame their conviction on their counsel. It is of course partly true that prisoners can always allege some kind of ineffectiveness by their trial counsel.[150] The rise of ineffective assistance of counsel claims suggests, however, that another dynamic is also at work. Habeas corpus rests on the premise that claims presented in habeas litigation have already been addressed by state or federal corrective processes.[151] Ineffective assistance of counsel doctrine should capture those rare cases in which attorney performance was so bad that it deprived the defendant of an adequate corrective process in the courts below. This system would work, then, if the legal system generally did afford corrective process to defendants and the decisions below were adequate to allay any concerns that the defendant's constitutional rights had been violated. It would not work, however, if the corrective process afforded to criminal defendants in state courts was not as

147. *Id.* at 694.

148. 215 F.3d 293 (2d Cir. 2000).

149. *Id.* at 295.

150. This was the reason courts traditionally opposed creating a remedy for ineffective assistance of counsel. For example, in 1945, the D.C. Circuit Court of Appeals, in an opinion written by Thurman Arnold, who was not exactly a conservative in his day, categorically rejected any habeas corpus relief for ineffective assistance of counsel for precisely this reason. *See* Diggs v. Welch, 148 F.2d 667, 670 (D.C. Cir. 1945). The Court explained:

> The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear.

Id.

151. *See* 28 U.S.C. § 2254(b)(1) (2006).

thorough or reliable as reformers suggested it was. The trouble with habeas corpus in the era of cause and prejudice, then, may simply be that what the courts and legislatures viewed as a safety valve—the opportunity to challenge a conviction where a defense attorney's performance was constitutionally inadequate—was quickly overrun. The dynamics underlying this change, in particular, the rise in indigency in the criminal justice system and the often inadequate resources given to public defenders and appointed counsel, are largely beyond the scope of this Essay.[152] The next Part, however, explores the various reasons why courts made ineffective assistance of counsel claims exempt from the procedural restrictions to which other potential habeas claims are subject.

IV. EXPLAINING THE POPULARITY OF INEFFECTIVE ASSISTANCE OF COUNSEL

As the analysis in the previous section indicated, ineffective assistance of counsel allegations now dominate habeas corpus litigation—a development several decades in the making—primarily because ineffective assistance of counsel claims are not subject to the strictest procedural forfeiture rules.[153] Why the exception? Part of the answer may be simply practical. Ineffective assistance of counsel claims often require additional fact finding in the form of either testimony from the prisoner's former counsel about the basis for various decisions, or investigations into the merits of substantive defenses or procedural deficiencies that defense counsel chose not to explore at trial.[154] As mentioned earlier, the logical forum for such fact finding to take place is in post-conviction proceedings rather than on direct appeal, which provides at least some reason for exempting ineffective assistance of counsel claims from the normal procedural

---

152. Professor William Stuntz devoted much of his career to analyzing the various ways in which the expansion of criminal procedure rights led to a political backlash that deprived indigent defendants of the resources necessary to contest criminal charges and thus, ironically, probably resulted in more poor defendants being sentenced to lengthy prison terms. *See, e.g.*, William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008) (discussing the inequalities in the American criminal justice system and possible steps for reversing them); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997) (discussing the harshness of criminal procedure).

153. *See* Harrington v. Richter, 131 S. Ct. 770, 788 (2011) (citing Strickland v. Washington, 466 U.S. 668, 689–90 (1984)). In *Harrington*, the Court explained that:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve.

Id.

154. *See, e.g.*, Massaro v. United States, 538 U.S. 500, 505 (2003) ("The court may take testimony from the witnesses for the defendant and the prosecution and from the counsel alleged to have rendered the deficient performance.").

default rules.[155] Other claims, however, such as a prosecutor's failure to turn over *Brady* material, also frequently require post-conviction fact finding, and so this practical point is likely only part of the story. I suggest that the answer stems from a combination of three different factors.

A. It Is a Byproduct of Cause and Prejudice

The first explanation is purely practical: Ineffective assistance of counsel is a claim that is seemingly specifically tailored to the cause and prejudice test. If a prisoner must present a claim to the trial court in the first instance or otherwise account for the failure, the most logical explanation for that failure is the defense counsel's decision not to raise or explore the issue in the original proceeding. The Supreme Court made clear in *Murray v. Carrier*,[156] however, that counsel's failure to raise an issue would not constitute cause for purposes of the cause and prejudice test unless the error was so egregious as to constitute ineffective assistance of counsel.[157] Therefore, any legal issues that are not adjudicated on the merits at trial—which are the claims most likely to result in a successful habeas petition—had to be presented as an ineffective assistance of counsel issue.[158] This result is one that many people predicted when the cause and prejudice test was adopted.[159]

Of course, allowing prisoners to present other substantive issues through the vehicle of an ineffective assistance of counsel challenge probably distorted the test for ineffective assistance of counsel that the Supreme Court thought it was developing in *Strickland*. A lawyer's performance, at least under the *Strickland* test, is supposed to be evaluated based on the entirety of the record and with due deference to the notion that some omissions may have been strategic.[160] But ineffective assistance of counsel case law is replete with examples, some from the Supreme Court itself, that hold that a single act or omission is serious enough

155. *See id.* at 504–05; United States v. Moreland, 604 F.3d 1058, 1068–69 (9th Cir. 2010) (citing United States v. Jeronimo, 398 F.3d 1149, 1156 (9th Cir. 2005)); United States v. Garcia, 567 F.3d 721, 729 (5th Cir. 2009) (citing United States v. Gulley, 526 F.3d 809, 821 (5th Cir. 2008)).

