

## Case Note

### Unreasonable Probability of Error

*Coleman v. State*, 741 N.E.2d 697 (Ind. 2000).

In *Strickland v. Washington*, the Supreme Court sought to create a uniform standard to guarantee effective assistance of counsel to criminal defendants, to “ensure a fair trial,” and to assure the reliability of “a just result.”<sup>1</sup> Justice O’Connor’s majority opinion created a two-pronged test for overturning a trial verdict: deficient performance and resulting prejudice. The Court explicitly established a difficult burden for proving deficient performance,<sup>2</sup> but set a moderate standard for prejudice as the “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”<sup>3</sup> The Court elaborated that this standard is lower than preponderance.<sup>4</sup> Thus, for penalty-phase ineffectiveness claims, a defendant may establish prejudice without having to “show that counsel’s deficient conduct more likely than not altered the outcome in the case.”<sup>5</sup> For guilt-phase ineffectiveness, the standard drops from reasonable probability to reasonable doubt.<sup>6</sup>

While *Strickland* may have been a good faith attempt to balance the right to counsel with judicial efficiency, the system still does not ensure reliability or justice.<sup>7</sup> One reason for this national crisis is that too many

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1. 466 U.S. 668, 686 (1984).

2. *Id.* at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential.”).

3. *Id.* at 694.

4. Counsel’s deficient performance may be prejudicial “even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Id.*

5. *Id.* at 693.

6. *Id.* at 695.

7. More and more horror stories about incompetent counsel, wrongly convicted death row inmates, and institutional failures have filled the pages of law journals and newspapers over the last few years. *E.g.*, JIM DWYER ET AL., ACTUAL INNOCENCE (2000); Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J.

lower federal and state courts have consistently misinterpreted, misapplied, undercut, or ignored parts of *Strickland*. In *Coleman v. State*, the Indiana Supreme Court offered a disturbing example of this pattern, despite the U.S. Supreme Court's intervention. After analyzing *Coleman* and surveying the errors by courts around the country, I suggest ways to clarify *Strickland* and to improve its application, both in general and for death sentence cases.

## I

Alton Coleman's case is hardly the most sympathetic one on death row. In 1986, he was sentenced to death for murdering a seven-year-old girl and raping and attempting to murder her ten-year-old relative.<sup>8</sup> The judge and jury, however, never heard the whole story, which included solid mitigating evidence. Coleman's childhood was horrific. His mother and grandmother were prostitutes who severely sexually and physically abused him.<sup>9</sup> His mother prostituted him in his adolescence, and his grandmother physically abused him and struck him on the head with a baseball bat on several occasions.<sup>10</sup> The abuse may have compounded other head injuries for which he was hospitalized. Medical experts diagnosed him with organic brain damage, Borderline Personality Disorder, and psychosis.<sup>11</sup>

But Coleman's court-appointed lawyers, Cornell Collins and Lonnie Randolph, never presented any of this evidence. They investigated no mitigating evidence whatsoever. In the penalty phase of the trial, Randolph offered only brief religious and moral arguments against the death penalty, and at the sentencing hearing, he added simply that Coleman should "be spared and studied" as a psychological specimen.<sup>12</sup> The two lawyers also botched the guilt phase of the trial.<sup>13</sup>

The Indiana Supreme Court made four errors in its application of *Strickland* in Coleman's 1998 appeal. First, it erred in applying an unduly difficult burden for prejudice from *Lockhart v. Fretwell*.<sup>14</sup> The U.S.

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1835 (1994); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Counsel*, 113 HARV. L. REV. 2062 (2000); Paul M. Barrett, *Lawyer's Fast Work on Death Cases Raises Doubts About the System*, WALL ST. J., Sept. 7, 1994, at A1; Frederic N. Tulsy, *Big-Time Trials, Small-Time Defenders*, PHILA. INQUIRER, Sept. 14, 1992, at A1.

8. He has also been convicted of murders in Ohio and Illinois.

9. Petition for Writ of Habeas Corpus at 18, *Coleman v. Mitchell*, No. 3:99CV0410 (N.D. Ind. filed Apr. 13, 2001) (petitioning from *Coleman*, 741 N.E.2d 697).

10. *Id.* at 17.

11. *Id.* at 20-21.

12. *Id.* at 10.

