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Ineffective Assistance of Counsel in DNA Cases: A Re-Appraisal of the Effectiveness of Strickland v. Washington Judges

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INEFFECTIVE ASSISTANCE OF COUNSEL IN DNA CASES: A RE-APPRAISAL OF THE EFFECTIVENESS OF *STRICKLAND V. WASHINGTON* JUDGES

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The advent of forensic DNA evidence has made possible the prosecution of many crimes that would otherwise be un-prosecutable or that would have been weak cases, if prosecuted. At the same time, forensic DNA technology has raised very substantial concerns about the reliability of evidence previously viewed as the gold standard in proof. Wrongful convictions by the Innocence Project and others have established that eyewitness misidentifications, false confessions, bad forensics and mistaken guilty pleas occur. The much lesser known but still very troubling concern is with the performance of defense counsel in cases in which the prosecution has forensic DNA evidence. Anecdotal evidence from wrongful convictions suggest that at least some lawyers are handling cases with DNA evidence or the potential for DNA evidence so poorly that wrongful convictions are occurring.

This Article examines the intersection of sophisticated forensic DNA technology and the hands-off Strickland *standard captured by an equally sophisticated decisional architecture. It collects of several layers of empirical evidence: judicial performance in over 300 ineffective assistance of counsel (IAC) opinions; DNA exonerations in cases in which DNA was used or DNA testing was denied and DNA cases in which a defendant raised an IAC claim, lost and was later exonerated. The Article also tracks almost 50 cases in which the prosecution presented DNA cases which resulted in either a complete dismissal, an acquittal at trial or a very favorable plea offer.*

The conclusion from the varied empirical evidence: judges are very often handling DNA IAC claims poorly. Strickland*'s decisional architecture is failing. Judges are over-relying on deference and presumption. They never assess what prevailing professional norms are for handling DNA cases. Whether through inattentiveness or*

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scientific illiteracy, they are creating an environment in which Strickland*'s command to ferret out unjust results is subverted. The Article concludes by offering four recommendations for improving that poor performance and for a more fundamental inquiry into the effectiveness of* Strickland *itself.*

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INTRODUCTION

In 1998 in Houston, Texas, the police arrested 16-year-old Josiah Sutton for the sexual assault of a victim.[1] They were investigating the sexual assault of the victim at gun point by two men in the back of a car.[2] A few days after the assault, the victim had identified Mr. Sutton and another teenager as the perpetrators of the assault as she was driving in her neighborhood.[3]

Upon arrest, Mr. Sutton agreed to provide his saliva and blood for forensic testing. The DNA testing included Mr. Sutton as a suspect. The testing excluded his friend in spite of the victim having identified him.[4]

At Mr. Sutton's trial, the jury heard evidence that semen from the backseat of the car in which the assault occurred was an "exact" match with Mr. Sutton and another unidentified male as well as the victim.[5] According to the testimony from the Harris County crime laboratory, the "exact" match meant that only 1 in 694,000 could have deposited the semen there.[6] The jury convicted Mr. Sutton of aggravated kidnapping and sexual assault, and he was sentenced to 25 years in prison.[7]

In prison, Mr. Sutton began to learn about forensic DNA evidence.[8] He sought independent DNA testing and filed a motion for a new trial based on ineffective assistance of counsel.[9] At an evidentiary hearing, Mr. Sutton's trial counsel said that he did not obtain independent DNA testing because, "(1) he informed appellant's family he would need more money for the analysis to be performed but they failed to pay it; and (2) there were no unadulterated samples left for independent analysis."[10] Two Sutton family members contradicted defense counsel's testimony saying that his trial lawyer took the money

1. Ken Otterbourg, *Josiah Sutton*, NAT'L REGISTRY EXONERATIONS (AUG. 6, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3672 [https://perma.cc/SAG9-WYCK].

2. *Id.*

3. *Josiah Sutton*, INNOCENCE PROJECT, https://innocenceproject.org/cases/josiah-sutton/ [https://perma.cc/56CP-YQUF].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Josiah Sutton*, CHRON, https://www.chron.com/exonerees/stories/josiah-sutton/ [https://perma.cc/Q8XK-43AH].

8. *Josiah Sutton*, INNOCENCE PROJECT, *supra* note 3.

9. *Id.*; Sutton v. State, No. 14-99-00951-CR, 2001 WL 40349, at *1 (Tex. App. Jan. 18, 2001).

10. *Sutton*, 2001 WL 40349, at *1.

and never told the family they needed to pay more.[11] In addition, a crime lab technician testified that an unadulterated biological sample for DNA testing did still exist.[12] The trial court denied Mr. Sutton's motion for a new trial, finding that defense counsel had not been constitutionally ineffective.[13]

On appeal, in applying the *Strickland v. Washington*[14] standard for resolving ineffectiveness claims,[15] the Texas appellate court deferred to the trial court's decision.[16] It found that (1) counsel's representation was not deficient; and (2) even if it was, Mr. Sutton was not prejudiced.[17] It noted:

> Appellant's counsel on appeal asserts the "independent DNA analysis in this case is very important to the entire case and the only viable defense available to defendant." But in arguing that the absence of independent DNA analysis prejudiced appellant's case under *Strickland*, appellate counsel does not produce any evidence of independent DNA analysis that would vindicate appellant or raise questions about his innocence. Nor does counsel explain why there was any impediment to obtaining such an analysis before the hearing on the motion for new trial. Likewise the State's DNA evidence which implicated appellant and led to the dismissal of charges against others accused, is not seriously challenged. In the absence of some showing from the record a negative effect upon the appellant, the second prong of *Strickland* was not met.[18]

In 2002, a state audit of the Harris County laboratory concluded that "DNA technicians there misinterpreted data, were poorly

11. *Id.*
12. *Id.*
13. *Id.*
14. 466 U.S. 668 (1984).
15. 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. *Id.* at 687.
16. *Sutton*, 2001 WL 40349, at *1.
17. *Id.* at *2.
18. *Id.*

trained[,] and kept shoddy records."[19] Shortly after the audit's release, the DNA laboratory was shut down for a time.[20]

Among those samples examined in the audit was that of Josiah Sutton. The audit found that the population frequency estimate for the crime scene sample was 1 in 8 among Black people, rather than the 1 in 694,000 provided for the trial. More dramatically, the audit found that Mr. Sutton's profile was incorrectly identified as matching the crime scene sample. In fact, Mr. Sutton was excluded as a possible contributor. He was exonerated after serving five years in prison.[21]

In 2006, the police arrested Donnie Lamon Young.[22] His DNA profile matched that of the crime scene sample.[23] The victim was shown a live line-up that included Mr. Young. She was not able to identify him more than seven years after the sexual assault.[24] Nonetheless, Mr. Young confessed to the sexual assault and pled guilty in 2007.[25]

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The Josiah Sutton case exemplifies many concerns with the criminal justice system. It highlights the exonerations produced by many organizations like the Innocence Project.[26] It reveals the stark reality that types of evidence previously thought of as gold standards of proof, confessions and eyewitness identification, were not as perfectly reliable as traditionally believed.

It also highlights the power and pitfalls of forensic DNA evidence. The advent of forensic DNA evidence has made possible the prosecution of many crimes that would otherwise be un-prosecutable or that would have been weak cases, if prosecuted.[27] The DNA

19. Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Testing in Houston Police Crime Lab*, N.Y. TIMES (Aug. 5, 2004), https://www.nytimes.com/2004/08/05/us/new-doubt-cast-on-testing-in-houston-police-crime-lab.html [https://perma.cc/J8X9-CTLF].

20. *Id.*

21. *Id.*

22. Matthew Shaer, *The False Promise of DNA Testing*, THE ATLANTIC (June 2016), https://www.theatlantic.com/magazine/archive/2016/06/a-reasonable-doubt/480747/ [https://perma.cc/M9LT-ZN2U].

23. *Id.*

24. Roma Khanna & Mike Glenn, *HPD Makes Arrest in Iconic DNA Case*, HOUS. CHRON (June 22, 2006), https://www.chron.com/news/houston-texas/article/HPD-makes-arrest-in-iconic-DNA-case-1581308.php [https://perma.cc/9V4B-VAT3].

25. Shaer, *supra* note 22.

26. The investigation into the Sutton case was led by Dr. William Thompson, a lawyer and professor at University of California-Irvine. Otterbourg, *supra* note 1.

27. Off. of Att'y Gen., *Advancing Justice Through DNA Technology: Using DNA to Solve Crimes*, U.S. DEPT. OF JUST., https://www.justice.gov/archives/ag/advancing-justice-through-dna-technology-using-dna-solve-crimes [https://perma.cc/WL4N-E7X9] (updated Mar. 7, 2021).

evidence in the Sutton case significantly bolstered the strength of a case that suffered from a shaky eyewitness testimony by the victim. The victim's original description to the police described a man who was "short and skinny" while Sutton was 6 feet, 2 inches tall and 205 pounds and the captain of his high school football team.[28] Yet, the lab analysis of the crime scene sample revealed a mixture of three people, a not uncommon circumstance in forensic DNA analysis and one which continues to challenge DNA analysts across the country.[29] It is the misinterpretation of this mixture that led to the faulty identification of an innocent man.[30]

These concerns about the reliability of eyewitness identifications and confessions, as well as the imperfections of forensic DNA interpretations are now relatively well known, if not well addressed. The much lesser known but still very troubling concern is with the performance of defense counsel in cases in which the prosecution has forensic DNA evidence. In Mr. Sutton's case, his lawyer did not, in the end, hire an expert or even informally consult with one to explain to him DNA science or the problems with mixtures.[31] There was no evidence that his lawyer had training, knowledge, or experience handling DNA cases. The lawyer's cross-examination was limited to lab protocols and chain-of-custody issues.[32] And, neither the trial court nor the appellate court found that extremely limited effort to constitute ineffective assistance of counsel.

Therein lies the focus of this Article. Most lawyers do not go to law school or become lawyers because they are good at science. Most judges do not become judges because they are good at science.[33] The suspicion is that the *Strickland* standard does not work as well, if at all, when the lawyer handling a case is not technically familiar with forensic DNA evidence and the judge evaluating whether their performance is deficient and whether that deficiency made a difference has the same lack of familiarity, let alone understanding.

28. Shaer, *supra* note 22.

29. The *DNA for the Defense Bar* publication by the National Institute of Justice identifies cases with a mixture of contributors as of a type "in which the need for expert assistance may be particularly strong . . . ." NAT'L INST. OF JUST., U.S. DEP'T OF JUST., DNA FOR THE DEFENSE BAR 19 (2012), https://www.ncjrs.gov/pdffiles1/nij/237975.pdf [https://perma.cc/2QQN-PYWH].

30. Shaer, *supra* note 22.

31. Otterbourg, *supra* note 1.

32. *Id.*

33. The notable exception, of course, are patent lawyers and judges on the United States Court of Appeals for the Federal Circuit.

This Article assesses this concern in the most empirical way possible and offers recommendations about how courts can improve the likelihood that counsel's conduct in cases with forensic DNA evidence does not "so undermine the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result,"[34] as it so painfully did in Mr. Sutton's case.

I conclude that courts can apply the Strickland standard correctly in ineffectiveness cases involving DNA only if (1) they have a basic and current understanding of what constitutes an "objective standard of reasonableness" against which to measure a lawyer's conduct in a DNA case, which is the very understanding that a *Strickland* "deficiency" analysis requires; and (2) they reduce their over-reliance on the deference and the presumptions of effectiveness that incorrectly allow them to avoid the objective-standard-of-reasonableness analysis. Finally, I propose a simple set of objective standards upon which judges can rely. The overall effect of this effort is to better reconcile and improve the intersection of a complex and potent scientific methodology with a judge's task of applying a decades-old legal standard, understanding that the judge may know little to nothing about the complex science.

Part I outlines the specific requirements of a *Strickland v. Washington* analysis. It includes the use of an objective standard-of-reasonableness analysis defined by reference to standards and prevailing professional norms, the strong presumption of effectiveness, and the circumstances in which a decision not to use a line of defense constitutes ineffectiveness. Part II describes a typical DNA case, some of the mechanisms for deconstructing the summary report the prosecution most often provides, and some of the possible issues and defenses in such a case. Part III examines available empirical evidence about ineffectiveness in DNA cases, including the lessons from DNA exonerations, DNA exonerations in which the exoneree initially raised an ineffectiveness claim and lost, and the fate of DNA ineffectiveness claims in over 300 appellate cases. Part IV analyzes the empirical evidence of mistakes and success in the trial of DNA cases, including over 45 DNA cases in which trial counsel obtained acquittals or dismissals. Part V proposes simple, minimal standards for lawyer conduct that meets an objective standard of reasonableness in a DNA case under *Strickland* in accord with prevailing professional norms.

34. Strickland v. Washington, 466 U.S. 668, 686 (1984).

I. *STRICKLAND V. WASHINGTON*

The jumping-off point for any assessment of the effectiveness of ineffective assistance of counsel (IAC) judges in DNA cases is Strickland v. Washington. Strickland established the two-part standard for IAC judges to use. It also articulated the aim of the standard: (1) the defendant must show that his lawyer's performance was deficient; and (2) the defendant must show the counsel's deficient performance prejudiced the defense.[35] The aim of the standard was clear: "[t]he 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."[36]

In *Strickland*'s companion case, *United States v. Cronic*[37], the Court captured much of the essence of how it viewed the importance of counsel under the Sixth Amendment:

> When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."[38]

At first glance, the *Strickland* standard seems to be a way of calling counsel to task for a particularly weak performance at trial. It evaluates counsel's conduct and potentially renders a particularly harsh judgment about that conduct and, implicitly, counsel's quality. A finding of ineffectiveness says that the lawyer has not even met a minimal standard for performance at trial and that the unarmed lawyer has sacrificed their client to the gladiator. It seems, then, to operate as a means of policing defense counsel and providing an incentive for higher quality performance at trial. It does not.[39] The *Strickland* Court was clear

35. *Id.* at 687.

36. *Id.* at 686.

37. 446 U.S. 648 (1984).

38. *Id.* at 656–57 (quoting United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), *cert. denied sub nom.* Sielaff v. Williams, 423 U.S. 876 (1975)).

39. At best, however, the test operates as an indirect incentive in that no direct consequences to counsel ensue from a finding of ineffectiveness. A finding of ineffectiveness does not

that the ineffectiveness standard exists only to protect the defendant, not to call the lawyer directly to task or to set a number of standards that detail the specifics of particular counsel conduct. The focus is on ensuring the defendant's right to a fair trial, not on disciplining their criminal defense lawyer.

Several features of *Strickland* and subsequent cases, as well as the federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) statute, embed a set of substantive and procedural mechanisms with which judges screen ineffectiveness claims. The Court's effort to articulate a way to measure counsel's deficiencies, its resistance to the adoption of rigid guidelines as measuring tools, the extent of its deference to attorney decision-making, the double deference embedded in federal habeas review of state ineffective assistance of counsel (IAC) claims, and the general unavailability of counsel for post-conviction IAC claims combine to erect a decisional architecture that guides IAC judges. But, it is also a decisional architecture that is so notably deferential that it may cause judges in DNA cases to miss conduct by counsel that produces an unjust result.

A. How to Measure Counsel's Deficiencies

Historically, Strickland resolved an overlap and/or a conflict in the standards that lower courts had been using in IAC cases. Some courts had favored reliance on specific guidelines that some courts had been using, in particular the ABA's Standards for the Defense Function.[40] Most courts did not follow that approach.[41] Rather they relied on a totality-of-circumstances model that they believed offered more flexibility to account for the facts in each case.[42]

automatically result in a finding of a violation of the rules of professional conduct. It also does not automatically result in a finding of legal malpractice. The standards for each of those findings are quite different, though each constitutes the direct sanctioning of an under-performing lawyer.

40. LAFAVE ET AL., CRIMINAL PROCEDURE § 11.10(a) (4th ed. 2004). In fact, the lower court in the *Strickland* case had used this approach to some extent. Washington v. Strickland, 693 F.2d 1243, 1254 (5th Cir. 1982), *rev'd*, 466 U.S. 668 (1984).

41. *See* LAFAVE ET AL., *supra* note 40, § 11.10(a); *see, e.g.*, Baldwin v. Maggio, 704 F.2d 1325, 1329 (5th Cir. 1983) ("The determination of whether a counsel rendered reasonably effective assistance turns in each case on the totality of facts in the entire record. Thus, we must consider a counsel's performance in light of 'the number, nature, and seriousness of the charges . . . the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses.'" (omission in original) (citations omitted)).

42. Some courts used a "farce and mockery" standard and others used a "reasonably competent attorney" one. While each of these standards did offer more case-specific flexibility, the vagueness of each was criticized as allowing too much subjectivity. LAFAVE ET AL., *supra* note 40,

Strickland adopted a different standard: objective reasonableness in light of the prevailing professional norms in order to measure counsel's conduct.[43] The Court focused on whether the result was just, not on the exact details of what was adequate or inadequate counsel conduct.[44] The Court identified in a general way the most basic areas of counsel performance, including duty of loyalty and a duty to avoid conflicts of interest.[45] It said that counsel functioned as assistant to the defendant and, in that role, had an "overarching duty to advocate the defendant's cause . . . . Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[46]

B. Resistance to the Adoption of Specific Guidelines

"Reasonableness under prevailing norms" was as far as the Court would go in providing any real grounding for what actually constituted ineffectiveness.[47] The *Strickland* Court was adamant about not adopting specific standards. It explicitly took the position that "[m]ore specific guidelines [than the two-part test were in]appropriate."[48] It did not eschew all attention to guidelines, saying that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[49] But, it did not see its task as laying out standards of performance for counsel. Rather, that task was the job of the legal profession to maintain "standards sufficient to justify the law's presumption that counsel will fulfil the role in the adversary process that the [Sixth] Amendment envisions."[50] This generalized deference to the standards of the legal profession was made more difficult to apply in actual cases by an accompanying, very specific refusal to formally adopt specific standards of the legal profession, like the ABA Standards for Criminal Justice, The Defense, but no more.[51] For the Court, rigid standards, obligations, or guidelines distracted from the

§ 11.10(a), at 635; James A. Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443, 453–54 (1977).