156. 477 U.S. 478 (1986).

157. *See id.* at 496 (citing United States v. Cronic, 466 U.S. 648, 657 n.20 (1984)).

158. *See id.*

159. *See supra* text accompanying note 63.

160. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) ("In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances."). Of course, the Court has acknowledged that an isolated error may form the basis of an ineffective assistance of counsel claim, but such cases were meant to be the exception. *See* Harrington v. Richter, 131 S. Ct. 770, 791 (2011) ("And while in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." (quoting *Murray*, 477 U.S. at 496)).

to constitute ineffective assistance, while simultaneously finding that the error was so basic that it could not possibly have been strategic.[161]

There are two salient points here. First, as the previous section demonstrated, ineffective assistance of counsel should be thought of not primarily as a constitutional claim in its own right, but rather as a way of making other constitutional or procedural claims in a habeas corpus petition. *Davis v. Secretary for the Department of Corrections* is just one example of how an independent criminal procedure claim is incorporated into an ineffective assistance of counsel claim.[162] The inquiry usually proceeds in three stages. First, is there merit to the underlying claim?[163] Second, is it likely that the outcome of the trial or sentencing would have been different had counsel presented the claim?[164] Third, is there a good reason why counsel did not pursue the claim during trial or sentencing?[165] When a court can answer yes to the first two questions and no to the third, it is very likely to entertain the habeas petition,[166] even if the Supreme Court has suggested that courts should be reluctant to grant the writ based on an attorney's isolated errors.[167]

Second, the fact that the Court preserved the claim of ineffective assistance of counsel as a means to overcome procedural default rules is also, in itself, evidence of the privileged place of ineffective assistance of counsel in habeas litigation.[168] The Supreme Court stated in *United States v. Cronic*,[169] and in *Murray v. Carrier*,[170] that a single error, as opposed to a record of deficient performance, could form the basis for an ineffective assistance of counsel claim if the error was sufficiently serious and prejudicial.[171] Both statements were arguably dicta—the Court reversed the lower court decision granting the writ in

---

161. *See, e.g.*, Rompilla v. Beard, 545 U.S. 374, 383–84 (2005) (holding that defense counsel's failure to examine petitioner's prior conviction file, in a capital case where those prior convictions would be used to establish eligibility for the death penalty, constituted ineffective assistance of counsel). Of course, given that these sorts of elementary mistakes often occur in capital cases, one can hardly criticize the Court for finding that kind of performance deficient.

162. *See supra* text accompanying notes 137–145.

163. *See, e.g.*, Mayo v. Henderson, 13 F.3d 528, 533 (2d Cir. 1994) (citing *Strickland*, 466 U.S. at 688) (stating that the petitioner must first show that attorney's actions did not meet the standard of care, i.e., objectively reasonable performance).

164. *See, e.g., id.* (citing *Strickland*, 466 U.S. at 694) (stating that the second inquiry is whether petitioner can "show that there is a 'reasonable probability' that but for his counsel's error, the outcome would have been different").

165. *See, e.g., id.* (finding no valid excuse for counsel's failure to raise a state law claim with respect to a key trial witness).

166. *See id.* at 534.

167. *See supra* note 160 and accompanying text.

168. *See* Voigts, *supra* note 7, at 1118 (stating that a claim for inefficient counsel is often a precondition to raising additional claims that petitioners otherwise would not be able to raise due to waiver or procedural default).

169. 466 U.S. 648 (1984).

170. 477 U.S. 478 (1986).

171. *See Murray*, 477 U.S. at 496 (citing *Cronic*, 466 U.S. at 657 n.20); *Cronic*, 466 U.S. at 657 n.20.

both cases[172]—but the Court seemingly felt compelled to leave ineffective assistance of counsel in place as a safety valve for the otherwise rigid procedural default rules despite its reluctance to actually grant the writ in the cases before it. As such, this first explanation about the need to overcome procedural default only tells part of the story. There are, after all, other ways of curing procedural default in federal habeas corpus litigation, such as the actual innocence bar,[173] but thus far, actual innocence claims have not overtaken habeas litigation in the same way that ineffective assistance of counsel claims have.[174] Ineffective assistance of counsel claims predominate in part because they are necessary, but also because petitioners have, in the past, perceived that courts are receptive to them—something that the list of successful ineffective assistance of counsel claims in Part III.B demonstrates at least anecdotally. Thus, an explanation of the rise of ineffective assistance of counsel in habeas litigation should also discuss the reasons why such claims might be particularly appealing to federal courts.

B. The Long Shadow of Gideon v. Wainwright

The reason that ineffective assistance of counsel has become central to federal habeas litigation is not just practical, but normative as well. The normative case for this development is probably best accounted for as a byproduct of the influence of *Gideon v. Wainwright*.[175] *Gideon* is perhaps the only defendant-friendly Warren Court criminal procedure decision that has not led to a significant backlash. In fact, it continues to stand as a rather heroic moment in the Court's history[176] and a centerpiece of its criminal procedure jurisprudence. Indeed, it is to this day the only case that the Court believes would satisfy the standard for retroactivity under *Teague*.[177]

Gideon, in turn, is a monument to lawyers' belief in their central place in the criminal justice system.[178] The rule that the Court announced in *Gideon*, that all

---

172. *Murray*, 477 U.S. at 497; *Cronic*, 466 U.S. at 666–67.

173. *See, e.g.*, Schlup v. Delo, 513 U.S. 298, 331 (1995) (discussing the application of rules regarding actual innocence).

