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# The Historical Case for Abandoning Strickland

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Brian R. Gallini\*

## The Historical Case for Abandoning *Strickland*

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### I. INTRODUCTION

Even the Justices considering *Strickland v. Washington* knew. “[T]his is a big case,” Justice Powell handwrote on the first page of his law clerk’s bench memorandum for *Strickland v. Washington*.<sup>1</sup> Indeed, it was<sup>2</sup>—and is.<sup>3</sup> In 1984, the Supreme Court for the first time decided who is an “effective” criminal defense attorney for purposes of the Sixth Amendment.<sup>4</sup> Specifically, the Court held that a defendant receives constitutionally unacceptable representation when (1) coun-

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1. Memorandum from Mark E. Newell to J. Powell (June 2, 1983) (on file with the Library of Congress, Manuscript Division, Lewis Powell Papers).

2. *E.g.*, Linda Greenhouse, *High Court Defines ‘Ineffective’ Counsel as a Basis for Appeal*, N.Y. TIMES, May 15, 1984, at A14.

3. *E.g.*, Elizabeth Gable, *Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years After Strickland*, 17 GEO. J. LEGAL ETHICS 755, 770 (2004).

4. *Strickland v. Washington*, 466 U.S. 668, 702 (1984) (Brennan, J., dissenting).

sel's representation falls below an objective standard of reasonableness that (2) prejudiced the defense, and therefore had an effect on the judgment.<sup>5</sup>

From the time of its publication, the decision received mixed reviews.<sup>6</sup> Since then, *Strickland* has remarkably been relied on by courts nationwide to uphold as constitutional criminal defense attorney conduct that includes sleeping through portions of a trial,<sup>7</sup> remaining completely silent during the proceedings,<sup>8</sup> mental illness,<sup>9</sup> alcohol use,<sup>10</sup> and drug use.<sup>11</sup>

With those results in mind, *Strickland* has steadily endured complaints from the media,<sup>12</sup> the bar,<sup>13</sup> and scholars alike.<sup>14</sup> But no article has looked back to ask a more basic question: Why? Why did the Court spend 1956–1969 expanding indigent access to justice—particularly in the right-to-counsel area—only to aggressively reverse course in *Strickland*? And a related question: Why did the opinion's author, Justice O'Connor, go so far as to apply the new *Strickland* standard to the facts of David Washington's case?

This Article makes two arguments: First, that *Strickland* is best understood as a backlash case—a case designed to radically recede from the Warren Court's more broadly conceived Sixth Amendment. By coalescing the Sixth Amendment, the Due Process Clause, the Fifth Amendment, and the Equal Protection Clause, the Warren Court issued a number of rulings that dramatically expanded indigent defendants' right to counsel. Creating the Warren Court's vision of that broadly conceived right took six years—from 1961–1967. But, once complete, the Warren Court's right to counsel included access not only to attorneys at trial, in the interrogation room, at lineups, and on appeal—among other procedural phases—but it also extended more generally to things an attorney might need, like a trial transcript.

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5. *Id.* at 687.

6. Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 94 (1986).

7. *E.g.*, *McFarland v. State*, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996).

8. *United States v. Sanchez*, 790 F.2d 245, 248 (2d Cir. 1986).

9. *Smith v. Ylst*, 826 F.2d 872, 876 (9th Cir. 1987).

10. *People v. Garrison*, 765 P.2d 419, 440 (Cal. 1989).

11. *Young v. Zant*, 727 F.2d 1489, 1492–93 (11th Cir. 1984); *People v. Badia*, 159 A.2d 577, 578 (N.Y. App. Div. 1990).

12. *E.g.*, Alan Berlow, *Lose That Lawyer*, SLATE (June 3, 2008, 4:04 PM), [http://www.slate.com/article/news\\_and\\_politics/jurisprudence/2008/06/lose\\_that\\_lawyer.html](http://www.slate.com/article/news_and_politics/jurisprudence/2008/06/lose_that_lawyer.html), archived at <http://perma.unl.edu/X3LG-NUVH>.

13. *E.g.*, Robert M. Andalman, *Ineffective Assistance of Counsel Claims Under the Wisconsin Constitution*, 67 WIS. LAWYER, Feb. 1994, at 14, 17.

14. *E.g.*, 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, 1272–81 (1986).

Yet, significant changes in Court personnel beginning in 1972 correspondingly altered the Supreme Court's views about indigent defendants' access to justice. By the time of *Strickland* in 1984, Warren Court holdovers Brennan, White, and Marshall were overrun by new and differing views about both indigent access to counsel and, most importantly for this Article, what counsel must do in order to be "effective."

Second, this Article asserts that by applying the new Sixth Amendment standard to the facts in Part V of *Strickland*, Justice O'Connor undermined—perhaps deliberately—what could have been a standard far more demanding of defense attorneys. She did so in part by bucking an established Supreme Court practice that favors remanding new Supreme Court standards to lower courts in criminal procedure cases.<sup>15</sup> *Strickland's* true problem is, therefore, not the standard for effective assistance, but rather the fallout from the Supreme Court's decision to apply that standard.

This Article proceeds in two parts. Part II traces the Warren Court's effort to establish a broad and robust right to counsel as it emerged in the 1960s. Part II then transitions to *Strickland* and explores how a majority of the Court concluded that an experienced attorney who felt "hopeless" about the chances of saving his client's life nevertheless provided constitutionally competent defense representation. To collectively do so, Part II considers the social and judicial climates leading up to 1984 and reviews the Justices' private *Strickland* papers, the Court's exchange of *Strickland*-related memoranda, and the parties' briefs and oral arguments.

Part III then argues that *Strickland's* backlash against the Warren Court's view of the right to counsel is best seen in the last section of the *Strickland* opinion. In Part V of *Strickland*, Justice O'Connor fascinatingly concluded that David Washington received effective assistance from his trial attorney, William Tunkey, despite her colleagues' vote at the Conference following oral argument to simply remand. A detailed look at the analytical assertions in Part V, alongside Justice O'Connor's voting history in right-to-counsel cases, explains why she sought—on her own—to undo the Warren Court's approach to the right to counsel. Properly understanding *Strickland* in this broader historical context reveals new and previously undiscovered reasons for the current Court to demand more from criminal defense representation.

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15. Elise Borochoff, *Lower Court Compliance with Supreme Court Remands*, 24 *TOURO L. REV.* 849, 854–55, 895–96 (2008).

## II. THE STRANGE RIGHT-TO-COUNSEL JOURNEY

The journey to *Strickland* follows a non-linear path that, at best, is dark and poorly marked. This Part seeks to clarify *Strickland's* origins and, in doing so, thematically proposes that the result in *Strickland* was preordained, in large part because a change in Court personnel brought with it a change in the Court's attitude toward the Sixth Amendment. Section II.A explores the impact of the Supreme Court's composition on the Sixth Amendment right to counsel in the years preceding *Strickland*. Building on section II.A, section II.B explores the *Strickland* opinion itself in more depth.

### A. The Journey to *Strickland*

The right to counsel exists in the Sixth Amendment, which provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>16</sup> On June 6, 1983, the date upon which the Supreme Court granted the State's writ of certiorari in *Strickland*,<sup>17</sup> the strength of the Sixth Amendment's right to counsel diminished. Some historical context is necessary to understand how.

At the time of its ratification in 1791,<sup>18</sup> the Sixth Amendment was understood to minimally provide a criminal defendant with the right to retain a private attorney.<sup>19</sup> A more difficult question loomed for more than a century: Does the Sixth Amendment require state governments to provide an attorney when the defendant cannot afford one?<sup>20</sup>

The Court's ambivalence about the contours of the right to counsel came to a sharp halt in 1953, following the appointment of Earl Warren as Chief Justice. Indeed, according to one commentator, "The [Warren Court] decisions with the greatest significance are clearly the right-to-counsel cases."<sup>21</sup> From the time of Warren's appointment until his retirement in 1969,<sup>22</sup> the Court steadily and dramatically expanded the right to counsel by thematically prioritizing "the

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16. U.S. CONST. amend. VI.

17. Docket, *Strickland v. Washington*, 466 U.S. 668 (1984) (No. 82-1554).

18. *Crawford v. Washington*, 541 U.S. 36, 46 (2004).

19. Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 438-39 (1993).

20. *History of Right to Counsel*, NAT'L LEGAL AID & DEFENDER ASS'N, [http://www.nlada.org/About/About\\_HistoryDefender](http://www.nlada.org/About/About_HistoryDefender) (last visited July 20, 2015), archived at <http://perma.unl.edu/X4GU-5EYT>.

21. A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 258 (1968); accord Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 495-96 (2009).

22. See JOSHUA DRESSLER & GEORGE C. THOMAS III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES* 8 (4th ed. 2010).

fundamental right of access to justice . . . .”<sup>23</sup> Indeed, rather than focusing on the Sixth Amendment’s text to expand the right to counsel, the Court, during Warren’s tenure, focused more broadly on the concept of equality—that is, an equal opportunity for defendants to construct a defense.<sup>24</sup> To do so, the Warren Court relied not only on the Sixth Amendment, but also on broadly conceived notions of due process and the Equal Protection Clause.<sup>25</sup>

The Warren Court’s controversial fusing of the Sixth Amendment, Fifth Amendment, Due Process Clause, and Equal Protection Clause made a powerful impact on the rights of indigent criminal defendants. To begin with, the Court decided *Griffin v. Illinois* in 1956, which guaranteed to indigent defendants a free copy of their trial transcript for purposes of appeal.<sup>26</sup> *Griffin*’s seemingly innocuous holding hardly appears the poster child for the so-called Warren Court’s individual rights “revolution,”<sup>27</sup> and, perhaps as a result, it generated little commentary.<sup>28</sup>

Thus, to many, the formally termed “Warren Court” did not begin until 1961, when the Court decided *Mapp v. Ohio*, which applied the Fourth Amendment’s exclusionary rule to the states through the Fourteenth Amendment.<sup>29</sup> Ironically, by 1961, the Warren Court had firmly established itself as far more than just controversial. Indeed, the Court, by that time, had endured outlandish claims that its members were Communists,<sup>30</sup> weathered attacks from Congress,<sup>31</sup> and withstood criticism from J. Edgar Hoover<sup>32</sup>—among other detractors.<sup>33</sup> The Court’s decision in *Mapp* served only to further fuel the

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23. Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense*, 97 MINN. L. REV. 1197, 1201 (2013).

24. See Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 393 (2001).

25. *E.g.*, *Douglas v. California*, 372 U.S. 353, 356–58 (1963); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

26. *Griffin*, 351 U.S. at 19.

27. Leonard W. Levy, *Introduction to THE SUPREME COURT UNDER EARL WARREN 4* (Leonard W. Levy ed., 1972).

28. See David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845 (2007).

29. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

30. Nadine Strossen, *Freedom of Speech in the Warren Court*, in *THE WARREN COURT: A RETROSPECTIVE* 68, 79 (Bernard Schwartz ed., 1996).

31. *E.g.*, 104 CONG. REC. 954 (1958).

32. See J. Edgar Hoover, *The Law and the Layman: Faith in the Courts Must Be Preserved*, 44 A.B.A. J. 1155, 1157–58 (1958).

33. See, *e.g.*, H.R. 11477, 85th Cong. (2d Sess. 1958); Bill Becker, *Attack on Warren Boomerangs on Anti-Reds School on Coast*, N.Y. TIMES, Dec. 17, 1961, at 58.

critics,<sup>34</sup> and more than sporadic claims emerged seeking impeachment of Chief Justice Warren, along with several Associate Justices.<sup>35</sup>

What *Mapp* was to the Fourth Amendment in terms of grandiose and stature, the Supreme Court's 1963 ruling in *Gideon v. Wainwright* was to the Sixth Amendment right to counsel.<sup>36</sup> Though substantially less controversial, *Gideon's* holding was nonetheless momentous—promising counsel at state expense to indigent defendants charged with a felony.<sup>37</sup> Writing for the majority on March 18, 1963, Justice Black reasoned, “[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>38</sup> Moreover, Justice Black added, “The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”<sup>39</sup>

*Gideon*, unlike *Griffin*, drew attention from both the media and legal commentators alike.<sup>40</sup> If *Gideon* was not a clear manifestation of the Warren Court's intent to expand and strengthen the right to counsel, the Court then decided *Douglas v. California*.<sup>41</sup> Remarkably, on the same day as *Gideon*, a majority of the Court relied on the Fourteenth Amendment to conclude that *Gideon* entitles indigent defendants to counsel at state expense in order to prosecute their first appeals as of right.<sup>42</sup>

One year later, in *Massiah v. United States*,<sup>43</sup> the Supreme Court returned to the Sixth Amendment to further expand the right to counsel.<sup>44</sup> In *Massiah*, the Court held that the “petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel.”<sup>45</sup> *Massiah's* narrow impact—applicable only to post-indictment interrogations—hardly stemmed the ris-

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34. *E.g.*, Leonard E. Ryan, *Narcotics Case Convictions Drop Since Ban on Illegal Searches*, N.Y. TIMES, Sept. 19, 1962, at 35.

35. ‘Impeach Earl Warren’ Sign Posted on Highway Upstate, N.Y. TIMES, Nov. 28, 1963, at 36.

36. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *see e.g.*, Justin Marceau, *Gideon's Shadow*, 122 YALE L.J. 2482, 2485–86 (2013).

37. *Gideon*, 372 U.S. at 342.

38. *Id.* at 342–45.

39. *Id.*

40. *E.g.*, Justice Mitchell D. Schweitzer, *The Rationing of Justice*, 65 COLUM. L. REV. 183, 184 (1965) (book review); Anthony J. Lewis, *Supreme Court Extends Ruling on Free Counsel: Holds States Must Provide Lawyers for All Poor in Serious Criminal Cases*, N.Y. TIMES, Mar. 19, 1963, at A1.

41. 372 U.S. 353 (1963).

42. *Id.*

43. 377 U.S. 201 (1964).

44. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2472 (1996).

45. *Massiah*, 377 U.S. at 206.

ing tide of Warren Court criticism.<sup>46</sup> Indeed, many viewed *Massiah* simplistically, as yet another case designed to expand the rights of criminal defendants.<sup>47</sup>

Further expansion of the Sixth Amendment, or so it initially appeared, came that same year when the Court decided *Escobedo v. Illinois*.<sup>48</sup> After police arrested Danny Escobedo for the murder of his brother-in-law, Escobedo requested counsel.<sup>49</sup> When officers began interrogating Escobedo, his lawyer arrived and requested permission to see him.<sup>50</sup> Those requests were denied, and Escobedo made incriminating statements.<sup>51</sup> He argued before the Supreme Court that his incriminating statements should have been suppressed at trial because officers unconstitutionally denied him access to his lawyer.<sup>52</sup> The Supreme Court agreed, holding in part that the collective circumstances surrounding Escobedo's interrogation denied him "[t]he Assistance of Counsel" in violation of the Sixth Amendment to the Constitution.<sup>53</sup>

Although the law enforcement community,<sup>54</sup> alongside the judiciary,<sup>55</sup> largely disapproved of *Escobedo*, criticism of the Warren Court had yet to peak. In 1966, two years after *Massiah*, the Court issued *Miranda v. Arizona*. In *Miranda*, the Supreme Court held that the Fifth Amendment required the prosecution to provide a defendant with "procedural safeguards" before using "statements, whether exculpatory or inculpatory, stemming from custodial interrogation . . ."<sup>56</sup> Those procedural safeguards are the now familiar *Miranda* warnings, which in part require that "an individual held for interrogation must be clearly informed that he has *the right to consult with a lawyer and to have the lawyer with him during interrogation* . . ."<sup>57</sup> Put differ-

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46. See James J. Tomkovicz, *An Adversary System Defense of the Right to Counsel Against Informants: Truth, Fair Play, and the Massiah Doctrine*, 22 U.C. DAVIS L. REV. 1, 5 (1988).

47. *E.g.*, Daniel Gutman, *The Criminal Gets the Breaks*, N.Y. TIMES, Nov. 29, 1964, at SM36 120-21.

48. 378 U.S. 478 (1964).

49. LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 29 (1983).

50. *People v. Escobedo*, 190 N.E.2d 825, 826 (Ill. 1963), *rev'd sub nom. Escobedo v. Illinois*, 378 U.S. 478 (1964).

51. BAKER, *supra* note 49, at 30.

52. *Escobedo*, 378 U.S. at 483-84.

53. *Id.* at 491 (quoting *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963)).

54. *E.g.*, LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 391-92 (2000).

55. See, *e.g.*, *State v. Smith*, 202 A.2d 669, 678 (N.J. 1964); *Commonwealth v. Negri*, 213 A.2d 670, 676 (Pa. 1965); *Wamsley v. Commonwealth*, 137 S.E.2d 865, 868 (Va. 1964).

56. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

57. *Id.* at 471 (emphasis added).

ently and more directly, the Warren Court created a Fifth Amendment right to counsel.<sup>58</sup>

Critics came from all around to chastise the Court.<sup>59</sup> The *New York Times* characterized the *Miranda* decision as providing “immunity from punishment for crime on a wholesale basis.”<sup>60</sup> Shortly after *Miranda*, Truman Capote testified before a Senate subcommittee and asked, “Why do they seem to totally ignore the rights of the victims and potential victims?”<sup>61</sup> Even Richard Nixon made his criticism well known on the campaign trail during the 1968 presidential election.<sup>62</sup> To the frustration of still others,<sup>63</sup> the Supreme Court’s 1964 “landmark”<sup>64</sup> decision in *Malloy v. Hogan* ensured that *Miranda*’s Fifth Amendment right to counsel would apply to the states.<sup>65</sup>

Notwithstanding unrelenting criticism, the Warren Court pressed on in 1967. In a trio of cases, *United States v. Wade*,<sup>66</sup> *Gilbert v. California*,<sup>67</sup> and *Stovall v. Denno*,<sup>68</sup> the Court extended the right to counsel for indigent defendants to lineup identifications. In *Mempa v. Rhay*, it held the right to counsel applies at sentencing.<sup>69</sup> Unlike the Court’s reliance on the Fifth Amendment in *Miranda*, it read the Sixth Amendment as broadly applicable to both cases<sup>70</sup>—a reading that was “hardly a foregone conclusion.”<sup>71</sup>

Justice Brennan, writing for a majority of the Court in *Wade*, specifically relied on the Sixth Amendment to hold that defendants are entitled to counsel during pretrial proceedings whenever necessary to ensure a fair trial.<sup>72</sup> Like *Wade*, the Court emphasized the impor-

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58. *E.g.*, Andrew E. Taslitz, *Slaves No More!: The Implications of the Informed Citizen Ideal for Discovery Before Fourth Amendment Suppression Hearings*, 15 GA. ST. U. L. REV. 709, 730 (1999).

59. SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 239 (2010).

60. Arthur Krock, *In the Nation: The Wall Between Crime and Punishment*, N.Y. TIMES, June 14, 1966, at 46.

61. BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 234 (1992) (internal quotation marks omitted).

62. *See, e.g.*, *The New Chief Justice*, N.Y. TIMES, May 22, 1969, at 46; JAMES MACGREGOR BURNS, *PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT* 202 (2009).

63. *E.g.*, Anthony Lewis, *Supreme Court Moves Again to Exert Its Powerful Influence*, N.Y. TIMES, June 21, 1964, at E3.

64. *Privilege Ruling: Justices Widen Scope of Fifth Amendment in State Actions*, N.Y. TIMES, June 16, 1964, at A1.

65. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964).

66. 388 U.S. 218 (1967).

67. 388 U.S. 263 (1967).

68. 388 U.S. 293 (1967).

69. *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

70. *Wade*, 388 U.S. at 226–27; *Gilbert*, 388 U.S. at 272; *Mempa*, 389 U.S. at 134.

71. WAYNE R. LAFAYE ET AL., *CRIMINAL PROCEDURE* § 11.1(a) (3d ed. 2000).

72. *Wade*, 388 U.S. at 227.

tance of counsel in *Mempa*;<sup>73</sup> as Justice Marshall wrote, “[A]ppointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.”<sup>74</sup>

Although Congress sought in 1968 to legislatively overrule both *Miranda* and *Wade*,<sup>75</sup> the Warren Court declined to retreat from either holding. Instead, although it would not issue another right-to-counsel opinion, the Warren Court completed its tenure by continuing to expand indigent rights in a trio of 1969 opinions.<sup>76</sup> By the time Chief Justice Warren Burger filled Warren’s position on June 23, 1969,<sup>77</sup> the Supreme Court had replaced the case-by-case right-to-counsel approach established by *Betts v. Brady*<sup>78</sup> in 1942 with a right to counsel at state expense for indigent defendants in felony cases,<sup>79</sup> lineups,<sup>80</sup> the interrogation room,<sup>81</sup> post-indictment,<sup>82</sup> and at sentencing.<sup>83</sup> So intense was the Warren Court’s influence by the end of its term that President Eisenhower was rumored to say that his decision to appoint Warren was “one of the two biggest mistakes I made in my Administration.”<sup>84</sup>

The transition to the Burger Court was significant. Some scholars, however, maintain that the Burger Court’s impact was blunted by its failure to overrule even one of the so-called Warren Court trilogy—*Gideon*, *Mapp*, and *Miranda*.<sup>85</sup> That view, though correct, overlooks the Burger Court’s ability to limit or, in some instances, wholly stop expansion of the Warren Court’s right to counsel in felony cases, lineups, the interrogation room, and sentencing. To begin with, the Burger Court’s route to halting *Gideon* began slowly—and only after a trio

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73. *Mempa*, 389 U.S. at 133–34.

74. *Id.* at 134.

75. 18 U.S.C. §§ 3501(a)–(b), 3502 (Supp. IV, 1968), *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000).

76. *See, e.g.*, Johnson v. Avery, 393 U.S. 483, 485 (1969); Williams v. Oklahoma City, 395 U.S. 458, 458 (1969); Gardner v. California, 393 U.S. 367, 370–71 (1969).

77. Linda Greenhouse, *Warren E. Burger Is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES, June 26, 1995, at A1.

78. 316 U.S. 455, 462 (1942).

79. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

80. *United States v. Wade*, 388 U.S. 218, 237 (1967).

81. *Miranda v. Arizona*, 384 U.S. 436, 471 (1966); *Escobedo v. Illinois*, 378 U.S. 478, 490–91 (1964).

82. *Massiah v. United States*, 377 U.S. 201, 206 (1964).

83. *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

84. JACK HARRISON POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 200 (1979).

85. *E.g.*, Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 68 (Vincent Blasi ed., 1983).

of cases that seemed to guard the Warren Court's right to counsel.<sup>86</sup> Then came *Argersinger v. Hamlin*.<sup>87</sup> *Argersinger*, an indigent defendant, was charged with an offense punishable by six months in prison, a \$1,000 fine, or both.<sup>88</sup> He was unrepresented during a bench trial where a judge found *Argersinger* guilty and sentenced him to ninety days in jail.<sup>89</sup> The Court reversed *Argersinger's* conviction, holding that "absent a knowing and intelligent waiver, no person may be *imprisoned* for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."<sup>90</sup> In doing so, the Court reasoned that "[t]he assistance of counsel is often a requisite to the very existence of a fair trial."<sup>91</sup>

The *Argersinger* decision initially looks like an expansion of *Gideon*. The circumstances surrounding *Gideon's* issuance in 1963, however, suggest otherwise.<sup>92</sup> At that time, Chief Justice Warren prioritized producing a unanimous Court at the expense of clarifying *Gideon's* reach.<sup>93</sup> Accordingly, he proposed his colleagues "leave to another day and other decisions whether the states were required to provide counsel in misdemeanor trials or for appeals."<sup>94</sup> Viewed against that historical anecdote, *Argersinger* limited *Gideon* by declining to hold that indigent defendants are entitled to counsel for misdemeanor trials. Indeed, by tying the right to counsel to actual imprisonment,<sup>95</sup> the Burger Court not only limited *Gideon's* reach, but also left open the possibility that a defendant might, in some cases, be entitled to a jury trial, but not to counsel.<sup>96</sup>

The Burger Court's backlash against *Gideon* grew more pronounced with the passage of time. In 1973, the Court held that indigent defendants are not automatically entitled to state-appointed

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86. *United States v. Tucker*, 404 U.S. 443, 446–49 (1972); *Loper v. Beto*, 405 U.S. 473, 483 (1972); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970).

87. 407 U.S. 25 (1972).

88. *Id.* at 26.

89. *Id.*

90. *Id.* at 37 (emphasis added).

91. *Id.* at 31.

92. *Scott v. Illinois*, 440 U.S. 367, 379 (1979) (Brennan, J., dissenting).

93. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 405 (1997).

94. *Id.* It is, of course, difficult to reconcile this statement with the fact that the Court handed *Douglas* down on the same day as *Gideon*. *Douglas v. California*, 372 U.S. 353, 357–58 (1963).

95. *Argersinger*, 407 U.S. at 40.

96. Defendants are entitled to jury trials when charged with offenses punishable by greater than six months of imprisonment. *Baldwin v. New York*, 399 U.S. 66, 69 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 160–62 (1968). When *Argersinger* refused to adopt a similar approach in the right-to-counsel context, it left open the possibility that a defendant might receive a jury trial for offenses punishable by greater than six months, but have no lawyer to assist him should his punishment exclude imprisonment. *Scott*, 440 U.S. at 382 (Brennan, J., dissenting).

counsel at parole revocation hearings.<sup>97</sup> Then, in 1974, it pointedly declined to extend the right to counsel to discretionary appeals beyond first appeals as of right.<sup>98</sup> Five years later *Scott v. Illinois* solidified *Argersinger's* holding that no indigent defendant be sentenced to a term of imprisonment without counsel.<sup>99</sup>

More precise validation about the recession from *Gideon* came from a majority of the Burger Court itself in 1975. In *Faretta v. California*, the Court held that the Sixth Amendment implies a right of self-representation—that is, the right *not* to have a lawyer's assistance at trial.<sup>100</sup> In doing so, the Court candidly acknowledged, citing *Gideon*:

There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel.<sup>101</sup>

By 1981, no further confirmation of the Burger Court's right-to-counsel direction was needed.<sup>102</sup> But cutting back on *Gideon* and its implications was hardly the only item on the Burger Court's right-to-counsel agenda prior to *Strickland*. In particular, the right to counsel at lineups—an area expanded under the Warren Court<sup>103</sup>—is perhaps the best illustration of Burger Court cutbacks.

In 1973, the Court, in *Kirby v. Illinois*, held that *Wade's* right-to-counsel rule applied only after the commencement of judicial criminal proceedings; thus, pretrial lineups conducted without counsel present and prior to formal charging do not violate the Sixth Amendment.<sup>104</sup> In further evisceration of *Wade* one year later, the Court, in *United States v. Ash*, concluded that the right to counsel did not apply to a photographic lineup, even if that display was presented to the witness *after* defendant's indictment.<sup>105</sup> More than stop the Warren Court's expansion, Professor Yale Kamisar concluded that the Burger Court "virtually demolished" the right to counsel at lineups in what "may well be the saddest chapter in modern American criminal procedure."<sup>106</sup> The Burger Court similarly cut back on the *Miranda* right to counsel. In 1971, the Burger Court limited *Miranda's* ability to exclude uncounseled statements.<sup>107</sup> In *Harris v. New York*, the prosecu-

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97. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

98. *Ross v. Moffitt*, 417 U.S. 600, 610 (1974).

99. *Scott*, 440 U.S. at 373–74.

100. *Faretta v. California*, 422 U.S. 806, 807 (1975).

101. *Id.* at 832.

102. *Accord Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 32–33 (1981).

103. See David A. Sonenshein & Robin Nilon, *Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance*, 89 OR. L. REV. 263, 266 (2010).

104. *Kirby v. Illinois*, 406 U.S. 682, 690–91 (1972).

105. *United States v. Ash*, 413 U.S. 300, 321 (1973).

106. Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 29–30 (1995).

107. *Harris v. New York*, 401 U.S. 222 (1971).

tion sought to introduce uncounseled, incriminating statements at trial to contradict defendant's direct testimony.<sup>108</sup> In permitting the use of such statements as impeachment evidence, the Court reasoned, "Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but *discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling.*"<sup>109</sup>

The Burger Court's effort to limit *Miranda*'s right to counsel became more direct three years later. In *Michigan v. Tucker*, the defendant sought to establish an alibi during police questioning; in particular, he told police he was with Robert Henderson on the night of the crime under investigation—a rape.<sup>110</sup> The defendant was convicted after Henderson contradicted his story.<sup>111</sup> He therefore argued on appeal that Henderson should not have testified because law enforcement violated *Miranda* by not advising him during the initial interrogation "that counsel would be appointed for him if he was indigent."<sup>112</sup> The Supreme Court affirmed the defendant's conviction by holding that the failure to inform him about his right to counsel was "an inadvertent disregard . . . of the *procedural rules*" established by *Miranda*.<sup>113</sup> Thus, although the defendant's statement was inadmissible pursuant to *Miranda*, the fruit of that statement—Henderson, the witness—could properly testify.<sup>114</sup>

Collectively, *Harris* and *Tucker* dramatically undermined the Warren Court's right to counsel; absolute exclusion of statements or the fruits of those statements obtained in violation of *Miranda* was no longer required. Thus, as the Burger Court approached *Strickland* in 1984, it had successfully modified, halted, or retreated from every facet of the Warren Court's right to counsel, except in the post-indictment context.<sup>115</sup>

## B. Defining Who Is "Effective" Counsel

Despite the litany of Supreme Court right-to-counsel holdings, the law prior to *Strickland* was unclear as to what constituted constitutionally adequate criminal defense<sup>116</sup>—a question distinct from that of *when* indigent defendants are entitled to counsel. For example, neither *Gideon*, nor *Douglas*—both of which provided indigent defend-

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108. *Id.* at 223–24.

109. *Id.* at 224 (emphasis added).

110. *Michigan v. Tucker*, 417 U.S. 433, 436 (1974).

111. *Id.* at 436–37.

112. *Id.* at 435, 438–39.

113. *Id.* at 445 (emphasis added).

114. *Id.* at 452.

115. *E.g.*, *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

116. *Strickland v. Washington*, 466 U.S. 668, 683 (1984).

ants with appointed counsel at different procedural stages—said anything about the minimum quality of attorneys appointed to represent clients during those procedural events. The Supreme Court, for its part, admitted that the issue presented in *Strickland* was novel.<sup>117</sup>

Enter David Washington. While in a laundromat one day in September 1976, a minister named Daniel Pridgen approached Washington and asked him on a date in exchange for compensation.<sup>118</sup> Although Washington agreed, he was incensed by the idea of a priest engaged in homosexual behavior.<sup>119</sup> He and an accomplice, Johnnie Gary Mills,<sup>120</sup> concocted a plan to kill Pridgen.<sup>121</sup>

On September 26, 1976, the pair went to Pridgen's home, and Mills lured Pridgen into homosexual activities.<sup>122</sup> Once Pridgen was undressed and in bed, Washington stabbed Pridgen to death, while Mills held him down.<sup>123</sup> The pair fled after stealing some items from Pridgen's home, including a small amount of cash, some jewelry, a .22 caliber pistol, and Pridgen's automobile.<sup>124</sup>

Remarkably, Washington would kill two more times. Three days after killing Pridgen, Washington planned to rob a home owned by Omer and Katrina Birk because he thought the Birks kept a substantial amount of cash there.<sup>125</sup> On September 23, 1976, Washington entered the home of Katrina Birk, wearing a rag around his face to disguise himself, and carrying rope, a knife, and a gun.<sup>126</sup> Once inside, he instructed Birk and her three sisters-in-law, Ruth Pitzer, Julia Sullivan, and Georgia Griffith, to lie on the floor.<sup>127</sup> Birk then offered Washington the contents of a moneybox holding approximately

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117. *Id.* at 686.

118. Joint Appendix at 3–4, *Strickland*, 466 U.S. 668 (No. 82-1554).

119. *Id.* at 499.

120. Mills and Washington were friends, but were not related. *Id.* at 124.

121. *Washington v. State*, 362 So. 2d 658, 660 (Fla. 1978).

122. *Id.*

123. *Id.*

124. *Id.*; Joint Appendix, *supra* note 118, at 29.

125. Joint Appendix, *supra* note 118, at 199–200, 202–03. Why Washington thought that the Birks kept cash in their home is a matter not precisely clarified by the record. According to one investigating detective, Washington regularly stole televisions from neighborhood homes and sold them to a Martin's Furniture Store. *Id.* at 200–01; *see also id.* at 499 (Washington told an examining psychiatrist he "often sold stolen property to Mrs. Birk and her husband"). When Mr. Martin did not have sufficient funds to pay Washington, he would ask Mr. Birk to obtain sufficient cash from his home to pay Washington. *Id.* at 200–01. Washington, however, was never charged with burglary or robbery in connection with the detective's allegations. For his part, Washington said he knew the Birks because of his work at the used furniture store and believed that the store obtained the majority of its merchandise illegally. *Id.* at 33, 37.

126. *Washington*, 362 So. 2d at 660; Joint Appendix, *supra* note 118, at 203, 208.

127. *Washington*, 362 So. 2d at 660; Joint Appendix, *supra* note 118, at 34.

\$120 inside.<sup>128</sup> When the pair thereafter got into a struggle, Washington stabbed Birk and then, using a towel as a silencer for his gun, shot Birk once in the back of the head.<sup>129</sup> After shooting and stabbing the other three victims, Washington fled the home with the moneybox.<sup>130</sup> Two of the three sisters survived the assault,<sup>131</sup> though both sustained devastating and permanent injuries.<sup>132</sup>

Four days later, Washington contacted twenty-year-old Frank Meli, a senior accounting major at the University of Miami—ostensibly in response to Meli's newspaper advertisement to sell his 1974 Camaro.<sup>133</sup> Meli and Washington met the next day so Washington could test drive the vehicle.<sup>134</sup> Following the drive, Washington persuaded Meli to go to Washington's home so that he could obtain the money to pay for the car.<sup>135</sup> Once at Washington's home, he used a knife to forcibly bind Meli to a bed.<sup>136</sup> Two of Washington's accomplices, Nathaniel Taylor and Johnny Gary Mills,<sup>137</sup> assisted Washington by preventing Meli's escape.<sup>138</sup> Washington then sold Meli's car and forced Meli to telephone his brother to seek a ransom.<sup>139</sup>

Two days later, on the morning of September 29, 1976, Washington paid Taylor and Mills part of the proceeds from the automobile sale.<sup>140</sup> He then entered the bedroom where Meli remained captive and stabbed him eleven times, as Meli recited the Lord's Prayer.<sup>141</sup> Washington left Meli clinging to life when Washington went to meet Meli's brother to obtain the ransom.<sup>142</sup> Washington left their planned meeting spot shortly after his arrival when he saw police nearby.<sup>143</sup> He returned home to find Meli dead; Washington dug a shallow grave

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128. Joint Appendix, *supra* note 118, at 88–89, 211, 217 (noting the total sum of \$120).

129. *Id.* at 89, 214–15. Washington used the weapon he stole from Pridgen in the Birk murders. *Id.* at 217.

130. *Washington*, 362 So. 2d at 660.

131. *Id.* at 660–61; see *Washington v. Strickland*, 693 F.2d 1243, 1247 n.1 (5th Cir. 1982), *rev'd*, *Strickland v. Washington*, 466 U.S. 668 (1984).

132. Joint Appendix, *supra* note 118, at 90, 171–72.

133. *Washington*, 362 So. 2d at 661; Joint Appendix, *supra* note 118, at 39, 92; DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH ROW* 134 (1995).

134. *Washington*, 362 So. 2d at 661.

135. *Id.*

136. *Id.*

137. Joint Appendix, *supra* note 118, at 38. Nathaniel Taylor is David Washington's stepbrother. *Id.* at 24, 69, 249.

138. *Washington*, 362 So. 2d at 661.