43. Strickland v. Washington, 466 U.S. 668, 688–90 (1984).
44. *Id.* at 689.
45. *Id.* at 688–90.
46. *Id.* at 688 (citation omitted).
47. *Id.* at 689.
48. *Id.* at 688.
49. *Id.*
50. *Id.*
51. *Id.* at 688–89.

goal of protecting a criminal defendant's right to a fair trial and just result under the Sixth Amendment.

Only occasionally post-*Strickland* has the Court explicitly looked to specific prevailing norms. For example, the *Williams-Wiggins-Rompilla* trilogy is a series of cases in the early 2000s in which the Court made significant reference to the ABA standards regarding the investigation and presentation of mitigating evidence in the penalty phase of a capital prosecution.[52] More notably, in *Padilla v. Kentucky*,[53] the Court confronted a defendant whose counsel failed to inform him of the collateral immigration consequences of a conviction prior to his guilty plea.[54] The Court relied upon "[t]he weight of prevailing professional norms" to make its finding that counsel "must advise her client regarding the risk of deportation."[55] The Court relied on nine different sources in discerning what the prevailing norms were, including the ABA standards, the National Legal Aid and Defender Association Performances Guidelines, a law review article, a Department of Justice, Office of Justice Compendium, etc.[56] Nonetheless, in all of these cases, the Court always noted such standards were only guides and not inexorable commands.[57]

The Supreme Court's willingness to use specific guidelines on occasion does not mean that lower courts will do so. Particularly in

52. Williams v. Taylor, 529 U.S. 362, 396 (2000); Wiggins v. Smith, 539 U.S. 510, 522 (2003); Rompilla v. Beard, 545 U.S. 374, 387 (2005).

53. 559 U.S. 356 (2010).

54. *Id.* at 367.

55. *Id.*

56. *Id.* at 367–68 ("National Legal Aid and Defender Assn., Performance Guidelines for Criminal Defense Representation § 6.2 (1995); G. Herman, Plea Bargaining § 3.03, pp. 20–21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 713–718 (2002); A. Campbell, Law of Sentencing § 13:23, pp. 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8–H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4–5.1(a), p. 197 (3d ed. 1993); ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(f), p. 116 (3d ed. 1999). '[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . .' Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14 (footnotes omitted) (citing, *inter alia,* National Legal Aid and Defender Assn., Performance Guidelines for Criminal Prosecution, §§ 6.2–6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants § 1.3 (3d ed. 2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (West 2009).").

57. Strickland v. Washington, 466 U.S. 668, 688 (1984); Bobby v. Van Hook, 558 U.S. 4, 17 (2009).

the case of complex forensic evidence like DNA, an IAC judge unversed in the nature of forensic DNA evidence and in the methods necessary for a defense attorney to deconstruct the seemingly overwhelming scientific evidence will need to rely on specific prevailing norms to assess a claim of ineffectiveness. But, any existing prevailing norms or guidelines are only as good as the judge's decision to consult and rely on them. The discretion built into *Strickland*'s approach to guidelines means that that may not always happen. Part III will investigate whether judges actually do so in IAC DNA cases.

C. Deference to Attorney Decision-Making

Strickland says that the Sixth Amendment is not about guaranteeing perfect lawyering.[58] The Court effectively tried to draw a line between mistakes and mistakes that lead to unjust results. Counsel can make strategic and tactical mistakes without being found to be ineffective. As the Court said in *Harrington v. Richter*,[59] "Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities."[60] There, one of the challenges related to whether counsel should have called experts regarding blood evidence.[61] The Court noted that any number of experts might have been valuable as witnesses but counsel was entitled to formulate a reasonable strategy and to balance limited resources.[62] The Court frequently pointed out that competent counsel can try a case any number of ways; that, depending on the case, a number of paths to an acquittal may exist and, even more to the point that "there are countless ways to provide effective assistance in any given case."[63]

58. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (holds that reasonable competence rather than perfect advocacy is all that is required under the Sixth Amendment).

59. 562 U.S. 86 (2011).

60. *Id.* at 110.

61. *Id.* at 108.

62. *Id.* at 107.

63. Strickland v. Washington, 466 U.S. 668, 689 (1984); *see also* Buck v. Davis, 137 S. Ct. 759, 775 (2017) (holding "*Strickland*'s first prong sets a high bar. A defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case. The lawyer has discharged his constitutional responsibility so long as his decisions fall within the 'wide range of professionally competent assistance.' It is only when the lawyer's errors were 'so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment' that *Strickland*'s first prong is satisfied." (citation omitted)).

The Court has also added another overlapping layer of deference best characterized as a no-backseat-driving approach. A reviewing court must avoid the application of 20/20 hindsight, that is, the natural tendency to look back after trial and speculate as to a possible, more successful trial strategy.[64] The court must look at counsel's conduct in the contemporary circumstance in which it was made.[65] It must avoid the kind of post-trial, second-guessing that comes so easily even to the most experienced trial lawyer.[66]

The sum total of these overlapping layers of deference amounts to what the Supreme Court has repeatedly referred to as the strong or heavy presumption of effectiveness that travels with trial counsel in every IAC claim. The Court does not want to intrude on the work of counsel unless an error of great significance has been made. As to rigid rules that would remove such a presumption, the Court has expressed concern that "the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause."[67] And, the Court has even encouraged IAC judges to speculate as to counsel's choices, saying in *Cullen v. Pinholster*[68]: "[t]he Court of Appeals was required not simply to 'give [the] attorneys the benefit of the doubt,' [citation omitted], but to affirmatively entertain the range of possible 'reasons Pinholster's counsel may have had for proceeding as they did.'"[69]

As the court in Yarborough states: "[T]here is a strong presumption that [counsel took certain actions] for tactical reasons rather than through sheer neglect."[70]

D. Double Deference in Federal Habeas Review

A number of procedural factors external to the substance of a *Strickland* claim also make the chances of winning an IAC claim post-trial or on appeal difficult. The confining strictures of federal habeas

64. Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

65. Maryland v. Kulbicki, 577 U.S. 1, 4 (2015).

66. *Richter*, 562 U.S. at 109 (2011) ("After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their responsibility for an unfavorable outcome.").

67. *Strickland*, 466 U.S. at 689.

68. 563 U.S. 170 (2011).

69. *Id.* at 196 (quoting Pinholster v. Ayers, 590 F.3d 651, 692 (9th Cir. 2009) (Kozinski, C.J., dissenting)).

70. Yarborough v. Gentry, 540 U.S. 1, 8 (2003).

corpus review in federal court since the passage of section 2254(d) as part of the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996 and the lack of a right to counsel for post-trial-collateral attacks have very much limited the number of successful IAC claims.

Statistically, the fate of habeas corpus IAC claims in federal courts has been bleak. One study found that 81% of the habeas petitions in capital cases raised IAC claims, and 50.4% of the petitions in non-capital cases raised ineffective assistance claims.[71] Of the 2384 non-capital filings they examined, only seven habeas petitioners were granted relief.[72] Of the 267 capital cases examined between 2000 and 2002, 5% were granted based on an IAC claim; in non-capital cases, the rate was less than 0.4%.[73] Not surprisingly, pro se litigants filed many IAC claims. The Federal Court system reported that, in 2019 in Courts of Appeals nationwide, appeals by pro se litigants constituted 45% of all filings and, of that number, 45% were prisoner petitions.[74] 87% of the prisoner petitions were filed pro se.[75]

The AEDPA is the most significant impediment many habeas corpus petitioners face. Section 2254(d) applies to petitioners seeking habeas relief from a state court conviction.[76] In particular, it imposes a very deferential standard on a federal court's review of a state court's ruling. Its language imposes several requirements for a successful habeas claim: "Clearly established federal law" must exist (as determined by the Supreme Court); the state court decision must be either contrary to that clearly established federal law or an unreasonable application of that law; and the underlying claim must have been adjudicated on the merits in state court.[77]

The Supreme Court has said that *Strickland* and its two-part test are clearly established federal law.[78] The actual challenge for a

71. NANCY J. KING ET AL., EXECUTIVE SUMMARY: HABEAS LITIGATION IN U.S. DISTRICT COURTS 5 (Aug. 2007), https://perma.cc/AU7Z-JBQF.

72. *Id.* at 9.

73. *Id.* at 10–11.

74. *U.S. Courts of Appeals—Judicial Business 2019*, U.S. CTS. (2019), https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2019 [https://perma.cc/TT3H-X4YC]. The court system does not detail how many of those prisoner petitions were habeas corpus petitions but it is likely a large majority.

75. *Id.*

76. 28 U.S.C. § 2254(d) (2018).

77. *Id.*

78. Williams v. Taylor, 529 U.S. 362, 391 (2000) ("It is past question that the rule set forth in *Strickland* qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'").

petitioner is to show that their case meets either the "contrary to" or "unreasonable application standards."[79] Federal courts have recognized that this is a standard that is deferential to the state court's ruling.[80] As to the "contrary to" standard, the state court must have gotten the clearly established law wrong.[81]

As to the "unreasonable application" standard, the complexity is greater, as is the deference. It is not enough that the state court's application of the law to the facts is one with which the reviewing federal court disagrees. It is not enough that the state court's finding of the facts is one with which the reviewing federal court disagrees. It is not enough that the reviewing court views the lower court's application of the law to the facts as "clear error." The court's application of the clearly established law must not only be erroneous, but it must be objectively unreasonable.[82]

What counts as "objectively unreasonable" turns out to be a high standard to meet. The Court in *Harrington v. Richter*[83] was very blunt about the height of the bar under section 2254(d):

> If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings. [citation omitted]. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. . . . As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.[84]

Combined with the *Strickland*'s deference due trial counsel, the deference also due the state court's ruling in an IAC case means that

79. 28 U.S.C. § 2254(d).

80. *Williams*, 529 U.S. at 389.

81. *Id.*

82. *Id.* at 411; *see also* LAFAVE ET AL., *supra* note 40, § 28.6(f), at 1362 ("It is not enough that a state court decision applying federal law was erroneous, 'that application must also be unreasonable.'").

83. 562 U.S. 86 (2011).

84. *Id.* at 102–03.

winning an IAC claim via a federal habeas corpus action is very difficult. The *Harrington* Court made that abundantly clear when it said, "[t]he standards created by Strickland and § 2254(d) are both 'highly deferential,' [citations omitted], and when the two apply in tandem, review is 'doubly' so."[85]

The adjudication-on-the-merits requirement also imposes barriers to review. First, a federal court will not entertain a habeas claim unless the issue has been adjudicated on the merits in state court.[86] If the petitioner is raising the IAC claim for the first time in the federal habeas petition, the court will dismiss the claim.[87] Second, the petitioner must have exhausted all remedies in state court before proceeding to federal court.[88] Third, it is up to the habeas court to decide not only whether the actual arguments or theories supported the state court's decision but also whether arguments or theories existed which "could have supported" the state court's decision.[89] Finally, the federal court may not hold an evidentiary hearing on the petitioner's IAC claim if a petitioner has failed to develop the factual basis for the claim.[90] If the state court has made factual findings relating to the claim, the habeas court shall presume that those findings are correct, subject to the petitioner proving them wrong by clear and convincing evidence.[91]

Success in federal court on an IAC habeas petition then means overcoming a series of significant substantive and procedural hurdles. That is both by Congress's design of the AEDPA and by the Supreme Court's interpretation of the combination of AEDPA and Strickland. Those hurdles seek to balance the federal courts' independent authority to determine what federal law is[92] with a recognition that only a few errors at the state court level are of such a magnitude that habeas corpus functions only as a "'guard against extreme malfunctions in the

85. *Id.* at 105 (quoting Knowles v. Mirzayance, 556 U.S. 111, 123 (2009)).

86. 28 U.S.C. § 2254(d) (2018).

87. *Id.* § 2254(c) (stating "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented").

88. *Id.* § 2254(b)(1)(A).

89. *Richter*, 562 U.S. at 102.

90. 28 U.S.C. § 2254(e)(2). Section 2254(e) does contain some very limited exceptions to this rule.

91. *Id.* § 2254(e)(1).

92. *See* Williams v. Taylor, 529 U.S. 362, 378–79 (2000).

state criminal justice systems,' not a substitute for ordinary error correction through appeal."[93]

The stark reality is that state defendants (the huge majority of criminal defendants in the United States[94]) wishing for success for their IAC claims, must start their claim in state court and, practically speaking, probably have a better chance of success in that court system. Many states have a state habeas corpus process and/or a process that allows for a motion-for-new-trial or other-post-conviction-relief process.[95] Depending on the jurisdiction, the direct-appeal process may allow for an IAC claim to be litigated. As section 2254(c) notes, one must raise an IAC claim in some fashion at the state level and have the court address its merits in what is effectively a prerequisite to a federal habeas petition.[96]

E. Lack of Access to Counsel

Whether in state or federal court, the availability of counsel is important. The numerous and complex procedural and substantive requirements of establishing a valid IAC claim are likely challenging for most counsel and much more so for a pro se defendant/petitioner. Many prisoner petitioners are, in fact, pro se.[97] In federal court, they do not have a right to counsel for a collateral attack on a federal conviction.[98] And, they do not have a right to counsel for a habeas attack on a state conviction.[99] The same is true in most state court systems.[100] Though some may have counsel by virtue of a non-profit advocacy organization like the National Innocence Project or other organization in its national network, the majority do not have counsel and must navigate the substantive and procedural hurdles described above themselves, without any training.

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93. *Richter*, 562 U.S. at 102–03 (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment).

94. Anisha Singh & Billy Corriher, *State or Federal Court?*, CTR. FOR AM. PROGRESS (Aug. 8, 2016), https://www.americanprogress.org/issues/courts/reports/2016/08/08/142438/fact-sheet-state-or-federal-court/ [https://perma.cc/EZM6-7PFF] (over 90 percent of cases are heard in state courts).

95. *See* 28 U.S.C. § 2254(b)(1)(A).

96. *Id.* § 2254(c).

97. *U.S. Court of Appeals—Judicial Business 2019*, *supra* note 74.

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

99. *Id.*

100. Murray v. Giarratano, 492 U.S. 1, 3–4 (1989).

Conceptually then, *Strickland*, its progeny and the AEDPA create a decisional architecture for judges through substance and procedure that has a good bit of flexibility for judicial discretion in the joints. Its two-part test suggests that guidelines may be of value and shies away from specific standards. Its design is to protect defendants from unjust results, and it strongly presumes that their lawyer acted within the bounds of effectiveness.[101] Short of an evidentiary hearing to the contrary, the deference embedded in the presumption includes the court's ability to speculate whether counsel "could" have had strategic reasons for their conduct.

The goal is to respect the outcomes of a state criminal justice process short of an "extreme malfunction" through an application of layered deference and presumption.[102] This decisional architecture has evolved in response to court decisions—*Strickland* and its progeny—and statutory change—primarily the AEDPA. The impetus for this evolution has been as much about broad deferential process concerns as it has been about ensuring that the outcomes in criminal cases are just or, at least, about reducing the number of unjust outcomes. Respect for the autonomy of a lawyer to try the case the way they decide and respect for the autonomy of a state court to make its own decisions both make sense conceptually.

The deeper question is whether this balancing of conceptual concerns as to IAC claims actually works well in practice. Too much deference and too many procedural hurdles in service to attorney and court autonomy may lead to an entrenched system that results in missing too many unjust outcomes. Yet, too much of a focus on just outcomes in every single case may lead to a system in which attorneys take a defensive posture in trying a case in a way that is too attentive to making mistakes and a court system burdened by endless IAC claims that seem to merit attention.

The remainder of this Article will examine the effectiveness of this decisional architecture as it has been operating with regard to a particular kind of challenging case—IAC claims in cases involving forensic DNA evidence. IAC DNA cases are challenging primarily because of the complexity of the DNA evidence. Such cases involve molecular biology, population genetics, and biostatistics. It involves not easily understood forensic science, and the science is prone to

101. Strickland v. Washington, 466 U.S. 668, 696 (1984).
102. Harrington v. Richter, 562 U.S. 86, 102–03 (2011).

misunderstanding by jurors. Perhaps more concerning, most lawyers and judges do not understand it as, with exceptions, they did not go to law school because they were particularly good at understanding complex science.

These dynamics create a risk that the well-intentioned decisional architecture for assessing IAC claims may well be ill-equipped, at the least, to sort out which are the IAC DNA claims with merit or without merit. To put it perhaps a bit too simply, if a court has no understanding of DNA evidence, they will perhaps be too prone to say some nuanced version of, "well, it's compelling evidence" and defer to the decisions of the trial lawyer who themselves had little understanding of how to approach let alone strategize well as to DNA evidence.

That concern with judicial lack of understanding is exacerbated by that which is very important but unstated in *Strickland*: the misfocus on a search for innocent defendants rather than not-guilty defendants. The search in IAC claims is for assurance that a contest has occurred; that the defense lawyer has engaged enough in attacking the prosecution's case; that the trial was not akin to the sacrifice of an unarmed prisoner to a gladiator. *Strickland*, however, does not say that an IAC court need not worry about the outcome as long as it is evident that the defendant is not innocent. It does not say that for a reason: the goal of the defense lawyer is only to raise at least one reasonable doubt. It is not to prove the client's innocence, which is constitutionally presumed. A court is looking in the wrong place if it is looking for the kind of deficient performance by counsel that would mean an innocent person was convicted. A court must look for the kind of deficient performance by counsel that means they overlooked a possible reasonable doubt. The second is a notably less onerous burden than the first for defense counsel. It also increases the number and types of errors that might constitute ineffectiveness.