174. *See* HANSON & DALEY, *supra* note 15, at 14 (reporting that ineffective assistance of counsel consisted of 25% of the issues raised in habeas corpus petitions, while actual innocence is not mentioned). It bears noting that the actual innocence exception probably presents a tougher hurdle for habeas petitioners than the ineffective assistance of counsel exception. A petitioner proceeding under the actual innocence exception must establish that, in light of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. The Court has emphasized that this exception requires new and credible evidence, often of a scientific or technical nature, and that it is a remedy reserved for "extraordinary" cases. *Id.* at 324, 327 (citing McCleskey v. Zant, 499 U.S. 467, 494 (1991)).

175. 372 U.S. 335 (1963).

176. *See* ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

177. *See* Whorton v. Bockting, 549 U.S. 406, 419 (2007).

178. While *Gideon* overruled the special circumstances rule that the Supreme Court had previously applied to cases in which a state court criminal defendant was denied the assistance of

felony defendants are entitled to the right to counsel,[179] supplanted a much fuzzier standard adopted in *Betts v. Brady*,[180] which gave a defendant a right to counsel only in cases where "the totality of facts" suggested that the defense would benefit from professional counsel.[181] Prior to its repeal in *Gideon*, criminal procedure scholars criticized *Betts* by demonstrating that the record from nearly any trial would reveal crucial pieces of evidence or eyewitness testimony that could have been excluded, demonstrated as irrelevant, or seriously undermined by competent defense counsel.[182] At the very least, the public's faith in the fairness of the ultimate outcome of the trial would be enhanced if the prosecution was put to its full burden of proof by professional opposition.[183] Because criminal defendants were often poor and politically powerless, the Court could not trust that state legislatures, responding to the normal demands of the political process, would provide them with adequate representation without some prompting on constitutional grounds.[184] The significance of *Gideon* as an anti-poverty measure "could not be missed,"[185] and the case was a paradigmatic example of the simple, representation-reinforcing criminal procedure right.[186]

The Court's opinion in *Strickland* went through great pains to demonstrate that it was consistent with, and actually furthered, the holding of *Gideon*.[187] As the Court explained:

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to

---

counsel, it was in line with a number of previous decisions finding that the Sixth Amendment entitled a defendant to the assistance of counsel in certain state cases, particularly capital cases, and in federal criminal cases. *See* Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938) (quoting U.S. CONST. amend. VI) (holding that the Sixth Amendment required the right to counsel in noncapital federal criminal prosecutions); Powell v. Alabama, 287 U.S. 45, 69 (1932) ("[A defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

179. *Gideon*, 372 U.S. at 344.

180. 316 U.S. 455 (1942).

181. *See id.* at 462. In another portion of the *Betts* opinion, the Court held that indigent defendants are entitled to counsel only if the denial of counsel would result in a "trial . . . offensive to the common and fundamental ideas of fairness and right." *Id.* at 473.

182. *See* Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 20 U. CHI. L. REV. 1, 42–56 (1962) (discussing the trial record in *Betts v. Brady*).

183. *See id.* at 53–56 (suggesting that assistance of counsel during trial is invaluable in holding the prosecution to its full burden of proof).

184. *See Gideon*, 372 U.S. at 343–45.

185. Michael J. Klarman, *Rethinking the History of American Freedom (Review Essay of Eric Foner,* The Story of American Freedom *(1998))*, 42 WM. & MARY L. REV. 265, 272 (2000).

186. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 124–25 (1980)

187. *See* Strickland v. Washington, 466 U.S. 668, 684–87 (1984).

> the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[188]

At the risk of belaboring a fairly obvious point, the Court needed to set some kind of floor for attorney performance in criminal defense cases because it recognized that "the right to counsel is the right to the effective assistance of counsel."[189]

Gideon and *Argersinger v. Hamlin*,[190] a later right to counsel case, set off calls for further reforms to the system with respect to appointing counsel in criminal cases, as the right to counsel is meaningless if the supposed counsel was merely "a warm body with a legal pedigree."[191] The federal courts of appeals responded to *Gideon* and similar cases by revising their own pre-*Strickland* standards for ineffective assistance of counsel. Throughout the 1960s, the relevant test was whether counsel had so thoroughly bungled the case as to make the proceedings "a farce, or a mockery of justice, or . . . shocking to the conscience of the reviewing court."[192] In the 1970s, however, the circuit courts gradually adopted a requirement of "customary" attorney performance or "reasonably effective assistance," which may or may not have been coupled with a requirement that the habeas petitioner demonstrate prejudice from the attorney's deficient performance.[193] These new Sixth Amendment standards

---

188. *Id.* at 685. For criticism of *Strickland* as a cover for state efforts to vitiate the right to counsel, see Richard L. Gabriel, Comment, *The* Strickland *Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due Process*, 134 U. PA. L. REV. 1259 (1986).

189. *Strickland*, 466 U.S. at 686 (quoting McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970)) (internal quotation marks omitted).

190. 407 U.S. 25 (1972).

191. David L. Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 818–19 (1976). *See also* NATIONAL LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 43, 46 (1973).

192. Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965) (citations omitted) (citing eleven Circuit Court cases in support of the enunciated rule). The test from *Beto* was cited by a number of federal circuit courts in their own habeas decisions. *See* Bazelon, *supra* note 191, at 819 n.39.