139. Joint Appendix, *supra* note 118, at 41, 95, 273.

140. Washington ultimately received \$2,000 for the vehicle. *Id.* at 42.

141. *Washington*, 362 So. 2d at 661; Joint Appendix, *supra* note 118, at 276–77, 317–18; DREHLE, *supra* note 133, at 134.

142. *Washington*, 362 So. 2d at 661.

143. *Id.*

and buried Meli under a tree in his backyard.<sup>144</sup> Washington's dramatic crime spree lasted twelve days.<sup>145</sup>

Taylor and Mills, Washington's accomplices, were arrested at Washington's residence on October 1, 1976.<sup>146</sup> Washington then turned himself in and confessed to killing Meli after waiving his *Miranda* rights.<sup>147</sup> Before signing his twenty-three-page sworn confession, Washington waived the presence of a lawyer by saying, "I don't need one if I told the truth. I don't need no attorney."<sup>148</sup> Washington was indicted on October 7 for first-degree murder in connection with Meli's death and was appointed counsel.<sup>149</sup>

Counsel for Washington, a private attorney with substantial criminal defense experience named William Tunkey,<sup>150</sup> advised Washington on several occasions not to speak further with anyone.<sup>151</sup> Although Washington initially heeded this advice by denying his role in the Birk and Pridgen killings,<sup>152</sup> he ultimately confessed to killing both victims.<sup>153</sup>

On November 17, Washington was indicted for first-degree murder in connection with the deaths of Birk and Pridgen.<sup>154</sup> All totaled, Washington was charged with three counts of first-degree murder, multiple counts of robbery, kidnapping for ransom, breaking and entering and unlawfully assaulting persons therein, three counts of attempted murder, and conspiracy to commit robbery.<sup>155</sup> Washington entered pleas of guilty and received three death sentences.<sup>156</sup>

The appellate road following Washington's convictions is a long one that spans six years and five published opinions.<sup>157</sup> At issue in all but the first of four appeals was whether Tunkey's conduct during Wash-

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144. *Id.*; Joint Appendix, *supra* note 118, at 43.

145. DREHLE, *supra* note 133, at 254.

146. *Washington*, 362 So. 2d at 661.

147. *Id.*

148. *Id.*

149. Joint Appendix, *supra* note 118, at vii-1.

150. Tunkey received his J.D. in 1970 from the University of Florida. *William R. Tunkey Lawyer Profile*, MARTINDALE.COM, <http://www.martindale.com/William-R-Tunkey/810580-lawyer.htm> (last visited July 20, 2015), *archived at* <http://perma.unl.edu/2NUA-BNSM>. He was admitted to the bar in May 1970, and practiced as an Assistant State Attorney until 1973. Joint Appendix, *supra* note 118, at 422. Tunkey then moved into a private practice that focused on criminal trials and appeals. *Id.* at 422. Prior to representing Washington, Tunkey estimated he had handled in excess of 1,000 criminal cases. *Id.* at 424.

151. Joint Appendix, *supra* note 118, at 26-27.

152. *Id.* at 141.

153. *Id.* at 122, 124-39, 259-60.

154. *Id.* at iv (providing chronological list of relevant docket entries).

155. *Id.* at 206-07.

156. *Washington v. State*, 362 So. 2d 658, 662 (Fla. 1978).

157. *Strickland v. Washington*, 466 U.S. 668 (1984); *Washington v. Strickland*, 693 F.2d 1243 (1982) (en banc), *rev'd*, *Strickland v. Washington*, 466 U.S. 668 (1984);

ington's sentencing hearing was constitutionally "effective." Richard Shapiro, counsel for Washington during each post-sentencing procedure, except Washington's direct appeal, frequently pointed to six reasons to demonstrate Tunkey's ineffectiveness:

1. Tunkey failed to ask for a continuance to prepare for Washington's sentencing hearing (there were five days between Washington's change of plea and sentencing);
2. Tunkey failed to obtain a psychiatric or psychological evaluation of Washington;
3. Tunkey failed to investigate and present character witnesses for Washington;
4. Tunkey failed to request a presentence investigation;
5. Tunkey failed to present either a meaningful sentencing memorandum or closing argument;
6. Tunkey failed to cross-examine the State's medical experts and, additionally, failed to undertake an independent medical examination.<sup>158</sup>

The case reached the Supreme Court five years after Washington's first direct appeal amidst federal habeas proceedings.<sup>159</sup> By then, Shapiro had already persuaded an en banc panel of Unit B of the Fifth Circuit to remand Washington's case to the district court.<sup>160</sup> That district court had, just months earlier, concluded that Tunkey "made an error in judgment," but that Washington failed to prove that the absence of Tunkey's error would have changed the outcome.<sup>161</sup> The Eleventh Circuit held that the district court failed to make factual findings relevant to whether Tunkey's failures to investigate were strategic and, if not, whether those failures were prejudicial.<sup>162</sup> In doing so, the Eleventh Circuit reasoned that, "In many cases it will not be clear whether the failure to investigate a line of defense is based upon trial strategy or upon neglect of counsel's professional obligations."<sup>163</sup>

With a remand of Washington's case now final, neither the State, nor Washington sought a rehearing on the en banc opinion.<sup>164</sup>

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Washington v. Strickland, 673 F.2d 879 (5th Cir. Unit B 1982); Washington v. State, 397 So. 2d 285 (Fla. 1981); Washington v. State, 362 So. 2d 658 (Fla. 1978).

158. Brief of Petitioner for Writ of Certiorari Appendix at 218–29, *Strickland*, 466 U.S. 668 (No. 82-1554) (reflecting Shapiro's list of issues during state habeas proceedings).

159. Docket, *Strickland*, 466 U.S. 668 (No. 82-1554) (showing Strickland's petition for writ of certiorari was received March 21, 1983).

160. *Strickland*, 693 F.2d at 1263.

161. Brief of Petitioner Appendix, *supra* note 158, at 282–83, 286.

162. *Strickland*, 693 F.2d at 1258–59.

163. *Id.* at 1257.

164. Brief of Petitioner for Writ of Certiorari, *Strickland*, 466 U.S. 668 (No. 82-1554).

Rather, the State filed its writ of certiorari seeking review by the United States Supreme Court on March 21, 1983.<sup>165</sup> In reviewing the petition, Justice Blackmun wrote privately, “[A] grant seems unavoidable, given the clear conflict and the importance of the issues.”<sup>166</sup> He added: “[I]t is about time the Court gave more guidance about effective assistance claims.”<sup>167</sup> By a vote of 6–3, the Court granted the State’s petition on June 2, 1983.<sup>168</sup>

Oral argument on *Strickland* took place on January 10, 1984, before Chief Justice Burger and Associate Justices Brennan, White, Blackmun, Powell, Rehnquist, Stevens, O’Connor, and Marshall.<sup>169</sup> Carolyn M. Snurkowski,<sup>170</sup> arguing for petitioner Strickland, focused primarily on the proper standard for evaluating attorney effectiveness.<sup>171</sup> But, with regard to Tunkey, she argued that Washington said during his guilty plea hearing that he had “no complaints” about him.<sup>172</sup> Further, Snurkowski suggested any complaints about Tunkey’s performance were more properly attributable to Washington himself given that he “cut [Tunkey] off at the knees with regard to presenting [the] case to a jury or to a judge . . . .”<sup>173</sup>

When Richard Shapiro began his argument on behalf of Washington, he was predictably more critical of Tunkey’s performance. Shapiro focused less on the standard because, he said, “[I]t is essential to point out what the District Court found as the reason for counsel’s lack of investigation.”<sup>174</sup> Shapiro emphasized that the district court found “as a fact” that Tunkey “had a feeling that nothing could be done to save Washington . . . .”<sup>175</sup> That feeling, Shapiro stressed, “was

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165. Docket, *Strickland*, 466 U.S. 668 (No. 82-1554).

166. Justice Blackmun Handwritten Notes (May 29, 1983) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 401, Folder 9).

167. *Id.*

168. Chief Justice Burger, Justice White, Justice Blackmun, Justice Powell, Justice Rehnquist, and Justice O’Connor voted in favor of the petition. Certiorari Voting Record from Justice Powell (June 2, 1983) (on file with the Library of Congress, Manuscript Division, Lewis Powell Papers). Justice Stevens voted to hold the petition; whereas, Justices Brennan and Marshall voted to deny. *Id.*

169. *Strickland*, 466 U.S. at 668.

170. Carolyn Snurkowski currently serves as Assistant Deputy Attorney General in Florida. *Carolyn Snurkowski, Assistant Deputy Attorney General*, FLA. DEPT. OF LAW ENFORCEMENT, <http://www.fdle.state.fl.us/Content/Criminal-Justice-and-Juvenile-Information-Services/Menu/Council-Members/Carolyn-Snurkowski.aspx> (last visited July 20, 2015), archived at <http://perma.unl.edu/Z3X6-KRLQ>. A 1972 graduate of Florida State College of Law, she has argued six cases before the Supreme Court, including *Strickland v. Washington*. *Id.*

171. *E.g.*, Transcript of Oral Argument at 1, *Strickland*, 466 U.S. 668 (No. 82-1554) (“[T]he manner in which [the Eleventh Circuit’s] standard should be applied is up for consideration.”).

172. *Id.* at 3.

173. *Id.*

174. *Id.* at 9.

175. *Id.* at 9–10.

behind [Tunkey's] failure to do an independent investigation on petitioner's background and potentially mitigating emotional and mental reasons for the killings."<sup>176</sup> Basically, Shapiro suggested that Tunkey "failed to fulfill the basic responsibilities of an advocate"<sup>177</sup> and thus "failed to conduct an investigation out of a sense of hopelessness."<sup>178</sup>

The Court decided *Strickland v. Washington* on May 14, 1984.<sup>179</sup> Broken cleanly into five parts, Justice O'Connor, as the majority author, provided the case's factual and procedural background in Part I, followed by an overview of Sixth Amendment history in Part II.<sup>180</sup> As Part II wound down, Justice O'Connor wrote, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."<sup>181</sup> Then, at the outset of Part III, the Court announced a standard that one commentator would later say "permits the worst lawyering to pass muster":<sup>182</sup>

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.<sup>183</sup>

Throughout Parts III and IV, the Court elaborated on both of the standard's components. First, addressing how to evaluate when counsel falls below an objective performance threshold, Justice O'Connor indicated that "prevailing professional norms" help.<sup>184</sup> Citing American Bar Association standards as an example, the Court noted that counsel must maintain the duty of loyalty, a duty to avoid conflicts, a duty to advocate the defendant's cause, and a duty to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."<sup>185</sup> But, Justice O'Connor cautioned, the standard is "highly deferential," and thus, "[A] court must indulge a strong pre-

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176. *Id.* at 10.

177. *Id.* at 11.

178. *Id.* at 18.

179. *Strickland*, 466 U.S. at 668.

180. *Id.* at 671-87.

181. *Id.* at 686.

182. William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 160 (1995).

183. *Strickland*, 466 U.S. at 687.

184. *Id.* at 688.

185. *Id.* (citation omitted).

sumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"<sup>186</sup>

Objectively deficient attorney performance does not alone constitute a Sixth Amendment violation. Rather, the Court explained, "[A]ny deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."<sup>187</sup> On this point, the Court said, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>188</sup> Finally, in a nod toward efficiency, Justice O'Connor wrote that a reviewing court could resolve an ineffective assistance claim on either the performance or prejudice prong.<sup>189</sup>

Things got interesting in Part V when, contrary to the Court's initial conference vote following oral argument,<sup>190</sup> Justice O'Connor applied the new standard to the facts of Washington's case. She explained Tunkey's actions were constitutionally reasonable and, even if unreasonable, could not have prejudiced the outcome of Washington's sentencing hearing.<sup>191</sup> As to the first part, Tunkey's performance, Justice O'Connor wrote that Tunkey "*made a strategic choice* to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes."<sup>192</sup>

To support her conclusion on Tunkey's performance, Justice O'Connor made three observations. First, she wrote that "[a]lthough counsel understandably felt hopeless about respondent's prospects, see App. 383-384, 400-401, *nothing in the record* indicates, as one possible reading of the District Court's opinion suggests, see App. to Pet. for Cert. A282, that counsel's sense of hopelessness distorted his professional judgment."<sup>193</sup> Second, to excuse Tunkey's failure to obtain either character evidence or have Washington undergo psychological testing, she indicated that Tunkey "could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help."<sup>194</sup> Finally, and more precisely related to the absence of character evidence introduced at Washington's

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186. *Id.* at 689 (citation omitted).

187. *Id.* at 692.

188. *Id.* at 694.

189. *Id.* at 697.

190. Justice Powell, Conference Notes (Jan. 13, 1984) (on file with the Library of Congress, Manuscript Division, Lewis Powell Papers).

191. *Strickland*, 466 U.S. at 698-99.

192. *Id.* at 699 (emphasis added).

193. *Id.* (emphasis added).

194. *Id.*

sentencing hearing, Justice O'Connor reasoned that "[r]estricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and *respondent's criminal history, which counsel had successfully moved to exclude*, would not come in."<sup>195</sup>

Moving to the prejudice prong, Justice O'Connor said, "[T]he lack of merit of [Washington's] claim is even more stark."<sup>196</sup> For support, she concluded that "[t]he evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge."<sup>197</sup> At most, she found, the omitted character evidence "shows that numerous people who knew respondent thought he was generally a good person . . . ."<sup>198</sup> As for the omitted psychological examination, Justice O'Connor suggested, "[A] psychiatrist and a psychologist believed [Washington] was under considerable emotional stress that did not rise to the level of extreme disturbance."<sup>199</sup> Again highlighting the absence of Washington's "rap sheet," she concluded that "admission of the evidence respondent now offers might even have been harmful to his case: his 'rap sheet' would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case."<sup>200</sup>

### III. *STRICKLAND'S* UNTOLD STORY

The Supreme Court's conclusion that William Tunkey's performance at sentencing was constitutionally competent is just the beginning. Part III tells the rest of the story: the untold facets of Washington's background and Tunkey's performance. Along the way, it questions why Justice O'Connor did not, as her colleagues requested, simply remand *Strickland* back to the lower court for application of the majority's standard to Washington's case. Section III.A tests the analytical assertions made in Part V of the *Strickland* opinion. Doing so exposes how little Tunkey *truly* did during Washington's sentencing hearing and, correspondingly, what the Supreme Court omitted from the *Strickland* opinion about Tunkey's performance. That, in turn, showcases why the majority's conclusion that Tunkey's conduct was "effective" doomed the *Strickland* standard before lower courts could even apply it for the first time.

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195. *Id.* (emphasis added).

196. *Id.*

197. *Id.* at 699–700.

198. *Id.* at 700.

199. *Id.*

200. *Id.*

Section III.B digs deeper. A look back at the Court's private exchange of *Strickland*-related memoranda reveals just how controversial the inclusion of Part V was amongst the Justices. Perhaps in part because of the Court's hidden discord, section III.B argues that Part V's imprecise and often inaccurate analysis was not "useful to lower courts,"<sup>201</sup> as Justice O'Connor had hoped. Rather, section III.B contends, Part V weakened the Sixth Amendment by downgrading what otherwise could have been a standard more demanding of defense attorneys. Indeed, the unending slew of complaints about *Strickland* might not exist had the Court simply remanded *Strickland* back to the lower court.

But why didn't Justice O'Connor include the factual details provided in section III.A about Tunkey's performance? Why didn't she write her first draft as her colleagues requested—to remand *Strickland*? Section III.C seeks to provide the answer: Part V of *Strickland* was the peak of a private war Justice O'Connor waged against the Warren Court's right to counsel. Indeed, the combination of Part V of *Strickland*, Justice O'Connor's decision to ignore the Conference vote, and her voting pattern in right-to-counsel cases up to that point in her career suggests no other plausible alternative.

#### A. Part V's Analytical Fallacies

Troubling analytical assertions pervade Part V of the *Strickland* opinion. Justice O'Connor, in Part V, made four primary assertions to conclude that Tunkey provided constitutionally competent assistance to Washington at his sentencing hearing. First, she asserted "[Tunkey] made a *strategic choice* to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes."<sup>202</sup> Second, she suggested that nothing in the record "indicates . . . that counsel's sense of hopelessness distorted his professional judgment."<sup>203</sup> Third, her opinion indicated that Tunkey could "reasonably surmise" that "character and psychological evidence would be of little help."<sup>204</sup> Fourth, Justice O'Connor pointed with praise to Tunkey's success in excluding Washington's rap sheet.<sup>205</sup>

A detailed examination of *Strickland*'s voluminous record reveals that Tunkey's sense of hopelessness about Washington's case did, in fact, affect his professional judgment. Indeed, the record paints a

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201. Letter from Justice Sandra Day O'Connor to Justice William J. Brennan (Mar. 13, 1984) (on file with the Library of Congress, Manuscript Division, William J. Brennan Papers, Box 647, Folder 1(1)).

202. *Id.*

203. *Strickland*, 466 U.S. at 699 (citation omitted).

204. *Id.*

205. *Id.* at 700.

troubling picture that shows Tunkey (1) giving up on his own suppression motions; (2) failing to seek a continuance to prepare for sentencing; (3) submitting a five-page sentencing memorandum with no supporting citations; and (4) doing almost nothing at the actual sentencing hearing, including during his closing argument. Moreover, the record reflects that Tunkey did not “reasonably surmise” that character/psychological evidence would be unhelpful; rather, Tunkey himself admitted he simply did not think of these topics. And as for the rap sheet, well, that did not even exist.

