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It's All YOUR Fault!: Examining the Defendant's Use of Ineffective Assistance of Counsel as a Means of Getting a "Second Bite at the Apple."

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It's All YOUR Fault!: Examining the Defendant's Use of Ineffective Assistance of Counsel as a Means of Getting a "Second Bite at the Apple."

Prentice L. White*

ABSTRACT

The United States Constitution provides individuals convicted of a crime with "a second bite at the apple." The Sixth Amendment provides an avenue to appeal one's conviction based on the claim of "ineffective assistance of counsel." What were the Framers' true intentions in using the phrase "effective assistance of counsel"? How does the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 affect habeas corpus appeals? This article answers these questions through the eyes of Thomas—a fictional character who is appealing his murder conviction.

This article first looks at the history surrounding effective assistance of counsel and discusses the difficulties criminal defendants face when asserting Sixth Amendment claims in both the federal and state context. This article takes a deep dive into a criminal defendant's rights and the defendant's burden of proof on appeal. Finally, this article concludes with a "survivor's guide" for newly-licensed trial attorneys who work as defense counsel in criminal cases. As part of this guide, this author suggests various methods attorneys can implement, which may help defense attorneys defend themselves against claims of ineffective assistance of counsel.

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Criminal defense work, regardless of public opinion, is a noble profession and is vital to maintaining a healthy judicial system for society as a whole. Many criminal cases present defense attorneys with difficult arguments to make. Nevertheless, criminal defense attorneys must represent their clients to the best of their abilities, like all other attorneys, and ensure that their clients receive fair and impartial trials. At the same time, defense attorneys must always be aware of potential pitfalls that can turn the defense counsel into the defendant. Criminal defendants, as part of their habeas petitions, will not hesitate to attack their attorneys while pursuing their second bite at the apple.

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For the past three weeks, Thomas had gone to the law library at the state penitentiary, poring over 20 dusty federal reporters every day, looking for a way to escape the hell hole he was dumped into following his conviction for second¹ degree murder.² At night, he would read the cases he copied from the old³ federal reporters⁴ that looked like they had been found in the dumpster behind a law firm that was closed in the early nineties.⁵ Naturally, it would take

1. See LA. REV. STAT. ANN. 14:30.1 (West 2017).

2. See Joseph M. Williams, *STYLE TOWARD CLARITY AND GRACE*, 19 (Univ. of Chicago Press 1990) quoting:

Stories are among the first kind of continuous discourse we learn. From the time we are children, we all tell stories to achieve a multitude of ends—to amuse, to warn, to achieve, to excite, to inform, to explain, to persuade. Storytelling is fundamental to human behavior. No other form of prose can communicate large amounts of information so quickly and persuasively.

See also N. O. Stockmeyer, Jr., *Beloved are the Storytellers*, 81 MICH. B. J. 54 (2002).

3. See *Rhodes v. Robinson*, 612 F.2d 766, 771 (3d Cir. 1979) (arguing that discarding out-of-date advance sheets and supplemental pamphlets from the prison did not interfere with the prisoner’s access to the court; the adequacy of the materials that remained in the library was the paramount concern for the courts).

4. See MARRY ELLEN WEST, 30 ILL. L. & PRAC. PRISONS § 48 (2017) (“[T]o satisfy the right to meaningful access to the courts under the due process clause, a prisoner only needs to receive access to a law library that will enable [them] to research the law and determine which facts are necessary to state a cause of action”). See also *Hadley v. Snyder*, 780 N.E. 2d 316, 323–24 (Ill. App. Ct. 2002).

5. See *Lindquist v. Idaho State Bd. of Corrs.*, 776 F.2d 851, 856 (9th Cir. 1985) (arguing that a prison’s primary responsibility is to provide an inmate with

him hours⁶ to read and understand the decisions from these cases because he had no legal training and he needed to look up every other word in *Black's Law Dictionary*.

Though the verdict was unanimous, Thomas strenuously opposed any responsibility for the death of the victim. The killing was the result of a turf war between the decedent and Thomas's co-defendant, Christopher. Christopher was a known felon in the neighborhood. In Thomas's neighborhood, murder was as common as finding a beer bottle in the street. While he readily admitted to being present during the shooting, Thomas was unarmed at the time and he had only realized that the decedent was shot when he heard one of the women on the street let out a loud scream. Thomas's defense counsel argued at trial that it was Christopher who had been involved in an altercation with the decedent 20 minutes before the shooting, but apparently the jury did not believe that Thomas was just an innocent bystander.

The only eyewitness⁷ at the shooting testified that both Thomas and Christopher were seen running together after the victim was shot. Thomas's attorney stood and made several objections during the eyewitness's testimony, but these objections seemed rather weak because his attorney struggled to identify the specific reason why he was objecting.⁸ Counsel's cross-examination was not any better. At the beginning of the second day of his trial, Thomas made several oral motions to represent himself,⁹ but the district judge denied his requests, since defense counsel had been present for each of the ten hearings during the discovery¹⁰ phase.

meaningful access to the courts, and that the law book inventory must meet minimum constitutional standards).

6. *Id.* at 858 (asserting that prison administrators must be able to regulate the time, manner, and place in which law library materials are used by the inmates).

7. *See Blackston v. Rapelje*, 780 F.3d 340, 358–59 (6th Cir. 2015) (indicating that the refusal to allow the defendant to impeach unavailable witnesses' prior testimony with later recantations violated the Sixth Amendment); *see also United States v. Holland*, 41 F. Supp. 3d 82, 97 (D.D.C. 2014) (gauging witnesses' credibility using a five-factor test); *Daniel v. Loizzo*, 986 F. Supp. 245, 249 (S.D.N.Y. 1997) (stating that a defendant is prohibited from using stale felony convictions against a witness for impeachment purposes).

8. *See Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (stating that a person who happens to be alongside the accused who merely happens to be a lawyer is not enough to satisfy the constitutional command for legal representation).

9. *See Faretta v. California*, 422 U.S. 806, 807 (1975) (declaring that a defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so, and the state cannot force a lawyer upon him when he insists that he wants to conduct his own defense).

10. *See LaFler v. Cooper*, 566 U.S. 156, 177–82 (2012) (Justice Scalia reconsidering his view that a defendant who voluntarily pleads guilty or rejects a

Counsel shared every document he received from the prosecutor's file with Thomas, and the district court specifically saw defense counsel sharing his notes on prospective jurors with Thomas during voir dire. Given the fact that defense counsel was actively and zealously representing Thomas, the district judge did not find any sufficient¹¹ grounds to disrupt the trial and have Thomas take over presenting testimonial and physical evidence to the jury.

The three-day jury trial was very difficult for Thomas and his family. He remembered how his mother and sister cried every time they saw him in court. He watched in horror as the jurors watched his attorney stutter through each question and mumble his objections on the record. There was a moment where counsel forgot¹² certain exceptions to the hearsay rule under the evidence code. Thomas tried to give some instruction to his attorney during the trial, but each of his handwritten comments was pushed aside because his attorney claimed that he needed to hear the witness's answers and could not entertain his client's trivial questions. When the guilty verdict was rendered, Thomas nearly fainted because he could not believe that such a one-sided trial could ever be considered constitutional. Based on his recollection of the facts,¹³ Thomas did not feel that he was ever implicated in this shooting.