193. *See* United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 641 (7th Cir. 1975) (holding that an attorney must meet "a minimum standard of professional representation"); Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) (holding that an attorney must "render[] reasonably effective assistance"); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974) (holding that the "reasonably effective assistance" standard applies to attorneys); United States v. DeCoster, 487 F.2d 1197, 1202, 1204 (D.C. Cir. 1973) (citing Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)) (stating that an attorney must provide "reasonably competent assistance," and that the burden is on the government to show a lack of prejudice); Moore v. United States, 432 F.2d 730, 736 (3d Cir. 1970) (holding that an attorney must conform to the "customary skill and knowledge that normally prevails at the time and place"); *Coles*, 389 F.2d at 226 (setting forth a list of requirements for effective performance). Three federal circuits continued to use the farce or mockery of justice standard. *See* Bazelon, *supra* note 191, at 820 n.47 (citing United States v. Reyes, No. 73-1595 (10th Cir., Dec. 10, 1975); United States v. Stern, 519 F.3d 521, 524 (9th Cir. 1975); United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974)).

certainly did not satisfy broader calls for reform,[194] but they established at least some nominal level of federal court oversight for the indigent defense system, albeit indirect oversight through the vehicle of habeas litigation.

Courts were thus careful to preserve ineffective assistance of counsel as a safety valve for otherwise defaulted habeas claims because it allowed federal courts to monitor compliance with one of the "bedrock procedural elements"[195] of constitutional criminal procedure. By scrutinizing the performance of defense counsel in state criminal trials, and by giving themselves the freedom to review otherwise unreviewable claims when counsel's error appeared sufficiently egregious, federal courts could, at least theoretically, ensure the vitality of the adversarial criminal process.[196] Of course, plenty of empirical evidence suggests that nothing like that actually took place. Instead, decades of budget cuts for public defenders and appointed counsel have largely deprived indigent defendants of any sort of effective representation.[197] But the issue here is doctrinal, and is more about what courts believe that they have accomplished as opposed to what they have actually accomplished. It thus makes perfect sense that in habeas litigation, which exists to review criminal convictions in violation of the Constitution, federal courts would be especially vigilant about defending one of their central criminal procedure precedents and particularly vigilant because, as lawyers themselves, that precedent reaffirms their profession's centrality in criminal procedure.

C. Counsel's Role in the Corrective Process

A final explanation, which closely tracks the previous one, is that permitting a broad range of habeas claims because of ineffective assistance of counsel serves as a middle ground between those proposing broad access to federal courts to litigate constitutional issues in state court convictions and those proposing a much narrower remedy in the interest of promoting finality. As mentioned briefly in Part II, there is an ongoing debate about the basic purpose

---

194. *See* Bazelon, *supra* note 191, at 821–23 (discussing why courts had not gone further in defining ineffective assistance).

195. Sawyer v. Smith, 497 U.S. 227, 242 (1990) (emphasis omitted) (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).

196. *See* Voigts, *supra* note 7, at 1121, 1124 (citing 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, 1862 (1994)) (stating that the Sixth Amendment's guarantee applies to the states through the Fourteenth Amendment, and that courts may review ineffective assistance of counsel claims even when there are no properly preserved constitutional claims).

197. *See* AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE pt. 2, at 7 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045–53 (2006) (discussing how underfunding for public defenders in many states has led to the deprivation of the constitutionally guaranteed right to effective counsel).

of the federal habeas remedy; specifically, whether it was meant to provide a federal forum for litigating constitutional claims, even when those claims were resolved by the state court, or whether it was intended to be a remedy solely for prisoners convicted by state courts that lacked jurisdiction or adequate corrective processes.[198] Courts could split the difference, at least in part, by enforcing strict procedural default rules, while creating an exception for claims that are so obvious that the failure to raise them in state court demonstrates the incompetence of defense counsel. Because the right to counsel has traditionally been based on concerns that an innocent defendant could be railroaded without professional assistance, habeas relief for ineffective assistance of counsel claims can serve as a proxy for defects in the corrective process and, in some cases, for claims of actual innocence.[199] Proponents of broad federal court review would no doubt prefer an expansive scope of review, but given the political and judicial pressure surrounding habeas corpus, these proponents probably cannot expect much more than the current habeas system provides.

This combination of practical and normative concerns explains the current state of the doctrine, which has established ineffective assistance of counsel as a safety valve for procedural default rules that would otherwise doom a habeas petition, and in turn, explains the predominance of ineffective assistance of counsel claims in federal habeas litigation. However, there is a substantial disconnect between doctrine and reality here because habeas litigation is expensive, time consuming for the federal courts, and exceedingly unlikely to result in a successful petition.[200] The best efforts of judges and legislators have

---

198. For the former view, see, e.g., Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 610, 618–20 (1982) (arguing, based on the legislative history of 28 U.S.C. § 2254, that Congress intended to provide state prisoners with the ability to relitigate constitutional claims in federal court); Steiker, *supra* note 11, at 377 (proposing that federal courts review freestanding claims of innocence). For the latter view, see Bator, *supra* note 11, at 454–62 (proposing to limit habeas relief to cases where the state court lacked jurisdiction or the state failed to supply an adequate corrective process).

199. The relationship between assistance of counsel and corrective process, and actual innocence is tenuous, however. Bator suggested at points in his article that he would not necessarily support granting the writ even in cases where a petitioner was not provided with legal counsel, if the record indicated that the state court was correct about the need for legal representation—following the old *Betts v. Brady* special circumstances rule. *See* Bator, *supra* note 11, at 459 n.30. At other points, however, Bator's article indicates that if a petitioner lacked counsel, a federal court could not separate the adequacy of the corrective process from the merits of certain constitutional questions. *See id.* at 949 n.142. Similarly, ineffective assistance of counsel claims will often center on errors that do not really shake our faith in the petitioner's guilt—*Kimmelman* itself is probably the best example of such a case. *See supra* note 83. However, because errors that implicate an attorney's competence have a way of casting doubt on the adequacy of the adversarial process below, it would be difficult to separate ineffective assistance of counsel claims that reflect on guilt or innocence from ineffective assistance of counsel claims that do not implicate the petitioner's guilt or innocence. The best that courts are likely able to do is to implement an over-inclusive rule that permits *Kimmelman*-type claims.