13. Despite being informed that state investigators had found potentially exculpatory hair evidence at the scene of the crime, they never investigated or presented this evidence. *Coleman v. State*, 703 N.E.2d 1022, 1028-29 (Ind. 1998).

14. 506 U.S. 364, 369-72 (1993). The Indiana Supreme Court, and many courts around the country, had mistakenly applied *Fretwell* to require defendants to prove, above and beyond

Supreme Court ultimately granted a writ of certiorari on this question in *Coleman*,<sup>15</sup> and vacated and remanded it in light of *Williams v. Taylor*.<sup>16</sup> There were three other errors for which the Court did not grant certiorari. First, the Indiana Supreme Court had not reviewed the ineffective assistance claim de novo, despite *Strickland*'s explicit statement that ineffective assistance is a mixed question of law and fact. Such questions are entitled to de novo review, and "no special standards ought to apply to ineffectiveness claims made in habeas proceedings."<sup>17</sup> Instead, the Indiana Supreme Court applied a highly deferential standard to the lower court's ruling on ineffectiveness in its own state habeas review.<sup>18</sup> Second, the Indiana Supreme Court had failed to apply *Strickland*'s reasonable doubt standard for prejudice during the guilt phase.<sup>19</sup> The Indiana Supreme Court's final error was in its application of *Strickland*'s reasonable probability standard to the death penalty phase, by failing to state that the petitioner was not required to prove prejudice by a preponderance of the evidence.<sup>20</sup> As a result of these errors, the court required Coleman to demonstrate that he was prejudiced by ineffective counsel by much more than a reasonable probability.

Although the U.S. Supreme Court did not grant certiorari on these questions, it did address some of them in *Williams*, in light of which Coleman's case was remanded. Justice O'Connor's majority opinion specified that if a court required a preponderance of the evidence for an ineffective assistance claim, such a decision would be contrary to clearly established precedent, and would be a prime example of a ground for habeas relief.<sup>21</sup> Despite the Supreme Court's clear articulation, the Indiana Supreme Court repeated these mistakes in *Coleman*'s remand.<sup>22</sup>

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*Strickland*'s two-pronged test, that their trials were "fundamentally unfair." These courts ignored the fact that *Fretwell* clearly applied only to a very exceptional set of circumstances.

15. *Coleman v. Indiana*, 529 U.S. 1085 (2000).

16. 529 U.S. 362 (2000) (holding that *Fretwell* modified the *Strickland* standard only for unusual "windfall" cases of ineffectiveness). In the interests of full disclosure, I note that I co-wrote the petition for certiorari with Bob Lancaster, who was the Robert Cover Fellow at the Jerome Frank Legal Services Organization.

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

18. *Coleman v. State*, 703 N.E.2d 1022, 1032 (Ind. 1998) ("[A] petitioner appealing from the denial of post-conviction relief labors under a heavy burden. We conclude that the evidence does not lead 'unerringly and unmistakably to a conclusion opposite to that reached by the trial court,' and that 'the court's findings are sufficient to support the judgment.'" (citations omitted). This ruling is particularly striking because the lower court had never given the ineffectiveness claim a full hearing in the first place. The Indiana Supreme Court was the first court to review the issue and the facts, and thus, the court was trying to defer to a lower court ruling against Coleman that did not exist. See *id.* at 1027.

19. *Id.* at 1029-30.

20. *Id.* at 1031-32.

21. *Williams*, 529 U.S. at 405-06.

22. The court correctly removed any reference to *Fretwell* and its more difficult prejudice standard, but the court explicitly rejected the use of de novo review for Coleman's ineffectiveness claim and offered an incoherent argument that misunderstood *Williams*. *Coleman*, 741 N.E.2d at

The Indiana Supreme Court is not unique in its misapplication of *Strickland*. Other courts have rejected de novo review for ineffective assistance claims.<sup>23</sup> Over the last ten years, the First, Fifth, Seventh, Eighth, and Eleventh Circuits have contradicted *Strickland* by requiring preponderance for the penalty phase and the guilt phase.<sup>24</sup> The circuits have rarely cited the reasonable doubt standard for the guilt phase, an unacceptable ambiguity. Most of the federal circuit courts have continued to make these errors or have failed to clarify the standard even after Justice O'Connor's clear admonition in *Williams* in April 2000. Recently, the Fifth Circuit and the District Court of Maryland explicitly required preponderance for proving prejudice.<sup>25</sup> Over the past year, the First Circuit has been ambiguous and inconsistent.<sup>26</sup> During the past two years, the Third, Seventh,<sup>27</sup> Eighth, Ninth, and D.C. Circuits have not once explicitly recognized that *Strickland* requires less than preponderance to demonstrate