One month ago, Thomas received the decision from the appellate court. He had written a *pro se* brief in conjunction with his appellate counsel's brief, but he feared that neither appellate counsel nor the appellate court judges actually read his brief. Thomas initially wanted to argue that he was mentally unfit to proceed to trial in the first place, but after spending over three weeks researching, drafting, and revising his brief to the appellate court, he knew that such an argument was contradictory because he never acted insane prior to his arrest, and his well-crafted brief

plea offer should be immune from an ineffective assistance of counsel claim—regardless of whether the guilty plea or its refusal was based on counsel's professional deficient advice). See also *Missouri v. Frye*, 566 U.S. 134 (2012); Peter A. Joy & Rodney J. Uphoff, *Systemic Barriers to Effective Assistance of Counsel in Plea Bargaining*, 99 IOWA L. REV. 2103 (2014) [hereinafter *Systemic Barriers*].

11. See *Brooks v. McCaughtry*, 380 F.3d 1009, 1010, 1012–13 (7th Cir. 2004) (concluding that the defendant must show that he possesses sufficient educational background or knowledge of the law to represent himself).

12. See *United States v. Loera*, 182 F. Supp. 3d 1173, 1202 (D.N.M. 2016) (citing the mistakes of defense counsel during trial can be inexcusable).

13. See David Maxfield and Michael Deutch, *Mind Mapping for Lawyers*, 21 S.C. LAW. 18, 19 (2009) (declaring that most individuals learn in three specific ways—auditory, kinesthetic, and visual. Auditory learners use sounds, conversations, melodies, etc., which lends itself to sequential thinking; material must be presented to them in a logical, ordered progression and they generally problem solve by attacking the issue(s) in a series of ordered steps).

made him appear well-versed in the law.¹⁴ As he read the opinion, he noticed that each of the arguments he and his attorney carefully drafted was met with the badge of *meritless*, *harmless*,¹⁵ or *immaterial* from the appellate judges. As Thomas turned the pages to this decision, he became more and more depressed. When the appellate court ruled that his conviction was affirmed, Thomas threw all of the cases, statutes, and police reports he had researched against the wall of his cell.¹⁶ The next morning, while picking up the papers from the floor of his cell, Thomas ran across his commitment order, which explained that he had two years¹⁷ to file a post-conviction relief application in the district court. A quick chat¹⁸ with the inmate lawyer¹⁹ revealed that Thomas had another²⁰ opportunity to reverse his wrongful conviction.

Days turned into weeks and all Thomas did was commit himself more and more to drafting his post-conviction application. He memorized the post-conviction relief statute. Thomas was now ready to launch into a new unchartered claim known as “ineffective assistance of counsel.” After all, in Thomas’s mind, he was sitting in this cell because his trial counsel was incompetent, unprepared,²¹

14. See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (contending that whenever a defendant has demonstrated that his sanity was questionable at the time of the offense, the State must give him access to a competent psychiatrist who will conduct an appropriate examination and assist in the evaluation, preparation, and presentation of the defense). See generally *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017).

15. See *United States v. Roy*, 855 F.3d 1133, 1135, 1140–44, 1146–50 (11th Cir. 2017) (ruling that defense counsel’s seven-minute absence from the trial while inculpatory testimony was being admitted did not fall under an exception to the harmless error rule because counsel did not miss a substantial part of the trial, and said testimony was repeated when counsel returned and counsel subjected the prosecution’s case to adequate adversarial testing).

16. See generally Karen Westwood, “*Meaningful Access to the Court*” and *Law Libraries: Where Are We Now*, 90 L. LIBR. J. 193 (1998).

17. See LA. CODE CRIM. PROC. art. 930.8 (2014).

18. In *Johnson v. Avery*, 393 U.S. 483 (1969), the United States Supreme Court struck down a regulation that prohibited prisoners from assisting each other with *habeas corpus* applications and other legal matters.

19. See generally *United States ex. rel. Para-Professional Law Clinic v. Kane*, 656 F. Supp. 1099 (E.D. Pa. 1987), *aff’d*, 835 F.2d 285 (3rd Cir. 1987).

20. See *Riascos-Prado v. United States*, 66 F.3d 30, 35 (2d Cir. 1995) (urging the fact that issues relative to ineffective assistance of counsel can be addressed on direct appeal unless the issue requires further elaboration using material outside of the appellate record; however, the defendant is not free to exclude ineffective assistant of counsel claims with the hope of preserving the issue for post-conviction review). See also *Billy-Eko v. United States*, 8 F.3d 111, 116 (2d Cir. 1993).

21. Pamela S. Karlan, *Race, Rights and Remedies in Criminal Adjudication*, 96 MICH L. REV. 2001, 2015 (1998) (sponsoring the idea that the remedy for a defendant who is convicted based on his trial counsel’s ineffectiveness may strike the courts as being too extreme, which means that when the courts “cannot

unconcerned, and inexperienced.²² This was Thomas's second bite at the apple and he was not going to let anyone or anything stop him from securing his right to freedom.

Though it was another opportunity to get into court, Thomas's journey to freedom would not be on either a straight or a smooth path. One glaring roadblock in his path was the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996.²³ The AEDPA provides a deferential standard of review for federal courts regarding state court convictions. In other words, it reduces the reach of a federal court's authority by only granting writs of review when the court finds the state court's decision unreasonable, and the federal court cannot reverse that decision merely due to disagreement.²⁴

In this Article, this Author will explore the true intentions of the framer's phraseology of "effective assistance of counsel" inside the United State Constitution.²⁵ Secondly, this Article will address the difficulty many criminal defendants face when asserting ineffective assistance of counsel ("IAC") claims in state and federal habeas corpus proceedings. Finally, this Author will provide something like a "survivor's guide" for newly-licensed trial attorneys who elect to represent defendants in criminal cases, describing how they can avoid IAC claims being filed against them. Further, this Author will suggest certain methods these attorneys can implement to defend themselves in the event such claims are filed.

I. HISTORY OF EFFECTIVE ASSISTANCE OF COUNSEL

Amendment VI of the United States Constitution reads as follows:

calibrate the remedy," they generally begin to "fudge on the right"). See also Transcript of Oral Argument at 42, *Missouri v. Frye*, 566 U.S. 134 (2012) (No. 10-444), wherein Justice Scalia commented that "one of the things that causes [the courts] to be suspicious of whether there's a constitutional violation [is when] . . . there really isn't any perfect remedy."

22. See *Buck v. Davis*, 137 S. Ct. 759, 775–76 (2017) (asserting that defense counsel's introduction of expert testimony that disclosed that his client was statistically more prone to violence in the future because he was black was not competent representation).

23. See 28 U.S.C.A. § 2254 (West 2017).

24. Sharad Sushi Khandelwal, Note, *The Path to Habeas Corpus Narrows: Interpreting 28 U.S.C. § 2254(d)(1)*, 96 MICH. L. REV. 434, 435 (1997). See also Gregory J. O'Meara, "You Can't Get There from Here?": *Ineffective Assistance Claims in Federal Circuit Courts After AEDPA*, 93 MARQ. L. REV. 545 (2009) [hereinafter *You Can't Get There from Here*].