Part II turns to a brief introduction of the science behind the opaque report of DNA results defense counsel first receives. Parts III & IV turn to a variety of empirical evidence to take some measure of how well the decisional architecture for IAC claims works when used to evaluate IAC DNA claims. These sections will look at over 450 IAC DNA cases, DNA exonerations, and the success of trial lawyers in challenging DNA before a jury and examples of cases in which a defendant claimed IAC based on how his lawyer handled the DNA evidence; lost the IAC DNA claim and was later exonerated by post-conviction DNA testing.

II. THE TYPICAL DNA CASE

This part describes a measure of the sophistication and complexity of the knowledge and understanding that is necessary to evaluate and potentially litigate a DNA case. DNA evidence is not just another type of forensic evidence like fingerprinting or blood grouping. To appreciate the significance of the empirical evidence in Parts III and IV and the standards described in Part V, it is important to understand the basics of the typical DNA case from the defense perspective.[103]

A defense lawyer most often first becomes aware that they have a DNA case when they receive the first packet of discovery from the prosecution.[104] Commonly, what they will see is a summary report of the DNA testing results. It usually is 1–4 pages and identifies, at a general level, what items were tested, and what known genetic profiles matched the genetic profiles in the crime scene sample of unknown origin. The report also describes what the statistical significance of any match is. It may be in the form of a population frequency estimate, a Combined Probability of Inclusion (CPI), or the product of probabilistic genotyping.[105]

A. The Summary Report

The summary report is the product of a four-step process.[106] In the first stage, the police or lab technicians collect the crime scene sample and, either then or more often later, collect known samples from the alleged victim, if any, and from potential suspect(s) and transport them to the forensic lab.

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103. What follows is neither an exhaustive treatment of the breadth or depth which might pass as a typical case.

104. Throughout this section, I will describe what commonly occurs in DNA cases with the understanding that the procedural and substantive variations in the country's 50+ criminal justice systems are numerous. The focus is on what a defense lawyer does in "deconstructing" a DNA case and reconstructing it into a viable theory of the case accounting for the DNA evidence, assuming a viable theory of the case exists.

105. "Population frequency estimate" captures the chance that someone else in the general population, unrelated to the suspect, has a genetic profile matching that of the crime-scene sample. "Combined Probability of Inclusion" (CPI), has been used often when one cannot distinguish between genetic profiles within a mixture. It tries to capture the probability of someone chosen at random in the population not being excluded as a contributor to the DNA mixture. "Probabilistic genotyping" uses statistical methods and algorithms via relatively new software to try to sort out mixtures.

106. Much of what is generally described in this section comes from my extensive personal experience litigating forensic DNA cases, attending innumerable training sessions, and reading extensive volumes of admissibility hearings and trial transcripts in other lawyers' DNA cases. I have also relied on an NIJ publication entitled *DNA For The Defense Bar*, *supra* note 29.

In stage two, the forensic lab engages in a preliminary analysis to determine what is present in the sample—sperm, skin cells, etc.—and, a bit simply, then transforms the crime scene sample and the known samples into a form by which the genetic profiles generated can be analyzed for comparison to each other.

In stage three, the analyst compares the genetic profile of the crime scene sample to the available known samples, both visually and by computer. During the comparison process, the analyst knows which samples are crime scene samples and which are the known samples and to whom each belongs. The analyst then declares a match, a non-match, or an inconclusive result. The match is best understood as a non-exclusion–the analyst cannot exclude the known sample's origin as being in the pool of people matching the genetic profile of the crime scene sample. If the crime scene sample involves a mixture of more than two people's DNA, then sorting out whose types (alleles) are present at each genetic location becomes more complicated.

In stage four, if they have declared a match, the analyst lends meaning to the significance of the declaration of a match or non-exclusion by developing a Population Frequency Estimate (PFE) that essentially characterizes the chances that the match is a coincidence. If the crime scene sample contains a mixture, the calculation of the PFE becomes more complicated and laboratories may use a CPI or probabilistic genotyping software.

Forensic DNA testing thus is a measuring system, a fancy one based on molecular biology, population genetics, and biostatistics, but nonetheless, a measuring system. An evidentiary sample is turned into a measurable form; the molecular biological ruler is "held up" to the sample and it is measured; and then the measurements are compared and lent meaning. Simple and complicated.

B. Deconstructing the Summary Report

A defense lawyer in a DNA case, in the first instance, sees only the final product—the summary report, usually about 1–4 pages long. It is their job to deconstruct the report to see how reliable the methodology used was; how reliably the analysis was done; how accurate the results were; and strategically, what is the best theory of the case that embraces that investigation.

On its face, the report is opaque as to possible challenges to the evidence. It may suggest that the crime scene sample involved a mixture of more than one or two individuals' DNA but will offer no

description as to how that mixture was interpreted or quantified. Other than that, the summary report reveals little of value to a lawyer seeking to mount a defense to seemingly overwhelming forensic evidence.

Broadly, a defense lawyer must engage in a two-step process to develop an effective theory of the case: (1) deconstructing the summary report in order to understand the DNA evidence to make informed strategic decisions about how to proceed in the case; and (2) implementing those decisions to maximize the opportunities presented, if any.

Complete discovery is the foundation for deconstructing a summary report. A lawyer cannot understand the significance of the DNA evidence otherwise.[107] The complete laboratory case file documents everything that occurs in the laboratory from the time the samples arrive until the results are produced and contains a wealth of other important information.[108] An evaluation of the scene-to-laboratory and the in-laboratory information is the only way a defense lawyer can begin to make informed decisions about how to proceed.

For a minimally effective discovery request, a defense lawyer will need to have at least some understanding of the relevant terms if they are requesting discovery and particularly if the discovery request is contested. Therein lies the need to consult, at least in a preliminary fashion, with an expert of some sort. That expert may be another lawyer or a forensic unit in the office with sufficient experience in DNA litigation to read the case files in a way that may bring to the fore possible issues in the scene-to-lab reports and the in-lab reports. Or, the lawyer may hire an expert to do a preliminary review of the files for the same purpose.[109] Or, the lawyer may educate themselves by reading transcripts of admissibility hearings and trails, attending training seminars,[110] by reading texts that specialize in forensic DNA

107. *Id.* at 21–31.

108. *Id.* at 24–30 (describing in detail the information a defense lawyer wants from the prosecution in a discovery request to lay the foundation for analyzing litigation choices).

109. *See, e.g.*, FORENSIC BIOINFORMATICS, http://www.bioforensics.com/ [https://perma.cc/BZ3E-QXFZ] (explaining how the company "reviews cases involving forensic DNA testing . . . [by] employ[ing] an automated analysis system to provide an objective review while making the results easy to understand").

110. *DNA CLE Courses*, NAT'L ASS'N OF CRIM. DEF. LAWS., https://nacdl.inreachce.com/SearchResults?searchType=1&category=fddb39d3-01ac-4689-97e6-d9f57f641f4c&sortBy=recentlyadded [https://perma.cc/5WU8-WNWD] (the National Association of Criminal Defense Lawyers (NACDL) has over 20 CLE training videos regarding forensic DNA evidence in its CLE store).

evidence[111] and talking informally with scientists and experienced DNA lawyers.

Once a lawyer has deconstructed the case files and made an informed, preliminary set of judgement about the possibilities, they will either develop a theory of the case that assumes the technical accuracy of the DNA evidence or a theory of the case that seeks to undermine its technical accuracy. The second approach will likely require the retention of an expert for trial preparation (particularly, cross-examination of the prosecution's experts) and often testimony at trial. It is also possible that even if the lawyer assumes that the DNA evidence is technically accurate after such review, they will still require the retention of an expert, particularly when the approach is a transfer defense.

C. Implementing the Strategy

Retention of an expert enables a lawyer to understand how to: (1) evaluate the DNA case well; (2) decide whether to ask for additional testing; (3) decide whether to mount an admissibility challenge; (4) prepare for cross-examination of the prosecution's expert; and (5) present expert testimony of one's own at trial. Each of these steps is on the table for consideration as counsel evaluates the case, though one may decide not to pursue all of them depending on the specifics of the case.

1. Deciding Whether to Ask for Additional Testing

The decision to ask for additional testing in a case is not simple. It involves assessing whether the facts of the case give rise to a possible reason for such testing and whether any testable sample remains. It involves litigating access to and funds for additional testing. It involves significant and often difficult conversations with one's client about the possible risks of getting additional testing. It involves

111. *See, e.g.*, JOHN M. BUTLER, FUNDAMENTALS OF FORENSIC DNA TYPING (2010); JOHN M. BUTLER, ADVANCED TOPICS IN FORENSIC DNA TYPING: INTERPRETATION (2014); PETER GILL, MISLEADING DNA EVIDENCE: REASONS FOR MISCARRIAGES OF JUSTICE (2014); Jason B. Sheffield, *Winning Despite DNA: The Truth You Must Reveal*, THE CHAMPION, Apr. 2020, at 18 https://justiceingeorgia.com/wp-content/uploads/2020/05/p18-26-33_Sheffield_DNA_April_2020_Champion_web-7.pdf [https://perma.cc/T76R-DJXJ]. For an extensive library of information on potential problems with DNA testing issues as well as a software program that helps one analyze the results in a particular case, see *Possible Issues with DNA Evidence*, FORENSIC BIOINFORMATICS, http://www.bioforensics.com/dna-testing-issues/ [https://perma.cc/FV38-APYD]; *GenoStat*, FORENSIC BIOINFORMATICS, http://www.bioforensics.com/genostat/ [https://perma.cc/64BC-WGPT].

assessing whether the prosecution will have access to the testing results in one's jurisdiction. And, it involves assessing whether in one's jurisdiction, if the prosecution does not have access to the results and they are incriminating, the prosecution can submit into evidence that the defense accessed the crime-scene sample and argue that the fact them not producing results suggests a bad result for the defendant. Sometimes, the ensuing decisions make themselves and sometimes they involve multi-layered risk assessments by well-informed counsel.

2. Deciding Whether to Mount an Admissibility Challenge

The decision to mount a challenge to the admissibility of the prosecution's forensic DNA evidence is very jurisdiction-specific. Within a particular jurisdiction, it may be that challenges to the molecular biological methodology (that encompassing stages three and four above) used by the testing laboratory in the case has passed a *Daubert* or *Frye* challenge.[112] Or, it may be that the methodology for interpreting mixtures raises questions about its reliability.[113] It may be that the stage-four quantification of the non-exclusion represents a new approach to that stage that raises an unresolved *Daubert* or *Frye* issue.[114]

Even if none of those issues come to the fore as a part of the lawyer's case-specific assessment, the case may raise an "application" issue in which the analyst in the case misapplied the approved methodology. Federally and in jurisdictions that have adopted a state version of Federal Rule of Evidence 702, application challenges are now admissibility challenges.[115] Litigation that might follow a decision to litigate admissibility is very expert-dependent.[116]

112. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993).

113. *See* discussion *infra* Section I.D.

114. *See* discussion *infra* Section I.D.

115. *See* FED. R. EVID. 702(d) ("[T]he expert has reliably applied the principles and methods to the facts of the case.").

In many jurisdictions prior to *Daubert*, application challenges did not constitute grounds for an admissibility challenge. *See, e.g.*, State v. Vandebogart, 616 A.2d 483, 492–93 (N.H. 1992) (rejecting an application challenge as part of a *Frye* challenge). And, *Daubert* itself said that a *Daubert* analysis did not encompass a challenge to the accuracy of the results. *Daubert*, 509 U.S. at 589–91.

Some jurisdictions, like California with its *Kelly/Frye* test, encompass certain kinds of application challenges as admissibility challenges. *See* People v. Kelly, 549 P.2d 1240, 1244–45 (Cal. 1976).

116. *See* Anjelica Cappellino, Daubert *vs.* Frye*: Navigating the Standards of Admissibility for Expert Testimony*, EXPERT INST. (SEPT. 7, 2021), https://www.expertinstitute.com/resources/in

3. Preparation for Cross-Examination of Prosecution's Expert(s)

Preparation for cross-examining the prosecution's DNA expert involves a set of joint decisions by counsel and the defense expert.[117] Again, such decisions are very case-specific but, currently, most often fall either under a case-related application issue or under some of the issues raised in Section II.D. The interrelationship between the expert's assessment and advice about the potentially important topics for cross-examination and the lawyer's level of command and confidence in their ability to develop those issues on cross-examination is profound.[118] It involves difficult decisions about which areas to pursue and which areas to forego based on, in the end, the lawyer's understanding and knowledge of the issues to be raised.

4. Presenting One's Own Expert Testimony

The issues present when counsel is presenting their own expert are similar to those present when preparing for cross-examination. Decision-making about what to cover on direct examination and how to cover it involve a dynamic process between the expert and the lawyer.[119] Not infrequently, an expert may have a clear set of scientific topics in mind.[120] Some of those topics may not, however, be of a kind that the lawyer would judge as ones that can be clearly and simply presented to the jury, be it because of the technical complexity of the issue or because of their relative lack of persuasive power.[121] In this dynamic decision-making process, a lawyer is often acting as something of a translator for the expert. They are assessing, with an eye towards a lay juror, which issues will "take" in front of the jury and which won't. And, translators of any kind must know both languages well—here, forensic DNA science and jury language—in order to accomplish the goal of presenting persuasive expert testimony during direct examination.

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sights/daubert-vs-frye-navigating-the-standards-of-admissibility-for-expert-testimony/ [https://perma.cc/6E4N-JG9K].

117. NAT'L INST. OF JUST., U.S. DEP'T OF JUST., LAW 101: LEGAL GUIDE FOR THE FORENSIC EXPERT 35 (Sept. 8, 2011), https://www.ojp.gov/pdffiles1/nij/252494.pdf [https://perma.cc/CN7L-76H2].

118. *See id.*

119. *See id.*

120. *Id.* at 21.

121. *See id.*

The import of the above review is clear. A lawyer handling a DNA case cannot engage in constitutionally adequate representation without a foundation of understanding, knowledge, and/or experience to make informed decisions, whatever the decision may be. However, lawyers cannot make such decisions without an informed review of the entire case file. It is unlikely they can make such decisions without the assistance of some sort of expert advice The number of substantive approaches an attorney can take in litigating a DNA case are several. Any of them requires a foundation of understanding, knowledge, and/or experience to implement.[122] The following section presents a selection of some of the current issues in current DNA litigation.

D. Some Current Issues in DNA Litigation

The goal for a criminal defense lawyer when assessing substantive approaches to attacking the prosecution's DNA evidence is on generating a defense that raises a reasonable doubt.[123] It is not about finding a way to establish the defendant's actual innocence.[124] That distinction is important in the consideration of an after-the-fact ineffective assistance of counsel claim. An effective DNA defense lawyer wins the case. They do not necessarily establish actual innocence and do not need to do so, though it sometimes may be the case.

Some of the current trends in successful defense litigation of DNA cases focus on: (1) complex mixtures; (2) laboratory performance; (3) probabilistic genotyping; and (4) transfer.

1. Complex Mixtures

A complex mixture is a mixture of more than two people's DNA profiles.[125] In Josiah Sutton's case, the crime scene sample was a mixture of three people.[126] Commonly, such a mixture is reported in a summary report. A laboratory uses a different method for calculating

122. Cappellino, *supra* note 116.

123. *See Beyond a Reasonable Doubt*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt [https://perma.cc/K9YG-4PEC].

124. *See id.*

125. PRESIDENT'S COUNCIL OF ADVISORS ON SCI. & TECH., EXEC. OFFICE OF THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS 8 (2016) [hereinafter PCAST], https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [https://perma.cc/BP2K-BEVZ].

126. *Josiah Sutton*, *supra* note 3.

the population frequency estimate of a mixture.[127] A laboratory sees complex mixtures in crime-scene samples when the sample is drawn from a location in which more than two people may have had access—clothing, steering wheels, blood stains, etc.[128] Importantly, a laboratory cannot determine which of the profiles was there first or more recently.[129]

A complex mixture is much more difficult to interpret than a simple one (one with no more than two profiles).[130] It presents several problems, particularly when small amounts of DNA are present because several DNA profiles are superimposed in the sample.[131] A publication by President's Counsel of Advisors on Science and Technology (PCAST) has highlighted many of these problems, concluding that "[i]t is often impossible to tell with certainty which alleles are present in the mixture or how many separate individuals contributed to the mixture, let alone accurately to infer the DNA profile of each individual."[132]

The PCAST report highlights at some length the problems laboratories have had quantifying the meaning of what is observed in a mixture.[133] It rejects the use of the previously commonly used statistical method of quantification—the Combined Probability of Inclusion (CPI).[134] It raises concerns about the next generation of statistical methods for interpreting mixture using probabilistic genotyping software, calling for more empirical evidence of foundational validity.[135] PCAST's research documents a number of examples of problems in real cases.[136]

Complex mixture cases are winnable. In a remarkable 2017 case from a collection of DNA cases in which defense counsel achieved a

127. PCAST, *supra* note 125, at 75–80.
128. *Id.* at 75.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 76; *accord* John M. Butler, *The Future of Forensic DNA Analysis*, 370 PHIL. TRANSACTIONS ROYAL SOC'Y B, Aug. 5, 2015, at 1, 6; John S. Buckleton et al., *Towards Understanding the Effect of Uncertainty in the Number of Contributors to DNA Stains*, 1 FORENSIC SCI. INT'L: GENETICS 20, 20 (2007).
133. PCAST, *supra* note 125, at 75.
134. *Id.* at 82.
135. *Id.*
136. *Id.* at 76–77; *see also* Itiel E. Dror & Greg Hampikian, *Subjectivity and Bias in Forensic DNA Mixture Interpretation*, 51 SCI. & JUST. 204, 204–08 (2011) (discussing the mixed DNA analysis from a real sexual assault case in Georgia).

dismissal or acquittal (hereinafter, DNA-Wins Collection),[137] the DNA evidence from the clothing of the victim of an attempted rape presented as a simple mixture—the victim and the defendant with a 1 in 211,000 chance of a coincidental match.[138] The sample involved small amounts of DNA (known as, low-copy number DNA).[139] Re-testing by the defense revealed that the DNA profile in the mixture originally identified as consistent with the defendant's turned out to be a complex mixture of three men, none of whom were the defendant.[140]

2. Laboratory Performance

In the context of forensic DNA evidence in criminal cases, even one mistake can have disastrous consequences—the conviction of an innocent person.[141] And, laboratory mistakes happen.[142]

The National Institute of Standards and Technology conducted a scientific study in which they sent the same mixture sample to 105 laboratories in the U.S. and three in Canada along with samples from three suspects.[143] Most of the laboratories correctly identified two of the suspects as being in the sample.[144] Seventy-four laboratories incorrectly identified the third suspect as being in the mixture when he was not.[145]

Sometimes, the mistakes arise out of the actions of a bad analyst as in Josiah Sutton's case where the analyst who analyzed the samples

137. Unpublished Questionnaire from Samuel Leonard, Deputy Pub. Def. IV, L.A. Cnty. Pub. Def., to author (on file with author) [hereinafter DNA-Win Case #55]. The author collected 59 DNA cases from around the country in which either a pre-trial dismissal or trial acquittal occurred. See Section IV.C for more detailed findings about the DNA-Wins Collection.