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699. The Indiana Supreme Court stated unequivocally, "[a]s a threshold matter, we reject Coleman's claim that he is entitled to de novo review because he presents mixed questions of law and fact." *Id.* at 699. The court cited a brief passage in *Williams* to justify this conclusion. *Id.* (citing *Williams*, 529 U.S. at 371). To the contrary, this passage in *Williams* makes it remarkably clear that the Virginia Supreme Court was accepting a "factual determination," rather than a determination on a mixed question. The Virginia Supreme Court also held that "both the performance and the prejudice components of the ineffectiveness test are mixed questions of fact and law" not binding on appeals. *Williams v. Taylor*, 487 S.E.2d 194, 198 (Va. 1997) (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 388-89 (1986)). In general, the Indiana Supreme Court has consistently refused to review ineffectiveness claims de novo and has imposed inappropriately difficult burdens upon petitioners. *E.g.*, *Harrison v. State*, 707 N.E.2d 767, 784 (Ind. 1999); *Spranger v. State*, 650 N.E.2d 1117, 1121 (Ind. 1995).

23. Texas's highest criminal court has rejected de novo review even more explicitly. *State v. Gill*, 967 S.W.2d 540, 542 (Tex. Crim. App. 1998).

24. In four cases over the last decade, the Fifth Circuit has explicitly required a preponderance of the evidence. *Rector v. Johnson*, 120 F.3d 551, 563 (5th Cir. 1997) (upholding a death sentence); *James v. Cain*, 56 F.3d 662, 667 (5th Cir. 1995); *Mann v. Scott*, 41 F.3d 968, 984 (5th Cir. 1994) (upholding a death sentence); *Jernigan v. Collins*, 980 F.2d 292, 296 (5th Cir. 1992). The First, Eighth, and Eleventh Circuits have also erred in requiring preponderance. *Mills v. Singletary*, 63 F.3d 999, 1020 (11th Cir. 1995) (upholding a death sentence); *Nave v. Delo*, 62 F.3d 1024, 1037 (8th Cir. 1995); *Lema v. United States*, 987 F.2d 48, 51 (1st Cir. 1993). The Seventh Circuit recently has shown some confusion about the prejudice standard, *Paters v. United States*, 159 F.3d 1043, 1049 (7th Cir. 1998) (Rovner, J., concurring), and has held that *Strickland* "usually" requires a preponderance of the evidence, *Rosenwald v. United States*, 898 F.2d 585, 587 (7th Cir. 1990).

25. *Montoya v. Johnson*, 226 F.3d 399, 408 (5th Cir. Sept. 14, 2000), *cert. denied*, 121 S. Ct. 2220 (2001); *Clark v. Johnson*, 227 F.3d 273, 284 (5th Cir. Sept. 12, 2000) ("The defendant bears the burden of showing by a preponderance of evidence that he was deprived of the right of effective counsel."), *cert. denied*, 121 S. Ct. 1129 (2001); *Obayanju v. United States*, 120 F. Supp. 2d 546, 548 (D. Md. Oct. 30, 2000). Full dates are provided for some cases throughout these notes to signify whether the decisions were handed down after *Williams v. Taylor*.

26. *Compare* *Cody v. United States*, 249 F.3d 47, 52 (1st Cir. 2001) ("Cody must prove by a preponderance of the evidence that his counsel unreasonably erred in permitting him to plead guilty, and that prejudice resulted."), *with* *González-Soberal v. United States*, 244 F.3d 273, 277 (1st Cir. 2001) (citing the passage in *Strickland* that rejected the preponderance standard).

27. The Seventh Circuit generally fails to clarify the *Strickland* prejudice standard. *But see* *Reeves v. United States*, 255 F.3d 389, 393 (7th Cir. 2001) (citing *Williams* for its rejection of the preponderance standard, but rejecting the petitioner's ineffectiveness claim).

prejudice.<sup>28</sup> The Tenth Circuit has clarified this once,<sup>29</sup> and the Eleventh just twice.<sup>30</sup> The Second Circuit,<sup>31</sup> the Fourth Circuit,<sup>32</sup> and the Sixth Circuit<sup>33</sup> have quoted the passage from *Williams* about the proper prejudice standard, but these circuits generally also fail to clarify the *Strickland* standard. A survey of state courts reveals several dozen cases requiring preponderance,<sup>34</sup> with Texas<sup>35</sup> and Iowa<sup>36</sup> courts as the worst offenders.