25. See U.S. CONST. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence (sic).²⁶

Reviewing the language used in the Sixth²⁷ Amendment, we realize that the Framers mentioned that an individual accused in a criminal prosecution shall have the “Assistance of Counsel for his defense.” There is no indication that counsel be effective, competent, or experienced in the realm of criminal law.²⁸ The term *effective assistance of counsel* did not materialize until the United States Supreme Court holding in *McMann v. Richardson*,²⁹ wherein the Supreme Court opined that the beauty of Amendment VI was the recognition that the assistance of counsel mentioned in the federal constitution was meant to bring about justice for each criminal defendant by having the prosecution’s case put through the crucible³⁰ of meaningful adversarial testing by a defense attorney who is well-versed in criminal procedure, evidence and trial advocacy such that the partisan advocacy³¹ on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.³²

This essentially is “the very premise of our adversary system of criminal justice.”³³ Consequently, without the adversarial testing guaranteed by the Sixth Amendment, a fair trial would be unattainable and the subsequent guilty verdict would be invalid.³⁴ The

26. *Id.*

27. See *Herring v. New York*, 422 U.S. 853, 856–58 (1975) (stating that at the heart of the Sixth Amendment is the requirement that every indigent criminal defendant should have appointed legal counsel, and said appointment would prevent the State from conducting trials against individuals facing incarceration without adequate legal assistance).

28. *Id.*

29. *McMann v. Richardson*, 379 U.S. 759, 770–71 (1970).

30. See *Engle v. Isaac*, 456 U.S. 107, 133–34 (1982). See also *United States v. Agurs*, 427 U.S. 97, 102 n.5 (1976).

31. See *Johnson v. Zerbst*, 304 U.S. 458, 467–68, (1938) (finding that “[u]nless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself”). See also *Gideon v. Wainwright*, 314 U.S. 219, 236–37.

32. See *United States v. Cronin*, 466 U.S. 648, 665–66 (1984).

33. See *Herring v. New York*, 422 U.S. 853, 862 (1975).

34. See *Davis v. Alaska*, 415 U.S. 308, 318 (1974).

State, and possibly defense counsel, would become the culprits who deprived the defendant of his liberty if a conviction was obtained through such a skewed and unjust process.³⁵

The ineffectiveness of Thomas's attorney in the introduction of this Article was evident from counsel's late and unconvincing objections to the prosecution's questions. It could be seen from the awkwardness of his questions on cross-examination and from counsel's unwillingness to involve Thomas in the trial strategy for the case. There was even a moment in record where defense counsel introduced evidence to a witness for impeachment purposes, but inadvertently forgot to offer it into evidence for the record. Realistically, defense counsel's performance, at least in Thomas's eyes, could not have been the product of any preparedness, professionalism, or competence. From the prosecution's perspective, defense counsel's clumsy trial technique was the equivalent of a three-year-old child warming up for a sparring session with a three-year-old Rottweiler.

In *McMann v. Richardson*, three separate state prisoners (Dash, Richardson, and Williams) filed federal habeas corpus³⁶ petitions, challenging their felony convictions for first-degree robbery, first-degree murder, and robbery respectively.³⁷ In each of their cases, these defendants argued before the nation's highest court that their convictions should be reversed because their individual defense attorneys failed to give them proper legal advice prior to their entry of a guilty plea to their respective charges. More specifically, they each alleged that their guilty pleas were the result of coerced confessions from either the trial judge or from law enforcement officers through the use of police brutality.³⁸

First, the United States Supreme Court noted that a conviction after a guilty plea is constitutionally valid because the conviction rests on the defendant's admission in open court that he committed the acts with which he was charged.³⁹ Such an admission, therefore, relieves the prosecution of the requirement to prove the defendant's guilt beyond a reasonable doubt, and the defendant further waives any right to contest the admissibility of any evidence that

35. See *Argersinger v. Hamlin*, 407 U.S. 25, 29–33 (1972).

36. See *You Can't Get There from Here*, *supra* note 24, at 559 (stating that *habeas corpus* is an instrument to protect against illegal imprisonment; it is written in the Constitution and neither the Executive nor Congress can abridge this safeguard).

37. See *McMann v. Richardson*, 379 U.S. 759, 762 (1970).

38. See *id.* at 763.

39. See *Brady v. United States*, 397 U.S. 742, 748 (1970). See also *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

the State might have offered against him at trial.⁴⁰ Thus, for a criminal defendant to subsequently allege through a post-conviction proceeding that his guilty plea must be reversed is an extremely high hurdle to jump when the grounds for his reversal are that his trial counsel misadvised⁴¹ him during the pre-trial phase of his case. Further, defense counsel's decision to have his client enter a guilty plea in order to save the State the expense and agony of a trial and to save him from a harsher penalty cannot be considered either ineffective or an obvious violation of the defendant's Sixth Amendment right to counsel.⁴²

The Supreme Court in *McMann* went on to mention that the State's right to use the defendant's incriminating statement against him at trial is permissible to show the strength of the prosecution's case, and that an entry of a guilty plea before a jury is impaneled is advantageous for the defendant.⁴³ Unless the defendant can show to the reviewing court something more than the fact that his confession may have been coerced, the conviction should stand, and the petition⁴⁴ for habeas corpus relief should be denied.⁴⁵ Defendants should not conjure up various arbitrary reasons to overturn their convictions, but the Supreme Court also opined that defendants should not be left to the mercies of incompetent counsel.⁴⁶ Instead, district judges should demand compliance with proper standards of performance by attorneys (appointed or retained) who are representing defendants in criminal cases.⁴⁷

The *McCann* court stated that criminal defendants who challenge their convictions under the ineffective assistance of counsel claim must portray their conviction as being constitutionally defective in a manner that is something more than just encouraging the reviewing court to *second guess* the lower court's decision to convict.⁴⁸ From Thomas's perspective, his goal was to illustrate to the district court in his post-conviction petition that his conviction resulted from either his counsel's: (1) unpreparedness, (2) lack of in-

40. *Brady*, 397 U.S. at 748.

41. See *Missouri v. Frye*, 566 U.S. 134, 147–49 (2012).

42. See *McMann*, 397 U.S. at 767–68.

43. *Id.*

44. See, e.g., *People v. Smith*, 321 N.E.2d 128, 131 (Ill. 1974).

45. See, e.g., *Geders v. United States*, 425 U.S. 80, 91–92 (1976) (finding that a bar on attorney-client consultations during an overnight recess was a denial of the defendant's right to effective assistance of counsel).

46. *Id.*

47. See *McMann*, 397 U.S. at 771.

48. *Id.*

vestigation, (3) unfamiliarity with the intricate details⁴⁹ of the laws of evidence and criminal procedure, (4) inexperience, or (5) counsel's lack of a coherent trial strategy moments before ultimately encouraging the defendant to amend his plea. While any of the five above-mentioned claims could be sufficient grounds to bring a legally sufficient claim of ineffective assistance of counsel, this Author suggests that the defendant should prove a combination of two or more elements to warrant an evidentiary hearing on his claim.

In *Missouri v. Frye*,⁵⁰ the United States Supreme Court was faced with a uniquely different situation where a defendant was charged with driving with a revoked license and the offense was converted to a Class D felony upon discovery that the defendant had been convicted of the same offense on three other occasions.⁵¹ The prosecutor presented two favorable plea bargains to defense counsel. In the first offer, the prosecutor recommended a three-year sentence if the defendant entered a guilty plea to the felony charge and accepted ten days in jail as "shock time." In the second offer, the prosecutor recommended a 90-day sentence if the defendant would enter a guilty plea to the misdemeanor offense. The misdemeanor charge usually carried a maximum term of one year in prison. Both offers were presented in a letter to defense counsel, but counsel failed to communicate the offers to the defendant, and the offers subsequently expired.⁵² Counsel's performance was deemed ineffective because he was unprepared and failed to perform the simplest of functions as defense counsel—keeping his client abreast⁵³ of any new developments in his case.⁵⁴

In *United States v. Cronic*,⁵⁵ the defendant and two other individuals were indicted and convicted of mail fraud involving a "check kiting" scheme that resulted in more than nine million dollars being illegally transferred between banks in Florida and Oklahoma. The defendant was identified in approximately 11 of the 13 counts listed in the indictment.⁵⁶ When the defendant's re-

49. See *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980) (arguing that multiple representation of a defendant and two of his co-defendants does not amount to ineffective assistance of counsel even when the complaining defendant is subsequently convicted and the two co-defendants are later acquitted).