138. *Id.*; Charlotte Word, *What Is LCN?—Definitions and Challenges*, PROMEGA (2010), https://www.promega.com/resources/profiles-in-dna/2010/what-is-lcn-definitions-and-challenges/ [https://perma.cc/VTN9-HVVS].

139. Word, *supra* note 138.

140. Chad Sokol, *Flawed DNA Test Nearly Pinned Spokane Man for Attempted Rape in Beverly Hills*, SPOKESMAN-REV. (Apr. 22, 2017), https://www.spokesman.com/stories/2017/apr/22/flawed-dna-test-nearly-pinned-spokane-man-for-atte/ [https://perma.cc/5LB9-5FYJ]. The DNA-Wins Collection contains 4 other cases that also involved mixtures.

141. *See, e.g.*, Katie Worth, *Framed for Murder by His Own DNA*, PBS: FRONTLINE (Apr. 19, 2018), https://www.pbs.org/wgbh/frontline/article/framed-for-murder-by-his-own-dna/ [https://perma.cc/C74R-7HV8].

142. *See* Shaer, *supra* note 22.

143. John M. Butler et al., *NIST Interlaboratory Studies Involving DNA Mixtures (MIX05 and MIX13): Variation Observed and Lessons Learned*, 37 FORENSIC SCI. INT'L: GENETICS 81, 81–94 (2018).

144. *Id.* at 89–90.

145. *Id.* at 90.

in the case got it wrong.[146] A 2004 Chicago Tribune analysis of two hundred DNA and death row exoneration cases "found that more than a quarter involved faulty crime lab work or testimony."[147] Sometimes, a lab analyst may be engaged in fraud.[148] Only consultation with experts, follow-up investigation, and access to case files uncovered these problems.

3. Probabilistic Genotyping

Forensic scientists have struggled with quantifying what is occurring in a mixture.[149] The PCAST report found that CPI-based methodologies were not foundationally valid.[150] Some laboratories have begun to use probabilistic genotyping software, a technique, though potentially promising, that is subject to significant concerns in the scientific community,[151] as well as significant litigation.[152] The PCAST report found that more foundation validation still needed to be done in some uses of probabilistic genotyping software.[153]

4. Transfer Issues

A transfer defense has become an increasingly effective defense in recent years.[154] For example, if the police collect the defendant's clothes and put them in the same bag as the victim's clothes, it is very possible that the victim's DNA will appear on the defendant's

146. *Josiah Sutton*, *supra* note 3.

147. Maurice Possley et al., *Scandal Touches Even Elite Labs*, CHI. TRIBUNE (Oct. 21, 2004, 2:00 AM), https://www.chicagotribune.com/investigations/chi-041021forensics-story.html [https://perma.cc/VM3L-XWHJ].

148. Laura Cadiz, *Md.-Based DNA Lab Fires Analyst Over Falsified Tests*, BALT. SUN (Nov. 18, 2004), https://web.archive.org/web/20211015212959/https://www.baltimoresun.com/news/bs-xpm-2004-11-18-0411180133-story.html.

149. PCAST, *supra* note 125, at 75.

150. *Id.* at 82.

151. Mark W. Perlin et al., *TrueAllele® Genotype Identification on DNA Mixtures Containing Up to Five Unknown Contributors*, 60 J. FORENSIC SCIS. 857, 857 (2015); Susan A. Greenspoon et al., *Establishing the Limits of TrueAllele® Casework: A Validation Study*, 60 J. FORENSIC SCIS. 1263 (2015); Jo-Anne Bright et al., *Developmental Validation of STRmix™, Expert Software for the Interpretation of Forensic DNA Profiles*, 23 FORENSIC SCI. INT'L: GENETICS 226 (2016).

152. *See* People v. Wakefield, 9 N.Y.S.3d 540, 540–43 (Sup. Ct. 2015); People v. Bullard-Daniel, 42 N.Y.S.3d 714, 715 (Cnty. Ct. 2016); *see also* People v. Rodriguez, No. 5471/2009 (N.Y. Sup. Ct. May 1, 2012) (considering a defendant's argument that probabilistic genotyping DNA evidence offered by the prosecution should be inadmissible). *See generally* Bess Stiffelman, *No Longer the Gold Standard: Probabilistic Genotyping Is Changing the Nature of DNA Evidence in Criminal Trials*, 24 BERKELEY J. CRIM. L. 110, 111–18 (2019) (explaining the complexities and difficulties with the new probabilistic genotyping software used for DNA analyses).

153. PCAST, *supra* note 125, at 81–82.

154. Stiffelman, *supra* note 152, at 115–16.

clothing.[155] The summary report will not reveal when or how the victim's DNA got on the defendant's clothing.[156] Transfer can occur in a large number of circumstances and scientists have documented direct and indirect transfer possibilities since at least 1997.[157] One review cataloged a series of studies in which DNA was collected from such touched items as tools, clothing, knives, vehicles, steering wheels, firearms, food, bedding, condoms, lip cosmetics, wallets, jewelry, glass, skin, fingerprints, paper, cables, windows, doors, and stones as well as transfers within DNA laboratories.[158]

The DNA-Win Collection provides several examples of cases in which a transfer defense was successful.[159] In one California case, the defendant was acquitted using a transfer defense accompanied by expert testimony.[160] In a 2012 New Hampshire case, the defendant was acquitted of an aggravated felonious sexual assault based on a transfer defense.[161] The DNA-Win collection had a total of sixteen acquittals

155. NAT'L INST. OF JUST., *supra* note 29, at 62.

156. *Id.*

157. Cynthia M. Cale et al., *Could Secondary DNA Transfer Falsely Place Someone at the Scene of a Crime?*, 61 J. FORENSIC SCIS. 196, 196 (2016). A subsequent study found secondary transfers occurred even when the handshakes were reduced to 60, 30, and 10 seconds. *DNA Can Be Transferred to Objects via Handshakes, at Random*, BUTING, WILLIAMS & STILLING, S.C. (Mar. 11, 2019), https://www.buting.com/blog/2019/03/dna-can-be-transferred-to-objects-via-handshakes-at-random/ [https://perma.cc/LU56-NFHG].

158. Roland AH van Oorschot et al., *Forensic Trace DNA: A Review*, 1 INVESTIGATIVE GENETICS (2010), https://investigativegenetics.biomedcentral.com/track/pdf/10.1186/2041-2223-1-14.pdf [https://perma.cc/SC2E-GDPH]; *see also* A. A. Oleiwi et al., *The Relative DNA-Shedding Propensity of the Palm and Finger Surfaces*, 55 SCI. & JUST. 329, 332 (2015) (analyzing the quantity of DNA recoverable from palmar surfaces and fingertips); Federica Alessandrini et al., *Fingerprints as Evidence for a Genetic Profile: Morphological Study on Fingerprints and Analysis of Exogenous and Individual Factors Affecting DNA Typing*, 48 J. FORENSIC SCIS. 586, 592 (2003) (analyzing individual factors affecting DNA typing); T. Boyko et al., *DNA Within Cars: Prevalence of DNA from Driver, Passenger and Others on Steering Wheels*, 51 AUSTL. J. FORENSIC SCIS. S91, S93 (2019) (analyzing DNA from within cars).

159. Unpublished survey questionnaires from defense attorneys, to author, and survey of news data, by author (on file with author) [hereinafter DNA-Win Collection]. The sample was derived from contact with some public defender programs around the country; with private criminal defense lawyers whom the author knew tried cases involving DNA evidence; through news reports about acquittals in DNA cases; through requests on listservs; and through the author's own experience trying DNA cases. The sample by no means comprises an exhaustive list of all the "victories" in cases in which DNA evidence was presented as the total number of attorneys providing data was less than 40.

160. Unpublished Questionnaire from Thomas J. Burns Jr., Att'y, L.A. Cnty. Alternate Pub. Def., to author (on file with author) [hereinafter DNA-Win Case #35].

161. Unpublished Questionnaire from Eleftheria Keans, Staff Att'y, N.H. Pub. Def., and Amanda Steenhuis, Managing Att'y, N.H. Pub. Def., to author (on file with author) [hereinafter DNA-Win Case #31]. One of the defense attorneys reported that the "[v]ictim's DNA was on our client's penis . . . . [V]ictim's vagina had only her [boyfriend's] DNA, not our client's. And based on when she said she had sex with [her boyfriend] and was assaulted . . . [boyfriend's] DNA should

or dismissals in which a transfer defense was used in whole or in part.[162]

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None of the issues identified here are apparent in the short summary report defense counsel receives.[163] That report is, effectively, opaque. Counsel can dissolve the opacity only with "extra" work, work beyond what counsel would routinely do in a fingerprinting or a blood grouping case.

The Sixth Amendment guarantees effective assistance of counsel in criminal cases, not perfect representation nor representation that establishes factual innocence.[164] The goal of that work is to show the jury that the case is not provable beyond a reasonable doubt; that a reasonable doubt exists. The goal is a manageable one with knowledge, training, and access to experience to raise the above and other issues.

III. EMPIRICAL EVIDENCE OF JUDICIAL INEFFECTIVENESS IN IAC DNA CASES

Empirical evidence from reported appellate IAC DNA cases is one way to measure how well the decisional architecture for IAC claims works. It suggests that the decisional architecture described in Part I is not striking the intended balance between deference and just results in IAC DNA cases. Courts are, more often than not, analyzing the claims superficially. Sometimes, they do not engage in the analytical work that *Strickland* and its progeny call for.[165] Sometimes, they over-rely, and too superficially, on the deference built into the *Strickland* standard or the double-deference embodied in the EDPA.[166]

A. IAC DNA Cases

A sampling of 317 IAC DNA cases at a forest level gives us an outline of the kinds and quality of cases and approaches IAC DNA courts have taken.[167] Before a closer, more substantive examination of

have been on client's penis along with her DNA. We argued DNA transfer (via hand) as [to] how her DNA was on client's penis." *Id.*

162. DNA-Win Collection, *supra* note 159.

163. NAT'L INST. OF JUST., *supra* note 29, at 28.

164. Strickland v. Washington, 466 U.S. 668, 669 (1984).

165. *Id.* at 687.

166. *Id.*

167. The sampling is not, statistically, a random sample. I started with a collection of 500 cases pulled from Westlaw with a search of the term "DNA & ineffective assistance of counsel," which

denials and grants of petitions/motions, it's important to get a look at the forest of case data more generally.

In the first instance, eighteen of those cases involved procedural dismissals that did not reach the merits.[168] Issues that lead to procedural dismissal included a lack of timely filing,[169] unauthorized subsequent post-conviction relief (PCR) petitions,[170] deferral pending filing of another collateral claim,[171] and a lack of jurisdiction.[172]

Of the remaining 299 cases, the most common procedural mechanisms bringing the IAC DNA case in front of the court were state/federal habeas corpus petitions (46.5%),[173] direct appeals (28.8%), and either post-conviction relief motions or a motions for new trial (25.4%). In 4.3% of the cases, the petitioner/defendant was litigating a motion to withdraw their appeal based on IAC. Substantively, petitioners/defendants did not fare well in their IAC DNA claims. Far more were denied than granted: 93% denied, 4.7% granted, and 2.3% were remanded in some fashion for an evidentiary hearing on the IAC claim. No comparative data about analogous non-DNA IAC claims is available to place this in context. Though this seems like an extraordinarily infrequent number of successful IAC DNA claims, it is also not surprising, given the number of substantive and procedural hurdles in place for IAC claims.

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produced over 3,000 cases. I examined 500 of those cases, of which 317 were cases that involved IAC & DNA, rather than requests for post-conviction DNA testing or other non-IAC DNA issues. In acknowledgement of the lack of statistical randomness of the sampling (which itself depends on an unavailable Westlaw algorithm), I have not drawn any conclusions in this section based on the sample being representative of what apparently is 2,500–3,000 reported IAC DNA cases.

To add a bit more shape to the dimensions of the forest being analyzed, the cases span approximately 30 years and portions of four decades, 1990–2020. Of the cases, 34.7% were federal district court cases; 3.5% were federal circuit court of appeals cases; and 56.2% were state court cases. Geographically, the cases originate in 44 different states. Of the federal cases, 43 different federal district courts had DNA IAC cases and seven different circuit courts of appeal.

168. *See, e.g.*, Ryals v. Abrams, No. 11-CV-95-KS, 2011 WL 3876992, at *5 (S.D. Miss. Aug. 16, 2011), *report and recommendation adopted*, No. 11-CV-95-KS, 2011 WL 3876940 (S.D. Miss. Aug. 31, 2011); Meyers v. Tibbels, No. 13CV02170, 2015 WL 1980631, at *1 (N.D. Ohio Apr. 30, 2015); Commonwealth v. Quiero, No. 2039 MDA 2014, 2015 WL 6689511, at *3 (Pa. Super. Ct. Aug. 17, 2015).

169. *Ryals*, 2011 WL 3876992, at *5.

170. State v. Frazier, 2013 WL 3339406, at *4 (Del. Super. Ct., June 19, 2013).

171. State v. Brown, 135 So. 3d 718, 723–24 (La. Ct. App. 2013) (deferring a claim until a post-conviction relief is filed); *Quiero*, 2015 WL 6689511, at *3 (filing a collateral appeal rather than direct appeal is appropriate).

172. Fletcher v. Outlaw, No. 06cv646, 2008 WL 2625662, at *3–4 (E.D. Tex. June 30, 2008) (overruling petitioner's objections due to the lack of jurisdiction to review a ruling by Court of Criminal Appeals for the Armed Forces or Court of Appeals for the Air Force).

173. Of the claims, 84.9% were federal habeas claims and 15.1% were state habeas claims. By far, state claims tended to be direct appeal, and post-conviction relief/motion-for-new-trial claims.

There are five trends discernable from drilling down on the analyses of individual cases: (A) no court ever explicitly engaged in determining what the "prevailing professional norms" were in the jurisdiction as it related to effective assistance of counsel in a case with forensic DNA evidence; (B) courts frequently relied on the deference standard of *Strickland* and the double deference standard of the AEDPA and did so with little explicit and detailed analysis of the circumstances of the case; (C) a failure to follow *Strickland*'s command to forego deference when analyzing whether counsel had a basis for doing no or little investigation of the prosecution's DNA evidence before opting for another defense; (D) a consistent absence of reliance of useful, analogous non-DNA IAC case law relating to a failure to request testing and a failure to hire, consult or call an expert to testify; and (E) representation by counsel matters as to the outcome. The result is a strong impression that courts considering IAC DNA cases do so in a seeming analytical vacuum except when relying on the deference and double-deference doctrines. Thus, those doctrines take on the almost explicit shape of easy escape hatches that avoid any effort to weigh the balance between appropriate deference and unjust results.

1. Prevailing Professional Norms

Recall that *Strickland* did not want to set specific standards as to that which constitutes effective assistance. It disliked the rigidity of that approach and preferred guidelines that acknowledged the wide range of professionally competent assistance. It wanted to identify only the kind of attorney conduct that fell outside that wide range. The best way to do so, it said, was to measure that conduct against the more flexible prevailing-professional-norms standard. Only then would a court be able to determine well which conduct constituted ineffective assistance.

In the sampling of cases, very few cases even referred to the concept of professional norms. When they did so it was most often obliquely. In *State v. Swan*,[174] the defendant claimed that his lawyer was ineffective for failing to retain a DNA expert and failing to ask for the raw data supporting the state DNA expert's report.[175] The court laid down part of the appropriate standard, saying: The *Strickland* standard requires the movant to "identify the act or omissions of

174. 28 A.3d 362 (Del. 2011).
175. *Id.* at 366.

counsel that are alleged not to have been the result of reasonable professional judgment."[176] But, it never went on to define "professionally competent" and it never considered where to find any barometer of professional competence.

In *Rodriguez v. Knipp*,[177] the defendant claimed that his lawyer was ineffective in not disclosing to him the prosecution's DNA report until after he was convicted.[178] The federal district court specifically noted the requirement that defense counsel's performance be "unreasonable under prevailing professional standards," and, again, never sought out what those prevailing professional standards were, let alone specify or define them.[179]

Frequently, courts would emphasize that trial counsel had wide latitude in strategic decisions, and they would not second-guess counsel's strategic choices. But, these courts never looked to any norms external to the case to measure what was a professionally normative strategic decision. Essentially, they would omit that part of the *Strickland* analysis.[180]

Not one court in the entire sample ever looked to specific external professional norms in making their judgements. This universal failure is particularly striking in light of the strong likelihood that most courts themselves have little to no experience, judicially or otherwise, with the minimal conduct necessary to try a DNA case, let alone what the best practices would be. No court in the sample here made reference to a single external reference in determining the prevailing professional norms, including those very few courts that even made a reference to such norms.