1. *Tunkey’s Suppression Motions, Sentencing Memorandum, and Performance at Sentencing*

Early in the case, Tunkey moved to suppress Washington’s confessions and certain physical evidence.<sup>206</sup> But he abandoned those motions in a dramatic fashion when Washington appeared before the trial court—against Tunkey’s advice—on December 1, 1976, to enter guilty pleas.<sup>207</sup> Before the formal change of plea hearing began, Tunkey addressed the court by making what he called “several announcements.”<sup>208</sup> As his remarks make clear, Tunkey, even at this early stage, was actually giving up. For instance, Tunkey inexplicably tanked his own suppression motions:

I have filed in behalf of Mr. Washington motions to suppress the statements, admissions, and confessions. However, *it is my considered judgment that there was a free and voluntary waiver of counsel in each case. There was a waiver of his various constitutional rights to remain silent, to the assistance of counsel, et cetera.*<sup>209</sup>

Tunkey was plainly wrong to abandon his motions to suppress Washington’s confessions, in part because the circumstances surrounding those confessions—particularly those surrounding Washington’s *Miranda* waivers—are conflicting or largely absent from the record. This facet of the *Strickland* story begins sometime either between 10:45–11:45 AM or 10:30 AM–2:00 PM on November 5, 1976.<sup>210</sup> While Washington was incarcerated and awaiting trial for killing Meli, two investigators, Detectives Major and Simmons, had an “initial conversation”<sup>211</sup> with Washington about his involvement in the

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206. Brief of Petitioner, *supra* note 164, at 13.

207. Joint Appendix, *supra* note 118, at 24, 400. Washington initially pleaded not guilty to all charges. *Id.* at 19.

208. *Id.* at 18.

209. *Id.* at 23 (emphasis added).

210. Compare *id.* at 142 (providing testimony from Detective Major suggesting that he was with Simmons for an interaction with Washington between 10:45–11:45 AM), with *id.* at 196–98 (including testimony from Detective Simmons suggesting he was present with Detective Major from 10:30 AM–2:00 PM).

211. *Id.* at 142.

deaths of Pridgen and Birk.<sup>212</sup> Without mentioning or discussing the role of Washington waiving *Miranda*,<sup>213</sup> Detective Major explained their interactions as follows:

After advising David Washington of his rights per the *Miranda* decision[,] I advised David that he was suspected of both the Reverend Pridgen's murder and Katrina Birk's murder; introduced myself as the lead investigator on the Pridgen homicide and Detective Simmons introduced himself as the lead investigator on the Birk homicide. We informed David that the investigation was still continuing and that evidence would be worked that would . . . prove that he in fact did kill Reverend Pridgen and Katrina Birk, and there was no reason for him to attempt to lie to us.

We informed [him] that we spoke to Johnnie Mills and that we had learned from Johnnie Mills of David's involvement; that Mills was telling us that David had told him about the murders.<sup>214</sup>

Washington responded by denying his role in both murders.<sup>215</sup> According to Detective Majors, Washington also “grinned a little bit and said that Johnnie Mills was lying to [sic] and that Johnnie Mills was there also in that he took part in the Pridgen homicide.”<sup>216</sup> Although a suspect offering an incriminating statement or gesture after receiving *Miranda* warnings does not necessarily constitute a waiver,<sup>217</sup> Tunkey's decision to abandon his suppression motions meant that the constitutionality of Detective Major's interaction with Washington was never challenged.

At 3:10 PM,<sup>218</sup> after securing a written waiver of Washington's *Miranda* rights,<sup>219</sup> investigators again questioned Washington—this time for one to two-and-a-half hours<sup>220</sup>—during which time he con-

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212. *Id.* at 141–42.

213. The sentencing transcript references a written waiver of *Miranda* for the Birk homicide, but there is no discussion of how that waiver was obtained. *Id.* at 120. Given that the issue was not litigated, this is not wholly surprising. The issue of how detectives obtained Washington's *Miranda* waiver for the various interrogations is repeated throughout the sentencing transcript. *Id.* at 197.

214. *Id.* at 142–43.

215. *Id.* at 141.

216. *Id.* at 144.

217. The law on *Miranda* waivers was particularly favorable to Washington at the time of his interrogation. *Miranda* placed a “heavy burden” on law enforcement to prove waiver of a suspect's *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). Only three years after Washington's interrogation did the Supreme Court issue *North Carolina v. Butler*, which recognized the possibility of an implied *Miranda* waiver. 441 U.S. 369, 373 (1979) (“[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.”).

218. Joint Appendix, *supra* note 118, at 119–20, 259–60. The record frustratingly does not clarify why the “initial conversation” ended, how the subsequent interaction began, or what occurred in the time between the interrogations.

219. *Id.* at 120, 222.

220. Compare *id.* at 261 (suggesting the interrogation lasted two-and-a-half hours), with *id.* at 122 (suggesting the interrogation lasted one hour).

fessed to killing both Pridgen and Birk.<sup>221</sup> Again, because Tunkey abandoned his suppression motions, the question of whether an improperly secured waiver tainted the constitutional validity of Washington's subsequent confessions was never litigated.<sup>222</sup>

Regardless, with Washington's guilty plea entered, the focus turned to sentencing. Without Tunkey seeking a continuance to prepare, Washington's sentencing took place just five days later, on December 6, 1976.<sup>223</sup> At the hearing, Florida law tasked Judge Richard Fuller—the same judge who presided over Washington's change of plea hearing—with determining whether (1) a sufficient number of aggravating circumstances supported a death sentence;<sup>224</sup> and (2) an insufficient number of mitigating circumstances existed to outweigh the aggravators.<sup>225</sup>

Tunkey submitted a memorandum to the court prior to sentencing that spanned five transcript pages and cited no cases.<sup>226</sup> In that memorandum, Tunkey conceded the applicability of two aggravating circumstances (three in one of the murders) and, moreover, conceded the inapplicability of four mitigating circumstances.<sup>227</sup> Justice O'Connor, though she incorrectly referred to the emotional disturbance mitigating circumstance as the “extreme emotional *distress*”<sup>228</sup> mitigating circumstance, correctly recognized Tunkey argued that

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221. *Id.* at 122, 124–39, 259–60. Confusingly, another portion of the record suggests Washington confessed to killing Meli at the time detectives searched Nathaniel Taylor's home. *Id.* at 249–50, 257.

222. Although the law on *Miranda*'s exclusionary rule was hardly as favorable to Washington in 1976 as was the law on waivers, it was minimally in flux. See *supra* note 217 and accompanying discussion. In particular, the question of whether a statement taken in violation of *Miranda* could thereafter taint another statement remained an open one. The Court did not take up that question until *Missouri v. Seibert*, 542 U.S. 600, 604 (2004). Prior to Washington's interrogation, the Supreme Court had ruled only that statements taken in violation of *Miranda* were admissible for impeachment purposes, see *Harris v. New York*, 401 U.S. 222, 226 (1971), and that a witness discovered from a statement taken in violation of *Miranda* could testify at the defendant's trial, see *Michigan v. Tucker*, 417 U.S. 433, 452 (1974). Stated more simply, Tunkey was wrong to tank his suppression motions. He could have at least advised Washington to enter a conditional plea of guilt, conditioned upon the opportunity for Tunkey to argue his suppression issues on appeal. See generally FLA. R. APP. P. 9.140(b)(2)(A)(i) (2014).

223. Joint Appendix, *supra* note 118, at 79 (providing date); *Washington v. State*, 362 So. 2d 658, 662 (1978) (providing sentence).

224. FLA. STAT. § 921.141(3)(a)–(h) (1975).

225. FLA. STAT. § 921.141(4)(a)–(h). The list of aggravating circumstances has dramatically expanded from eight factors to sixteen since 1975. FLA. STAT. § 921.141(5)(a)–(p) (2014). The list of mitigating circumstances, however, has not changed. FLA. STAT. § 921.141(6)(a)–(h).

226. Joint Appendix, *supra* note 118, at 332–37.

227. *Id.* at 333–34.

228. *Strickland v. Washington*, 466 U.S. 688, 699 (1984) (emphasis added).

mitigating circumstance and highlighted that defendant pleaded guilty—all in under two sentences. Without even mentioning Washington's troubled upbringing, Tunkey simply wrote:

[I]t is the contention of counsel for the Defendant that: a) the Defendant has no significant history of prior criminal activity; b) the Defendant was acting under the influence of extreme mental or emotional disturbance at the time that he committed the acts complained of in the above-styled cases, and; c) that the Defendant's age is such that a sentence of imprisonment for life in the State Penitentiary with no parole for anywhere between 25 and 75 years, depending upon whether sentence is rendered in the above-styled causes are consecutive or concurrent, would both severely and adequately punish the Defendant for the crimes complained of and would insure society that the Defendant would not ever again become a threat to the community.<sup>229</sup>

Tunkey also wrote that Washington freely admitted guilt and expressed a willingness to testify against his co-defendant, Gary Mills.<sup>230</sup> The idea that relaying these separate arguments with such brevity was a matter of strategy is difficult to accept.

By contrast, to support its request for a death sentence and to prove an appropriate number of aggravating circumstances, the State introduced testimony from ten witnesses, including detectives,<sup>231</sup> a forensic pathologist,<sup>232</sup> and surviving victims<sup>233</sup>—among others.<sup>234</sup> The State's case spans more than two hundred pages of transcript,<sup>235</sup> during which time it introduced nineteen different exhibits.<sup>236</sup>

Tunkey was then left to argue that a sufficient number of mitigating circumstances existed to save Washington's life. He did little. During the State's case, he cross-examined Detective Simmons simply to confirm that Washington waived his *Miranda* right to counsel prior to confessing,<sup>237</sup> and he cross-examined Detective John Spiegel to es-

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229. Joint Appendix, *supra* note 118, at 334–35.

230. *Id.* at 335–36.

231. *Id.* at 103–47 (direct examination of Detective Charles Major, lead investigator of Pridgen's murder); *id.* at 184–221 (direct examination of David L. Simmons, lead investigator of Birk's murder and attempted murder of Sullivan, Griffith, and Pitzer).

232. *Id.* at 154–61 (direct examination of Elidio Fernandez, medical examiner who performed autopsy on Pridgen).

233. *Id.* at 162–82 (direct examination of Pitzer, one of Birk's sisters-in-law).

234. *Id.* at 223–29 (direct examination of Hubert Lawrence Rosomoff, neurosurgeon who operated on one of the sisters-in-law); *id.* at 229–36 (direct examination of Ronald Keith Wright, deputy chief medical examiner who conducted Birk's autopsy); *id.* at 236–51 (direct examination of John Spiegel, lead investigator in Meli's murder); *id.* at 253–86 (direct examination of Charles Zatrepaek, police officer who worked on Meli's case); *id.* at 287–93 (direct examination of Harry Bill Coleman, the man who sold the motorcycle); *id.* at 294–310 (direct examination of Wright, who also performed autopsy on Meli).

235. *Id.* at 81–311.

236. *Id.* at 80–81 (listing exhibits).

237. *Id.* at 221–23.

tablish that Washington did not act alone.<sup>238</sup> But beyond a periodic objection during the State's case,<sup>239</sup> Tunkey did not otherwise participate.<sup>240</sup> He specifically declined to cross-examine the State's medical examiners on three occasions,<sup>241</sup> a fact witness,<sup>242</sup> and an investigating detective.<sup>243</sup> When it came time to put on his own case, he declined to do so, choosing instead to rely on the testimony given at the plea hearing<sup>244</sup> and the sentencing memorandum he submitted before the hearing.<sup>245</sup> Beyond that, in Tunkey's words, "We will offer no additional testimony at this time."<sup>246</sup>

The proceedings reached closing arguments. After the State made its case for the death penalty, Tunkey briefly addressed the court to request that it not impose the death penalty.<sup>247</sup> Without connecting his remarks to the governing statute's mitigating factors, Tunkey said the following:

I cannot tell the Court and I don't know that the Court knows itself what possesses any person, whether it is David Washington or anybody else, to commit a series of acts like this, and yet the Court knows that he is a living breathing human being with some degree of intelligence, with the ability to express himself and even though, obviously, the acts which he committed were atrocious or terrible he also possess[es] somewhere within him a spark which is good, which is decent.

There are obviously others in the past who have come before judges about to be sentenced for crimes as serious, perhaps more serious, who have been given the opportunity one way or another to live out their lives, whether it be in prison or after being in prison and back in society, who have been productive members of society, whether that be in a prison or elsewhere. I suggest to the Court that David Washington is not different when you go back and talk about a Leopold and Loeb case or Birdman of Alcatraz case, somewhere within this man, I suggest to the Court, there is a spark which deserves the chance to expire naturally.

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238. *Id.* at 252–53.

239. *E.g., id.* at 303 (objecting to the phrasing of the State's question).

240. *See, e.g., id.* at 161 (declining to cross-examine the medical examiner who performed Pridgen's autopsy); *id.* at 175 (declining to cross-examine one of the sisters-in-law and objected to the testimony of the other sister-in-law as cumulative testimony); *id.* at 182–84 (cross-examining one sister-in-law solely about forgiving Washington and whether he should be "penalized by God's laws or by man's"); *id.* at 221–23 (cross-examining only briefly the lead investigator of Birk's homicide, focusing on whether Washington expressed his desire to have an attorney present); *id.* at 236 (declining to cross-examine medical examiner who performed autopsy on Birk).

241. *Id.* at 229 (declining to cross-examine a neurosurgeon); *id.* at 236 (same); *id.* at 310 (same).

242. *Id.* at 293 (declining to cross-examine a witness who sold Washington a motorcycle after the Meli killing).

243. *Id.* at 286 (declining to cross-examine Detective Charles Zatrepaek, who investigated the Meli homicide).

244. *Id.* at 313.

245. *Id.* at 101.

246. *Id.* at 313.

247. *Id.* at 321.

Whatever punishment he is going to receive in the hereafter, he is going to receive, whether this Court gives him the death penalty or not.

I simply ask this Court not to interpose the judgment of the hereafter but to let this defendant serve out his natural life in prison. The people of the state can be assured that he is no longer a threat. The people of the state can be assured that David Washington is not going to be on the streets; that David Washington is not going to commit crimes. On the other hand, the people of the state do not have to have the moral judgment or the religious judgment on their hands of having taken a human life.

I ask this Court from the bottom of my heart and on behalf of David Washington who I have represented for some months now to impose consecutive sentences of life in the state penitentiary with no parole for twenty-five years as to each of those consecutive sentences.<sup>248</sup>

The sentencing court thereafter gave Washington the death penalty in each of the three cases, Pridgen, Birk, and Meli, to run consecutively.<sup>249</sup>

Despite the foregoing, Justice O'Connor wrote, "[Tunkey] made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on [Washington's] acceptance of responsibility for his crimes."<sup>250</sup> But neither before nor after that comment did Justice O'Connor acknowledge the true scope of Tunkey's performance. Absent from *Strickland* is any recognition that Tunkey gave up on viable suppression motions.<sup>251</sup> The opinion likewise declines to discuss Tunkey's shoddy sentencing memorandum or his disjointed closing argument. Worse yet, the *Strickland* opinion does not confront Tunkey's decision not to put on a case at Washington's sentencing hearing.

But there's more.

## 2. *Character Evidence, Psychological Evidence, and Giving Up on David Washington*

Tunkey never had Washington examined by a psychologist or psychiatrist. Had Tunkey done so, he could have helped the sentencing judge answer a key question: Why? At the change of plea hearing, the judge openly wondered why Washington would commit these crimes and then so readily admit guilt.<sup>252</sup> In other words, why would Washington—a person with no prior record,<sup>253</sup> no history of substance abuse,<sup>254</sup> and no history of emotional problems<sup>255</sup>—suddenly snap and go on a twelve-day crime spree that left three people dead?

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248. *Id.* at 322–24.

249. *Id.* at 329.

250. *Strickland v. Washington*, 466 U.S. 688, 699 (1984).

251. *See supra* notes 217, 222, and accompanying text.

252. Joint Appendix, *supra* note 118, at 50–59.

253. *Id.* at 51; *see infra* subsection III.A.3 (discussing the existence of Washington's rap sheet).

254. Joint Appendix, *supra* note 118, at 64, 137.

Entering the sentencing hearing, Washington had undergone one psychiatric evaluation performed by the State's examiner.<sup>256</sup> That single interview concluded, in relevant part, that Washington "showed no evidence of any psychosis at the time of the interview and there was nothing from his description of the events surrounding the alleged offenses which would indicate that he was suffering from any major mental illness at that time."<sup>257</sup> Washington had simple answers. He wanted a job, was unable to get one, and turned to crime as a poorly thought-out solution to feed his family.<sup>258</sup> Moreover, he believed strongly in the importance of admitting guilt and accepting responsibility.<sup>259</sup>

But a subsequent psychiatric report<sup>260</sup> and declarations from Washington's friends<sup>261</sup> and family members<sup>262</sup>—none of whom testified at Washington's sentencing hearing<sup>263</sup>—told a more detailed

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255. *Id.* at 65.

256. *Id.* at 4–6 (providing a chronological list of relevant docket entries and page one of the psychiatric evaluation).

257. *Id.* at 4.

258. *Id.* at 51–53.

259. *E.g., id.* at 69 ("I gave myself up because I was guilty.").

260. *Id.* at 495–503.

261. *Id.* at 348–49 (Washington's former employer); *id.* at 352–53 (Washington's high school band director); *id.* at 354–55 (Washington's church president); *id.* at 356–57 (Washington's adult choir director); *id.* at 358–59 (church secretary at Washington's church); *id.* at 360–61 (Washington's former neighbor); *id.* at 362–63 (another former neighbor); *id.* at 365 (police officer who had known Washington for over ten years).

262. *Id.* at 338–39 (Washington's grandmother, Lulu Parham); *id.* at 340–41 (Washington's mother, Julia Taylor); *id.* at 342–43 (Washington's brother, Clarence Morgan); *id.* at 344–45 (Washington's older sister, Renee Reed); *id.* at 346–47 (Washington's younger sister, Diane Taylor).