50. *Missouri v. Frye*, 566 U.S. 134 (2012).

51. *Id.* at 138.

52. *Id.*

53. Ray Taylor, *Defending Lawyers in Disciplinary Proceedings*, 31 AM. JUR. TRIALS 633 (1984).

54. See generally Joel Mallord, *Putting Plea Bargaining on the Record*, 162 U. PA. L. REV. 683 (2014).

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

56. *Id.* at 648–649.

tained attorney withdrew, the district court appointed new counsel. The defendant found new counsel to be ineffective following his subsequent conviction and sentencing to 25 years in prison.⁵⁷ In his appeal, the defendant alleged that his counsel was ineffective and in violation of his Sixth Amendment right because his attorney (1) was given only 25 days to prepare for trial; (2) was inexperienced in criminal law, since he primarily operated a real estate practice; and (3) was virtually inaccessible to the defendant during the 25 days he was preparing for trial. The defendant argued, in contrast, that the Government had over four years to investigate and to review thousands of documents related to this serious and complicated case.⁵⁸

On the surface, it may appear that the defendant in *Cronic* had a perfectly plausible argument of ineffective assistance of counsel simply based on the inadequate time that his newly appointed attorney had to prepare for trial. However, the United States Supreme Court disagreed. The Court affirmed the notion that the right to effective counsel is an integral part of a criminal defendant's right to a fair and impartial trial.⁵⁹ The Supreme Court went on to say that the ineffective assistance of counsel claim is meaningless unless the aggrieved defendant can show an actual breakdown of the adversarial process during the trial of his case.⁶⁰

In other words, simply showing that defense counsel did not have as much time as the prosecution or that counsel had not handled as many felony criminal cases as the prosecutor is not sufficient enough to label counsel as ineffective.⁶¹ If defense counsel is actively and zealously representing his client even with having just a fraction of the time than that available to the prosecutor, the defendant has not shown prejudice.⁶² Actually, counsel's effectiveness is portrayed when counsel has exhibited average or above-average competence⁶³ in his representation despite the fact that he had less

57. *Id.*

58. *Id.*

59. *See id.* at 658.

60. *See* United States v. Valenzuela-Bernal, 458 U.S. 858, 867–69 (1982); United States v. Morrison, 449 U.S. 361, 364 (1981).

61. *See* Walker v. United States, 422 F.2d 374, 375 (3d Cir.) (per curiam), *cert. denied*, 399 U.S. 915 (1970) (noting that “a criminal defendant is entitled to reversal of his conviction whenever he makes some showing of a possible conflict of interest or prejudice, however remote”).

62. *See* United States v. Cronic, 466 U.S. 648, 663 (1984).

63. *See* Trapnell v. United States, 725 F.2d 149, 151–52 (2d Cir. 1983) (stating that the proper standard for attorney performance is that of “reasonably effective assistance”).

time to prepare than his opponent and had not handled complex criminal cases in his legal history.

In addition to *Cronic*, consider the decision in *Weaver v. Massachusetts*,⁶⁴ wherein the defendant filed an ineffective assistance of counsel claim, alleging that his trial counsel violated his Sixth Amendment right simply because counsel failed to object to the prosecution's request to close the courtroom during jury selection.⁶⁵ The jury trial, however, was open to the public. In denying the ineffective assistance of counsel claim, the United States Supreme Court noted that the closure was limited to voir dire.⁶⁶ There was no evidence of jury misbehavior during jury selection and no evidence that any juror lied during the process. More importantly, the Supreme Court concluded that the defendant could not link defense counsel's failure to object to a reasonable probability of a different outcome in the trial.⁶⁷ Hence, claims like the ones presented in *Cronic* and *Weaver* would not provide a sustainable foundation for ineffectiveness.

Finally, in the iconic⁶⁸ case of *Strickland v. Washington*,⁶⁹ the United States Supreme Court was presented with a case wherein the defendant brought an ineffective assistance of counsel claim against his trial counsel after being convicted of three capital murders, having been sentenced to death on each count.⁷⁰ In conjunction with his claim of ineffective assistance of counsel, the defendant asserted that his counsel violated his right to effective counsel by not obtaining and presenting several documents which would have provided mitigating evidence towards his sentencing.⁷¹ Trial counsel elected to only use the district court's statements from the plea colloquy to support the defendant's claim for a more lenient sentence. During the plea colloquy, the defendant in *Strickland* explained to the trial judge that he committed a string of felony offenses, which included brutal stabbing murders, torture, kidnap-

64. *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017).

65. *Id.* at 1902.

66. *Id.* at 1903–04.

67. *Id.* at 1913–14.

68. Justin F. Marceau, *Remedying Pretrial Ineffective Assistance*, 45 TEX. TECH. L. REV. 277, 279 (2012), [hereinafter *Pretrial Ineffectiveness*] (reporting that “the 1984 decision in *Strickland v. Washington* made the *Gideon v. Wainwright* promise of an attorney for all indigent defendants facing serious charges meaningful by insisting that the mere appointment of counsel, standing alone, was inadequate to comply with the Sixth Amendment”). See also Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B. C. L. REV. 1069, 1070 (2009).

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

70. *Id.*

71. See *State v. Gagliano*, 438 N.W.2d 783, 787–88 (Neb. 1989).

ping, severe assaults, attempted murders, attempted extortion, and theft.⁷² All felonies took place in Florida, and the defendant stated to the court that he accepted responsibility for his actions. The defendant stated that the decision to commit these offenses stemmed from his being under extreme stress and in need of a way to feed his family. The trial judge responded by stating that it “had a great deal of respect for people who are willing to step forward and admit their responsibility.”⁷³

At the sentencing hearing, counsel chose not to present any corroborating evidence to support the defendant’s psychiatric stability, and he chose to not order a pre-sentencing report in anticipation of sentencing. Counsel’s explanation for not presenting any supporting evidence on this issue was his belief that reiterating the district court’s statement during the hearing would be sufficient. Counsel apparently believed that the defendant’s lack of any significant criminal history would also prevent him from receiving a death sentence. However, the State put on a wealth of evidence regarding the details of how these gruesome felony offenses were committed. Without any mitigating evidence to weigh against the aggravating circumstances, the district court found that all three murders were especially heinous, atrocious, and cruel, especially because the victims were repeatedly stabbed. The district court also noted that at least one murder was committed during the commission of another dangerous and violent felony offense, and for pecuniary gain.⁷⁴ Despite defense counsel’s hope that the mitigating circumstances would shift the district court away from imposing the death penalty, the district court concluded that the aggravating circumstances surrounding these heinous crimes far outweighed any mitigating circumstances.⁷⁵ Hence, the district court sentenced the defendant to death on all three counts of murder and to various prison terms for the other convictions.

This was a case of first impression for the United State Supreme Court, representing the first time the Court directly and fully addressed a claim of “actual ineffectiveness.”⁷⁶ While the Court recognized that counsel of record in a felony criminal case is to conduct a substantial investigation⁷⁷ into each of several plausible lines of defense, the Court also conceded that counsel may still carry the

72. See *Strickland*, 466 U.S. at 672 (internal quotations omitted).

73. *Id.*

74. *Id.* at 674.