200. About 17,000 habeas petitions are filed annually in federal courts, and only about four-tenths of 1% are successful. Joseph L. Hoffmann & Nancy J. King, *Justice, Too Much and Too*

done very little to reduce the number of habeas petitions filed in federal court, as prisoners seem to be recasting other constitutional claims as ineffective assistance of counsel claims.[201] Thus, ineffective assistance of counsel—which conceivably may have been an exception acceptable even to critics of habeas litigation—has instead become another form of habeas relief for courts to narrow through a variety of jurisprudential tools. The next section discusses that change, which is currently taking place.

V. ENDING THE INEFFECTIVE ASSISTANCE OF COUNSEL ERA

AEDPA created a number of new and significant hurdles for habeas petitioners[202] that have reduced a petitioner's chances of success in court,[203] even if AEDPA has not done much to deter filing petitions in the first place.[204] AEDPA and its attendant deferential standards of review for state court decisions have also given the Supreme Court and the federal courts of appeals occasion to issue a number of high profile opinions in habeas cases alleging ineffective assistance of counsel—most issued within the last seven to eight years—that are decidedly unreceptive to such claims and seem designed to stem the tide of petitions presenting the claim in federal court.[205] This section focuses on two doctrinal points, both of which are emphasized throughout the case law. The first point emphasizes that § 2254(d)(1) allows federal courts to award habeas relief only where the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,"[206] while the second point restricts the meaning of "clearly established federal law" by cabining the reach of that phrase only to the holdings of Supreme Court cases, leaving state courts free to apply, or not apply, the Court's dicta as they see fit. In other words, these two points involve judicial gloss upon the meaning of the phrases "contrary to, or an unreasonable application of," and "clearly established federal law."

Expensive, N.Y. TIMES, Apr. 17, 2011, at WK8. *See also* KING ET AL., *supra* note 96, at 58 (pre-AEDPA grant rate was about one per 100 filings; post-AEDPA grant rate was about one in 284 filings).

201. *See* Kevin J. O'Brien, *Federal Habeas Review of Ineffective Assistance Claims: A Conflict Between* Strickland *and* Stone*?*, 53 U. CHI. L. REV. 183, 194 (1986) (stating that, for example, "a person who is convicted after his attorney neglected to raise a fourth amendment claim at trial will be likely to cast his habeas petition as a Sixth Amendment issue").

202. *See supra* text accompanying notes 85–95.

203. *See supra* note 200.

204. *See* SCALIA, *supra* note 22, at 17.

205. *See* discussion *infra* Part V.A–B.

206. 28 U.S.C. § 2254(d)(1) (2006).

A. *A Broad View of "Reasonable Applications" of Clearly Established Federal Law*

Criminal cases rarely present completely identical factual situations, and for that reason, courts rarely find a precedential case directly on point. This is particularly true when a court applies the *Strickland* standard, which boils down to reasonable attorney performance, a case-by-case question, and prejudice, also a case-by-case question.[207] Under AEDPA, state courts have some freedom when applying federal case law; if there is any doubt how precedent applies, the state court can get the answer wrong, provided that its wrong answer is nevertheless reasonable.[208] And while the term "unreasonable" is "difficult to define," it is one of those difficult-to-define terms that judges are consistently asked to apply.[209]

In practice, a state court's freedom to offer any "reasonable" interpretation of federal precedent means that precedent will most likely not apply in a novel factual situation. For instance, in *United States v. Cronic*,[210] the Supreme Court explained that a defendant who is "denied the presence of counsel at a critical stage of the prosecution" has likely been so prejudiced by that denial that "the cost of litigating [its] effect in a particular case is unjustified."[211] However, a state court is free to determine that a defendant whose counsel appears via speakerphone at a plea hearing (defense counsel who literally phones it in) has not been denied the *presence* of counsel at the hearing.[212] Even if the Supreme Court, in *Cronic*, meant, by using the phrase "presence of counsel" to call for counsel to be physically in the courtroom at the critical stages, the state is given the benefit of the doubt in the face of the drafting ambiguity.[213]

In the context of ineffective assistance of counsel claims specifically, the Court has instructed lower courts that *Strickland* and AEDPA establish a "doubly deferential" standard of review.[214] That is, courts in general should be highly deferential when evaluating an attorney's performance under *Strickland*,

---

207. *See* Yarborough v. Alvarado, 541 U.S. 652, 664 (2004) ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.").

208. *See* Williams v. Taylor, 529 U.S. 362, 410 (2000) ("For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.").

209. *See id.*

210. 466 U.S. 648 (1984).

211. *See id.* at 658, 662.

212. *See* Wright v. Van Patten, 552 U.S. 120, 121, 126 (2008) (per curiam).

213. *See id.* at 126–29 (Stevens, J., concurring).