## II

This evidence suggests a double crisis in criminal defense: a crisis of ineffective assistance of counsel, compounded by a crisis of ineffective judging. This record of judicial error demonstrates that Justice O'Connor's attempt at clarification in *Williams v. Taylor* was not sufficient. The Supreme Court and the lower federal courts must vigilantly review courts' application of *Strickland*, in search of these all-too-frequent errors and ambiguities. In addition to this renewed commitment to policing against ineffectiveness, either the Court or Congress should impose additional protections of the fundamental Sixth Amendment right to counsel. In *Miranda v. Arizona*,<sup>37</sup> and again in *Dickerson v. United States*,<sup>38</sup> the Court recognized that it can create prophylactic rules that are constitutionally

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28. My database search for these five circuits covered at least 160 ineffective assistance cases. These failures provoked a lengthy dissent by Eighth Circuit Judge Donald E. O'Brien. *Hanes v. Dormire*, 240 F.3d 694, 703 (8th Cir. 2001) (O'Brien, J., dissenting).

29. *Romano v. Gibson*, 239 F.3d 1156, 1180-81 (10th Cir. 2001).

30. *Meeks v. Moore*, 216 F.3d 951, 960 (11th Cir. June 27, 2000); *Mincey v. Head*, 206 F.3d 1106, 1143 (11th Cir. Mar. 16, 2000).

31. *Mask v. McGinnis*, 233 F.3d 132, 140 (2d Cir. Nov. 15, 2000); *Francis S. v. Stone*, 221 F.3d 100, 109 (2d Cir. Aug. 9, 2000).

32. *Rose v. Lee*, 252 F.3d 676, 689 (4th Cir. 2001).

33. *Doan v. Brigano*, 237 F.3d 722, 740 n.2 (6th Cir. 2001) (Suhreheinrich, J., concurring).

34. *E.g.*, *Gordon v. State*, No. CR 99-482, 2001 Ark. LEXIS 213, at \*3-4 (Mar. 29, 2001); *In re Resendiz*, 25 Cal. 4th 230 (2001); *Short v. State*, 13 P.3d 1253, 1255 (Idaho Ct. App. Oct. 4, 2000); *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001); *State v. Hess*, 622 N.W.2d 891, 902 (Neb. 2001).

35. *E.g.*, *Mehmood v. State*, No. 14-00-00115-CR, 2001 Tex. App. LEXIS 4095, at \*4 (June 21, 2001); *Salas v. State*, No. 04-98-00895-CR, 2001 Tex. App. LEXIS 3536, at \*3 (May 31, 2001); *Washington v. State*, No. 04-99-00463-CR, 2001 Tex. App. LEXIS 2683, at \*7 (Apr. 25, 2001); *Bryant v. State*, No. 14-00-00508-CR, 2001 Tex. App. LEXIS 1759, at \*4-5 (Mar. 15, 2001). Texas courts repeatedly hold that "[t]he *Strickland* test requires [that] a defendant demonstrate by a preponderance of the evidence: (1) defense counsel's performance was deficient; and (2) the deficient performance prejudiced the defendant's case to such a degree the defendant was deprived of a fair trial." *Salas*, 2001 Tex. App. LEXIS 3536, at \*3.

36. *E.g.*, *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001); *State v. Ramirez*, 616 N.W.2d 587, 593 (Iowa Sept. 7, 2000); *State v. Oetken*, 613 N.W.2d 679 (Iowa July 6, 2000); *State v. Lambert*, 612 N.W.2d 810 (Iowa July 6, 2000).

37. 384 U.S. 436 (1966).

38. 530 U.S. 428 (2000).

necessary for “safeguard[ing] a fundamental trial right,”<sup>39</sup> and as the Court noted in *Miranda*, Congress can always increase the protections of those rights.<sup>40</sup> The crisis of ineffective counsel and the courts’ failure to protect Sixth Amendment rights demand prophylactic measures. Focusing on *Strickland*’s prejudice prong, I offer two proposals for all ineffectiveness cases, and three for death penalty cases in particular.