263. Each of their affidavits stated some version of the following: "I would have been willing to testify for David, but I was never contacted by anyone." *Id.* at 341 (Washington's mother); *see, e.g., id.* at 339 (Washington's grandmother: "I would have been willing to testify for David, but no one ever contacted me."); *id.* at 343 (providing similar statement from Washington's brother); *id.* at 345, 347 (including similar statements from Washington's sisters); *id.* at 349 (Washington's former employer: "I would have been willing to testify about David's background, character and personality, but I was never contacted or interviewed by anyone in connection with the case."); *id.* at 353 (showing a similar statement by his high school band director); *id.* at 355 (the president of the church Washington attended: "I was in a position to provide evidence regarding David's background, character and personality, but I was never contacted or interviewed by anyone in connection with David's case."); *id.* at 357 (recording a similar statement by Washington's choir director); *id.* at 361 (Washington's former neighbor: "We have discussed David and would have been willing to testify on David's behalf, but were never contacted or interviewed by anyone."); *id.* at 365 (a former police officer: "I would have been willing to testify on David's behalf about his background, character and personality at the time of sentencing, but I was never contacted or interviewed by anyone at that time in connection with David's sentencing.").

story about Washington. As a young black male with a tenth-grade education, Washington was living in a Miami slum prior to the killings.<sup>264</sup> Born in 1949 as the oldest of seven children,<sup>265</sup> Washington's childhood was far from ideal; growing up, he was passed back and forth between his mother and grandmother, and endured frequent severe beatings from his stepfather.<sup>266</sup> His stepfather's sexual abuse of Washington's sister further marred his upbringing.<sup>267</sup> Collectively, as one of the examining psychiatrists hired by Shapiro later opined, "[H]is childhood of emotional deprivation, severe physical abuse and extreme violent actions towards him laid the groundwork for the resentment and rage which was triggered by factors in his adult life over which he felt he had no control . . . ."<sup>268</sup>

Yet, despite his troubled youth, Washington played snare drums in his high school band, sang in the youth choir in church,<sup>269</sup> enjoyed playing basketball,<sup>270</sup> and ultimately assembled a respectable employment history. From 1968–1971, Washington worked at the freight delivery department unloading tractors for Seaboard Airline Railroad in Miami.<sup>271</sup> His supervisor characterized him as a "very good worker" who "eventually had to be laid off along with several other employees."<sup>272</sup> After Seaboard, Washington had difficulty finding steady work; he worked for Associated Grocers of Florida for nearly a year from 1971–1972 and then at Burdines in Miami for parts of 1973.<sup>273</sup> Washington then worked briefly for the Miami Department of Solid Waste, followed by Food Fair in Miami.<sup>274</sup> He remained at Food Fair until May 1, 1975, "when he was laid off for lack of work."<sup>275</sup>

By the age of twenty-five, Washington was married with one child and placed on unemployment—a benefit that expired in 1976.<sup>276</sup> Washington's inability to obtain steady employment caused him to slip into depression.<sup>277</sup> The lights and water were shut off in his

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264. *Id.* at 1, 3.

265. *Id.* at 495.

266. *Id.* at 6–7, 11; *see id.* at 496 (noting Washington had scars on his back and thighs from the beatings).

267. *Id.* at 340 (declaration of Washington's mother); *id.* at 497 (psychological examination by Dr. Jamal A. Amin).

268. *Id.* at 8.

269. *Id.* at 352–53.

270. *Id.* at 497.

271. *Id.* at 348.

272. *Id.*

273. *Id.* at 350–51.

274. *Id.* at 351.

275. *Id.*

276. *Id.* at 50.

277. DREHLE, *supra* note 133, at 134; *see Joint Appendix, supra* note 118, at 3–4; *see also id.* at 15 (according to psychiatric findings, "David was experiencing a high

home, and his wife left him.<sup>278</sup> Washington's stress and desperation peaked in September 1976—the month Washington began killing—when his wife had their second child, but Washington, in his words, “didn't even have Pampers to put on my baby's behind.”<sup>279</sup>

Judge Fuller, the sentencing judge, learned little about Washington from Tunkey's representation.<sup>280</sup> Tunkey later admitted that although he made some preparations for a trial, he did not separately prepare for Washington's sentencing hearing *at all*.<sup>281</sup> Tunkey therefore never obtained his own investigator,<sup>282</sup> did not have Washington independently examined by a psychiatrist or psychologist,<sup>283</sup> did not attempt to bring in character witnesses to testify,<sup>284</sup> did not discuss Washington's childhood with his relatives (thus, did not learn about Washington being abused as a child),<sup>285</sup> and did not request a presentencing report.<sup>286</sup> In sum, beyond conversations with Washington, Tunkey made no effort to save Washington's life.<sup>287</sup> Judge Fuller therefore concluded with little difficulty that “[t]he defendant was not suffering from the influence of extreme mental or emotional disturbance during the perpetration of the crimes outlined above and the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to requirements of law was not substantially impaired.”<sup>288</sup>

Why did Tunkey do so little for Washington? Tunkey would have the chance to explain. At a hearing on Washington's subsequent federal habeas petition,<sup>289</sup> Washington's new lawyer, Richard Shapiro, fascinatingly called Tunkey as his first witness.<sup>290</sup> During his testimony, Tunkey revealed two primary reasons why he made no effort to save Washington's life. First and most alarmingly, contrary to Justice O'Connor's assertions in Part V, Tunkey did not think about a strat-

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level of anxiety and sense of incompetence and frustration at the time the crimes were committed”).

278. Joint Appendix, *supra* note 118, at 360. During this time, Washington “entered a series of illicit affairs, resulting in the conception and birth of several children.” *Id.* at 498.

279. *Id.* at 50.

280. Judge Fuller admitted to learning new information about Washington during the federal habeas hearing that he did not hear at sentencing. *Id.* at 463.

281. *Id.* at 374–77.

282. *Id.* at 378.

283. *Id.* at 384–85.

284. *Id.* at 388–89. Tunkey thought these witnesses “superfluous” in light of Washington's guilty plea. *Id.* at 430.

285. *Id.* at 390–91.

286. *Id.* at 404–05.

287. *Id.* at 397.

288. *Washington v. State*, 362 So. 2d 658, 663 (Fla. 1978).

289. The hearing took place April 9–10, 1981. Brief of Petitioner Appendix, *supra* note 158, at 254.

290. Joint Appendix, *supra* note 118, at 372.

egy. In explaining why he did not request a presentence report, Tunkey candidly remarked it was “perhaps lack of forethought” and admitted, “*I cannot say now, with hindsight that [ ] was a matter of trial strategy . . .*”<sup>291</sup>

When asked why he did not seek a psychiatric or psychological evaluation, Tunkey said that, to him, Washington “was sane.”<sup>292</sup> After being asked whether he viewed the question of sanity at trial as equivalent to the death penalty mitigating circumstance of a defendant’s ability “to appreciate the criminality of his conduct,”<sup>293</sup> Tunkey admitted, “I see where you are going. Maybe I should have because [Washington] said he had been out of work for six months and he had impressed me as being sincerely concerned for the welfare of his wife and child.”<sup>294</sup> He later added, “I did not think at the time to go ahead and utilize psychiatric or psychological experts . . . *I did not think of that.*”<sup>295</sup>

The absence of psychological or psychiatric reports aside, it did not even occur to Tunkey to request a continuance from the court to give him additional time to prepare for sentencing<sup>296</sup>—despite a sentencing date set just five days after Washington pleaded guilty.<sup>297</sup> And, with regard to the brief sentencing memorandum he filed, Tunkey could not explain why he conceded the applicability of certain aggravating circumstances, while also conceding the inapplicability of certain mitigating circumstances.<sup>298</sup>

As for the second reason why he did so little, Tunkey explained that he gave up when he found out that Washington confessed to the Pridgen and Birk killings. In Tunkey’s words, after seeing the confessions, “I had a hopeless feeling. There is no question about that.”<sup>299</sup> He added: “I can honestly say that I don’t know that I felt that there was anything which I could do which was going to save David Washington from his fate.”<sup>300</sup> Finally, although it is not a mitigating circumstance in the 1975 Florida death penalty statute, Tunkey “felt

291. *Id.* at 405 (emphasis added).

292. *Id.* at 414.

293. *Id.* at 415.

294. *Id.* at 416.

295. *Id.* at 421 (emphasis added).

296. *Id.* at 400 (“As far as the time between the entry of the plea and affirmatively and aggressively moving for a continuance really occurred to me.”).

297. *Id.* at 79 (providing date); *Washington v. State*, 362 So. 2d 658, 662 (Fla. 1978) (providing sentence). Judge Fuller later said this was “more time” than is normally provided prior to a sentencing in his courtroom. *See Joint Appendix, supra* note 118, at 455.

298. *Joint Appendix, supra* note 118, at 411–14.

299. *Id.* at 384.

300. *Id.* at 400; *see id.* at 404 (“I really could find very little to address myself to in terms of a relevant, cogent presentation of mitigating circumstances as outlined in the statute itself . . .”).

that one of the mitigating circumstances ought to be the fact that [Washington] was pleading guilty.”<sup>301</sup>

For these reasons, Justice Brennan was privately concerned. He wrote to Justice O'Connor on the same day she circulated her first draft to express his concern about Tunkey's performance while representing Washington. Justice Brennan was specifically worried that Justice O'Connor's opinion equated Tunkey's hopelessness with strategy.<sup>302</sup> Citing the findings made at the federal district court level, Justice Brennan suggested there was “at least a strong possibility that Tunkey's decision [not to investigate potentially mitigating circumstances] was not the product of a strategy, but rather of a sense of hopelessness.”<sup>303</sup> He added:

I do not consider it 'reasonable' for counsel in a death case to make decisions based on a feeling of hopelessness and frustration. Indeed, it seems to me that the worse the client's plight, the more important it is that his lawyer acts professionally and not on the basis of emotion.<sup>304</sup>

Thus, Justice Brennan suggested, “[I]t is hazardous for us to try to apply the new standards to a cold record and determine for ourselves the real basis for Tunkey's decisions.”<sup>305</sup>

Against that disquieting backdrop, Justice O'Connor nonetheless determined in Part V that it “is not difficult in this case” to conclude “that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable.”<sup>306</sup> Moreover, even if Tunkey's performance was unreasonable, it did not prejudice the outcome.<sup>307</sup> The Supreme Court was not the first to wrestle with the prejudicial effect of Tunkey's performance at Washington's sentencing hearing. After Washington's death sentences were affirmed, Shapiro appealed a state trial court order denying his motion for post-conviction relief to the Florida Supreme Court.<sup>308</sup> In rejecting Shapiro's claims by written opinion on April 6, 1981, the Florida Supreme Court could “find no prejudice caused to appellant” and thus was “unable to find merit in any of appellant's arguments which assail his sentence . . . .”<sup>309</sup>

Yet, in response to the federal habeas petition Shapiro filed, the district court saw the case differently. In a written order, the court

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301. *Id.* at 403.

302. Letter from Justice William J. Brennan to Justice Sandra Day O'Connor (Mar. 13, 1984) (on file with the Library of Congress, Manuscript Division, William J. Brennan Papers, Box 647, Folder 1(1)).

303. *Id.*

304. *Id.*

305. *Id.*

306. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

307. *Id.* at 699.

308. *Washington v. State*, 397 So. 2d 285, 286 (Fla. 1981).

309. *Id.*

expressed “some concern” about Tunkey’s failure to investigate,<sup>310</sup> his failure to request a presentence investigation,<sup>311</sup> and his failure to present character witnesses.<sup>312</sup> The court even concluded, “Mr. Tunkey made an error in judgment” and “should have made an independent investigation of factors relevant to mitigation, [which] would have produced generally favorable information from family, friends, former employers, and medical experts.”<sup>313</sup> Like the Florida Supreme Court, though, the district court was unable to find any prejudice to Washington given the overwhelming evidence of his guilt,<sup>314</sup> and therefore denied the writ.<sup>315</sup>

Shapiro filed a motion for rehearing or a new trial,<sup>316</sup> which was denied,<sup>317</sup> and he appealed to the Fifth Circuit—again arguing that Tunkey provided ineffective assistance to Washington at sentencing.<sup>318</sup> Shapiro found another receptive listening ear. The Fifth Circuit reversed the district court on April 23, 1982, holding that the district court employed the incorrect legal standard for evaluating prejudice.<sup>319</sup> After reconsidering the case en banc, Unit B of the Fifth Circuit remanded to the district court because of that court’s failure to make factual findings on whether Tunkey’s failures to investigate were strategic and, if not, whether those failures were prejudicial.<sup>320</sup>

Like the Fifth Circuit, Justice Brennan was also concerned about whether Tunkey’s performance prejudiced the outcome of Washington’s sentence. As to Part V of Justice O’Connor’s *Strickland* draft opinion, Justice Brennan plainly disagreed with her assessment of whether Tunkey’s performance could have prejudiced the outcome of Washington’s sentencing hearing.<sup>321</sup> Justice Brennan wrote to her in part as follows:

The sentencing judge had no explanation for Washington’s extraordinary conduct before him, nor was there any testimony from persons who knew the defendant before his crime spree and who could explain what kind of person he was. All the sentencing judge had, as a result of Tunkey’s decision not to investigate further, was Washington’s ‘apology.’ The fact that the sentencing judge had virtually no information concerning Washington the man creates, in my judgment, a reasonable doubt about the outcome that would not other-

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310. Brief of Petitioner Appendix, *supra* note 158, at 261.

311. *Id.* at 280.

312. *Id.* at 281.

313. *Id.* at 282–83.

314. *Id.* at 285–86.

315. *Id.* at 294.

316. Joint Appendix, *supra* note 118, at 490.

317. *Id.* at 507.

318. *Washington v. Strickland*, 673 F.2d 879, 882 (5th Cir. Unit B 1982).

319. *Id.* at 901–02.

320. *Id.* at 1258–59.

321. Letter from Justice William J. Brennan to Justice Sandra Day O’Connor, *supra* note 302.

wise exist—or, to paraphrase your opinion, undermines my confidence in the outcome.<sup>322</sup>

In response to Justice Brennan’s concerns about her analysis of the prejudice prong, Justice O’Connor wrote that the evidence of nonstatutory mitigating circumstances—namely the evidence of Washington’s character—would not have made “any difference in the weighing of aggravating and mitigating circumstances . . . .”<sup>323</sup>

Evidence of Washington’s character, however, was only part of Justice Brennan’s concern. Indeed, the majority in *Strickland* declined to address Washington’s history of physical and sexual abuse, as well as Tunkey’s failure to learn about the abuse.<sup>324</sup> But perhaps most troubling is the psychological examination of Washington, unseen by the sentencing court, which revealed that Washington, at the time of the crimes, “suffered extreme emotional and mental distress which resulted in a violent hysterical dissociative reaction.”<sup>325</sup> Apart from excluding that conclusion, which bore directly on the “extreme mental or emotional disturbance” mitigator in the 1975 Florida death penalty statute,<sup>326</sup> worse yet is Justice O’Connor dismissal of Tunkey’s admission that it never occurred to him to have Washington examined by a psychologist.<sup>327</sup>

But there’s still more.

### 3. *Washington’s “Rap Sheet”*

Although the Supreme Court and two prior appellate courts made much of the fact that Tunkey “excluded Washington’s ‘rap sheet,’”<sup>328</sup> there was, in fact, no rap sheet to exclude. Washington had no criminal history.<sup>329</sup> How, then, did Washington’s non-existent rap sheet take on a life of its own? Here’s the rest of the story.

Washington testified at his change of plea hearing that “I have been living right here in Dade County for eleven years and up until September of this year [1976] I never was arrested in Dade County for anything. You fault me for the crimes I committed, but you got to go a

322. *Id.* Justice Brennan again suggested remanding the case. *Id.*

323. Letter from Justice Sandra Day O’Connor to Justice William J. Brennan, *supra* note 201.

324. Joint Appendix, *supra* note 118, at 7, 11, 496.

325. *Id.* at 503.

326. FLA. STAT. § 921.141(4)(b) (1975).

327. Joint Appendix, *supra* note 118, at 421.

328. *Strickland v. Washington*, 466 U.S. 668, 673, 676, 700 (1984); *Washington v. Strickland*, 693 F.2d 1243, 1247 (5th Cir. Unit B 1982), *rev’d*, *Strickland*, 466 U.S. 668; *Washington v. State*, 397 So. 2d 285, 287 n.\* (Fla. 1981).

329. Case Search for David Washington, MIAMI-DADE COUNTY, FLORIDA, CLERK OF THE CTS., <https://www2.miami-dadeclerk.com/CJIS/CaseSearch.aspx>, archived at <https://perma.unl.edu/8DBD-JVW2> (search “Defendant,” first name: “David,” last name: “Washington,” date of birth: “12/13/1949”; then follow “Washington, David L, B, M, 12/13/1949” hyperlink).

little further back and see why I did commit these crimes.”<sup>330</sup> He added: “I never been in the Dade County Jail, nothing but a traffic violation.”<sup>331</sup> Moreover, Washington said about killing Pridgen, “That is the first time I committed a crime.”<sup>332</sup>

Yet, at the end of the State’s case, it nevertheless sought to introduce “the defendant’s rap sheet.”<sup>333</sup> Tunkey objected, noting, “I would like to amplify that I object to [the State’s] comment that [it] wants to introduce a so-called rap sheet . . . .”<sup>334</sup> The sentencing court sustained Tunkey’s objection, telling the State that “[t]here is an appropriate manner for establishing other convictions and this is not it . . . .”<sup>335</sup> The sentencing court, in pronouncing the sentence later, said the following about Washington’s criminal history:

While there was no evidence admitted of prior convictions of the defendant, he readily admitted that he had carried on a course of burglaries and had stolen property for a significant period of time, thus eliminating Section 921.141(6)(a), Florida Statutes, as a mitigating circumstance. The court finds, however, that even if the defendant were considered to have had no significant history of prior criminal activity, that the aggravating circumstances of this case would still clearly far outweigh this factor of mitigation.<sup>336</sup>

Confusion about Washington’s criminal history continued during his 1978 direct appeal from his death sentences to the Supreme Court of Florida when, despite resisting his follow-up appointment,<sup>337</sup> Tunkey remained his attorney of record.<sup>338</sup> In relevant part, Tunkey argued that the sentencing court failed to consider Washington’s absence of criminal history as a mitigating factor.<sup>339</sup> In rejecting Tunkey’s argument and affirming Washington’s death sentences, the Florida Supreme Court reasoned:

[I]t appears from the record, and was recognized by the trial judge, that appellant had carried on a course of burglaries and had stolen property for a significant period of time. In his confession in the Birk case appellant stated he had committed a series of burglaries throughout Dade County and sold the stolen merchandise to Katrina Birk and her husband. He reiterated in open court that he was selling “hot merchandise” to Katrina Birk.<sup>340</sup>

Whether, as the Florida Supreme Court believed, Washington admitted “a course of burglaries” and “reiterated in open court” that he

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330. Joint Appendix, *supra* note 118, at 46.