75. *Id.*

76. *Id.* at 686.

77. See Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1661–67 (2008) (discussing the benefits of counsel’s strategy of

mantle of effectiveness if both the attorney's experience and the novelty of the defense strategy recommended by the defendant suggested that a substantial investigation would be fruitless and unreasonable.⁷⁸ This case also created an analytical principle that many criminal defense attorneys internally recite to themselves before making their first appearance in court on behalf of a criminal client. The motto that these advocates must become intimately familiar with is as follows: (1) whether my performance is within the range demanded of lawyers in criminal cases, and (2) whether any professional errors I have committed could have changed the outcome of the proceeding in an unfavorable way for my client.⁷⁹

Any credible defense attorney would subscribe to the notion that hindsight should never be the benchmark by which to judge the effectiveness of an attorney's performance.⁸⁰ At the conclusion of a trial is usually when critics surface. Specifically, the United States Supreme Court in *Strickland* articulated the following regarding the hindsight evaluation process:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.⁸¹

One might ask whether there is hope for a convicted defendant who believes that his attorney was incompetent, inexperienced, or unconcerned. There appear to be so many hurdles for a defendant to overcome in order to prevail on the ineffective assistance claim.

intentionally failing to investigate as an advantage to the defendant in a capital case).

78. See *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979).

79. See *Strickland*, 466 U.S. at 687 (underlining the factors needed to be proven by a criminal defendant in his ineffective assistance of counsel claim, which are: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant's case because the errors were so serious that counsel prohibited him from having a fair and impartial trial and counsel jeopardized the reliability of the trial's outcome). See also Robert R. Riggs, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77 (2007) [hereinafter *T-Rex Without Teeth*].

80. See *Systemic Barriers*, *supra* note 10, at 2104.

81. See *Strickland*, 466 U.S. at 690.

The defendant can become lethargic as a result the many loopholes and exceptions if he makes the decision to challenge his conviction due to his attorney's performance. Ideally, an ineffective assistance of counsel claim is a valid and credible argument for a defendant or his post-conviction counsel provided that they methodically do their homework before filing the petition. Without adequate preparation,⁸² a defendant who challenges a felony conviction following his direct appeal may fall prey to the same vices as the defendants discussed below.

II. THE DEFENDANT'S UPHILL BATTLE ON POST-CONVICTION

It is a well-settled principle in criminal justice jurisprudence that over 90 percent⁸³ of all criminal defendants charged with a felony offense enter a guilty plea to their charges and consequently waive⁸⁴ their right to a jury trial. Notwithstanding the fact that these defendants may have an assortment of explanations as to why they decided to amend their plea, the resounding theme is that each of them wants to avoid the embarrassment of being found guilty in open court and they want to secure some form of leniency⁸⁵ from the judge during sentencing. These unsuspecting defendants may subsequently learn that a waiver of their right to bring an ineffective assistance of counsel claim was inserted in the plea agreement that circumvented their option of addressing this issue on direct appeal or during a state or federal habeas corpus proceeding. The

82. See *T-Rex Without Teeth*, *supra* note 79, at 83 (stating that there are instances where defense counsel can make a purely professional decision not to engage in an investigation if such activity is deemed to be unreasonable or unnecessary). See also *Strickland*, 466 U.S. at 689–90.

83. See Colin Miller, *Anchors Away: Why the Anchoring Effect Suggests that Judges Should Be Able to Participate in Plea Discussions*, 54 B. C. L. REV. 1667, 1724 (2013) (stating that more than 90 percent of all criminal cases are resolved by plea bargains, and while most states do not allow the judges to participate in these plea negotiations, some states have encouraged judges to be involved in these proceedings to ensure a fair and just agreement that will not be subject to a reversal later) (citing Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 24–49 (2009)).

84. See Advisory Committee's Notes on Fed. R. Crim. P. 32, advisory committee's note to 1983 amendment (concluding that "were withdrawal [of a guilty plea] automatic in every case where a defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim") (quoting *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975)).

85. See *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992) (arguing that the "chief virtues" of a plea agreement are speed, economy, and finality).

only salvation⁸⁶ for these defendants is then to show a nexus between the waiver⁸⁷ and counsel's deficient⁸⁸ performance.⁸⁹ In essence, the defendant's burden of proof is similar to the burden of proof for obtaining a new trial, which is as follows: (1) whether material evidence was discovered after the conviction, (2) whether the evidence is both new and material, and (3) whether the evidence is outcome-determinative.⁹⁰

For example, in *DeRoo v. United States*,⁹¹ the defendant was indicted for one count of possession of ammunition by a convicted felon.⁹² He later entered a guilty plea and was sentenced to 210 months of imprisonment with three years of supervised release and a \$50 special assessment fee.⁹³ From the record, it appears that the defendant waited until the day of trial to enter a guilty plea to the offense under a plea agreement with the Government.⁹⁴ In waiving his right to a jury trial, the defendant also waived his right to contest both his judgment of conviction⁹⁵ and sentence either on direct appeal or on post-conviction appeal. Despite the waiver, the defen-

86. See *Pretrial Ineffectiveness*, *supra* note 68, at 280 (summarizing that “the dual requirement of proving deficient performance and prejudice has proven ‘notoriously difficult’ for all defendants”).

87. Waivers are not absolute, especially when a defendant waives his right to appeal an illegal sentence or a sentence imposed in violation of the terms of an agreement. See *United States v. Michelsen*, 141 F.3d 867, 872 (8th Cir.), *cert. denied*, 525 U.S. 942 (1998).

88. See *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993), *cert. denied*, 508 U.S. 979 (1993) (claiming that it is highly doubtful that a plea agreement could waive a claim of ineffective assistance of counsel based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain).

89. See *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (stating that “[a] decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside ‘the range of competence demanded of attorneys in criminal cases’”).

90. See FED. R. CRIM. P. 33(b)(1). See also *United States v. Wall*, 389 F.3d 457, 465 (5th Cir. 2004).

91. *DeRoo v. United States*, 223 F.3d 919 (8th Cir. 2000).

92. See 18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(e)(1) (2012).

93. *DeRoo*, 223 F.3d at 919.

94. Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 825–26 (2015) [hereinafter *Using Outcomes*] (identifying prosecutors as wielding enormous power to not only control which cases are prosecuted, but also dictating the charges imposed, drafting plea-bargaining agreements, and rewarding leniency to defendants in order to induce guilty pleas). See also *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978) (holding that a prosecutor who uses the possibility of imposing harsher offense that carries a mandatory life sentence against a defendant who is reluctant to accepting a lenient plea offer was not a violation of the defendant's due process rights).

95. See FED. R. CRIM. P. 11(e)(1)(B).

dant filed a motion to vacate⁹⁶ his conviction pursuant to 28 U.S.C. § 2255. The district court summarily denied the motion to vacate, finding⁹⁷ that a waiver which included a waiver of his right to appeal both his conviction and sentence was enforceable.⁹⁸

The Eight Circuit, however, declined to follow this jurisprudence and reserved judgment on the merits of the ineffective assistance of counsel claim until the aggrieved defendant could show a connection between the guilty plea with both (1) the waiver⁹⁹ of habeas corpus review and (2) his counsel's advice, which allegedly prejudiced¹⁰⁰ his case.¹⁰¹ In other words, without a showing of prejudice, it would be premature for the reviewing court to address legal counsel's alleged incompetence or deficient performance.¹⁰²

A defendant does indeed face a "heavy burden" when he makes the decision to challenge the legitimacy of his conviction and/or sentence on the premise that his legal counsel was ineffective.¹⁰³ However, not all allegations will constitute incompetence. In *United States v. Pruitt*,¹⁰⁴ the defendant, who was indicted for conspiracy to possess methamphetamines along with two other drug offenses, entered into a plea agreement with the Government wherein he indicated that he would "not appeal whatever sentence [was] imposed by the court."¹⁰⁵ The defendant later brought a motion to vacate his sentence under federal habeas corpus proceedings on the claim that his counsel prejudiced his case by not drafting a

96. See *Pretrial Ineffectiveness*, *supra* note 68, at 281 (articulating that the general antidote for a defendant subjected the ineffective assistance of counsel is to reverse his recent conviction, and schedule a new trial because it puts all parties back on equal footing in order to litigate the question of one's guilt).