First, the Supreme Court should require all courts to state explicitly that they are reviewing ineffective assistance claims de novo. This rule would improve compliance with *Strickland*, prevent tangled webs of heightened standards such as those seen in *Coleman*, and simplify the appeals process.

Second, courts should have to state explicitly that the standard for prejudice is below preponderance. Currently, the failure to explain the term “reasonable probability” too often does a great disservice to petitioners, because the term itself is misleading. Law dictionaries and lay dictionaries associate “probability” with “more likely than not” and “preponderance,” often suggesting an even higher burden.<sup>41</sup> In other contexts, courts around the country have interpreted “probability” as “more likely than not” and as “a preponderance.”<sup>42</sup> Thus, “probability” was a poor word choice in *Strickland*. If a court invokes *Strickland*’s reasonable probability standard without explaining that this burden is less than “preponderance” or “more likely than not,” the presumption should be that such a court is applying the standard incorrectly. Preferably, the Supreme Court or Congress could change the phrasing entirely, because the word “probability” is so confusing. In terms of crude percentages as a measure of proof, the Supreme Court in *Strickland* was roughly trying to convey some percentage between fifty-one percent (preponderance) and some very small percentage, say, one percent (reasonable doubt). I would suggest that “reasonable

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39. *Id.* at 440 n.5 (citing *Winthrow v. Williams*, 507 U.S. 680, 691 (1993), in ruling that *Miranda*’s prophylactic rule was a constitutionally based protection of Fifth Amendment rights not subject to legislative repeal).

40. *Miranda*, 384 U.S. at 467, 490.

41. *Black’s Law Dictionary* defines “probable” as “[h]aving the appearance of truth; having the character of probability; appearing to be founded in reason or experience. *Having more evidence for than against*; supported by evidence which inclines the mind to believe, but leaves some room for doubt; *likely*.” BLACK’S LAW DICTIONARY 1201 (6th ed. 1990) (emphasis added). It defines “probability” as “[l]ikelihood; appearance of reality or truth; reasonable ground of presumption[;] a condition or state created when there is more evidence in favor . . . of a given proposition than there is against it.” *Id.* Lay dictionaries define the words using terms such as “likelihood,” “more likely than not,” and “supported generally but not conclusively by the evidence.” RANDOM HOUSE COLLEGE DICTIONARY 1055 (4th ed. 1984) (defining “probable”); ROGET’S INTERNATIONAL THESAURUS 838 (4th ed. 1988) (listing synonyms for “probability”).

42. *E.g.*, *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir. 1993); *Kivikovski v. Smart Prof’l Photocopying Corp.*, No. 00-524-B, 2001 U.S. Dist. LEXIS 2017, at \*5 n.4 (D.N.H. Feb. 20, 2001); *Penn v. Wal-Mart Stores, Inc.*, 116 F. Supp. 2d 557, 564-65 (D.N.J. 2000); *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1226 (D. Colo. 1998); *Struckman v. Burns*, 534 A.2d 888, 895 (Conn. 1987); *Card v. State*, 747 A.2d 32, 35 (Conn. App. Ct. 2000); *Cohen v. Yale-New Haven Hosp.*, No. 365,908, 2000 Conn. Super. LEXIS 2304 (Aug. 31, 2000); *Jane Doe Two v. Zedek*, 587 N.W.2d 885, 893 (Neb. 1999).

possibility” conjures this rough idea of, say, a twenty-five percent chance much better than “reasonable probability.”

While courts should guard against incompetent defense counsel in all cases, they should be most vigilant in reviewing death sentences. In *Strickland*, Justice O’Connor wrote that, “[f]or purposes of describing counsel’s duties,” capital sentencing “need not be distinguished from an ordinary trial.”<sup>43</sup> Justice Marshall dissented, arguing that, because “death is qualitatively different” in its finality, its severity, and the need for reliability, the reasonable probability standard should be rejected.<sup>44</sup> Justice Marshall’s dissent should be revisited, and Justice O’Connor has recently indicated that she is open to these concerns.<sup>45</sup>