214. Yarborough v. Gentry, 540 U.S. 1, 5–6 (2003) (per curiam) (citing 28 U.S.C. § 2254(d)(1) (2006); Wiggins v. Smith, 539 U.S. 510, 521 (2003); Strickland v. Washington, 466 U.S. 668, 688 (1984)); *see also* Knowles v. Mirzayance, 129 S. Ct. 1411, 1420 (2009) ("Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, [the petitioner's] ineffective-assistance claim fails.") (internal citation omitted).

indulging the presumption that a defense attorney is strategically choosing to explore certain defenses and forego others.[215] Additionally, a federal court should be equally deferential to the state court's determination with respect to the attorney's performance.[216] Therefore, the state court's decision to deny collateral relief on the petitioner's ineffective assistance of counsel allegation should be reversed by a federal court only when the state court made an unreasonable determination about the unreasonable conduct of defense counsel.[217] Further, the way in which the Supreme Court has framed the applicable standard of review could be described as "triply deferential," as courts have more freedom when applying general rules that result in case-by-case determinations, such as the *Strickland* standard, than in applying specific rules that dictate certain outcomes.[218]

B. A Narrow View of "Clearly Established" Federal Law

Just as state courts are given some leeway in how they apply federal law, they are also given the benefit of the doubt as to just what constitutes federal law. AEDPA specifically limited the relevant body of law to "clearly established Federal law, *as determined by the Supreme Court of the United States*."[219] Therefore, state courts are not obliged to follow their local federal court of appeals on questions with a circuit split. The Supreme Court, in *Williams v. Taylor*,[220] further limited "clearly established federal law" to the holdings of Supreme Court cases, such that dicta, no matter how carefully considered, are not binding on state courts in the context of AEDPA.[221]

This rule regarding dicta is a departure from the normal rule because lower courts are generally obliged to respect the dicta in Supreme Court decisions as well as the specific holding, provided that the dicta are carefully considered.[222] The rule is also ironic given that the statement in the *Williams* opinion was,

---

215. *Yarborough*, 540 U.S. at 5–6.

216. *See id.* at 5 (citing *Wiggins*, 539 U.S. at 520–21; Woodford v. Visciotti, 537 U.S. 19, 24–25 (2002) (per curiam); Williams v. Taylor, 529 U.S. 362, 409 (2000)).

217. *See id.* (citing *Wiggins*, 539 U.S. at 520–21; *Woodford*, 537 U.S. at 24–25; *Williams*, 529 U.S. at 409).

218. *See* Yarborough v. Alvarado, 541 U.S. 652, 664 (2004).

219. 28 U.S.C. § 2254(d)(1) (2006) (emphasis added).

220. 529 U.S. 362 (2000).

221. *See id.* at 412 ("'[C]learly established federal law, as determined by the Supreme Court of the United States' . . . refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." (quoting § 2254(d)(1))).

222. *E.g.*, Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n, 216 F.3d 1180, 1189 (D.C. Cir. 2000) (court finding itself "bound" to the Supreme Court's legal interpretation, even though given in dicta, because "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative" (quoting United States v. Oakar, 111 F.3d 146, 153 (D.C. Cir. 1997))).

arguably, itself part of the dicta.[223] Nevertheless, the Court's gloss on clearly established federal law appeared in a series of post-AEDPA cases where the Court rejected habeas petitions after determining that the relevant principle of federal law that the petitioner relied upon was merely non-binding dicta.[224] The federal courts of appeals have taken the hint and have rejected habeas petitions where the relevant provision of federal law was not spelled out in the holding of the case.[225]

Taken together, these two limitations on the availability of habeas relief indicate that if ineffective assistance of counsel was the ideal claim for the era of cause and prejudice, a safety valve in case of larger breakdowns in corrective processes, it is something else entirely in the era of AEDPA. Indeed, despite a few successful petitions in capital cases, often limited only to the capital sentencing portion of the state proceeding,[226] the Supreme Court has been distinctly unreceptive to ineffective assistance of counsel claims in the last few years.[227] The Court now cautions lower courts regarding the "substantial judicial

223. Carey v. Musladin, 549 U.S. 70, 78 (2006) (Stevens, J., concurring) ("Nevertheless, in a somewhat ironic dictum in her *Williams* opinion, Justice O'Connor stated that the statutory phrase 'clearly established Federal law, as determined by the Supreme Court of the United States,' refers to 'the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'" (quoting *Williams*, 529 U.S. at 412)). Of course, because federal courts are obliged to respect carefully considered dicta like the gloss on "clearly established Federal law" from *Williams*, this establishes a "dicta for federal courts, no dicta for state courts" dichotomy in habeas review. *Compare Natural Res. Def. Council, Inc.*, 216 F.3d at 1189 (quoting *Oakar*, 111 F.3d at 153) (recognizing that federal courts are bound by dicta of the Supreme Court, rather than just holdings), *with Williams*, 529 U.S. at 412 (explaining that state courts should rely only on the Supreme Court holdings, and not dicta).

224. *See Carey*, 549 U.S. at 76–77 (citing § 2254(d)(1)); Yarborough v. Alvarado, 541 U.S. 652, 660–62, 666, 669 (2004) (citing *Williams*, 529 U.S. at 412); Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003) (citing § 2254(d)(1); *Williams*, 529 U.S. at 412); Tyler v. Cain, 533 U.S. 656, 664–66 (2001) (citing § 2254(d)(1); *Williams*, 529 U.S. at 412).

225. *See, e.g.*, Childers v. Floyd, 642 F.3d 953, 975, 977–78, 980 (11th Cir. 2011) (citing *Williams*, 529 U.S. 412) (rejecting petitioner's habeas claim because it found no clear Supreme Court precedent); Likely v. Ruane, 642 F.3d 99, 102 (1st Cir. 2011) (citing Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam); *Williams*, 529 U.S. at 412)) (rejecting petitioner's habeas claim because there was no clear Supreme Court holding that the admission of certain evidence violated the Confrontation Clause); Sanborn v. Parker, 629 F.3d 554, 569–70, 586 (6th Cir. 2010) (reversing the lower court because it relied partially on dicta from a Supreme Court case in support for granting petitioner's habeas claim).