97. See *United States v. Abarca*, 985 F.2d 1012, 1014 (stating that a criminal defendant may waive the statutory right to file a § 2255 petition challenging the length of his sentence, but the waiver, by itself, cannot categorically foreclose the bringing of such petition on a claim of ineffective assistance of counsel).

98. See *DeRoo*, 223 F.3d at 924.

99. See Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 657 (2013) (stating that it is not rationally feasible that a defendant would waive a right that he cannot fully appreciate until the waiver is signed; further, the defendant's waiver would have to be from a conflict-free attorney, not a self-interested one).

100. See *Frazier v. State*, 303 S.W.3d 674, 683 (Tenn. 2010) (ruling that the statutory right to post-conviction counsel included the right to conflict-free counsel, and because counsel "can hardly be expected to objectively evaluate his or her performance;" thus, courts should either disqualify current counsel or obtain a valid waiver of the conflict).

101. *Id.*

102. See *United States v. Apfel*, 97 F.3d 1074, 1076 (8th Cir. 1996).

103. See *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

104. *United States v. Pruitt*, 32 F.3d 431 (9th Cir. 1994).

105. See *id.* at 432.

letter to the defendant's probation officer, explaining that the defendant had accepted responsibility for his actions. Said letter was intended to be a method by which the defendant would receive a lesser sentence for the conviction in the case. The Ninth Circuit denied the motion to vacate, finding that the defendant could not prove that he was prejudiced because the defendant drafted a letter explaining all of the same information that he initially wanted his attorney to disclose in his letter.¹⁰⁶ The Ninth Circuit also found that the district court was unmoved by the information included in the defendant's *pro se* letter, and that counsel's failure to draft the letter to the court did not negatively impact the sentence.¹⁰⁷ In addition, the Ninth Circuit opined that the defendant was originally facing a sentence of at least ten years, but with the plea agreement—which was negotiated by defense counsel—the defendant was only going to serve 48 months.¹⁰⁸

We can conclude from the various holdings listed above that a defendant's desire to erase his conviction and/or sentence through a habeas corpus proceeding will be fruitless if the defendant cannot first prove that he suffered some form of prejudice and that the prejudice was as a result of legal counsel's below-average performance. The defendant's evidence of prejudicial behavior, without a doubt, cannot simply be counsel's rejection of an irrelevant trial strategy¹⁰⁹ or his failure to lodge a useless objection.¹¹⁰ However, if the defendant's proof of ineffectiveness is his attorney's failure to file a notice of appeal despite the presence of an appeal waiver¹¹¹ that was knowingly inserted in the plea agreement, then defense counsel may not be able to escape unscathed.¹¹²

106. *Id.*

107. *See Pruitt*, 32 F.3d at 433.

108. *Id.*

109. *See State v. Hoppens*, 140 S.3d 293, 302–03 (stating that counsel's failure to object to invalid errors is not a sign of counsel's ineffectiveness).

110. *See State v. Allen*, 03-2418 (La. 6/29/05); 913 So.2d 788, *cert. denied*, 547 U.S. 1132 (2006) (declaring that counsel's failure to object to the sufficiency of the factual basis in a change of plea hearing or to omit making an *Alford* plea would be indications of counsel's ineffectiveness).

111. *See Systemic Barriers*, *supra* note 10, at 2105 (finding that the unintentional consequence of appeal waivers is that it leaves the unsuspecting criminal defendant to the mercies of incompetent counsel, and without any valid recourse).

112. *See United States v. Garrett*, 402 F.3d 1262 (10th Cir. 2005) (claiming that the defendant's claim of ineffective assistance of counsel may be established by his attorney's failure to file a notice of appeal even though an appeal waiver was included in the agreement and the defendant instructed his attorney to file the document anyway). However, the appellate courts in *Nunez v. United States*, 546 F.3d 450, 451–52 (7th Cir. 2008), and *United States v. Mabry*, 536 F.3d 231, 241 (3d Cir. 2008), declined to follow the holding in *Garrett*, questioning when defense

In *Roe v. Flores-Ortega*,¹¹³ the defendant was convicted following his entry of a guilty plea¹¹⁴ to second-degree murder. Defendant requested that his attorney file a notice of appeal regarding his conviction. Defense counsel assured the defendant that she would prepare the appellate documents, but failed to do so. Because counsel failed to preserve her client the constitutional right to appeal his conviction, whether purposefully or negligently,¹¹⁵ the United States Supreme Court declared counsel's conduct to be "professionally¹¹⁶ unreasonable."¹¹⁷

Accordingly, any defendant who attempts to prevail in a habeas corpus proceeding by sacrificing his counsel on the altar of the federal Constitution must be able to portray to the court that he was prejudiced (i.e., wrongfully convicted and sentenced) and that the prejudicial action resulted from the skill set of a less than average advocate. The defendant must also indicate that his attorney's uninformed decisions resulted in him impulsively surrendering his right to contest the Government's evidence in a jury trial.¹¹⁸ Manipulation of this caliber is a violation of *Gideon*¹¹⁹ and is the best evidence of ineffectiveness.

counsel could be declared ineffective for respecting the terms of the plea agreement.

113. *Roe v. Flores-Ortega*, 528 U.S. 470, 470 (2000).

114. *Using Outcomes*, *supra* note 94, at 826 (supporting the notion that the current criminal justice system is a system of pleas, not a system of trials; further, the United States Supreme Court has now framed the task of the federal judicial system as reorienting the constitutional criminal law to fit this reality).

115. *See McCarthy v. United States*, 394 U.S. 459, 466 (1969) (asserting that the decision as to whether the right to a jury trial or the right to waive the assistance of counsel remains with the defendant regardless of counsel's personal opinion).

116. Laurence A. Steckman, *Attorney Inaction as Trial Strategy: A Study of the Effects of Judicial Use of Non-Action Neutral Language on the Analysis and Adjudication of Claims of Ineffective Assistance of Counsel under the Sixth Amendment*, 6 J. SUFFOLK ACAD. L. 89 (1989) (declaring that counsel's trial strategy of standing mute during trial was neither professional nor an effective strategy).

117. *McCarthy*, 394 U.S. at 466 (holding that guilty plea cannot truly be voluntary unless defendant possesses knowledge of how law relates to facts).

118. *Using Outcomes*, *supra* note 94, at 827 (boosting the idea that the plea-bargaining process is terribly complicated and can lead to defendants being at the mercy of overburdened, underfunded appointed counsel, and these defendants may lack access to important information about their plea options or find it difficult to weigh whether to accept a plea deal or risk trial). *See also* STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 30–33 (2012); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1153–59 (2011).

119. *See generally Gideon v. Wainwright*, 372 U.S. 335 (1963). *See also Systemic Barriers*, *supra* note 10, at 2106.