331. *Id.* at 51.

332. *Id.* at 52.

333. *Id.* at 310.

334. *Id.* at 311.

335. *Id.* at 312.

336. *Washington v. State*, 362 So. 2d 658, 663 (Fla. 1978).

337. After pronouncing the sentence, the court sought to appoint Tunkey as appellate counsel, though he resisted and requested another attorney be appointed so Tunkey could be co-counsel. Joint Appendix, *supra* note 118, at 329–30.

338. *Washington*, 362 So. 2d at 660.

339. *Id.* at 666.

340. *Id.*

had sold stolen merchandise to the Birks is debatable. Although an investigating detective, Detective Simmons, testified at Washington's sentencing hearing that he believed Washington committed several neighborhood burglaries,<sup>341</sup> Washington did not admit as much at his plea hearing. Rather, at that time, he indicated to the court his belief that the Birks were a ripe target for a robbery because, in his words, "they dealt with hot merchandise."<sup>342</sup> Washington added, "They had a little shop set up. It was more hot merchandise into this place than it was legal merchandise."<sup>343</sup> Local newspapers reported, contrary to the testimonies of both Detective Simmons and Washington, that the Birks did not run a fencing operation; rather, they "ran frequent yard sales."<sup>344</sup>

Confusion about Washington's criminal history persisted when Shapiro appealed the trial court's order denying his motion for post-conviction relief to the Florida Supreme Court.<sup>345</sup> The Florida Supreme Court rejected Shapiro's complaint that Tunkey failed to proffer evidence of Washington's "good character and his emotional and economic stress" prior to the killings in part because Washington had already relayed to the court "this was his *first encounter with the law*."<sup>346</sup> Confusingly, the court, in that same opinion, thereafter praised Tunkey's success in "preventing the introduction of appellant's 'rap sheet.'"<sup>347</sup>

Clarity about Washington's criminal history did not emerge after Shapiro filed a writ of habeas corpus in federal district court on April 6, the same day the Florida Supreme Court denied relief and stayed Washington's execution.<sup>348</sup> During the hearing on Shapiro's federal habeas writ, Shapiro asked Tunkey point-blank whether Washington had a rap sheet. The pair had the following exchange:

[Shapiro]: Did you make any other effort to determine whether [Washington] had ever been within the custody of the Department of Corrections or any other custodial facility in Florida?

[Tunkey]: As part of the discovery material which I had, I had been given a copy of the FBI rap sheet by the prosecuting attorneys. I think it might be part of the record.

But in any event, my recollection is that *even that revealed a lack of any convictions and certainly incarcerations*. That is my recollection.<sup>349</sup>

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341. Joint Appendix, *supra* note 118, at 200.

342. *Id.* at 37.

343. *Id.* at 37.

344. DREHLE, *supra* note 133, at 134.

345. *Washington*, 397 So. 2d at 286.

346. *Id.* (emphasis added).

347. *Id.* at 287 n.\*.

348. Brief of Petitioner Appendix, *supra* note 158, at 254, 259.

349. Joint Appendix, *supra* note 118, at 386 (emphasis added). Confusingly, Tunkey said at the hearing, "I think [Washington] did [have a prior conviction], but I don't think the rap sheet could prove it." *Id.* at 427.

Further evidence about the absence of any rap sheet came from an independent psychological examination performed by Dr. Jamal A. Amin on April 20, 1981.<sup>350</sup> The report, filed in support of Washington's federal habeas petition, noted: "Despite the instability and acts of violence against him [growing up], there are no reports of prior crimes of violence nor of any drug or alcohol use by Mr. Washington, normal outlets under such stress."<sup>351</sup>

Despite substantial ambiguity about the existence of Washington's criminal history, Strickland nonetheless highlighted for the Supreme Court in his opening brief that "defense counsel successfully excluded the Defendant's 'rap sheet.'"<sup>352</sup> Justice Powell's clerk, Cammie R. Robinson, remained skeptical about references to Washington's supposed rap sheet. In a bench memorandum she authored for Justice Powell dated December 30, 1983, she wrote, in response to Washington's claim that Tunkey prejudicially failed to request a sentencing hearing, that "such a request likely would have done more harm than good . . . ."<sup>353</sup> To support her conclusion, she wrote, "[A]ny presentence report would have included [defendant's] 'rap sheet' and would have put before the judge all of defendant's prior criminal activities."<sup>354</sup> Yet, in a troubling but telling footnote, Robinson admitted: "I have not found any reference describing what if any prior criminal acts were committed by defendant."<sup>355</sup>

The so-called "rap sheet" nonetheless played a major role in Justice O'Connor's majority opinion in *Strickland*: she highlighted its existence four times.<sup>356</sup> First, at the outset of the opinion, she indicated that Tunkey "successfully moved to exclude respondent's 'rap sheet.'"<sup>357</sup> Second, in justifying Tunkey's failure to request a presentence report, Justice O'Connor noted, "[A]ny presentence investigation would have resulted in admission of respondent's 'rap sheet'

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350. *Id.* at 495.

351. *Id.* at 497.

352. Brief of Petitioner, *supra* note 164, at 21.

353. Bench Memorandum from Cammie R. Robinson for Justice Powell 6 (Dec. 30, 1983) (on file with author).

354. *Id.*

355. *Id.* at 6 n.1.

356. *Strickland v. Washington*, 466 U.S. 668, 673, 676, 699-700 (1984).

357. *Id.* at 673 (emphasis added). To support the assertion, the opinion cites "A227; App. 311." *Id.* at 673. The citations are unhelpfully circular. Page 227 is the petitioner's appendix in support of his certiorari brief, which excerpts part of the state court's habeas opinion that states, "[U]pon objection by defense counsel, [the court] refused the State's request to admit the defendant's 'rap sheet' at the sentencing hearing." Brief of Petitioner Appendix, *supra* note 158, at 227. Page 311 is a Joint Appendix page that includes Tunkey's effort to strike the State's reference at sentencing to Washington's criminal history. Joint Appendix, *supra* note 118, at 311. Neither page actually supports the proposition that Washington, in fact, had a criminal history.

and thus would have undermined his assertion of no significant history of criminal activity.”<sup>358</sup> Third, in Part V, she observed: “Restricting testimony on respondent’s character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent’s criminal history, which counsel had successfully moved to exclude, would not come in.”<sup>359</sup> Finally, also in Part V, Justice O’Connor took aim at Washington’s claim that Tunkey should have introduced character or psychological evidence on his behalf, noting “admission of the evidence respondent now offers might even have been harmful to his case: his ‘rap sheet’ would probably have been admitted into evidence . . . .”<sup>360</sup>

The idea that one of the most famous cases in the Supreme Court’s history was in part built on a lawyer’s effort to exclude a document that never existed is, in a word, disheartening.

### B. The Disutility of Part V

Part V of the *Strickland* opinion was not always part of the Court’s plan. At the Court’s Conference following oral argument, a majority agreed that, procedurally, the opinion should end by vacating the Fifth Circuit’s decision and remanding for state court application of the Court’s new standard. Indeed, Justice Blackmun’s handwritten conference notes reflect that Justice Brennan, Justice Marshall, and Justice White all favored remanding.<sup>361</sup> Justice Powell’s conference notes indicate that Justices Blackmun, Stevens, and Rehnquist also voted to remand.<sup>362</sup> Collectively, all but Justice O’Connor—and possibly Chief Justice Burger<sup>363</sup>—voted in favor of having the district court evaluate whether Tunkey’s representation was constitutionally deficient pursuant to the Court’s new standard.<sup>364</sup>

Despite the Conference results, Justice O’Connor unilaterally decided in her first draft on March 13, 1984, to include a section apply-

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358. *Strickland*, 466 U.S. at 676 (emphasis added). To support her reference to Washington’s rap sheet, Justice O’Connor again cited the petitioner’s appendix in support of his certiorari brief, though pages 226–28 are merely an excerpt of the state court’s opinion. Brief of Petitioner Appendix, *supra* note 158, at 226–28.

359. *Strickland*, 466 U.S. at 699.

360. *Id.* at 700 (emphasis added). Justice O’Connor offers no citation to support this assertion.

361. Justice Blackmun Conference Notes (Jan. 13, 1984) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 401, Folder 9).

362. Justice Powell Conference Notes, *supra* note 190.

363. It is possible that Chief Justice Burger also favored remanding, but both Justice Powell’s and Justice Black’s notes are ambiguous on this point. *See id.*; Justice Blackmun Conference Notes, *supra* note 361.

364. According to Justice Powell’s notes, Justice O’Connor said it is “not necessary to remand.” Justice Powell Conference Notes, *supra* note 190.

ing the Court's new standard to Tunkey's conduct: Part V.<sup>365</sup> The Court was both confused and concerned. Justice Blackmun's clerk, Elizabeth Taylor,<sup>366</sup> privately wrote a letter to him the next day and nicely summarized the Court's confusion: "[Part V] indicates that the record shows . . . that the defense provided was the result of reasonable professional judgment," but "the District Court made a contrary factual finding."<sup>367</sup> She likewise summarily noted concern about the inclusion of Part V from Justices Stevens and Brennan.<sup>368</sup> She concluded her letter by recommending that Justice Blackmun "put pressure on SOC to change the last section of the opinion" by authoring "a public note urging that she reconsider remanding the case rather than reversing outright."<sup>369</sup>

Feedback from the Justices on Justice O'Connor's first draft reflected, not surprisingly, a deep divide on whether Part V should be included in the final opinion. In his three-page letter on March 13, 1984, Justice Brennan told Justice O'Connor that he was "troubled by Part V of [her] opinion."<sup>370</sup> Apart from the substantive concerns he raised about her analysis of Tunkey's performance, Justice Brennan was concerned more basically about whether the Court was able to apply its new standard to Washington's case:

[Y]our opinion engages in its own assessment of the facts, and concludes that none of the evidence Tunkey could have adduced rose to the level of 'extreme emotional disturbance.' Whether any such evidence could have satisfied the statutory mitigating factor is, however, a question of Florida law we are not competent to resolve.<sup>371</sup>

This was not the first time Justice O'Connor heard this concern. During oral argument, counsel for Strickland made her view clear during a colloquy with Justice O'Connor that the Florida trial court's assessment of aggravating and mitigating factors was a determination of Florida law.<sup>372</sup>

Justice O'Connor was not persuaded. She responded to Justice Brennan immediately by two-page letter also dated March 13. In it,

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365. First Draft of *Strickland v. Washington* Majority Opinion (Mar. 13, 1984) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 401, Folder 8(2)).

366. The letter is signed only "Elizabeth," but must have been authored by Elizabeth Taylor, Justice Blackmun's clerk during the 1983-84 Term. *Harry A. Blackmun*, OYEZ, [http://www.oyez.org/justices/harry\\_a\\_blackmun?page=2#more](http://www.oyez.org/justices/harry_a_blackmun?page=2#more) (last visited July 20, 2015), archived at <http://perma.unl.edu/B9HP-FG5S>.

367. Letter from Elizabeth Taylor to Justice Harry A. Blackmun (Mar. 14, 1984) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 401, Folder 9).

368. *Id.*

369. *Id.*

370. Letter from Justice William J. Brennan to Justice Sandra Day O'Connor, *supra* note 302.

371. *Id.*

372. Transcript of Oral Argument, *supra* note 171, at 4.

she wrote that including Part V “is helpful because it gives a concrete illustration of how the otherwise abstract principles articulated in the opinion apply to one particular set of facts.”<sup>373</sup> As to the Court’s ability to address Washington’s case, she added: “You suggest that it is a question of Florida law whether the statutory mitigating circumstance of extreme emotional disturbance could be found present on the proffered evidence; if that is so, the matter is foreclosed by the Florida courts’ negative answer to that question in this case.”<sup>374</sup>

Despite her response, divisions amongst the Court about Part V persisted. Chief Justice Burger, for example, wrote to Justice O’Connor on March 14, 1984, joining her opinion and indicating that he saw “no need to remand.”<sup>375</sup> Justice Rehnquist also wrote to Justice O’Connor that day expressing his view that “without Section V . . . the opinion is somewhat abstract and might mean a number of things to a number of people.”<sup>376</sup> He added, “I think the lower courts will get a far better idea of what the opinion means if we ourselves apply it to the facts of this case.”<sup>377</sup> Justice Stevens, on the other hand, shared Justice Brennan’s concerns. In a letter to Justice O’Connor dated March 22, 1984, he too expressed displeasure with her inclusion of Part V because he believed the majority should “adhere to the position taken by the majority at conference and remand for application of the standard set forth in [her] opinion.”<sup>378</sup> Finally, on March 23, Justice Powell wrote, “[W]e should decide *Strickland*. It would be helpful for the lower courts to have us apply the new standards.”<sup>379</sup>

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373. Letter from Justice Sandra Day O’Connor to Justice William J. Brennan, *supra* note 201.

374. *Id.*

375. Letter from Chief Justice Warren E. Burger to Justice Sandra Day O’Connor (Mar. 14, 1984) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 401, Folder 8(2)).

376. Letter from Justice William H. Rehnquist to Justice Sandra Day O’Connor (Mar. 14, 1984) (on file with the Library of Congress, Manuscript Division, William J. Brennan Papers, Box 647, Folder 1(1)).

377. *Id.*

378. Letter from Justice John Paul Stevens to Justice Sandra Day O’Connor (Mar. 22, 1984) (on file with the Library of Congress, Manuscript Division, William J. Brennan Papers, Box 647, Folder 1(1)).

379. Letter from Justice Powell to Justice Stevens and Justice O’Connor (Mar. 23, 1984) (on file with the Library of Congress, Manuscript Division, Lewis Powell Papers).

Perhaps on the strength of Justices Blackmun's,<sup>380</sup> White's,<sup>381</sup> and Powell's<sup>382</sup> simple desire to have Justice O'Connor join them in her opinion, Justices Stevens and Brennan relented.<sup>383</sup> Part V therefore remained in the final draft. But the Justices' optimistic predictions—that Part V would provide “helpful” guidance to lower courts—would not pan out. Even in the immediate aftermath of its publication, lower courts struggled with *Strickland* in the 1980s. Although a majority of courts adopted the Supreme Court's approach,<sup>384</sup> one court rejected the decision outright,<sup>385</sup> and others declined to fully adopt both parts of the Supreme Court's test.<sup>386</sup> More importantly, adoption of the *Strickland* standard hardly produced consistent results.<sup>387</sup>

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380. Letter from Justice Harry A. Blackmun to Justice Sandra Day O'Connor (Mar. 26, 1984) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 401, Folder 8(2)).
381. Letter from Justice Byron R. White to Justice Sandra Day O'Connor (Mar. 22, 1984) (on file with the Library of Congress, Manuscript Division, Thurgood Marshall Papers, Box 345, Folder 2). Justice White had previously joined Justice O'Connor's opinion more informally on the day she circulated her first draft by handwriting “please join me” on the draft's first page. First Draft of *Strickland v. Washington* Majority Opinion (Mar. 13, 1984) (on file with the Library of Congress, Manuscript Division, Byron R. White Papers, Box 636, Folder 2(1)).
382. Letter from Justice Lewis F. Powell to Justice Sandra Day O'Connor (Mar. 23, 1984) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 401, Folder 8(2)) (“It would be helpful for the lower courts to have us apply the new standards.”).
383. Letter from Justice John Paul Stevens to Justice Sandra Day O'Connor (Mar. 28, 1984) (on file with the Library of Congress, Manuscript Division, Harry A. Blackmun Papers, Box 401, Folder 8(2)); Letter from Justice William J. Brennan to Justice Sandra Day O'Connor (May 9, 1984) (on file with the Library of Congress, Manuscript Division, William Brennan Papers, Box 647, Folder 2). Why Brennan changed his mind is a mystery. Berger, *supra* note 6, at 115 (calling Brennan's decision to concur “puzzling”). Justice Marshall wrote “NO!!” on his copy of Justice Brennan's concurrence/dissent. First Draft of *Strickland v. Washington* Concurring Opinion (Mar. 28, 1984) (on file with the Library of Congress, Manuscript Division, Thurgood Marshall Papers, Box 345, Folder 2). He too seemed confused by Brennan's decision to join Justice O'Connor in applying the *Strickland* standard.
384. Todd R. Falzone, Note, *Ineffective Assistance of Counsel: A Plea Bargain Lost*, 28 CAL. W. L. REV. 431, 433 n.8 (1992) (citing cases).
385. *State v. Smith*, 712 P.2d 496, 500 n.7 (Haw. 1986).
386. *Sanders v. Lane*, 861 F.2d 1033, 1039 (7th Cir. 1988); *Ex parte Cruz*, 739 S.W.2d 53, 58 (Tex. Crim. App. 1987).
387. *Compare State v. Pitsch*, 369 N.W.2d 711, 715–16 (Wis. 1985) (holding defendant's actions did not justify counsel's failure to obtain his record or request a hearing upon learning defendant wished to testify), *and Johnson v. Kemp*, 615 F. Supp. 355, 359 (S.D. Ga. 1985) (noting counsel's investigation was not “reasonably designed to uncover available mitigation evidence”), *with People v. Rogers*, 497 N.E.2d 856, 857 (Ill. App. Ct. 1986) (holding defendant's failure to testify was a matter of trial strategy, and there was no “reasonable probability that . . . trial counsel's representation was ineffective”); *and Gainer v. State*, 372 S.E.2d 848, 848–49 (Ga. Ct. App. 1988) (concluding attorney's decision to avoid associating his client with prior conflict may be considered a “sound trial strategy”).