2. Deference and Double Deference

Strickland made abundantly clear that courts were to lend deference to trial counsel as they measured counsels' performance. As noted above, wide latitude was due counsel in the strategic choices they made in recognition of the many different a successful ways counsel may try a case.[181] There was to be no second-guessing, back-

176. *Id.* at 383.
177. No. CV 12-2901, 2013 WL 1397461 (C.D. Cal. Mar. 7, 2013).
178. *Id.* at *5.
179. *Id.*
180. *See* People v. Garcia, 939 N.E.2d 972 (Ill. App. Ct. 2010); Commonwealth v. Morgan, 899 N.E.2d 770 (Mass. 2009); Payne v. Washington, No. 11-cv-325, 2017 WL 780840 (W.D. Mich. Mar. 1, 2017).
181. *See supra* Part I.

seat-driving, or Monday-morning-quarterbacking. The reviewing court was to place itself in the position of counsel at the moment of the decision(s) under review, knowing that no case could be tried perfectly. The *Strickland* standard, in effect, was only setting the most minimum of performance bar. It was not setting the bar for what was quality lawyering. For the *Strickland* Court, attentiveness was due only to the Sixth Amendment concern of outside-the-wide-range lawyering that produced unjust results, not to the overlapping concern of incentivizing a better quality of lawyering.[182]

Most courts in the sample relied heavily on the deference standard in some fashion. Some articulated it in a very summary fashion.[183] Others did a deeper analysis before concluding that the presumption had been pierced.[184] Some relied on the failure of the petitioner/defendant to make an actual evidentiary showing of ineffectiveness that would pierce the presumption.[185] Some relied on the "could have decided" strategy, i.e., speculating on an empty record that counsel could have had this or that strategic reason for their conduct.[186] And, not infrequently, courts would rely on a combination of the above.[187]

For example, in *Aaron v. Scutt*,[188] the petitioner initially raised a claim in state court that their counsel's failure to pursue DNA testing constituted ineffectiveness.[189] The federal court, in reviewing the petitioner's subsequent habeas petition, quickly and summarily articulated a number of reasons the petitioner's claim failed:

> Counsel may have reasonably concluded that such testing could be inculpatory and that the better strategy was to challenge the lack of physical evidence linking Petitioner to the

182. I appreciate that, in theory, whatever *Strickland* established as the minimum performance standard had a significant indirect effect on how lawyers would choose to perform in cases. The debate around guidelines versus more firm standards, in part, captures the Court's adamancy in not playing the role of "supervising" the quality of lawyering except at the extremes. That said, given the equally pliant standards in the areas of legal malpractice and the ethics of poor lawyering, little legal incentive exists for lawyers to engage in quality lawyering. Perhaps, this reflects a semi-conscious reliance on the economics of legal practice: the better a lawyer you are, the more money you make.

183. *See, e.g.*, Wilson v. Knipp, 85 F. Supp. 3d 1165 (N.D. Cal. 2015).

184. *See, e.g.*, Richey v. Bradshaw, 498 F.3d 344, 362 (6th Cir. 2007).

185. *See, e.g.*, Holloway v. Sisto, No. C 06-05545, 2010 WL 1293206 (N.D. Cal. Mar. 31, 2010).

186. *See, e.g.*, Cullen v. Pinholster, 563 U.S. 170 (2011).

187. *See, e.g.*, Garcia v. Thaler, No. 12-CV-00256, 2013 WL 2368309 (S.D. Tex. May 29, 2013).

188. No. 11-CV-11147, 2013 WL 6182771 (E.D. Mich. Nov. 26, 2013).

189. *Id.* at *13.

> crime and the quality of the police investigation. Counsel's strategic decision is "due a heavy measure of deference." [citation omitted]. Moreover, Petitioner has not shown that any such tests would have exonerated him or otherwise benefitted his defense. His conclusory allegations are insufficient to demonstrate prejudice.[190]

The heavy measure of deference places the burden on the petitioner to produce actual evidence and to eliminate all possible, even unarticulated, reasons for the strategic decisions not to seek testing.

The counsel-could-have standard—a variant of the basic deference test—appeared frequently in courts' analyses. In *People v. Jones*,[191] the court was evaluating defendant's claim that counsel was ineffective in stipulating to the prosecution's DNA evidence.[192] It said,

> Further, there is a strong presumption that trial counsel made sound strategic decisions. Considering the results of the DNA test that linked defendant's DNA to the victim, defense counsel *could have* reasonably decided that stipulating to the admission of these results would avoid focusing the jury's attention on this damaging evidence.[193]

The use of the deferential counsel-could-have standard rendered the court's analysis a short, analytically light analysis. Notably, such an analysis also implicitly presumes counsel did a sufficient investigation of the prosecution's DNA evidence to support their decision to stipulate to, rather than challenge, the DNA evidence.[194]

By way of contrast, some courts produced an extended analytical explanation assessing both the standard and the circumstances of the case. The court in *Chambers v. Beard*,[195] in accepting the Magistrate judge's recommendation, did an analysis both of the law and the case facts before denying the habeas petition:

> There is a strong presumption that counsel is effective and the courts, guarding against the temptation to engage in hindsight, must be "highly deferential" to counsel's reasonable strategic decisions. The mere existence of alternative, even

190. *Id.* at *14.
191. No. 305586, 2013 WL 4746730 (Mich. Ct. App. Sept. 3, 2013).
192. *Id.* at *6.
193. *Id.* at *7 (emphasis added) (citation omitted).
194. *See* Garcia v. Thaler, No. 12-CV-00256, 2013 WL 2368309, at *10–12 (S.D. Tex. May 29, 2013) (laying out the applicable law and drawing a summary conclusion).
195. No. 06-CV-980, 2009 WL 2191748 (M.D. Pa. July 22, 2009).

> more preferable or more effective, strategies does not satisfy the first prong of the *Strickland* test.[196]

The court then went into an extended analysis of the totality of the factual circumstances of the case before denying the claim.[197]

The absence of a full description of the applicable standard and, in particular, any subsequent analysis of the factual circumstances of the case was not uncommon in the sample.[198] To be sure, some cases were "worthy" of summary treatment where the petitioner/defendant stated vague or demonstrably meritless claims.[199] Sometimes, an insufficient record existed to make other than a superficial decision using the deference standard.[200] Some courts, however, did analyze the specific circumstances of the case even in the absence of an evidentiary record from below. Many cases made short shrift of any significant consideration of the claim in reliance on the deference standard.

In federal cases, the double-deference standard described in Part I was a potent deciding factor. That standard not only called for deference to the actual and possible explanations for counsel's strategic choices, it also cautioned federal courts in habeas cases to defer to a state court decision unless it was contrary to established federal law or an unreasonable application thereof.[201]

In *Murphy v. Angelone*,[202] the court was short and to the point about the application of the double-deference standard to petitioner's

196. *Id.* at *4 (citations omitted).

197. *Id.* at *4–9; *see also* Bradley v. Cartledge, No. 15-2705, 2016 WL 5539524 (D.S.C. Sept. 30, 2016) (offering a detailed analysis of the factual circumstances of a petitioner's IAC claim before denying the claim); Rios v. State, 368 S.W.3d 301 (Mo. Ct. App. 2012) (detailing at length the facts surrounding an appellant's IAC claim and ultimately denying it); Byrd v. Alexander, No. 08 Civ. 0070, 2009 WL 10677100 (S.D.N.Y. Oct. 21, 2009) (discussing the facts of the case and petitioner's ineffective assistance of counsel claim at length before denying it).

198. *See, e.g.*, Flowers v. State, 799 So. 2d 966 (Ala. Crim. App. 1999); Cave v. Commonwealth, No. 2005-CA-001865-MR, 2006 WL 3375206 (Ky. Ct. App. Nov. 22, 2006); State v. Kash, No. CA2002-10-247, 2004 WL 190187 (Ohio Ct. App. Feb. 2, 2004); Cuellar v. State, No. 11-99-00073-CR, 2000 WL 34234938 (Tex. App. May 18, 2000); Rodriguez v. State, No. 04-00-00770, 2002 WL 1022589 (Tex. App. May 22, 2002); State v. Rockwell, No. 00-1118, 2001 WL 194983 (Iowa Ct. App. Feb. 28, 2001); Hernandez v. Kernan, No. 16-CV-1211, 2017 WL 3219965, at *6–7 (S.D. Cal. July 28, 2017).

199. *See* Davis v. State, 615 S.E.2d 203 (Ga. Ct. App. 2005); Vance v. United States, No. 05CR43, 2010 WL 3244875 (N.D.W. Va. June 25, 2010), *report and recommendation adopted*, 2010 WL 3270107 (N.D.W. Va. Aug. 16, 2010).

200. *See* Barstad v. State, 764 S.E.2d 453 (Ga. Ct. App. 2014); Worthington v. State, 166 S.W.3d 566 (Mo. 2005).

201. *See* Dowthitt v. Johnson, 230 F.3d 733, 740 (5th Cir. 2000).

202. No. Civ.A. 7:01-CV-00168, 2001 WL 34780568 (W.D. Va. July 31, 2001).

claim that their counsel failed to sufficiently investigate items found at the crime scene by means of DNA testing:[203]

> In denying relief on Murphy's ineffective assistance of counsel claims, the Virginia court [the state court] applied *Strickland*, noting that the petitioner had failed to meet either the performance or the prejudice prong of that analysis. I do not find that the state court's application of *Strickland* was contrary to or an unreasonable application of the federal standard found in *Strickland*, nor do I find the state court's determination to have been based on an unreasonable determination of the facts before that court.[204]

Overall, the deference and double-deference standards resulted in what is a very low rate of courts' granting IAC DNA claims, at least in the sample.

3. The Presumption when Counsel Chooses to Forego a Defense

One of the issues that shows up in the sample is how to analyze counsel's decision to forego a defense. In IAC DNA cases, it most often occurs when counsel decides not to challenge the DNA evidence and to adopt another defense, including even stipulating to the DNA evidence. This issue is particularly fraught in IAC DNA cases because of the underlying concern that counsel is avoiding the DNA evidence because either they do not understand it or because they think, incorrectly, it is unchallengeable.[205] The question becomes whether the IAC standards used by IAC DNA courts can pick up this potential problem.

Strickland and subsequent cases are clear on how a court should deal with this circumstance. The *Strickland* Court confronts how to analyze the choice not to use a defense directly:

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203. *Id.* at *2.

204. *Id.*; see also Wilson v. Knipp, 85 F. Supp. 3d 1165, 1171 (N.D. Cal. 2015) ("Accordingly, the state courts' rejection of petitioner's claim is not contrary to, or an unreasonable application of, clearly established Supreme Court law."); Cullen v. Pinholster, 563 U.S. 170, 190 (2011) ("Our review of the California Supreme Court's decision is thus 'doubly deferential.'"); Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("In light of these principles, the Ninth Circuit erred in finding the California Court of Appeal's decision objectively unreasonable."); Knowles v. Mirzayance, 556 U.S. 111, 123 (2009) ("Under the doubly deferential judicial review that applies to a *Strickland* claim evaluated under the § 2254(d)(1) standard, . . . Mirzayance's [IAC] claim fails.").

205. Part IV will address empirical evidence in which trial counsel has won a "not guilty" verdict or a dismissal in a case in which the prosecution offered DNA evidence. Part I discussed the numerous ways in which DNA evidence can be challenged.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.[206]

Subsequently, federal courts have refined and amplified the requirement that a decision that renders a particular investigation unnecessary must be reasonable. In *Andrus v. Texas*,[207] the Supreme Court emphasized the importance of independent investigation of the prosecution's case. It found a Sixth Amendment violation and noted counsel's failure "to conduct any independent investigation of the State's case in aggravation, despite ample opportunity to do so."[208]

Other federal courts have added more definition to the requirement.[209] The Sixth Circuit has said that the problem in that case was not that the lawyer had a duty to shop around for an arson expert, rather "[t]he point is that Kluge [the lawyer] had a duty to know enough to make a reasoned determination about whether he should abandon a possible defense based on his expert's opinion."[210] Other circuits have agreed.[211]

The Fifth Circuit has been even more pointed in saying that "*Strickland* does not, however, require deference to decisions that are not informed by an adequate investigation into the controlling facts and law."[212] The Eighth Circuit has also taken that approach in saying,

206. Strickland v. Washington, 466 U.S. 668, 690–91 (1984).

207. 140 S. Ct. 1875 (2020).

208. *Id.* at 1884.

209. *See* Richey v. Bradshaw, 498 F.3d 344, 363 (6th Cir. 2007).

210. *Id.*

211. Baxter v. Thomas, 45 F.3d 1501, 1514–15 (11th Cir. 1995); Lockett v. Anderson, 230 F.3d 695, 714 (5th Cir. 2000); Lewis v. Alexander, 11 F.3d 1349, 1353 (6th Cir. 1993) (explaining that a petitioner's dissatisfaction with the "degree of his attorney's investigation" differs from a situation where the attorney has not investigated at all).

212. Moore v. Johnson, 194 F.3d 586, 615 (5th Cir. 1999); *see also* United States v. Drones, 218 F.3d. 496, 500 (5th Cir. 2000) ("*Strickland* does not require us to defer to decisions that are uninformed by an adequate investigation into the controlling facts and law.").

"Although we generally give great deference to an attorney's informed strategic choices, we closely scrutinize an attorney's preparatory activities."[213] It further explained this concern when it said, a "[t]actical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum,"[214] and that the "measure of deference . . . must not be watered down into a disguised form of acquiescence."[215]

A close look at 26 cases in the sample in which the petitioner alleged a lack of investigation shows that, in at least 15 cases, the reviewing court did not discuss or implement the non-deferential method of analyzing a choice not to investigate or closely scrutinize counsel's pre-trial preparation of the DNA potion of the case. In *Garcia v. Thaler*,[216] the defendant claimed that their lawyer was ineffective for failing to pursue an investigation into the prosecution's contaminated DNA evidence. The court rejected the defendant's claim, relying on the strong presumption and highly deferential standard of *Strickland*.[217] In *Holloway v. Sisto*,[218] the court rejected the defendant's claim that counsel was ineffective in not getting the blood on the bumper of a relevant car compared, via DNA retesting, to the victim's blood. It simply ruled that there was no evidence it was not a strategic decision.[219]

The concern is that by explicit or implicit reliance on deference or on a strong presumption in failure-to-investigate cases, the court is likely to miss or overlook those cases in which defense counsel is seeking to avoid dealing with DNA evidence due to fear or to lack of understanding. The deference/presumption standards quickly become a type of there-is-nothing-that-shows-it-wasn't-a-strategic-decision approach that will almost always fail to pick up that counsel is avoiding the DNA evidence and nothing more. Part IV will show that this is a real concern in IAC DNA cases.

213. Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993); *see also* Chambers v. Armontrout, 907 F.2d 825, 835 (8th Cir. 1990) (Gibson, J., dissenting) ("In contrast to the close scrutiny which courts give to an attorney's preparatory activities, greater deference is given to an attorney's informed strategic choices.").

214. Bouchillon v. Collins, 907 F.2d 589, 597 (5th Cir. 1990).

215. Profitt v. Waldron, 831 F.2d 1245, 1248 (5th Cir. 1987).

216. No. 12-CV-00256, 2013 WL 2368309 (S.D. Tex. May 29, 2013).

217. *Id.* at *12.

218. No. C 06-05545, 2010 WL 1293206 (N.D. Cal. Mar. 31, 2010).

219. *Id.* at *12.

In the one positive example, counsel in *Spagnola v. Haas*[220] did an extensive investigation before deciding to move forward with a "transfer" defense rather than attacking the DNA evidence head-on.[221] In *Sampson v. Clarke*,[222] "counsel vigorously cross-examined the Commonwealth's forensic experts, and this cross-examination emphasized the inconsistencies and inconclusive findings related to the scientific evidence."[223]

An approach that subjects pre-trial choice-of-defense investigations, or lack thereof, to close scrutiny and does not over-rely on deference and presumption is more likely to pick up the cases that may be troublesome in the way described above. Such an approach does not set the bar too high for defense counsel. It does not require them to do a rigorous investigation of every possible defense before deciding on the one best for the case. It requires only enough to make an "informed strategic choice," as counsel did in *Spagnola* and *Sampson*.

4. Failure-to-Test and Failure-to-Consult/Hire-an-Expert Cases

Another concern arises in judicial decisions in many of the failure-to-test and failure-to-consult/hire-an-expert cases. In the sample, those two complaints were the most common ones raised by petitioners/defendants: 109 cases with failure-to-test complaints and 80 cases with failure-to-consult/hire-an-expert complaints.[224]

The concern is that IAC DNA courts do little to examine whether counsel truly was making an informed strategic choice when they chose not to consult or retain an expert or not to arrange for original or additional testing. As Part II shows, it is still the rare attorney who can look at the one-to-four page DNA summary that they get and determine whether the testing was well or poorly done.

To investigate the DNA evidence in an adequate enough fashion,[225] a lawyer must get the full case file from the forensic laboratory

220. No. 11-CV-10329, 2017 WL 1209097 (E.D. Mich. Apr. 3, 2017).

221. *Id.* at *7.

222. No. 15CV370, 2016 WL 5349479 (E.D. Va. July 15, 2016), *report and recommendation adopted*, 2016 WL 5346076 (E.D. Va. Sept. 23, 2016).

223. *Id.* at *12.

224. The other types of complaints were: failure to make pre-trial or trial objections (69 cases); failure to investigate or get discovery (57); bad cross-examination (37); bad advice generally or as to a plea (24); bad closing argument (7); failure to present DNA evidence other than an expert (6); mistaken trial stipulation (5); bad voir dire (1); and other (8). Many petitions alleged several of these failings.