In light of the extensive record of lower courts’ errors even in death penalty cases, a reasonable doubt prejudice standard would send a powerful message that the Supreme Court will not tolerate incompetent counsel when a defendant’s life is at stake. In addition, the Court should adopt a per se rule on counsel’s investigation and presentation of mitigating evidence. The Court has recognized in two major death penalty precedents, *Lockett v. Ohio*<sup>46</sup> and *Eddings v. Oklahoma*,<sup>47</sup> that defendants are entitled to a presentation of mitigating evidence. In his *Strickland* concurrence, Justice Brennan synthesized this right with the right to counsel, arguing that defendants have a right to counsel that will investigate and present mitigating evidence.<sup>48</sup> It is now time to create a per se rule to enforce this duty more clearly. According to this bright-line rule, once the petitioner establishes the existence of mitigating evidence of some weight (even low weight), and establishes that counsel failed to investigate reasonably, then the petitioner will have established a claim of ineffective assistance in the penalty phase, and will be entitled to a new sentencing hearing.

Finally, jurisdictions with the worst capital defense systems should be held to a higher standard until they improve. The Innocence Protection Act, which Congress is now debating, would create a National Commission on Capital Representation that would evaluate the capital defender system in

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

44. *Id.* at 715 (Marshall, J., dissenting) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). Justice Marshall suggested that the standard should be stated as “a significant chance that the outcome would have been different.” *Id.* at 717. However, this formulation is still too ambiguous, because significance can mean even more than preponderance.

45. In a speech expressing many concerns about the country’s death penalty system, she commented, “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.” *Justice O’Connor on Executions*, N.Y. TIMES, July 5, 2001, at A16.

46. 438 U.S. 586 (1978).

47. 455 U.S. 104 (1982).

48. *Strickland*, 466 U.S. at 706 (Brennan, J., concurring); see also Comment, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1549 (1983).

each jurisdiction.<sup>49</sup> In states that the Commission deems unacceptably deficient in providing capital defense, courts should require proof beyond a reasonable doubt that there was no prejudice in the death penalty phase. Alternatively, the prejudice requirement could be suspended entirely for death penalty review in those states, so that a mere finding of deficiency would suffice for a new sentencing.<sup>50</sup> There is precedent for courts using even more drastic procedural changes in response to gross inadequacies, such as shifting the burden to the state to prove that counsel was not deficient, in order to encourage improved public defender systems.<sup>51</sup>

One might argue that these reforms would create a problem for the administration of justice. However, justice demands some inconvenience, especially when a death sentence is at stake. Furthermore, per se rules improve judicial economy and clarity of review; in contrast, courts currently must consider the case in its entirety. One might also offer a separation of powers argument against Congress's intervention into judicial procedure, but this proposal is far less of an intervention than the Federal Rules of Civil Procedure and the Federal Rules of Evidence, or the harsh habeas reforms in the Anti-Terrorism and Effective Death Penalty Act<sup>52</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act.<sup>53</sup> If Congress can intervene to restrict defendants' rights, it can intervene to protect them, too. A more potent counterargument is that if some courts are already misapplying or incompletely citing standards, these doctrinal reforms are unlikely to correct the problem. These changes, however, will no longer allow judges to hide behind procedural veils, deferring to lower court opinions and erecting impossible burdens of proof—they will have to confront the question of life and death more directly. If these judges uphold death sentences, at least they will be applying a standard more clearly and consistently, without the moral crutch of deferential review. And perhaps these judges, every once in a while, will enforce the right to counsel more than nominally.

—Jed Handelsman Shugerman

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49. Innocence Protection Act, S. 486, 107th Cong. §§ 201-203 (2001).

50. Such a plan would balance federalism and the enforcement of the Sixth Amendment, consistent with *Miranda*'s encouragement for states to create their own mechanisms for protecting Fifth Amendment rights. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998). Similarly, states should be encouraged to create their own institutions and mechanisms to improve the quality of defense, with Congress and the federal courts playing a supervisory role, and intervening only in extreme cases.

51. *State v. Peart*, 621 So. 2d 780 (La. 1993); see also *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984) (“[S]o long as the County of Mohave fails to [improve its defense counsel system], there will be an inference that the adequacy of representation is adversely affected by the system.”); *State v. Lynch*, 796 P.2d 1150, 1173 (Okla. 1990) (proposing another solution).

52. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

53. Pub. L. No. 104-208, div. C, 110 Stat. 3009 (1996) (codified in scattered sections of 8 and 18 U.S.C.).