The passage of time failed to increase the consistency of *Strickland*'s applicability, and, as a result, the 1990s saw growing discontent with *Strickland* among the judiciary. Throughout the 1990s, lower courts, for example, created their own standard,<sup>388</sup> modified the standard,<sup>389</sup> or wholly rejected it.<sup>390</sup> In the 2000s, lower courts continued to struggle with *Strickland*'s applicability to conflict-of-interest cases,<sup>391</sup> whether subsequent Supreme Court cases had modified its standard,<sup>392</sup> and whether *Strickland* properly applied to noncapital sentences.<sup>393</sup>

Apart from the absence of "helpful" lower court guidance, a warehouse full of research firmly indicates that *Strickland* failed to provide any meaningful benchmark for the conduct of defense attorneys.<sup>394</sup> The absence of meaningful defense representation is particularly pronounced in death penalty cases.<sup>395</sup> Part V, it would seem, was an utter failure.

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388. *People v. Claudio*, 629 N.E.2d 384, 385–86 (N.Y. 1993).
389. *State v. Steffensen*, 902 P.2d 340, 343 (Alaska Ct. App. 1995).
390. *Craig v. State*, 825 S.W.2d 128, 129–30 (Tex. Crim. App. 1992).
391. *United States v. Esparza-Serrano*, 81 F. App'x 111, 115 (9th Cir. 2003).
392. *State v. England*, No. 24637–6–II, 2001 WL 629393, at \*3 n.5 (Wash. Ct. App. June 7, 2001).
393. *Davis v. Grigas*, 443 F.3d 1155, 1158 (9th Cir. 2006).
394. *See, e.g.*, Jane Fritsch & David Rohde, *Lawyers Often Fail New York's Poor*, N.Y. TIMES, Apr. 8, 2001, at A1; Stephen Henderson, *Defense Often Inadequate in 4 Death-Penalty States*, McCLATCHY DC (Jan. 16, 2007), <http://www.mcclatchydc.com/news/nation-world/national/article24460360.html>, archived at <http://perma.unl.edu/N2ET-PTFD>; Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986–1987); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 74–75 (1993–1994); Stephen B. Bright et al., *Keeping Gideon from Being Blown Away*, 4 CRIM. JUST. 10, Winter 1990, at 10–11 (1990).
395. ABA Task Force on Death Penalty Habeas Corpus, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, reprinted in 40 AM. U. L. REV. 1, 48–60 (1990); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 334 (1995); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 324–29 (1993); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43: RUTGERS L. REV. 281, 282–83 (1990–1991); Yale Kamisar, *Gideon v. Wainwright: A Quarter Century Later*, 10 PACE L. REV. 343, 360–67 (1990); Ronald Tabak, *Gideon v. Wainwright in Death Penalty Cases*, 10 PACE L. REV. 407, 407–12 (1990). Perhaps separate warehouses should exist to store the catalogue of stories confirming that same conclusion in the more precise contexts of guilty pleas, trial, sentencing, and on appeal.
- Guilty Pleas: *See, e.g.*, S. CTR. FOR HUMAN RTS., "IF YOU CANNOT AFFORD A LAWYER . . ." A REPORT ON GEORGIA'S FAILED INDIGENT DEFENSE SYSTEM 35 (2003), archived at <http://perma.unl.edu/TWE-6E8P>; Stephen B. Bright, *Turning Celebrated Principles into Reality*, 27 CHAMPION 6 (2003); Tara Harrison, *The Pendu-*

### C. Justice O'Connor's Private and Unspoken War

How could one of the most famous criminal procedure cases in the Supreme Court's history produce such a malleable standard? In doing so, how could the Court omit so much critical information about Tunkey's performance? The answer: Justice O'Connor cautiously and quietly waged an unspoken war against the Warren Court's broadly defined right to counsel. Or at least that's what the story of *Strickland*, coupled with her opinions and voting pattern in right-to-counsel cases, more than suggests.

A Reagan-appointee, Justice O'Connor became the first woman to serve on the Supreme Court by replacing Justice Potter Stewart on September 25, 1981.<sup>396</sup> Over the course of Justice O'Connor's time on the bench, she participated in sixty-five right-to-counsel decisions—sixty-four of which she heard during her time on the Supreme Court.<sup>397</sup> Her participation follows a bell curve that reflects a war for

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*lum of Justice: Analyzing the Indigent Defendant's Right to the Effective Assistance of Counsel When Pleading Not Guilty at the Plea Bargaining Stage*, 2006 UTAH L. REV. 1185, 1192–93 (2006); Falzone, *supra* note 384, at 434.

Trial: *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: Death Sentence Not for the Worst Crimes but for the Worst Lawyer*, 103 YALE L.J. 1835, 1839 (1994) [hereinafter Bright, *Worst Lawyer*]; Bob Herbert, Op-Ed, *In America: Cheap Justice*, N.Y. TIMES, Mar. 1, 1998, at 15; Bill Rankin, *Ruling Upholds Capital Case*, ATLANTA J. CONST., Aug. 18, 2001, at H4; Bill Rankin, *Murder Case Botched, New Lawyers Say Courts*, ATLANTA J. CONST., Aug. 4, 1999, at B2; *A Lawyer Without Precedent*, HARPER'S MAG., June 1, 1997, at 24; TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY 87–88 (2000) [hereinafter TEX. DEFENDER SERV., A STATE OF DENIAL], archived at <http://perma.unl.edu/M2TA-VKQK>.

Sentencing: *See, e.g.*, *Carter Center Symposium on the Death Penalty* 14 GA. ST. U.L. REV. 329, 341 (1998); Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 248–49 (1991); TEX. DEFENDER SERV., LETHAL INDIFFERENCE: THE FATAL COMBINATION OF INCOMPETENT ATTORNEYS AND UNACCOUNTABLE COURTS 36–38 (2002), archived at <http://perma.unl.edu/VWU4-9ZJQ>.

Appeal: *See, e.g.*, Bright, *Worst Lawyer*, *supra* note 395, at 1861; TEX. DEFENDER SERV., A STATE OF DENIAL, *supra* note 395, at 79; Marc Caputo, *Justice Blasts Lawyers over Death Row Appeals*, MIAMI HERALD, Jan. 28, 2005, at B5.

396. HUNTER R. CLARK, JUSTICE BRENNAN: THE GREAT CONCILIATOR 271 (1995).

397. In chronological order, Justice O'Connor heard the following right-to-counsel cases during her time on the Supreme Court: *Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Torna*, 455 U.S. 586 (1982); *Wyrick v. Fields*, 459 U.S. 42 (1982); *Morris v. Slappy*, 461 U.S. 1 (1983); *Jones v. Barnes*, 463 U.S. 745 (1983); *Oregon v. Bradshaw*, 462 U.S. 1039 (1983); *McKaskle v. Wiggins*, 465 U.S. 168 (1984); *Solem v. Stumes*, 465 U.S. 638 (1984); *Strickland v. United States*, 466 U.S. 668 (1984); *United States v. Cronin*, 466 U.S. 648 (1984); *United States v. Gouveia*, 467 U.S. 180 (1984); *Smith v. Illinois*, 469 U.S. 91 (1984); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Maine v. Moulton*, 474 U.S. 159 (1985); *Nix v. Whiteside*, 475 U.S. 157 (1986); *Moran v. Burbine*, 475 U.S. 412 (1986); *Michigan v. Jackson*, 475 U.S. 625 (1986); *Darden v. Wainwright*, 477 U.S. 168 (1986); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Murray v. Carrier*, 477 U.S. 478 (1986); *Kimmelman v.*

Justice O'Connor that began before *Strickland*, peaked with *Strickland*, and thereafter saw her recede from her right-to-counsel position, generally consistent with the harsh position she took in *Strickland*.

Justice O'Connor heard seven right-to-counsel cases in her two years on the Court prior to *Strickland*. Of those, she authored two majority opinions, and in all seven cases, she joined a majority that declined to expand the right to counsel.<sup>398</sup> In *McKaskle v. Wiggins*, one of her two majority opinions during that span,<sup>399</sup> the Court rejected a pro se defendant's claim that standby counsel's interference during his trial violated his Sixth Amendment right to represent himself.<sup>400</sup> Although standby counsel "intervened in a substantial manner without Wiggins' permission well over 50 times during the course of the three-day trial,"<sup>401</sup> a majority of the Court was unconcerned; it noted, "[T]he primary focus must be on whether the defendant had a fair chance to present his case in his own way."<sup>402</sup>

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Morrison, 477 U.S. 365 (1986); *Connecticut v. Barrett*, 479 U.S. 523 (1987); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Burger v. Kemp*, 483 U.S. 776 (1987); *Wheat v. United States*, 486 U.S. 153 (1988); *Satterwhite v. Texas*, 486 U.S. 249 (1988); *McCoy v. Court of Appeals of Wis., Dist. 1*, 486 U.S. 429 (1988); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Cutillo v. Cinelli*, 485 U.S. 1037 (1988) (dissenting from the denial of certiorari); *Penon v. Ohio*, 488 U.S. 75 (1988); *Perry v. Leeke*, 488 U.S. 272 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *Murray v. Giarratano*, 492 U.S. 1 (1989); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Powell v. Texas*, 492 U.S. 680 (1989); *Butler v. McKellar*, 494 U.S. 407 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Lozada v. Deeds*, 498 U.S. 430 (1991); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Coleman v. Thompson*, 501 U.S. 722 (1991); *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Godinez v. Moran*, 509 U.S. 389 (1993); *Custis v. United States*, 511 U.S. 485 (1994); *Nichols v. United States*, 511 U.S. 738 (1994); *Davis v. United States*, 512 U.S. 452 (1994); *McFarland v. Scott*, 512 U.S. 849 (1994); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998); *Peguero v. United States*, 526 U.S. 23 (1999); *Martinez v. Court of Appeals of Cal., Fourth Appellate Dist.*, 528 U.S. 152 (2000); *Smith v. Robbins*, 528 U.S. 259 (2000); *Williams v. Taylor*, 529 U.S. 362 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Daniels v. United States*, 532 U.S. 374 (2001); *Texas v. Cobb*, 532 U.S. 162 (2001); *Mickens v. Taylor*, 535 U.S. 162 (2002); *Bell v. Cone*, 535 U.S. 685 (2002); *Alabama v. Shelton*, 535 U.S. 654 (2002); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Yarborough v. Gentry*, 540 U.S. 1 (2003); *Iowa v. Tovar*, 541 U.S. 77 (2004); *Fellers v. United States*, 540 U.S. 519 (2004); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Halbert v. Michigan*, 545 U.S. 605 (2005).

398. *McKaskle*, 465 U.S. at 184; *Barnes*, 463 U.S. at 571; *Bradshaw*, 462 U.S. at 1044; *Morris*, 461 U.S. at 12; *Torna*, 455 U.S. at 587–88; *Wyrick*, 459 U.S. at 48–49; *Engle*, 456 U.S. at 134.

399. She also wrote the majority opinion in *Engle*, 456 U.S. at 109.

400. *McKaskle*, 465 U.S. at 184.

401. *Id.* at 191 (White, J., dissenting).

402. *Id.* at 177.

The Court's opinion in *Strickland* came out just months after *Wiggins*. The Court decided *United States v. Cronin*<sup>403</sup>—another effective assistance-of-counsel case—on the same day as *Strickland*. In *Cronin*, a court-appointed young lawyer with a real estate practice was chosen to represent a defendant and received just twenty-five days to investigate his case.<sup>404</sup> The Tenth Circuit found ineffective assistance of counsel because those circumstances hampered counsel's preparation.<sup>405</sup> Justice O'Connor joined a majority of the Court in reversing the Tenth Circuit because, "[The] case is not one in which the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel."<sup>406</sup> Interestingly, the *Cronin* majority—unlike *Strickland*—remanded the case back to the lower court for a determination of any "specific errors made by trial counsel."<sup>407</sup>

After *Strickland*, Justice O'Connor would not write another right-to-counsel opinion until *Moran v. Burbine*<sup>408</sup> nearly two years later.<sup>409</sup> During the interim time between *Strickland* and *Burbine*, her opinion about the right to counsel began to shift. In the Court's first two right-to-counsel cases post-*Strickland*, she voted with the majority to oppose expansion of the right to counsel.<sup>410</sup> Her votes in those cases were the tenth and eleventh in a row, respectively, wherein Justice O'Connor voted against the right to counsel.<sup>411</sup> She broke that voting pattern at the end of 1984 by voting to construe a defendant's request for counsel as unambiguous,<sup>412</sup> and later agreeing that due process guarantees effective assistance of counsel to defendants on appeal.<sup>413</sup>

Justice O'Connor's brief recession from her established voting pattern initially seemed an anomaly. At the end of 1985, she declined to join a majority of the Court in *Maine v. Moulton*,<sup>414</sup> which held that the Sixth Amendment forbade introduction of a defendant's incriminating statements recorded by his co-defendant post-indictment.<sup>415</sup>

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403. 466 U.S. 648 (1984) (identifying the date of decision as May 14, 1984).

404. *Id.* at 649.

405. *Id.* at 650.

406. *Id.* at 666.

407. *Id.*

408. 475 U.S. 412 (1986).

409. Compare *Strickland v. Washington*, 466 U.S. 668 (1984) (decided May 14, 1984), with *Burbine*, 475 U.S. at 412 (decided March 10, 1986).

410. *Solem v. Stumes*, 465 U.S. 638, 642 (1984); *United States v. Gouveia*, 467 U.S. 180, 192–93 (1984).

411. See *supra* note 397 and accompanying citations.

412. *Smith v. Illinois*, 469 U.S. 91, 93 (1984).

413. *Evitts v. Lucey*, 469 U.S. 387, 395 (1985).

414. 474 U.S. 159, 176 (1985).

415. *Id.* at 181 (Burger, C.J., dissenting). Justice O'Connor joined Parts I and III of Chief Justice Burger's dissent.

Then, early in 1986, she joined Chief Justice Burger's opinion in *Nix v. Whiteside*,<sup>416</sup> which reversed an Eighth Circuit holding that a defendant's attorney provided ineffective assistance of counsel.<sup>417</sup> The defendant in *Nix* sought to elicit the cooperation of his attorney in helping him commit perjury.<sup>418</sup> In response, counsel in *Nix* threatened to reveal the defendant's plan to the trial court, which the Eighth Circuit said wrongfully "constituted a threat to violate the attorney's duty to preserve client confidences."<sup>419</sup> But the Supreme Court thought otherwise, holding that counsel's "admonitions to his client can in no sense be said to have forced [defendant] into an *impermissible* choice between his right to counsel and his right to testify as he proposed for there was no *permissible* choice to testify falsely."<sup>420</sup>

That same year, Justice O'Connor wrote the majority opinion in *Moran v. Burbine*.<sup>421</sup> In *Burbine*, the defendant did not request a lawyer to assist him during an interrogation about his participation in the murder of a young woman.<sup>422</sup> The defendant's sister, however, retained a lawyer for him, who "telephoned the police station and received assurances that [defendant] would not be questioned further until the next day."<sup>423</sup> Despite those assurances, law enforcement proceeded with defendant's interrogation and obtained inculpatory statements from him that evening.<sup>424</sup> Although the First Circuit characterized the police conduct as "reckless,"<sup>425</sup> Justice O'Connor, writing for the Court, disagreed and held that law enforcement's decision to question the defendant violated neither his Fifth nor Sixth Amendment right to counsel.<sup>426</sup> She reasoned, "Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right."<sup>427</sup>

In 1986, a busy year for right-to-counsel issues, Justice O'Connor dissented from the Court's decision in *Michigan v. Jackson*<sup>428</sup> to bar admission of uncounseled incriminating statements taken from a de-

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416. 475 U.S. 157, 159 (1986).

417. *Id.* at 163, 176.

418. *Id.* at 161.

419. *Id.* at 163.

420. *Id.* at 173.

421. 475 U.S. 412 (1986).

422. *Id.* at 415.

423. *Id.*

424. *Id.*

425. *Id.* at 422.

426. *Id.* at 428-32.

427. *Id.* at 422.

428. 475 U.S. 625, 637 (1986) (Rehnquist, J., dissenting). Justice O'Connor joined Justice Rehnquist's dissent. Importantly, the defendant in *Jackson* requested counsel during his arraignment. *Id.* at 627 (majority opinion).

fendant post-arraignment.<sup>429</sup> And later, in *Darden v. Wainwright*,<sup>430</sup> she voted with a majority of the Court to hold that counsel was not ineffective pursuant to *Strickland*, despite spending only an hour-and-a-half preparing for the punishment phase of a capital murder case.<sup>431</sup> Days after *Darden*, she agreed in *Kuhlmann v. Wilson* that the Sixth Amendment permitted introduction of statements a defendant made to a police informant who shared his cell—even post-indictment—so long as the officer did not act “deliberately to elicit incriminating remarks.”<sup>432</sup>

Although her vote in *Kuhlmann* was her seventh in a row that favored limiting or otherwise restricting the right to counsel,<sup>433</sup> she reversed course briefly in the Court’s next right-to-counsel case: *Kimmelman v. Morrison*. In *Kimmelman*, she joined a majority of the Court in holding that counsel was ineffective by failing to file a timely suppression motion premised on Fourth Amendment violations.<sup>434</sup> The Court reasoned that counsel’s failure to file was “not due to strategic considerations”;<sup>435</sup> rather, it was premised on a “startling ignorance of the law.”<sup>436</sup> But her favoritism toward the right to counsel was once again short-lived; months later she joined a majority of the Court in *Pennsylvania v. Finley*, holding that prisoners have no constitutional right to counsel “when mounting collateral attacks upon their convictions . . . .”<sup>437</sup> Her vote in *Finley* set off three more consecutive votes to limit the right to counsel.<sup>438</sup>

The gentle post-*Strickland* recession from her approach to right-to-counsel cases continued uninterrupted until her resignation in 2005.<sup>439</sup> Indeed, between *Finley* in 1987 and Justice O’Connor’s final right-to-counsel case in 2005, *Halbert v. Michigan*, the Court heard and ruled on forty-one right-to-counsel cases.<sup>440</sup> Of those forty-one,

429. *Id.* at 637 (Rehnquist, J., dissenting).

430. 477 U.S. 168 (1986).

431. *Id.* at 184–85.

432. *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986).