225. I.e., an investigation that prepares to attorney to make an "informed strategic choice" about how to handle the DNA evidence.

and either talk to another lawyer who has significant experience evaluating or litigating DNA evidence and/or talk to or retain a DNA expert to evaluate the testing already done. The failure to hire an expert may indicate: a misunderstanding of the potential issues with forensic DNA evidence; a fear of one's inability to manage DNA evidence in any depth; a blind belief in the incontrovertible strength of the DNA evidence; or a version of all of these. Alternatively, it may mean that the lawyer has taken appropriate steps to educate themselves generally about DNA evidence and, in particular, about the analysis in the particular case.[226]

In the sample, some courts relied heavily on the presumption of effectiveness in a way that resulted in no examination of the logic behind the failure to consult or call an expert. In *State v. Elzie*,[227] the court simply stated without any substantive analysis that the decision not to call witnesses "was a tactical and strategic decision, not an example of ineffective assistance of counsel, and we will give great deference to trial counsel in these decisions."[228]

In several cases, courts relied on the counsel-could-have rationale without any examination of the circumstances of the case.[229] Sometimes, that approach took the form of a statement that the defendant had "failed to demonstrate that a legitimate explanation was absent for . . . defense counsel's decision not to retain an expert witness to challenge the DNA test results."[230]

In other cases, courts presumptively stated that the decision not to call an expert does not represent ineffectiveness and left it at that.[231] In still other cases in the sample, courts stated that a defendant's claim that counsel should have arranged for DNA testing failed because of "overwhelming evidence to the contrary."[232]

Another version of this theme runs throughout the cases about failure to consult/retain an expert or get original or additional DNA

226. *See, e.g.*, Perryman v. Valensuela, No. C 13-0311, 2014 WL 3963123, at *4 (N.D. Cal. Aug. 13, 2014) (explaining that original counsel consulted with another attorney who analyzed the lab's testing methodology and raised concerns and that subsequent attorney did not follow up nor request additional testing based on those concerns).

227. 865 So. 2d 248 (La. Ct. App. 2004).

228. *Id.* at 256.

229. *See, e.g.*, Rice v. Hall, 564 F.3d 523, 525–26 (1st Cir. 2009) (commending counsel for putting on a "decent" defense and speculating as to why they may have chosen not to call an expert).

230. People v. Pottorff, 43 N.Y.S.3d 169, 172 (App. Div. 2016).

231. *See* State v. Stevens, 58 N.E.3d 584, 604 (Ohio Ct. App. 2016).

232. Johnson v. Conway, No. 09-CV-0127, 2011 WL 382734, at *13 (W.D.N.Y. Feb. 3, 2011).

testing. In *Felder v. Goord*,[233] the petitioner claimed that counsel failed to retain and have an expert testify.[234] The court denied the habeas petition, stating both that the decision to call an expert "fall[s] squarely within the ambit of trial strategy" and that the petitioner failed to show what testimony a DNA expert would have offered that "would have affected the result of his trial."[235]

More dramatically, in *State v. Simpson*,[236] the defendant claimed that his counsel was ineffective because they did not have the DNA testimony reviewed by an expert.[237] The court denied their claim because "we do not know what such experts would have concluded, or whether they would have aided Simpson's defense, because his petition for post-conviction relief is devoid of evidence outside the record from such experts."[238] Notably, post-conviction relief counsel had petitioned the trial court to appoint a DNA expert for the very purpose of developing the record necessary to make the showing later found lacking by the appellate court.[239] The trial court denied that request, and the appellate court affirmed that denial, saying:

> We see no error in the trial court's denial of Simpson's motions for appointment of the foregoing experts in connection with his petition for post-conviction relief. The short answer to his arguments is that he had no right, statutory or constitutional, to the appointment of experts to assist in his post-conviction relief petition.[240]

The court then went on to cite a well-established body of law in support of the lack of constitutional right to experts for a collateral attack.[241]

Therein lies the catch-22 of many IAC DNA cases that involve failures to call DNA experts and failures to request DNA testing. Simpson is the clearest example with the denial of an expert accompanying the denial of the claim for a failure to show what an expert would say. Yet, many courts routinely denied IAC DNA claims because the petitioner/defendant failed to make a record of what the

233. 564 F. Supp. 2d 201 (S.D.N.Y. 2008).
234. *Id.* at 217.
235. *Id.* at 220 (alteration in original).
236. 61 N.E.3d 905 (Ohio Ct. App. 2016).
237. *Id.* at 907.
238. *Id.* at 909.
239. *Id.* at 912.
240. *Id.*
241. *Id.*

expert or the testing would have shown, thereby failing to establish a deficient performance by counsel.[242]

The message becomes: (1) a defendant is entitled to a finding of ineffectiveness (2) if they can show that the result of testing (3) that did not occur (4) for which their lawyer failed to ask (5) which is the basis for their complaint (6) is one that benefits them. The puzzle is more difficult when courts like the *Simpson* court deny requests for post-conviction DNA testing.

The puzzle is also more difficult in those states with post-conviction DNA testing statutes. The federal system and several states have post-conviction DNA testing statutes that place upon a petitioner/defendant an additional barrier to get the testing courts require for an IAC DNA claim. Federally, one seeking post-conviction DNA testing must show a reasonable probability that testing will produce non-cumulative evidence that would help establish that the applicant was actually innocent of the crime for which the applicant was convicted or adjudicated as delinquent.[243]

In Washington state, the petitioner must make a showing that "the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis."[244] In Pennsylvania, the petitioner must show "there is a reasonable probability[] that the testing would produce exculpatory evidence that would establish: . . . the applicant's actual innocence of the offense for which the applicant was convicted."[245] And, in Vermont, the petitioner also must show, "[a] reasonable probability exists that the petitioner would not have been convicted . . . ."[246]

In states like Washington, Pennsylvania, and Vermont, then, the effective set of hurdles require that an IAC defendant show with actual test results that counsel should have gotten testing and also show that, in order to get such test results, there is a reasonable probability that they would be exculpatory.[247] The only slightly too simple message is: we will grant your IAC claim if you have testing that shows you are

242. *See, e.g.*, *id.* at 909.
243. D.C. CODE § 22-4133(d) (2021).
244. WASH. REV. CODE ANN. § 10.73.170(3) (West 2002 & Supp. 2010).
245. 42 PA. CONS. STAT. § 9543.1(a)(6)(i) (2021).
246. VT. STAT. ANN. tit. 13, § 5566(a)(1) (2021).
247. The showing necessary for post-conviction testing also requires an additional set of procedural hurdles in order to file the appropriate petition, most often without appointed counsel.

innocent, but we will allow that testing only if you show you are probably innocent.

5. Lack of Availability of Counsel

Of petitioners/defendants, 53.2% were represented by counsel and 39.1% were pro se.[248] This suggests superficially that more representation by counsel occurred than the lack of a right to counsel for collateral attacks and some direct appeals may suggest. However, the case data can only track reported cases, and it is not practical and possible to track how many pro se cases were summarily dismissed due to the lack of coherence, let alone the quality, of many pro se petitions, appeals, PCR, and motions for a new trial.

The data also suggests that a petitioner/defendant was much more likely to have counsel at the state level than at the federal level. Of state petitioners/defendants, 73% had counsel whereas only 18.2% of the federal district court petitioners/defendants had counsel, though 81.8% of the federal circuit petitioners had counsel. The data also says that only 21.2% of federal habeas petitioners had counsel while 66.7% of state habeas petitioners had counsel. In addition, 82.6% of direct-appeal defendants and 67.2% of motion-for-a-new-trial defendants (both overwhelmingly state rather than federal procedural mechanisms) had counsel. The rough outline then shows somewhat more counsel for state than federal claims and more cases with counsel than pro se.

One had a better chance of winning an IAC claim if one had counsel. Of those fourteen petitioners/defendants whose IAC petitions/motions were granted, 85.7% had counsel and 14.3% were pro se. In this sample, if you had counsel, you would win 8.4% of the time. If you were pro se, you would win 1.7% of the time. Neither are great odds, to be sure. But, given the complexities of successfully litigating an IAC claim in either state or federal court, the availability of counsel mattered.

****

The tension between the search for just results and the seeming need for systemic screening captures the profound dilemma of IAC DNA case law. Some of the issues identified above relate to a less-than-energetic legal analysis by courts, like the failure of any sustained effort to identify what the prevailing professional norms are, or an

248. In 7.7% of the cases, it was not possible to discern whether counsel was involved.

over-reliance on the presumption/deference. Many of the issues relate only to the substantive and procedural restrictions and hurdles put in place by *Strickland*, the AEDPA, and attendant case law.

The systemic justifications behind these restrictions and hurdles, standing alone, are rational. Finality in legal processes is important. The autonomy of a criminal defense lawyer to try their case the best way they can without the second-guessing of informed strategic choices is important. The avoidance of an onslaught of frivolous IAC claims is important. A measured respect by the federal judiciary for the decisions of state courts is important.

But Josiah Sutton's case captures in real terms the risk that travels with these systemic rationales. The trial court denied Sutton's motion for a new trial.[249] On review, the appellate court discerned that the trial court had "implicitly" made the finding that Sutton's defense lawyer had enough reasons for not getting additional testing, though, apparently, the trial court did not explicitly articulate that factual finding.[250] In doing so, it relied on a Texas case that said, "where a trial court makes no explicit findings of historical fact, we presume it made findings necessary to support its ruling as long as those implied findings are supported by the record."[251]

In its prejudice analysis, the court also noted that Sutton had not produced "any evidence of independent DNA analysis that would vindicate appellant or raise questions about his innocence," nor was there an explanation for why testing had not been obtained.[252]

This is a typical example of an IAC DNA decision. It is full of presumptions that favor the trial court and/or trial counsel. The presumptions burdened Sutton with making difficult showings that, practically speaking, he cannot make, be it what the unarticulated factual findings of the trial court were or that the results of DNA testing that he had asked his lawyer for at trial and not received would be, if obtained. And the cases in the sample very frequently read like Sutton's case.

249. Sutton v. State, No. 14-99-00951-CR, 2001 WL 40349, at *1 (Tex. App. Jan. 18, 2001).

250. *Id.* at *2.

251. *Id.* at *1 (citing Carmouche v. State, 10 S.W.3d 323, 327–28 (Tex. Crim. App. 2000); *see* Carmouche v. State, 10 S.W.3d 323, 327–28 (Tex. Crim. App. 2000) (where a trial court makes no explicit findings of historical fact, we presume it made findings necessary to support its ruling as long as those implied findings are supported by the record).

252. *Sutton*, 2001 WL 40349, at *2.

But the rest of the Sutton story is very troubling. Five years after his conviction, a round of DNA-testing auditing of samples in the Harris County crime lab occurred, based on the Sutton case and other cases. The DNA analyst in Sutton's case had made a mistake.[253] Upon re-testing, Sutton was exculpated.[254]

The wall of substantive and procedural complexity facing a lawyer or a pro se petitioner/defendant is daunting. It very possibly has an unintended negative effect on the system identifying DNA cases in which ineffectiveness occurred. The empirical examination of a sample of IAC DNA cases suggests that courts may not be picking up the kinds of cases in which lawyers are avoiding the DNA evidence out of misunderstanding, fear, lack of knowledge, or all three.

Courts may also be avoiding a sustained analysis of IAC cases with DNA evidence because of embedded and mistaken beliefs. It may be that courts do not appreciate either (1) the complexity of DNA evidence and the need for experts who can help lawyers make an informed strategic choice; and/or (2) that cases with DNA evidence are triable cases.

It is those suggestions that cause concern that defendants in DNA cases may be the victims of ineffective lawyering; lawyering that means they do not have a fair trial; lawyering that produces an unjust result contrary to the fundamental goal of the Sixth Amendment described in Strickland. Part IV will turn to a different kind of empirical analysis in order to evaluate whether evidence exists that these concerns are valid and grounded or purely speculative. Part IV will look at what we can learn from DNA exonerations; from whether a case with DNA evidence can, realistically, ever be triable and from those cases in which failed IAC efforts in DNA cases have been followed years later by an exoneration.

IV. EMPIRICAL EVIDENCE OF MISTAKES AND SUCCESSES IN DNA CASES

Empirical evidence from exonerations show that mistakes are made in criminal cases that produce unjust results. Empirical evidence from exonerations show that lawyers make mistakes that produce unjust results. Empirical evidence from exonerations also shows that lawyers make mistakes in DNA cases that produce unjust results.

253. Otterbourg, *supra* note 1.
254. *Id.*

Empirical evidence from exonerations also shows that IAC courts do not necessarily pick up these kinds of mistakes, even in cases in which IAC claims are filed challenging the lawyers' handling of the DNA evidence. Finally, empirical evidence shows that DNA cases are winnable in spite of the seemingly overwhelming nature of DNA evidence.

It is difficult to empirically investigate poorly decided IAC and IAC DNA claims. As the founder of The National Registry of Exonerations and others conclude:

> We do not systematically discuss misconduct by criminal defense attorneys in representing their clients[,] . . . their misconduct and incompetence may do as much to produce false convictions as misconduct by prosecutors and police officers combined.
>
> But we can't. The failures of defense counsel are overwhelmingly sins of omission, especially the failure to investigate their clients' cases. The absence of action is hard to spot. A failure to even try to contact persuasive alibi witnesses will rarely be apparent at trial, and almost never when a guilty plea is taken. Unless such failures are actually litigated—which is uncommon—they are likely to remain unknown.[255]

In spite of this challenge, a search for empirical evidence of mistakes in trials involving possible IAC issues, particularly those with DNA-related ineffectiveness, is possible with a layered approach. This section will examine evidence from exonerations in non-DNA cases; evidence from exonerations in DNA cases; exonerations in DNA cases that included failed IAC claims; and finally, whether DNA cases are even winnable whatever the quality of the lawyering.

The combinations of this data suggest that wrongful convictions are occurring, that some of them may be occurring in winnable cases, and some of them are occurring in cases in which post-trial ineffective

255. SAMUEL R. GROSS ET AL., GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT 9–10 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf [https://perma.cc/U6TB-PMNB]; *see* SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 41–43 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf [https://perma.cc/88GA-KF2Z] (listing an exoneration in which we know that the legal defense was severely ineffective, but only as an example).

claims did not pick them up. Together, this evidence suggests a need for better IAC standards.

A. The Evidence from Exonerations in Non-DNA Cases

Mistakes happen in criminal trials, mistakes that cause wrongful convictions. Both the Innocence Project ("IP") and the National Registry of Exonerations ("Registry") have continued to document the existence of wrongful convictions.[256] The Registry has documented 2,877 exonerations since 1989.[257] The IP has documented 375 DNA exonerations, including 21 people who served time on death row.[258]

The causes of the Registry exonerations cover the gamut of potential serious errors at trial. One Registry study found that 12% of the first 2,400 Registry exonerations involved false confessions.[259] Twenty-nine percent of the IP's DNA exonerations involved false confessions.[260] Sixty-nine percent of the IP DNA exonerations involved some sort of eyewitness misidentification,[261] and 30% of the Registry's exonerations involved some sort of misidentification as of

256. The Innocence Project both documents wrongful convictions and works with individuals to investigate and potentially reverse their convictions. INNOCENCE PROJECT, https://innocenceproject.org/ [https://perma.cc/4YJY-PBXA].

The National Registry of Exonerations "provides detailed information about every known exoneration in the United States since 1989—cases in which a person was wrongly convicted of a crime and later cleared of all the charges based on new evidence of innocence." NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/KD66-MYLK].

257. NAT'L REGISTRY OF EXONERATIONS, *supra* note 256.

258. *Exonerate the Innocent*, INNOCENCE PROJECT, https://www.innocenceproject.org/exonerate/ [https://perma.cc/FG7F-PD8M]. Note that most of the Innocence Project DNA exonerations are included in the Registry's 2,877 exonerations. Many of the Registry's exonerations are not a result of post-conviction DNA testing. In addition, within both the Registry and IP data sets, exonerations exist in which more than one contributing factor are identified as being involved in the wrongful conviction.

259. *Age and Mental Status of Exonerated Defendants Who Confessed*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf [https://perma.cc/9M49-LZWB].

260. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/82RK-FU9N].

261. *Id.*

September 22, 2016.[262] Eight percent of the Registry's exonerations, jailhouse informants were used at trial.[263]

In cases more closely akin to DNA cases, wrongful convictions involving some sort of bad or mistaken forensic science have also been common in the IP data. In the IP data, 46% of the DNA exonerations involved unvalidated or improper forensic science ranging from faulty DNA analysis,[264] like that done in Josiah Sutton's case,[265] poorly based hair analysis interpretation, like that in Habib Wahir Abdal's case,[266] or incorrect fingerprint analysis, like that in Clemente Aguirre-Jarquin's case.[267]

One study of the trial transcripts of 137 exonerees involving forensic science found that forensic analysts provided conclusions that misstated empirical data or were unsupported by empirical data in 60% of the cases.[268] More to the point, defense counsel either did not make any objections to the invalid forensic science testimony in these trials or did not effectively cross-examine the forensic analysts:

> The presentation of forensic science testimony is typically one-sided in the majority of states that do not routinely fund the provision of forensic experts for indigent defendants. Moreover, in cases where defendants are able to present expert testimony, the experts are sometimes inexperienced or ineffective, and they may not have access to the underlying forensic evidence. Thus, it should come as no surprise that,

262. Kaitlin Jackson & Samuel Gross, *Tainted Identifications*, NAT'L REGISTRY EXONERATIONS (Sept. 22, 2016), http://www.law.umich.edu/special/exoneration/Pages/taintedids.aspx [https://perma.cc/X879-TNHB].

263. Samuel Gross & Kaitlin Jackson, *Snitch Watch*, NAT'L REGISTRY EXONERATIONS (May 13, 2015), http://www.law.umich.edu/special/exoneration/Pages/Features.Snitch.Watch.aspx [https://perma.cc/AGP6-79FU].

264. Vanessa Meterko, *Strengths and Limitations of Forensic Science: What DNA Exonerations Have Taught Us and Where to Go from Here*, 119 W. VA. L. REV. 639, 640 (2016).

265. *Josiah Sutton*, *supra* note 3.