III. DO YOU REALLY WANT TO HAVE A CRIMINAL LAW PRACTICE?

Law students who have voiced an interest in practicing criminal law have always articulated to the Author a desire to represent the poor and disadvantaged. They were sickened by the way the indigent¹²⁰ were treated in criminal court, and they wanted to end the cycle of neglect by providing not only a competent ear, but also a caring and concerned voice to those individuals who have suffered under the iron hand of the law. Growing up in the inner city of New Orleans, this Author can appreciate the sentiments of those who carry a passion for the poor, the abused, and the neglected. This Author was also a former assistant district attorney and an advocate for battered women in domestic violence cases. For the past fifteen years, this Author has also represented criminal defendants on direct appeal in both state and federal courts, and from this experience, there remains one central theme that he would stress to anyone brave enough to open the doors of their practice to this particular field of law—record everything! The Apostle Paul wrote: “Brethren, my heart’s desire and prayer to God for Israel is that they might be saved. For I bear them record that they have a zeal . . . but not according to knowledge.”¹²¹

In like manner, this Author sincerely believes that those who enter the corridors of the state and federal criminal courts sincerely want to honor their quest to reform the justice system, but also believes that they will not clear this hurdle unless they fully understand the dynamics of this venture. Israel, as mentioned in this particular scripture, is synonymous for those attorneys who elect to represent criminal defendants. These attorneys must be equipped with the knowledge and the patience to perform their task well. Without this knowledge, they are destined to not only fail, but to fail in the worst possible way.

Consider, for example, the situation where a young man named John¹²² happens to be walking along the beach when he sees someone struggling in the water. John knows how to swim and has been trained as a life guard when he was a teenager. John enters the water with the intent of saving this person who is only seconds away from drowning. Though John knows how to swim, he also

120. See 18 U.S.C. § 3006(A) (1948).

121. See *Romans* 10:1–2 (King James).

122. Charles Fried, *The Artificial Reason of the Law or: What Lawyers Know*, 60 TEX. L. REV. 35 (1981) (stating that an “analogy is the application of a trained, disciplined intuition where the manifold of particulars is too extensive to allow our minds to work on it deductively”).

knows that if he neglects his training, he could drown because the person who he is helping is so desperate to survive that he will not hesitate to push John down in the water just so he can make it back to shore.

Being a criminal attorney in many ways is like being a life-guard: we are entrusted with the responsibility to preserve life. Although we accept criminal cases with the mindset of providing competent legal representation to those in dire circumstances, it can become a pivotal moment in our career if we forget, even for a second, that our clients would not delay in placing the blame of their conviction in our laps when it is convenient for them to do so. On many occasions, this Author has had to endure bar complaints from former clients because the trial strategy that was implemented was not successful¹²³ in getting them acquitted. Because my post-conviction clients have been more demanding and less forgiving than all of my other clients combined, the United States Supreme Court has opined that attorneys, like this Author, should be given the presumption¹²⁴ that the trial strategy, though not favorable to the defendant, may actually still be sound, reasonable, and credible.¹²⁵ Some scholars would disagree, arguing that the indigent defendant's perspective is most relevant.¹²⁶ Thankfully, the United States Supreme Court, through *Strickland*, has served to "limit the pool of litigants [rather] than . . . expand it."¹²⁷

Because my criminal clients have spent countless hours in the prison law libraries, they have not been shy about educating me on what the law is and on how to draft the various petitions, motions, and briefs that are necessary to provide reasonable representation. Over the years, I have seen the fundamental transformation of criminal attorneys from the role of advocate to that of butler. The "butler" reference is not meant to insinuate that attorneys should ignore their client's wishes or instructions. Rather, this Author's use of the term "butler" is reserved for those situations where the

123. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (citing that a fair assessment of the counsel's performance on behalf of the defendant is not distorting effects of hindsight or to reconstruct the circumstances of counsel's challenged conduct, but to evaluate the conduct from counsel's perspective at the time of the representation). See also *You Can't Get There from Here*, *supra* note 24, at 569.

124. *Id.* at 669 ("A court must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance.").

125. *Id.*

126. *Id.* at 710 (Marshall, J., dissenting).

127. See Gregory J. O'Meara, "You Can't Get There From Here?": *Ineffective Assistance Claims in Federal Circuit Courts After the AEDPA*, 93 MARQ. L. REV. 545, 570 (2009) (citing *Lindstadt v. Keane*, 239 F.3d 191 (2d. Cir. 2001)).

defendant instructs (sometimes commands) the attorney to make an argument, file a motion, or address an issue with outdated jurisprudence, and then expects the attorney to simply comply with those instructions without protest.¹²⁸ Clearly, if my client desires to file a direct appeal or a writ application to the high court, I would not try to suppress their constitutional right to do so, but this same client should also expect me to advise him on the likelihood of success with his specific argument. Consequently, the attorney is ethically¹²⁹ bound to not deprive the defendant of the knowledge of the potential downfalls of presenting certain arguments to the court in light of the existing statute(s) and/or jurisprudence.¹³⁰ In this manner, we are acting more as a partner in the defendant's representation as opposed to maintaining a master-servant relationship.

Post-conviction clients generally threaten to terminate legal representation if the attorney ever refuses or fails to do exactly what they are told to do. Bar complaints are commonly used by defendants as leverage at any given stage of the proceeding, and appellate¹³¹ and trial attorneys are never far away from the proverbial "chopping block" whenever the defendant becomes unhappy with counsel's execution of duties. For this reason, this Author kindly warns both trial and appellate counsel against being careless¹³² and urges them to document every conversation, trial strategy, oral objection, assignment of error, and legal argument made in any given criminal matter. Through this documentation, the attorney preserves an explanation for himself in the event that he or she is ever called to testify in a post-conviction matter on ineffective

128. See *Alvord v. Wainwright*, 469 U.S. 956, 960–61 (1984) (Marshall, J., dissenting) (finding the majority's decision not to grant *certiorari* was clear error because defense counsel gave absolute deference to the uniformed reaction of a defendant whose mental capabilities were questionable, and the majority made it appear to be reasonable for counsel not to pursue an independent investigation into his client's history of mental illness, but to defer his client's wishes without regard to his client's knowledge of or his ability to understand the law). See also *T-Rex Without Teeth*, *supra* note 79, at 84–85.

129. See generally David Hricik and Jae Ellis, *Disparities in Legal Ethical Standards Between State and Federal Judicial Systems: An Analysis and a Critique*, 13 GEO. J. LEGAL ETHICS 577 (2000).

130. See *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (stating the defendant's sole responsibility in his ineffective assistance of counsel claim is to demonstrate to the court that he would have timely appealed his case to the higher court if it had not been for his lawyer's deficient performance).

131. See Jacob Szewczyk, *Following Orders: Campbell v. United States, the Waiver of Appellate Rights, and the Duty of Counsel*, 64 CATH. U. L.A. REV. 489 (2015) (claiming that defense counsel's failure to file a notice of appeal, even if the defendant has waived his right to appeal in a plea bargain, actually robs a defendant of this crucial proceeding).