433. The seven consecutive votes occurred in: *Maine v. Moulton*, 474 U.S. 159 (1985); *Nix v. Whiteside*, 475 U.S. 157 (1986); *Moran v. Burbine*, 475 U.S. 412 (1986); *Jackson*, 475 U.S. 625; *Darden*, 477 U.S. 168; *Murray v. Carrier*, 477 U.S. 478 (1986); and *Kuhlmann*, 477 U.S. at 436.

434. *Kimmelman v. Morrison* 477 U.S. 365, 385–87 (1986).

435. *Id.* at 385.

436. *Id.*

437. *Pennsylvania v. Finley* 481 U.S. 551, 555 (1987).

438. *Wheat v. United States*, 486 U.S. 153, 163–64 (1988); *Connecticut v. Barrett*, 479 U.S. 523, 529–30 (1987); *Burger v. Kemp*, 483 U.S. 776, 795–96 (1987).

439. William Branigin, Fred Barbash & Daniela Deane, *Supreme Court Justice O’Connor Resigns*, WASH. POST, July 1, 2005, at A1.

440. *Halbert v. Michigan*, 545 U.S. 605 (2005); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Iowa v. Tovar*, 541 U.S. 77 (2004); *Fellers v. United States*, 540 U.S. 519 (2004); *Yarborough v. Gentry*, 540 U.S. 1 (2003); *Mickens v. Taylor*, 535 U.S. 162 (2002); *Alabama v. Shelton*, 535 U.S. 654 (2002); *Bell v. Cone*, 535 U.S. 685 (2002); *Dan-*

Justice O'Connor voted to restrict or limit the right to counsel in twenty-six of them.<sup>441</sup> In other words, as she did in other areas,<sup>442</sup> Justice O'Connor, during her time, evolved from a "classic conservative"<sup>443</sup> at the outset into a Justice "neither consistently conservative nor consistently liberal."<sup>444</sup>

But that general review fails to uncover a more precise shift in Justice O'Connor's post-*Strickland* views about defense counsel, which surfaced in 2000. In *Williams v. Taylor*,<sup>445</sup> the first death sentence overturned by the Supreme Court pursuant to *Strickland*, the defendant made several admissions about his involvement in a robbery and

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iels v. United States, 532 U.S. 374 (2001); *Texas v. Cobb*, 532 U.S. 162 (2001); *Smith v. Robbins*, 528 U.S. 259 (2000); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000); *Martinez v. Court of Appeals of Cal.*, 4th Appellate Dist., 528 U.S. 152 (2000); *Peguero v. United States*, 526 U.S. 23 (1999); *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998); *Custis v. United States*, 511 U.S. 485 (1994); *McFarland v. Scott*, 512 U.S. 849 (1994); *Nichols v. United States*, 511 U.S. 738 (1994); *Davis v. United States*, 512 U.S. 452 (1994); *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Godinez v. Moran*, 509 U.S. 389 (1993); *Coleman v. Thompson*, 501 U.S. 722 (1991); *McNeil v. Wisconsin*, 501 U.S. 171 (1991); *Butler v. McKellar*, 494 U.S. 407 (1990); *Minnick v. Mississippi*, 498 U.S. 146 (1990); *Michigan v. Harvey*, 494 U.S. 344 (1990); *United States v. Monsanto*, 491 U.S. 600 (1989); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *Powell v. Texas*, 492 U.S. 680 (1989); *Murray v. Giarratano*, 492 U.S. 1 (1989); *Perry v. Leeke*, 488 U.S. 272 (1989); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Patterson v. Illinois*, 487 U.S. 285 (1988); *Penson v. Ohio*, 488 U.S. 75 (1988); *McCoy v. Court of Appeals of Wis.*, Dist. 1, 486 U.S. 429 (1988); *Satterwhite v. Texas*, 486 U.S. 249 (1988); *Wheat*, 486 U.S. 153; *Barrett*, 479 U.S. 523; *Burger*, 483 U.S. 776. She also joined Justice White's dissent from the denial of certiorari in *Cutillo v. Cinelli*, 485 U.S. 1037, 1037 (1988) (White, J., dissenting), and joined Justice Rehnquist in voting to deny the petition in *Lozada v. Deeds*, 498 U.S. 430, 432 (1991)—both of which involved right to counsel issues.

441. *Tovar*, 541 U.S. at 81; *Yarborough*, 540 U.S. at 11; *Mickens*, 535 U.S. at 179; *Bell*, 535 U.S. at 697–98; *Cobb*, 532 U.S. at 173; *Flores-Ortega*, 528 U.S. at 477; *Smith*, 528 U.S. at 278; *Martinez*, 528 U.S. 152; *Woodard*, 523 U.S. at 289; *Davis*, 512 U.S. at 459; *Lockhart*, 506 U.S. at 372; *Godinez*, 509 U.S. at 399; *Coleman*, 501 U.S. at 732; *McNeil*, 501 U.S. at 178; *Butler*, 494 U.S. 407, 415; *Harvey*, 494 U.S. 354; *Monsanto*, 491 U.S. at 614; *Caplin & Drysdale*, 491 U.S. at 618; *Murray*, 492 U.S. at 6; *Perry*, 488 U.S. at 280; *Duckworth*, 492 U.S. at 211; *Patterson*, 487 U.S. at 291; *Wheat*, 486 U.S. at 164; *McCoy*, 486 U.S. at 435; *Kemp*, 483 U.S. at 795–96; *Barrett*, 479 U.S. at 529.

442. That pattern generally mirrors her voting trends in other areas. *E.g.*, Tom Curry, *O'Connor Had Immense Power as Swing Vote*, MSNBC, [http://www.nbcnews.com/id/5304484/ns/us\\_news-the\\_changing\\_court/t/oconnor-had-immense-power-swing-vote/#.U5dUyC\\_IaC8](http://www.nbcnews.com/id/5304484/ns/us_news-the_changing_court/t/oconnor-had-immense-power-swing-vote/#.U5dUyC_IaC8) (last updated July 1, 2005, 10:33 AM), archived at <http://perma.unl.edu/Z63R-X9JV>.

443. Abigail Perkiss, *A Look Back at Justice Sandra Day O'Connor's Court Legacy*, YAHOO! NEWS (July 1, 2015, 8:30 AM), <http://news.yahoo.com/look-back-justice-sandra-day-o-connor-court-094809112.html>, archived at <http://perma.unl.edu/ZUT6-9BC2>.

444. Warren Richey, *As O'Connor Votes, So Tilts the Supreme Court*, CHRISTIAN SCI. MONITOR, June 30, 2003, at 1.

445. 529 U.S. 362 (2000).

murder.<sup>446</sup> At the sentencing hearing following his conviction, the prosecution introduced the defendant's substantial prior criminal history, which included convictions for armed robbery, burglary, grand larceny, arson, and violent assaults on elderly victims.<sup>447</sup> Defendant's counsel introduced "testimony of [the defendant's] mother, two neighbors, and a taped excerpt from a statement by a psychiatrist."<sup>448</sup>

The Court held that counsel provided ineffective assistance of counsel at sentencing by failing to prepare an adequate investigation.<sup>449</sup> In particular, the Court found counsel failed to uncover defendant's abusive and "nightmarish childhood," declined to introduce evidence that defendant was "'borderline mentally retarded' and did not advance beyond sixth grade," and "failed to seek prison records recording [the defendant's] commendations for helping to crack a prison drug ring . . . ."<sup>450</sup>

Justice O'Connor wrote a separate concurring opinion agreeing, in particular, with the majority's *Strickland* analysis.<sup>451</sup> Fascinatingly, she chastised the lower court's "obvious failure to consider the totality of the omitted mitigation evidence"<sup>452</sup>—the very type of evidence she herself discounted in *Strickland*.<sup>453</sup> Although she readily concluded in *Strickland* that omitted character evidence could not satisfy the prejudice component,<sup>454</sup> Justice O'Connor suggested in *Williams* that it was "impossible to determine" whether the lower court's error "affected its ultimate finding that Williams suffered no prejudice."<sup>455</sup> She therefore favored the very procedural outcome she emphatically opposed in *Strickland*: Remand.<sup>456</sup>

A 2001 speech Justice O'Connor gave to a group of female lawyers in Minnesota perhaps explains her dramatic about-face.<sup>457</sup> Despite being a longtime supporter of the death penalty, she admitted during her remarks, "[T]he system may well be allowing some innocent de-

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446. *Id.* at 367–68.

447. *Id.* at 368.

448. *Id.* at 369.

449. *Id.* at 395.

450. *Id.* at 396.

451. *Id.* at 415–16 (O'Connor, J., concurring).

452. *Id.* at 416 (emphasis added).

453. *Strickland v. Washington*, 466 U.S. 668, 699 (1984) ("Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help.").

454. *Id.* at 699–700.

455. *Williams*, 529 U.S. at 414 (O'Connor, J., concurring).

456. *Id.* at 416.

457. Editorial, *Justice O'Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16. The speech generated substantial media interest. See, e.g., *O'Connor Questions Death Penalty*, N.Y. TIMES, July 4, 2001; *O'Connor Questions Death Penalty*, ABCNEWS.COM (July 3, 2001, 11:07 AM), <http://abcnews.go.com/US/story?id=92961>.

fendants to be executed . . . .”<sup>458</sup> She partially blamed the quality of defense representation, noting that Texas defendants who could afford private attorneys were less likely to be convicted compared with those who were appointed counsel.<sup>459</sup> Astonishingly, she added: “Perhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used . . . .”<sup>460</sup>

After those remarks, she would participate in nine more cases that raised a right-to-counsel issue. Not only did her voting pattern continue to shift aggressively in favor of right-to-counsel expansion, so too did her views about *Strickland*. As to the former point, Justice O’Connor, in her final right-to-counsel cases, wrote to allow right-to-counsel challenges as the *only* basis to collaterally attack a federal sentence following an Armed Career Criminal Act conviction,<sup>461</sup> voted to expand the provision of counsel to indigents who receive a suspended sentence that could result in prison time,<sup>462</sup> wrote to suppress uncounseled statements taken in violation of the Sixth Amendment,<sup>463</sup> and voted in favor of providing counsel to indigent defendants appealing convictions secured by guilty plea.<sup>464</sup> Importantly, two of those four cases were decided by the slimmest of margins—a 5–4 vote<sup>465</sup>—where Justice O’Connor presumably served as the swing vote.<sup>466</sup>

As to the latter point, Justice O’Connor’s views about *Strickland* emerged with increasing clarity during her final nine right-to-counsel cases. In *Wiggins v. Smith*,<sup>467</sup> she considered defense representation similar to Tunkey’s representation of Washington. Following defendant Wiggins’ conviction for first-degree murder, robbery, and theft, the question turned to whether he should receive the death penalty.<sup>468</sup> Counsel for Wiggins moved to bifurcate sentencing in order to

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458. Editorial, *supra* note 457 (internal quotation marks omitted).

459. *Id.*

460. *Id.* (internal quotation marks omitted).

461. *Daniels v. United States*, 532 U.S. 374, 382 (2001).

462. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

463. *Fellers v. United States*, 540 U.S. 519, 524–25 (2004).

464. *Halbert v. Michigan*, 545 U.S. 605, 610 (2005).

465. *Shelton*, 535 U.S. at 656 (noting Court composition and opinion breakdown); *Daniels*, 532 U.S. at 375 (same).

466. Often regarded by commentators as the swing vote throughout her tenure, it is hard to overstate the importance of Justice O’Connor’s votes. *E.g.*, Emily Bazelon, *The Swing Vote*, N.Y. TIMES, Feb. 5, 2006. For example, five of the last twelve right-to-counsel cases Justice O’Connor participated in were decided by 5–4 votes. *Rompilla v. Beard*, 545 U.S. 374, 376 (2005); *Shelton*, 535 U.S. at 656; *Mickens v. Taylor*, 535 U.S. 162, 163 (2002); *Texas v. Cobb*, 532 U.S. 162, 163 (2001); *Daniels*, 532 U.S. at 375.

467. 539 U.S. 510, 513 (2003) (noting Court composition and opinion breakdown).

468. *Id.* at 515.

retry certain factual aspects of the case and then present a mitigation case, “if necessary . . . .”<sup>469</sup> Sentencing proceedings commenced after the court denied counsel’s motion.<sup>470</sup> During opening argument, counsel suggested the sentencing jury consider Wiggins’ background and upbringing, but never introduced evidence of his life history during the proceedings.<sup>471</sup> Apart from these deficiencies, counsel’s investigation drew only from a presentencing investigation and records kept by the Baltimore Department of Social Services.<sup>472</sup> Wiggins received the death penalty.<sup>473</sup>

During subsequent appellate proceedings, counsel admitted that he “did not remember retaining a forensic social worker to prepare a social history, even though the State made funds available for that purpose.”<sup>474</sup> Rather, he elected to focus on “retry[ing] the factual case and disputing Wiggins’ direct responsibility for the murder.”<sup>475</sup> Justice O’Connor acknowledged the similarities between this case and *Strickland*,<sup>476</sup> but reached a different outcome: “Counsel’s investigation into Wiggins’ background did not reflect reasonable professional judgment.”<sup>477</sup> She reasoned that counsel’s investigation “was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further.”<sup>478</sup>

Turning to the prejudice inquiry, Justice O’Connor concluded, “[H]ad the jury been confronted with [the] considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.”<sup>479</sup> To reach her prejudice conclusion, she referenced Wiggins’ absence of prior convictions: “Wiggins’ sentencing jury heard only one significant mitigating factor—that Wiggins had no prior convictions. Had the jury been able to place petitioner’s excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance.”<sup>480</sup> The *Wiggins* Court, for only the second time, invalidated a death sentence pursuant to *Strickland*.<sup>481</sup>

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469. *Id.*

470. *Id.*

471. *Id.*

472. *Id.* at 523.

473. *Id.* at 516.

474. *Id.* at 517.

475. *Id.* (alteration in original) (internal quotation marks omitted).

476. *Id.* at 521.

477. *Id.* at 534.

478. *Id.*

479. *Id.* at 536 (alteration in original).

480. *Id.* at 537.

481. Marcia Coyle, *New Standards in Death Penalty Cases Predicted*, N.J. L. J., July 28, 2003, at 18.

Justice O'Connor amplified the message that her views about *Strickland* had firmly changed in the final ineffective-assistance case she heard on the Court.<sup>482</sup> In *Rompilla v. Beard*, two public defenders represented the defendant during both the guilt and punishment phases.<sup>483</sup> Following his conviction for murder, defense counsel introduced minimal mitigation evidence in the form of testimony from five of the defendant's family members.<sup>484</sup> The defendant received the death penalty and, during a series of appeals, argued that counsel failed "to present significant mitigating evidence about [his] childhood, mental capacity and health, and alcoholism."<sup>485</sup> The Supreme Court agreed and held that even when a defendant's family suggests otherwise, a "lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial."<sup>486</sup>

*Rompilla* was the third case to overturn a death sentence pursuant to *Strickland*. As yet another 5–4 case, Justice O'Connor's vote was critical. Perhaps sensing as much, she wrote a separate concurring opinion highlighting the importance of counsel investigating the circumstances behind a defendant's prior criminal history.<sup>487</sup> She observed that in this case, counsel's "failure to obtain the critical file 'was the result of inattention, not reasoned strategic judgment.'"<sup>488</sup> Apart from her ironic focus on the importance of investigating criminal history (recall that Washington had none), Justice O'Connor chastising counsel's "inattention" tidily rounds out her *Strickland* journey—a journey that began with approval of conduct by an attorney who admittedly gave up on his client.<sup>489</sup>

Two years after her resignation, Justice O'Connor gave a speech as part of a conference on *Strickland*.<sup>490</sup> She admitted "that what we have with the *Strickland* Standard is not answering all the questions that need to be answered,"<sup>491</sup> and therefore suggested the Supreme Court revisit the case.<sup>492</sup> If *Strickland*'s own author thinks it's time to

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

483. *Id.* at 377–78.

484. *Id.* at 378.

485. *Id.* (alteration in original).

486. *Id.* at 377.

487. *Id.* at 394–96 (O'Connor, J., concurring).

488. *Id.* at 395–96 (O'Connor, J., concurring) (footnote omitted) (quoting *Wiggins v. Smith* 539 U.S. 510, 534 (2003)).

489. Joint Appendix, *supra* note 118, at 383, 400, 404.

490. Lisa White, *Strickland v. Washington: Justice O'Connor Revisits Landmark Legislation*, LIBR. OF CONGRESS, <http://www.loc.gov/loc/lcib/08012/oconnor.html> (last visited July 20, 2015) archived at <http://perma.unl.edu/C4Y7-R2SR>.

491. Justice Sandra Day O'Connor, *Strickland v. Washington* Conference: Keynote Address (Nov. 7, 2007), speech and transcript archived at <http://perma.unl.edu/86Z5-LAAY>.

492. White, *supra* note 490.

revisit the standards governing defense attorney competency, then the time for the Supreme Court to do so is surely overdue.

#### IV. CONCLUSION

Chief Justice Warren, during his tenure on the Court, worked to establish a broad and robust right to counsel for indigent defendants—one that hardly depended on the Sixth Amendment alone. Rather, the Warren Court relied on the Due Process Clause, the Fifth Amendment, and the Equal Protection Clause in order to expand access to counsel at trial, during lineups, on appeal, and in the interrogation room. But the Warren Court never addressed the minimum competency required of counsel in each of those contexts. Its failure to do so turned out to be momentous.

The close of the Warren Court saw a change in Court personnel. One new Justice in particular—Justice O'Connor—had a vision at the outset of her tenure of the right to counsel that differed greatly from her predecessors. That vision is best exemplified by her majority opinion in a case that struck back against the Warren Court: *Strickland v. Washington*. *Strickland* ostensibly sought to provide “helpful” guidance to lower courts by defining competency requirements for defense counsel. But the passage of time has softened Justice O'Connor’s views. Even she believes the time is ripe for a break away from *Strickland*: “We have to make some modifications and some judgments that will adjust it . . . .”<sup>493</sup>

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493. O'Connor, *supra* note 491.