226. *See, e.g.*, Porter v. McCollum, 130 S. Ct. 447, 448 (2009) (per curiam) (holding that petitioner was denied his Sixth Amendment right to counsel where counsel failed to introduce strong mitigating evidence); Rompilla v. Beard, 545 U.S. 374, 383–86 (2005) (holding that counsel was deficient for failing to make reasonable investigations of petitioner's prior convictions in order to assist in mitigation); Wiggins v. Smith, 539 U.S. 510, 514, 523–25 (2003) (holding that petitioner received ineffective assistance of counsel where counsel failed to make certain reasonable discoveries and did not act properly with respect to known discoveries in the sentencing stage of petitioner's trial); *Williams*, 529 U.S. at 390–91 (holding counsel was ineffective because counsel "failed to investigate and to present substantial mitigating evidence to the sentencing jury").

227. *See, e.g.*, Cullen v. Pinholster, 131 S. Ct. 1388, 1403–04 (2011) (rejecting habeas petitioner's ineffective assistance of counsel claim); Premo v. Moore, 131 S. Ct. 733, 746 (2011)

resources" that habeas litigation consumes and the concordant need for caution when issuing the writ of habeas corpus.[228] This was a predictable reaction to the fact that ineffective assistance of counsel began to swallow other claims in habeas litigation. Faced with the prospect of a safety valve becoming a shortcut, and given the political and federalism concerns implicated by habeas litigation, the Court was at pains to demonstrate to petitioners that this was not the case.[229]

One case from the October 2010 term, *Padilla v. Kentucky*,[230] serves as a counterpoint to this last point, insofar as it held that defense counsel could be constitutionally ineffective for failing to advise a defendant on the collateral consequences of conviction, i.e., the effect of a guilty plea on a defendant's immigration status.[231] That expansion of the *Strickland* rule is important, insofar as it departs from the more recent trend in the Supreme Court's ineffective assistance of counsel case law. But whether *Padilla* will have much of an effect on habeas litigation has yet to be determined. The courts are currently split on whether the *Padilla* opinion announced a rule that should apply retroactively in habeas proceedings,[232] a question that will obviously bear on how much additional litigation the opinion will cause. At any rate, the rule in *Padilla* applies with full force only where the immigration consequences of a guilty plea are obvious. Where "the law is not succinct and straightforward," an attorney has a more limited obligation and "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[233] This limitation, in concert with ambiguity over whether *Padilla* will apply to any collateral consequences other than immigration issues, and the fact that prisoners who plead guilty file habeas petitions at a much lower rate than prisoners convicted after trial,[234] suggests that *Padilla* will not open the floodgates of habeas litigation and was not a reversal from the Court's recent ineffective assistance of counsel jurisprudence.

(same); Harrington v. Richter, 131 S. Ct. 770, 792 (2011) (same); Berghuis v. Thompkins, 130 S. Ct. 2250, 2264–65 (2010) (same); Smith v. Spisak, 130 S. Ct. 676, 687 (2010) (citing § 2254(d)(1); Strickland v. Washington, 466 U.S. 668, 694 (1984)) (same); Wong v. Belmontes, 130 S. Ct. 383, 386 (2009) (per curiam) (citing Belmontes v. Ayers, 529 F.3d 834, 862–63 (9th Cir. 2008)) (same).

228. *See Harrington*, 131 S. Ct. at 780.

229. *See id.*

230. 130 S. Ct. 1473 (2010).

231. *Id.* at 1483 (holding that defense counsel must have a basic understanding of immigration law to competently represent clients who face deportation or other immigration consequences in criminal cases).

232. *Compare* United States v. Orocio, 645 F.3d 630, 634 (3d Cir. 2011) (holding that *Padilla* applies retroactively on habeas review), *and* United States v. Hubenig, No. 6:03-mj-040, 2010 WL 2650625, at *8 (E.D. Cal. July 1, 2010) (same), *with* Ellis v. United States, No. 10 Civ. 4017 (BMC), 2011 WL 3664658, at *9 (E.D.N.Y. June 3, 2011) (holding that *Padilla* does not apply retroactively), Mathur v. United States, Nos. 7:07-CR-92-BO, 7:11-CV-67-BO, 2011 WL 2036701, at *3 (E.D.N.C. May 24, 2011) (same), Mendoza v. United States, 774 F. Supp. 2d 791, 798 (E.D. Va. 2011) (same), *and* Doan v. United States, 760 F. Supp. 2d 602, 606 (E.D. Va. 2011) (same).

233. *Padilla*, 130 S. Ct. at 1483.

234. *See id.* at 1485 & n.14 (citing FLANGO, *supra* note 18, at 36–38).

Indeed, one case scheduled for the Supreme Court's October 2011 term seems likely to continue the current trend. The question presented in *Martinez v. Ryan* is whether a criminal defendant, who is prevented by a state statute from raising the ineffectiveness of his trial counsel on direct appeal, has a constitutional right to the effective assistance of counsel in his first state post-conviction proceeding.[235] The Supreme Court has never held that a prisoner has the right to counsel in a collateral proceeding,[236] so the case presents the additional issue of whether a prisoner has any kind of Sixth Amendment right to counsel, let alone the effective assistance of counsel, in a collateral proceeding.