132. See *Pretrial Ineffectiveness*, *supra* note 68, at 285.

assistance of counsel. Nevertheless, the attorney must meditate on his ethical obligations while sharing information with his client and disclosing information to the prosecution during discovery.¹³³

On several occasions, this Author, as appellate counsel, has had to explain in a very diplomatic manner why trial counsel failed to either raise a particular objection or make a clear record of an argument when the case was on appeal. Without a contemporaneous objection or an adequate discussion on the record of a specific claim or argument, the appellate courts are inclined¹³⁴ either to dismiss the appeal, to find no merit whatsoever to the claim, or to overshadow the district court's unjustified ruling by cloaking it with harmless¹³⁵ error, in essence telling the legal community *there is nothing to see here!*

The attorney-client relationship is a fleeting concept because everything hinges on whether the counselor's trial strategy¹³⁶ was profitable for the defendant. Thus, it is incumbent on the attorney to document the substance and length of his conversations with the client.¹³⁷ The attorney should record the statistical likelihood that his client's argument of choice would be viewed favorable by a twelve-member jury. The attorney should share this research with the client as often¹³⁸ as possible. Counsel should file any and all pleadings and motions timely and adequately prepare to question the State's witnesses. Maintaining open and continuous dialogue with the client and his loved ones can be a valuable antidote for an improper ineffective assistance of counsel claim.

For example, in *Attorney Grievance Comm'n of Maryland v. Middleton*,¹³⁹ an attorney was found in violation of the Maryland

133. Kevin R. Reitz, *Clients, Lawyers and the Fifth Amendment: The Need for a Projected Privilege*, 41 DUKE L. J. 572, 644–645 (1991) (indicating that defense counsel is “not generally required to make the prosecution’s case for them, so long as the defense’s (sic) investigation does not conceal or otherwise impede the prosecution’s discovery of the evidence”).

134. *See Switzer v. United States*, 131 F.2d 377 (6th Cir. 1942). *See also Ametovski v. I.N.S.*, 935 F.2d 273 (9th Cir. 1991).

135. Evan Tsen Lee, *Section 2254(d) of the Federal Habeas Statute: Is It Beyond Reason?*, 56 HASTINGS L. J. 283, (2004) (arguing that the problem with 28 U.S.C. § 2254(d) is that the statute is ambiguous as to what type of and how much deference is owed to state court convictions and under what conditions).

136. *See generally* Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763 (2000) (arguing that all tactical and strategic decisions should be reserved for the attorney, who, while acting as a detached expert, would not have time to engage in meaningful consultation with the defendant on every decision).

137. *See generally id.*

138. *See generally id.*

139. *Att’y Grievance Comm’n of Md. v. Middleton*, 756 A.2d 565 (Md. 2000).

Disciplinary Code when the court cited the following errors committed by this attorney during a criminal case: First, counsel failed to meet with or review possible defense strategies with his client. Secondly, counsel failed to “[p]ursue a motion to suppress evidence that may have been illegally obtained.”¹⁴⁰ Third, the attorney failed to present an available intoxication defense as mitigation. Fourth, counsel failed to adequately prepare to cross-examine the State’s witnesses. Lastly, the attorney failed to request specific jury instructions relative to the charges at issue and to object to potentially improper jury instructions that may have been prejudicial to his client.¹⁴¹

Reciprocally, the attorney should not be so dismissive of the client’s thoughts, strategies and ideas. After all, the defendant’s freedom is in jeopardy. *The defendants* will be the ones to suffer the consequences of being found guilty and they are the ones who will be removed from their family for an extended period of time. The clients’ relationships with their children will also be broken by their incarceration.

Appellate counsel should have regular contact with prior counsel and thoroughly question prior counsel not only on trial strategies, but also on tactics that previous counsel outright rejected. Appellate counsel should also get an explanation of the overall demeanor and personality of the defendant¹⁴² during these proceedings. When the relationship can no longer be salvaged, the attorney should be willing to disclose all available options to the defendant, encourage the defendant to consult with independent counsel, and then surrender all information¹⁴³ and unearned funds¹⁴⁴ to the client when the client has shown that he understands the risks and has elected to take those risks.¹⁴⁵ Typically, a defendant pleads guilty to avoid a harsher sentence. The prosecutor will benefit from the quick conviction, and the district court conserves scarce judicial resources.¹⁴⁶ However, defendants are never opposed to undoing this plea agreement if they find that their attorney has misled them

140. *Id.* at 568.

141. *Id.* at 568.

142. *Id.* at 568–75; *T-Rex Without Teeth*, *supra* note 79, at 103–04.

143. See MODEL RULES OF PROF’L CONDUCT R. 1.4 (AM. BAR ASS’N 1983).

144. See MODEL RULES OF PROF’L CONDUCT R. 1.5 (AM. BAR ASS’N 1983).

145. See *Cooper v. State*, 356 S.W.3d 148, 153–54 (Mo. 2011) (declaring that a defendant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates the defendant was adequately informed of his rights and that the waiver was made knowingly, voluntarily and intelligently).

146. *United States v. Agurs*, 427 U.S. 97 (1976) (stating that the purpose of the harmless error rule is to conserve scarce judicial resources and to avoid point-

solely to reach a quick conclusion to the case.¹⁴⁷ For this reason, attorneys who fail to recognize this truth and the impact that comes with establishing a criminal defense practice will undeniably suffer the penalty of being naive and unprepared.

IV. CONCLUSION

Despite the public protest, criminal defense is a noble profession. We are required to provide reasonable, competent, and professional representation to individuals charged with felony and misdemeanor crimes. Defending people charged as murderers, rapists, and child molesters is always difficult and challenging, especially when the facts of the case are horrific and terribly graphic. Nevertheless, the charge of every attorney is to guarantee that their clients will receive a fair¹⁴⁸ and impartial trial, and that every rule of evidence and every statute in criminal procedure will be adhered to without exception.

However, these attorneys must keep in mind that the desire of freedom is so strong that the individuals they are entrusted to represent can make the attorney a defendant in post-conviction proceedings. Therefore, we must be vigilant¹⁴⁹ and forward-thinking¹⁵⁰ with regard to our representation. Record everything. Share everything you have learned in your representation with your clients and with their family members if the client gives prior authorization.¹⁵¹ Share your thoughts, notes, and research. Counsel should engage in meaningful conversation with every person remotely associated with his client's case.¹⁵² Remember, the habeas corpus

less trials, and to prevent an abuse of the judicial process that would bestir the public to ridicule it). *See also* Delaware v. Van Arsdall, 475 U. S. 673 (1986).

147. *See Using Outcomes*, *supra* note 94, at 833 (quoting Brady v. United States, 397 U.S. 742, 752 (1970)).

148. *See T-Rex Without Teeth*, *supra* note 79, at 83 (asserting that the surrounding purpose of the Sixth Amendment as articulated in *Strickland*, is to ensure that criminal defendants receive a fair trial).

149. *See Alvord v. Wainwright*, 469 U.S. 956, 960 (1984) (finding defense counsel's trial strategy to be totally unreasonable in light of the ABA Standards).

150. *See generally* Wiggins v. Smith, 539 U.S. 510 (2003).

151. *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 14 (AM. BAR ASS'N 2017) (stating that the lawyer shall promptly inform the client of any decision or circumstance relative to the case, and to reasonably consult with the client on the means to accomplish client's objectives).

152. *See generally* Williams v. Taylor, 529 U.S. 362, 368–96 (2000) (holding that counsel was ineffective in his representation of a defendant in a capital murder case where counsel failed to properly investigate his client's childhood which could have mitigated his sentence; counsel did not present the "extensive records that graphically described the defendant's nightmarish childhood or the fact that he was repeatedly abused by his biological parents, foster parents, and was borderline mentally retarded").

process is the defendant's second bite¹⁵³ at the apple, and these individuals will not waver in taking that infamous bite out of their attorney.

153. *Id.*