266. *Habib Wahir Abdal*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/habib-wahir-abdal/ [https://perma.cc/QP6Y-N9VQ] (indicating that because the analyst had inadequate "empirical data on the frequency of various class characteristics in human hair, it was invalid . . . to give statistics on the number of hairs needed to determine a match").

267. Maurice Possley, *Clemente Aguirre-Jarquin*, INNOCENCE PROJECT, https://innocenceproject.org/cases/clemente-aguirre-jarquin/ [https://perma.cc/WAN2-6FAW] (explaining that a fingerprint analyst incorrectly matched Aguirre-Jarquin's fingerprint with what was actually an "impossible to read" fingerprint on the knife used in a homicide case).

268. Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 1–2 (2009).

> despite the stakes, the defense does not often meaningfully challenge invalid forensic science testimony.[269]

The litany of wrongful-conviction empirical evidence is compelling, whatever the cause.

The study, however, strongly suggests that, at least in cases with forensic science evidence, the quality of representation is deficient. Though the *Strickland* standard, by design, does not pick up every mistake by defense counsel, one would have hoped that it would pick up a large measure of those mistakes that are so serious as to lead to the conviction and incarceration, often for long periods of time, of an innocent person.

An additional look at the IP and Registry data as to inadequate or ineffective legal representation also tells us how often some degree of poor defense counsel performance occurs in cases that would later lead to an exoneration. The IP data show that an "inadequate defense" was a factor in at least 4.8% of its 365 exonerations.[270] The Registry data reflects that "inadequate legal defense" was a factor in about 27% of its 2,891 cases.[271] These cases include defense counsel who: failed to call a key witnesses;[272] failed to challenge the adequacy of the basis of an expert's opinion;[273] failed to present exculpatory forensic evidence at trial;[274] failed to call time-of-death expert witnesses;[275] and failed to conduct an investigation,[276] among many additional types of failures in other cases.

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269. *Id.* at 90.

270. *See All Cases*, INNOCENCE PROJECT, https://innocenceproject.org/all-cases/1/#inadequate-defense [https://perma.cc/JGL8-F29T].

271. *Summary View of Exoneration Cases*, NAT'L REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/browse.aspx [https://perma.cc/D9AT-RVDX].

272. *See, e.g.*, Maurice Possley, *Ezequiel Apolo-Albino*, NAT'L REGISTRY OF EXONERATIONS (Nov. 5, 2016), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5014 [https://perma.cc/NY7N-MQVE]; Maurice Possley, *Teshome Campbell*, NAT'L REGISTRY OF EXONERATIONS (Sept. 6, 2018), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4829 [https://perma.cc/YZ37-EL5B].

273. *See, e.g.*, *Anthony Hicks*, INNOCENCE PROJECT, https://innocenceproject.org/cases/anthony-hicks/ [https://perma.cc/DV7V-C83Y].

274. *See, e.g.*, *Richard Johnson*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/richard-johnson/ [https://perma.cc/4B4C-XVAT].

275. *See, e.g.*, *Kirstin Blaise Lobato*, INNOCENCE PROJECT, https://innocenceproject.org/cases/kirstin-blaise-lobato/ [https://perma.cc/77KE-CW5U].

276. *See, e.g.*, Michael S. Perry & Maurice Possley, *Reggie Cole*, NAT'L REGISTRY OF EXONERATIONS (July 19, 2017), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3113 [https://perma.cc/5ZJP-RJZY].

Exoneration collections like the IP and the Registry are indisputable proof that the protections from convicting the wrong person built into the criminal system have not worked well. One of these core protections is the Sixth Amendment's guarantee of effective assistance of counsel. Zealous advocacy by a defense lawyer plays a powerful role in making that system work well to prevent serious mistakes. And, IAC claims are the primary, almost the sole, backup that catches serious mistakes by defense counsel—in the words of *Strickland*, "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[277]

A look at 18 cases in which the Registry identified some sort of forensic error at trial shows that in 13 of those cases, an immediate post-trial IAC claim was either not filed or failed.[278] Kevin Richardson, then 14 years old, was one of the "Central Park Five," five young men who falsely confessed to attacking and sexually assaulting a jogger in Central Park in 1989.[279] Richardson was tried as a juvenile and, among other evidence, "A forensic analyst testified that a hair found on the victim was 'similar' to Richardson's hair 'to a reasonable degree of scientific certainty.'"[280] Mr. Richardson was convicted in 1990 and received a 5–10 year sentence.[281] In 2002, another individual, Matias Reyes, confessed to the attack, and follow-up DNA testing corroborated his confession and established that the hairs found on the victim were from Mr. Reyes.[282] The positive resolution for Mr. Richardson did not come about through any IAC claim.[283]

In many of the 787 Registry cases in which the Registry determined that inadequate legal defense was a contributing factor in the

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

278. These numbers summarize an overall examination of such cases in the registry. Note that in some of these cases, the combination of a forensic error of some sort and the ineffectiveness of defense counsel was picked up after post-conviction DNA testing revealed the serious mistake. Often, that occurred many years after the original conviction and after the involvement of the IP or a similar *pro bono* organization. That delayed post-conviction representation did not come about through post-trial appointed counsel filing an IAC claim shortly after the final resolution of the case on direct appeal. *See, e.g.*, Rob Warden, *Dennis Williams*, NAT'L REGISTRY OF EXONERATIONS (Oct. 22, 2016), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3744 [https://perma.cc/5ZZK-XVGF].

279. *Central Park Five Tragedy Reframed in Netflix Series "When They See Us,"* INNOCENCE PROJECT (May 24, 2019), https://innocenceproject.org/central-park-five-tragedy-reframed-in-netflix-series-when-they-see-us/ [https://perma.cc/SCV7-75V9].

280. *Kevin Richardson*, NAT'L REGISTRY EXONERATIONS (Dec. 8, 2014), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3578 [https://perma.cc/TG47-YSG4].

281. *Id.*

282. *Id.*

283. *See id.*

wrongful conviction, an IAC claim either was not filed,[284] failed,[285] or only occurred much later as post-conviction DNA testing was done.[286] In a number of these cases, the trial and conviction occurred at a time when DNA testing would have been available for analysis.

B. Evidence from Exonerations in DNA Cases

In the IP data, a number of cases are present in which some sort of DNA evidence was presented at the original trial, the defendant was convicted and, some years later, subsequent DNA evidence exonerated them.[287] Dwayne Jackson was charged with burglary, robbery, and kidnapping The police had taken DNA samples from him and found a "match."[288] The DNA evidence was the only evidence connecting Mr. Jackson to the crime.[289] Facing a life sentence if convicted, Mr. Jackson plead guilty to one charge in exchange for the dropping of other charges.[290] Seven years after sentencing, the California Justice Department found that the crime scene sample matched someone other than Mr. Jackson.[291] Further investigation revealed that Mr. Jackson's sample had been switched with an original co-defendant

284. *See, e.g.*, Maurice Possley, *Keith Cooper*, NAT'L REGISTRY OF EXONERATIONS (July 28, 2018), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5091 [https://perma.cc/U6WX-X5EC]; Maurice Possley, *Sharrif Wilson*, NAT'L REGISTRY OF EXONERATIONS (Mar. 13, 2017), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4372 [https://perma.cc/8VND-RPTL].

285. *See, e.g.*, Maurice Possley, *Jerry Lee Jenkins*, NAT'L REGISTRY OF EXONERATIONS (June 7, 2013), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4191 [https://perma.cc/53NQ-55AV]; Maurice Possley, *Claude Brooks, Jr.*, NAT'L REGISTRY OF EXONERATIONS (June 20, 2017), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5152 [https://perma.cc/QV8V-KESJ].

286. *See, e.g.*, Maurice Possley, *Paul Browning*, NAT'L REGISTRY OF EXONERATIONS (Sept. 4, 2021), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5724 [https://perma.cc/94EB-49MP].

287. *See, e.g.*, *Gilbert Alejandro*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/gilbert-alejandro/ [https://perma.cc/P4NR-Y59R]; *Ronjon Cameron*, INNOCENCE PROJECT, https://innocenceproject.org/cases/ronjon-cameron/ [https://perma.cc/N9YL-2JZ6]; Maurice Possley, *Ronjon Cameron*, NAT'L REGISTRY OF EXONERATIONS (Feb. 11, 2018), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4802 [https://perma.cc/U4CN-ZBRW]; *Dwayne Jackson*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/dwayne-jackson/ [https://perma.cc/5G34-DKXZ]; *Christopher Miller*, INNOCENCE PROJECT, https://www.innocenceproject.org/cases/christopher-miller/ [https://perma.cc/5W9F-PB9J]; *Marlon Pendleton*, INNOCENCE PROJECT, https://innocenceproject.org/cases/marlon-pendleton/ [https://perma.cc/A3ZF-28EA].

288. Maurice Possley, *Dwayne Jackson*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3821 [https://perma.cc/E966-FYDM].

289. *Id.*

290. *Id.*

291. *Id.*

(who had been exculpated by DNA testing) at some point by a lab technician.[292]

Marlon Pendleton was charged with sexual assault and robbery after the victim, six months after the incident, saw a police sketch on TV and thought that the man was the one who assaulted her.[293] She confirmed this by picking Mr. Pendleton out of a lineup.[294] The forensic analyst said there was not enough of a sample for DNA testing, and Mr. Pendleton was convicted.[295] After serving 10 years in jail, Mr. Pendleton was exonerated when it turned out that enough of a sample existed for testing.[296] No evidence existed that an IAC claim was filed upon his conviction.[297]

We do not know with any degree of certainty why in most of these cases why IAC claims were not filed. It could be because the defendant was unaware of that option or was unable to manage the daunting procedural process accompanying filing and litigating an IAC claim. It could be that they did not have a lawyer to assist in navigating the IAC procedural process. We do not know, with any degree of certainty, why, in some of these cases, the court ruling on an IAC motion was because of the demanding substantive and procedural strictures of the Strickland standard in state or federal courts. What we do know is that the data certainly implicates the fundamental quality of the lawyering occurring in many of these exonerations, particularly in cases involving forensics and/or DNA evidence.

Another study of "inadequate legal defense" in Registry exonerations cases found that 381 (23.4%) of the first 1,635 Registry cases involved inadequate legal defense as a contributing factor of a wrongful conviction, 36 of which noted inadequate legal defense as the sole contributing factor.[298] Importantly, many of those cases were not overturned based on a judicial determination of ineffectiveness under the Sixth Amendment.[299] This finding represents a stronger and more

292. *Id.*

293. Rob Warden, *Marlon Pendleton*, NAT'L REGISTRY OF EXONERATIONS (May 12, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3529 [https://perma.cc/5S5E-CLKS].

294. *Id.*

295. *Id.*

296. *Id.*

297. *See Marlon Pendleton*, *supra* note 287.

298. Rosa Ellis Greenbaum, Investigating Innocence: Comprehensive Pre-Trial Defense Investigation to Prevent Wrongful Convictions 13 (2019) (Master's thesis, University of California, Irvine) (eScholarship).

299. *Id.* at 13–14.

focused conclusion that the *Strickland* standard is not picking up ineffectiveness, be it because of the strictness of the standard, the procedural hurdles, or the lack of access to counsel.

The study also found that 80.6% of the inadequate legal defense exonerations involved a failure to investigate as a contributing factor and was the sole contributing factor in 34.7% of the cases.[300] Additionally, 23.7% of the investigative failures involved a failure to investigate physical evidence, which meant the physical evidence "went unchallenged or unpresented";[301] 18% involved a failure to investigate medical evidence, which meant a failure to investigate and challenge inculpatory evidence or a failure to develop exculpatory medical evidence;[302] and 4.7% involved a failure to investigate DNA evidence.[303] As to the DNA evidence, in eight cases, defense counsel failed to request DNA testing for biological evidence.[304]

For example, in one case, the DNA results remained in the forensic lab, unrequested by defense counsel.[305] More dramatically, Jesse Miller, Jr. was tried and convicted twice in Florida based on forensic DNA testimony that "incontrovertibly placed Miller at the crime scene."[306] At his third trial, new defense counsel had hired an independent expert to challenge the state's DNA analysis.[307] Miller was acquitted.[308]

The conclusion that failures to investigate are a substantial problem in inadequate legal defense exonerations returns us to the challenges in the strictures of *Strickland* jurisprudence. Recall *Cullen v.*

300. *Id.* at 17.

301. *Id.* at 18, 22–23; *see, e.g.*, Maurice Possley, *Jerry Jamaal Jones*, NAT'L REGISTRY OF EXONERATIONS (Apr. 15, 2013), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4136 [https://perma.cc/C9VL-A7AP].

302. Greenbaum, *supra* note 298, at 27–28; *see, e.g.*, Maurice Possley, *Debbie Loveless*, NAT'L REGISTRY OF EXONERATIONS (Feb. 11, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3393 [https://perma.cc/J3CZ-97AN].

303. Greenbaum, *supra* note 298, at 30; *see, e.g.*, Maurice Possley, *Cheydrick Britt*, NAT'L REGISTRY OF EXONERATIONS (Nov. 21, 2013), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4309 [https://perma.cc/G263-QSEL].

304. Greenbaum, *supra* note 298, at 30; *see, e.g.*, Maurice Possley, *Cheydrick Britt*, *supra* note 303.

305. Greenbaum, *supra* note 298, at 30; *see* Rob Warden, *Lafonso Rollins*, NAT'L REGISTRY OF EXONERATIONS (May 12, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3596 [https://perma.cc/LDX9-TZN7].

306. Greenbaum, *supra* note 298, at 30–31.

307. *Id.*

308. *Id.*; Marc Freeman, *Palm Beach County Jury Acquits Man in 1999 Chick-Fil-A Murder*, SUN SENTINEL (June 30, 2014), https://web.archive.org/web/20210628174623/https:/www.sun-sentinel.com/news/fl-xpm-2014-06-30-fl-jesse-lee-miller-trial-closes-20140630-story.html.

Pinholster in which the Supreme Court reprised the *Strickland* warning that a strong presumption exists that counsel has made all significant decisions through the exercise of their professional judgment.[309] A court must "affirmatively entertain the range of possible 'reasons Pinholster's counsel may have had for proceeding as they did.'"[310] Recall also that, in a federal habeas corpus IAC claim, the court applies a doubly deferential approach to the state court's decision.[311]

And, finally, recall that only some DNA IAC courts had looked beyond the presumption that counsel's failure to investigate was a strategic choice in order to investigate whether that failure was an informed decision. In the 26 DNA IAC cases in the sample in which the petitioner/defendant alleged a failure to investigate, in at least 15 cases, the reviewing court did not discuss or implement the non-deferential method of analyzing a choice not to investigate or closely scrutinize counsel's pre-trial preparation of the DNA portion of the case.[312]

Many of the inadequate-legal-defense exonerations in the Registry cases did not have successful IAC challenges.[313] Many of the other exoneration cases in this section did not have successful, or any, IAC claims.[314] *Strickland*'s failed effort to regulate the frequency of serious mistakes calls into question whether counsel is even functioning at all in these cases.

C. DNA Exonerations in Testing-Requested Cases with Failed IAC Claims.

The most compelling evidence that the regulatory effect of the *Strickland* standard is not working is in those cases like Josiah Sutton's, in which the prosecution presented DNA evidence at trial; the defendant was convicted; then filed an IAC claim and lost, only to later be exonerated by DNA testing.[315] In Sutton's case in particular, he had requested additional DNA testing for trial and his counsel failed to follow up on that request.[316] His post-trial IAC claim citing

309. Cullen v. Pinholster, 563 U.S. 170, 189 (2011).
310. *Id.* at 196 (quoting Pinholster v. Ayers, 590 F.3d 651, 692 (9th Cir. 2009) (Kozinski, C.J., dissenting)).
311. Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).
312. *See supra* Section I.C.
313. *See supra* Section IV.B
314. *See supra* text accompanying notes 297–298 and 302–303.
315. Khanna & Glenn, *supra* note 24.
316. Otterbourg, *supra* note 1.

counsel's failure to do so was unsuccessful; yet, new DNA testing exonerated him later.[317]

In Convicting the Innocent: Where Criminal Prosecutions Go Wrong, Brandon Garrett presents a wealth of information about the IP's first 250 DNA exonerations.[318] Through an examination of trial transcripts in 88% of those cases,[319] he identifies 153 exonerations in which forensic testimony was a part of the trial record.[320] In 61% (93) of those cases that eventually resulted in exonerations, invalid forensic testimony was presented.[321]

To sharpen the point, he identifies 12 cases that ended with DNA exonerations in which trial counsel did not request what would have been exculpatory DNA testing that was then available.[322] In only four of those cases (including Josiah Sutton's case), did the defendants even file IAC claims and in three of those four their claims were denied.[323] Only Anthony Hicks' IAC claim was granted.[324]

In one of those cases, Brian Piszczek was charged with rape, felonious assault, and burglary after the victim, two months after the incident, identified him from a photo lineup as well as identifying him as her assailant during trial.[325] Though his girlfriend provided him with an alibi, he was convicted after trial.[326] Mr. Piszczek then filed an IAC claim, stating that his counsel did not adequately cross-examine the State's expert and failed to request DNA testing.[327] The appellate court denied the claim in a fashion quite similar to the denials described in section II above:

> We also find that Piszczek's trial counsel adequately cross-examined the State's expert. He was able to establish that no

317. *Id.*

318. BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 277 (2011).

319. *Id.*

320. *Id.* at 280.

321. *Id.* at 280–81.

322. *Id.* at 206–07.

323. *Id.*; Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 115–16, 116 n.232 (2008). In an earlier treatment of the subject, Garrett identifies those four as Brian Piszczek (*Brian Piszczek*, INNOCENCE PROJECT, https://innocenceproject.org/cases/brian-piszczek/ [https://perma.cc/8JNA-D5AZ]), Josiah Sutton (*Josiah Sutton*, *supra* note 3), Mark Bravo (*Mark Diaz Bravo*, INNOCENCE PROJECT, https://innocenceproject.org/cases/mark-diaz-bravo/ [https://perma.cc/4T7S-U789]), and Anthony Hicks (*Anthony Hicks*, *supra* note 273).