Martinez v. Ryan demonstrates a dynamic between criminal procedure rights and resources that can only be described as "Stuntzian."[237] That is, underlying the case is an instance in which a state controls the relief available for a federal constitutional claim by controlling the circumstances under which the claim can be made, and the resources available in presenting it.[238] In Arizona, prisoners are not allowed to raise claims about the effectiveness of their trial counsel on direct appeal; however, prisoners are permitted to raise those claims in their first petition for post-conviction relief, where they may or may not be represented by counsel.[239] A petitioner may or may not have the resources to investigate the ineffective assistance of counsel claim—a pro se petitioner almost certainly would not. The petitioner in *Martinez* was represented by counsel in the first post-conviction proceeding, but counsel later filed a statement attesting that she saw no tenable grounds for post-conviction relief.[240] Under the Arizona Rules of Criminal Procedure, the petitioner could have filed his own pro se petition for post-conviction relief, but he alleged that his lawyer failed to inform him that he had such a right.[241] In a second post-conviction proceeding, the petitioner, represented this time by different counsel, raised a number of claims about the effectiveness of trial counsel, which the Arizona state court rejected because the petitioner failed to raise them in the initial post-conviction petition.[242] Turning

---

235. Martinez v. Schriro, 623 F.3d 731, 733 (9th Cir. 2010), *cert. granted*, 131 S. Ct. 2960 (2011); *see also* Martinez v. Ryan, SCOTUSBlog, http://www.scotusblog.com/case-files/cases/martinez-v-ryan/ (last visited Dec. 14, 2011).

236. *See* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . .").

237. The term "Stuntzian" refers to William Stuntz, whose work described the often frustrating ways that criminal procedure rights play out in the criminal justice system, where legislatures frequently respond to the expansion of criminal procedure rights by giving indigent defendants fewer and fewer opportunities to raise claims regarding those rights. *See* Michael Klarman, David Skeel, & Carol Steiker, *Introduction: Appreciating Bill Stuntz*, *in* THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ 6–7 (2012), *available at* http://ssrn.com/abstract=1899957.

238. *See id.*

239. *See* ARIZ. R. CRIM. P. 32.1(a).

240. *Martinez*, 623 F.3d at 734.

241. *See id.*

242. *Id.*

to the federal courts, the petitioner argued that the ineffectiveness of his counsel in the first post-conviction proceeding was sufficient cause to excuse his procedural default, a claim that the federal district court and the Ninth Circuit Court of Appeals rejected, reasoning that a prisoner has no right to counsel in a post-conviction proceeding.[243] The Supreme Court granted certiorari on June 6, 2011.[244]

Predicting the outcome of Supreme Court cases is always tricky, and because AEDPA requires federal courts to be even more deferential than they otherwise would be, it is especially difficult to predict the outcome of habeas cases. That said, *Martinez v. Ryan* is probably not an ideal vehicle for proponents of the right to counsel in post-conviction proceedings. If the Supreme Court were to rule for Martinez, it would open a second front for review of otherwise defaulted claims, and the Court has been at pains to limit the availability of review for defaulted claims, even in the first collateral proceeding. The ineffectiveness of post-conviction counsel could excuse a prisoner's failure to present claims about the ineffectiveness of his trial counsel, and the ineffectiveness of trial counsel would then excuse the prisoner's failure to present otherwise defaulted constitutional claims. In other words, state and federal courts would have to review the performance of counsel at two different levels before going on to assess the impact of an issue that never came up at trial in the first place. And again, while it is difficult to predict these sorts of cases, that seems to be an unlikely outcome.

VI. CONCLUSION

The primary purpose of this Essay was simply to describe a particular phenomenon in habeas litigation, the fact that ineffective assistance of counsel has eclipsed most other issues presented in habeas petitions, and then to offer an explanation as to how that happened, along with a description of what the judicial and legislative response has been. Any further prescriptions for reform, both in terms of reducing the volume of habeas litigation and clearing the procedural thicket that meritorious claims must overcome, are beyond this Essay's present purposes. However, it is worth asking, given the resources spent on habeas petitions in both federal and state courts, what the future of this litigation will look like in an era where there no longer appears to be any safety valves for procedural default.

The answer, and it is admittedly a pessimistic one, is that not much will really change. Despite decades of procedural reform, prisoners continue to file habeas petitions at a fairly consistent rate. Like all litigants, habeas petitions will

---

243. *See id.* at 735–36, 739–40 ("We conclude that there is no federal constitutional right to the assistance of counsel in connection with state collateral relief proceedings, even where those proceedings constitute the first tier of review for an ineffective assistance of counsel claim.").

244. Martinez v. Ryan, 131 S. Ct. 2960 (2011).

respond to cues from the courts. When told that they will forfeit any claim that was not properly presented in the original proceeding, they will look for some way to cure the default; and, when told that one particular claim is a good way to cure a previous default, they will raise that claim.[245] If a petition presenting those claims is less likely to succeed right now, so be it. A habeas petition never had much chance of success anyway. Reformers on both sides should be unhappy with the current state of affairs—no decrease in the volume of cases, yet more impediments for the meritorious ones. Then it is, indeed, worth considering whether the time has come for more serious reforms, ones that go beyond simply tinkering with procedural rules, doctrine, and standards of review.[246]

245. This remark is not meant to dismiss concerns about the adequacy of representation for indigent defendants in the United States, which are legitimate concerns. *See supra* note 197 and accompanying text. What I mean is simply that independent of the *merits* of ineffective assistance of counsel claims, habeas corpus doctrine encouraged petitioners to present those claims. That this occurred during a time when indigent defense systems became more and more overburdened is ironic, and perhaps suggests courts may not be the most effective guardians of Sixth Amendment rights.

246. *See* Meltzer, *supra* note 11, at 2526–27 (proposing that resources for federal habeas litigation could be redirected to criminal defense systems).