324. GARRETT, *supra* note 318, at 206–07.

325. *Brian Piszczek*, *supra* note 323.

326. *Id.*

327. State v. Piszczek, No. 62203, 1993 WL 106966, at *3 (Ohio Ct. App. Apr. 8, 1993).

> pubic hair sample was taken from Piszczek, no fingerprints were found linking him to the crime, and that tests done of the seminal fluid could not conclusively prove that it was Piszczek's. Furthermore, it is not likely that the outcome of the trial would have been different. Piszczek was positively identified by Quelette. He perfectly matched the description given by the victim immediately after the attack. Piszczek has not shown that trial counsel's alleged errors determined the outcome of the trial. His third assignment of error is without merit.[328]

In October 1994, Mr. Piszczek was exonerated and released from prison, where he had spent four years.[329]

In a case beyond the four that Garrett identified, Donya Davis was charged with sexual assault in 2006 based on an identification by the victim from a photo line-up.[330] Analysis of the rape kit found that "[t]he testing was presumptive for the presence of semen, but no sperm was identified. DNA tests on skin cells from the victim's thighs developed a partial male profile that excluded Davis."[331] Davis asked his lawyer for further DNA testing comparing his neighbor's son's DNA to the DNA on the thigh.[332] Counsel chose not to pursue that option. At Davis' first trial, the jury failed to reach a unanimous verdict.[333] Mr. Davis was convicted in his second trial before a judge only.[334] Mr. Davis filed an IAC claim, based on counsel's failure to get the additional DNA testing.[335]

On appeal, the court noted that the DNA offered at trial did not implicate Mr. Davis and he was thus not deprived of a substantial defense by his lawyer's failure to retain a DNA expert.[336] It then closely analyzed the circumstances:

> Defense counsel's decision not to request DNA testing was likely based on this concern of creating detrimental evidence

328. *Id.*
329. *Brian Piszczek*, *supra* note 323.
330. Maurice Possley, *Donya Davis*, NAT'L REGISTRY OF EXONERATIONS (Oct. 15, 2020), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4546 [https://perma.cc/3E9H-HL3Q].
331. *Id.*
332. People v. Davis, No. 282081, 2009 WL 2343155, at *1 (Mich. Ct. App. July 30, 2009).
333. Possley, *supra* note 330.
334. *Id.*
335. *Davis*, 2009 WL 2343155, at *1.
336. *Id.* at *2.

> that did not otherwise exist. By not excluding Brown's son, defense counsel was able to create doubt regarding incriminating statements that defendant allegedly made to Brown and propose that Brown was only trying to protect her son. Defense counsel extensively cross-examined Brown on these issues and defense counsel also argued during closing argument that there was no physical evidence that linked defendant to the crime, while emphasizing how defendant was excluded as the unknown donor of skin cells found on the victim's thigh.[337]

The court then went on to note that a post-trial motion for DNA testing had been denied and that the defendant had "failed to overcome the strong presumption that counsel's performance was sound trial strategy."[338]

These examples offer up two conclusions. First, the previous discussion about the substantive and procedural restrictions of the *Strickland* standard becomes more vivid when viewed through the prism of these examples. Courts are not drilling down on the details of the case in their IAC analyses. They appear too easily to rely on the presumption/deference that *Strickland* provides in order to justify conclusions, including speculation of why counsel may have acted as they did.

For example, in one case, the appellate court invoked the we-will-not-second-guess-tactical-decisions mantra without examining whether the tactical decision was a well-informed one.[339] In the *Piszczek* case, the court resolved the *Strickland* prong-two analysis by a quick survey of what it saw as other compelling evidence. Those conclusions lead to unjust results, as proven by the subsequent DNA exonerations.

It is possible that counsel in those cases were not ineffective, and the defendants were still wrongfully convicted. But, courts are not relying on a set of minimum standards about how to try a case in which the prosecution is offering DNA evidence or in which the defendant has made a request for DNA testing. If such minimum standards were in place, IAC courts could rely on them to guide a more structured and deeper analysis of what counsel's strategy and choices were. Then, we

337. *Id.*
338. *Id.*
339. People v. Bravo, 23 Cal. Rptr. 2d 48, 52 (Ct. App. 1993) (depublished). *See generally Mark Diaz Bravo*, *supra* note 323.

would have a much better sense whether a wrongful conviction resulted because of counsel's ineffectiveness or in spite of their effectiveness.

The second conclusion that these examples provoke is a rising uncertainty of whether wrongful convictions occurred in those many IAC DNA cases in Section III.A. In many of those cases, the defendant asked for DNA testing or at least for the retention of a DNA expert.[340] In the very large majority of those cases, the appellate courts summarily dismissed the IAC claim based on counsel's failure to request DNA testing or at least to retain an expert.[341] Again, most frequently, the courts did not engage in any serious, guided examination of counsel's possible failures, including a close look at whether such a decision was an informed choice.[342]

The superficial lore among defense counsel and others who work with those incarcerated is that "all" of them say they are innocent. It's an overly light response to the frequency with which that statement is made. A court system will likely crash of its own weight if the case circumstances of all such post-conviction statements were thoroughly investigated. Therein lies the principle of finality, a principle which draws a firm line upon conviction.

However, an IAC claim exists as an important means (direct appeals being another) to identify those cases in which serious errors occurred at trial by virtue of constitutionally deficient performance by defense counsel. The empirical evidence in this section strongly suggests that something is amiss in the application of the *Strickland* standard, at least as to DNA cases. Courts need either better screening tools, like minimum standards, or a better legal standard than that which *Strickland* and its progeny present.

D. Empirical Evidence that DNA Cases Are Winnable

The principle of finality plays a role in the adjudication of IAC DNA claims. When a judge first acquires an IAC claim on his docket, they know that the defendant before them has been convicted. Often, in the first instance, they were the very trial judge in the matter. If they are an appellate judge, they know that the defendant has been convicted and they know the trial court judge has made a finding of no

340. *See supra* Section III.A.5.
341. *See supra* Section III.A.4.
342. *See supra* Section III.A.3.

ineffectiveness—"double finality," in a sense.[343] Also, as described in Part I, a federal habeas petition means that, at the district court and circuit court of appeals levels, the judge confronts a triple or quadruple finality circumstance. At the federal level, that layered finality is captured in the equivalent layers of deference embedded in habeas litigation.

We presume that judges experienced in the intellectual and psychological challenges of handling cases remain as neutral and fair as possible. The criminal justice system would have little credibility without that presumption. We never know, of course, the degree to which that presumption is actually the case in every circumstance. The estimable Judge David Bazelon captured much of this instinct well in 1973.[344] In explaining one reason—a disturbing one to him—that judges are reluctant to reverse convictions on the grounds of ineffectiveness, he said:

> It is the belief—rarely articulated, but, I am afraid, widely held—that most criminal defendants are guilty anyway. From this assumption it is a short path to the conclusion that the quality of representation is of small account. This may be an important reason why appellate courts commonly require appellants to show not only that their constitutional right to effective counsel was denied but also that the denial was prejudicial. [footnote omitted].
>
> This "guilty anyway" syndrome underlies much of the current push for greater "efficiency" in the criminal courts. On all sides these days we hear the clamor for "judicial reform," which too often looks like a euphemism for dealing with more defendants in less time. Why allow men who are "guilty anyway" to clutter the courts with all sorts of difficult legal and constitutional questions?[345]

I suspect that nothing has changed in the forty-seven years since Judge Bazelon wrote those thoughts.

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343. The timing of an IAC claim varies a good bit from jurisdiction to jurisdiction and even within a jurisdiction. In New Hampshire, for example, an IAC claim can be filed between conviction (as a motion for a new trial) and the litigation of the direct appeal, with the direct appeal placed on hold until the IAC claim (if denied) joins the direct appeal. Sometimes the IAC claim is filed as a motion for a new trial or a state habeas corpus petition after the resolution of the direct appeal. And, that process is a description of only a set of IAC processes in one state. Great variation exists around the country.

344. David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 26 (1973).

345. *Id.*

One of the central and mostly unstated premises of this Article has been that cases with DNA evidence in them are hard. They are hard for the prosecutor, the defense lawyer, the jury, the victim, and the defendant. They are hard because DNA evidence is complex scientific evidence. It involves principles and methodologies rooted in molecular biology, population genetics, and biostatistics. Like most lawyers and judges, the prosecutor and defense lawyer very likely did not go to law school because of their excellence in science, let alone those topics. The judge very likely did not ascend to the bench, be it by appointment or election—because of their excellence in understanding science.[346] A number of studies confirm that jurors find DNA evidence particularly persuasive, even more so than eyewitness testimony, according to one study.[347] A Gallup poll in 2005 found that 85 percent of people polled found DNA evidence to be either completely or very reliable.[348]

These factors make it very easy for a prosecutor, a defense lawyer, or a judge involved in a trial in the criminal justice system to conclude, at least unconsciously, some version of, "Well, it is DNA; that means guilty; no chance of a trial victory." When a defense lawyer does that, it is the beginning of the path to ineffectiveness, be it an instinct to plead the case; to find another way to mount a defense other than attacking the "irrefutable" DNA or just simply a diminishment of their level of commitment to the case. Therein lies one of the central, implicit concerns of this Article.

When a judge has that same instinct, it can lead to a more superficial evaluation of an IAC DNA claim, among other risks attending the exercise of sound decision-making by the judge. Therein lies a second central concern of this Article as revealed by the cases discussed in Section III.A.

346. Randy Jonakait once wrote, "[A]ttorneys are reasonably bright people who became lawyers partly because they were afraid of science and math. . . . If so, lawyers will not examine the scientific evidence with as much skepticism as they would other information." Randolph N. Jonakait, *Stories, Forensic Science, and Improved Verdicts*, 13 CARDOZO L. REV. 343, 349 (1991).

347. *E.g.*, Dominique Clancy & Ray Bull, *The Effect on Mock-Juror Decision-Making of Power-of-Speech Within Eyewitness Testimony and Types of Scientific Evidence*, 22 PSYCHIATRY, PSYCHOL. & L. 425, 426 (2015); Joel D. Lieberman et al., *Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?*, 14 PSYCHOL., PUB. POL'Y, & L. 27, 32 (2008).

348. *In Depth: Topics A to Z: Crime*, GALLUP, https://news.gallup.com/poll/1603/crime.aspx [https://perma.cc/U989-SXYT].

The instinct—"Well, it is DNA; that means guilty; no chance of a trial victory"—is wrong. It is not the case that cases in which the prosecution offers DNA evidence are unwinnable, whether before trial or at trial. Well-prepared, aggressive defense lawyers win cases even though the prosecution has DNA evidence in their favor. They win dismissals by successfully challenging the admissibility of the DNA evidence under *Frye* or *Daubert*. They win better plea offers for their clients by aggressively challenging the quality of the forensic analyst's work pre-trial and they win trials—complete and full acquittals in cases in which the prosecution presents forensic DNA evidence through an expert.

A sampling of criminal defense lawyers around the country confirms this point. The sample includes 49 cases in which the prosecution presented or was going to present DNA evidence at trial.[349] Of those cases, 30 resulted in acquittals after trial; 10 resulted in dismissals before trial; 6 resulted in advantageous plea bargains after challenges to the DNA evidence; and 3 were won on direct appeal.[350] The sampling does not offer up an overall percentage of DNA cases that end in a favorable result to the defendant. That data is too difficult to gather. Rather, the point of the data is that, whatever that percentage may be, DNA cases can and do result in favorable outcomes for defendants, very likely through the effectiveness of the legal representation.

The most common issue raised by counsel in the sample of successes was transfer, the defendant's DNA ended up on the incriminating item through innocent transfer rather than by virtue of the defendant being the perpetrator. The defense argued transfer in 16 of the 49 cases.[351] In one well-known murder case in California, DNA matching the genetic profile of the defendant ended up under the fingernails of the deceased.[352] Good investigation by counsel and subsequent high-quality police work eventually brought to light that the defendant had been picked up by paramedics earlier in the evening of the murder.[353] One theory said that the paramedics had used pulse oximeters on his fingers; another that they used other equipment in relation to the defendant and another said that they simply had some of the defendant's

349. DNA-Win Collection, *supra* note 159.
350. *Id.*
351. *Id.*
352. Worth, *supra* note 141.
353. *Id.*

DNA on their clothing.[354] Whatever the actual circumstance, those same paramedics went to the scene of the homicide and tended to the deceased.[355] At that point, the transfer occurred.[356] The case was dismissed.[357]

In another case, the defendant was acquitted even though DNA matching his genetic profile was found on handcuffs the victim had said were placed on his wrists by one of three masked men, two of them armed, who entered his home and stole $525,000. The state forensic analyst had testified that the chances of the DNA on the handcuffs coming from someone other than the defendant were one in 319.5 trillion.[358] The defense argued that "DNA could come from someone else who had had contact with [the defendant], perhaps years before, and thus the DNA reading didn't prove [the defendant] was one of the three robbers."[359] The jury acquitted the defendant in 40 minutes.[360]

In each of those cases, the defense had other weaknesses in the prosecution's case to which they could call attention. But, without at least the possibility of an innocent accounting for the presence of the defendant's DNA at the crime scene—through the efforts of defense counsel—it is very unlikely the same result would have been reached.

In 6 of the 49 cases, the defense successfully excluded the DNA evidence pre-trial as a result of a *Daubert* or *Frye* challenge.[361] Most often, the challenge was to the method of calculating population

354. *Id.*

355. *Id.*

356. *Id.*

357. Martha Neil, *Murder Defendant's Airtight Alibi Contradicted DNA Evidence*, AM. BAR ASS'N J. (June 28, 2013, 11:30 AM), https://www.abajournal.com/news/article/murder_defendants_airtight_alibi_contradicted_dna_evidence [https://perma.cc/8HVQ-QH2N].

358. Thomas J. Prohaska, *Jury Discounts DNA Evidence in Acquittal; Short Deliberation Frees Accused Home Invader*, BUFFALO NEWS (Dec. 19, 2012), https://buffalonews.com/news/jury-discounts-dna-evidence-in-acquittal-short-deliberation-frees-accused-home-invader/article_b77f4c37-e03d-57cf-8ffa-02c0cd5334fc.html [https://perma.cc/LKZ5-ZZM3].

359. *Id.*

360. *Id.*

361. *See* Unpublished Survey of news data from Cybergenetics filled out by author (on file with author) [hereinafter DNA-Win Case #7]; Unpublished Questionnaire filled out by author (on file with author) [hereinafter DNA-Win Case #36]; Unpublished Survey of news data from New York Daily News filled out by author (on file with author) [hereinafter DNA-Win Case #38]; Survey of news data from New York Daily News filled out by author (on file with author) [hereinafter DNA-Win Case #39]; Unpublished Questionnaire filled out by author (on file with author) [hereinafter DNA-Win Case #51]; Unpublished Questionnaire filled out by author (on file with author) [hereinafter DNA-Win Case #47].

frequency estimates, particularly in relation to mixtures.[362] A few cases involved an attack on lab or analyst practices.[363] One case involved a challenge to the use of "low-copy DNA" in the forensic analysis.[364]

In 6 of the 49 cases, the defense litigated at trial the significance of the presence of a mixture, either arguing that the DNA analyst misinterpreted the mixture or that an additional person other than the "expected" people (the defendant and/or the victim) was present in the crime scene biological sample.[365] Likely, the mixture approach successfully raised a reasonable doubt in the minds of jurors or in the mind of the prosecutor. In one mixture case, the DNA evidence appeared to present a mixture of the victim's genetic profile and that of the defendant's.[366] The population frequency estimate was "only" 1 in 211,000 because the victim and the defendant shared types at several genetic locations.[367] The crime scene sample was taken from the exterior of some jeans.[368] The defendant contended that he was not in California at the time and his cellphone records placed him in Spokane.[369] Nonetheless, the victim picked him out of a well-conducted photo

362. *See, e.g.*, Unpublished Questionnaire filled out by author (on file with author) [hereinafter DNA-Win Case #27]; Unpublished Questionnaire filled out by author (on file with author) [hereinafter DNA-Win Case #28]; DNA-Win Case #36, *supra* note 363.

363. *See, e.g.*, Unpublished Survey of news data from New Times Broward-Palm Beach filled out by author (on file with author) [hereinafter DNA-Win Case #3]; Unpublished Survey of news data from The Detail filled out by author (on file with author) [hereinafter DNA-Win Case #21]; Unpublished Survey of news data from The Globe and Mail filled out by author (on file with author) [hereinafter DNA-Win Case #23]; Unpublished Survey of news data from The Atlantic filled out by author (on file with author) [hereinafter DNA-Win Case #25]; Unpublished Questionnaire filled out by author (on file with author) [hereinafter DNA-Win Case #40].

364. DNA-Win Case #39, *supra* note 361.

365. *See* Unpublished Survey of news data from Yahoo News filled out by author (on file with author) [hereinafter DNA-Win Case #9]; Unpublished Survey of news data from New York Criminal Defense Lawyer Blog filled out by author (on file with author) [hereinafter DNA-Win Case #22]; DNA-Win Case #25, *supra* note 363; Unpublished Questionnaire from Aileen O'Connell, Staff Att'y, N.H. Pub. Def., and Eric Raymond, Staff Att'y, N.H. Pub. Def., to author (on file with author) [hereinafter DNA-Win Case #32]; Unpublished Questionnaire from Tonya Deetz, Att'y, L.A. Cnty. Alternate Pub. Def., to author (on file with author) [hereinafter DNA-Win Case #34]; DNA-Win Case #55, *supra* note 137.

366. DNA-Win Case #55, *supra* note 137. These facts are based on an e-conversation the author had with the trial lawyer on the case, Samuel Leonard, from the Los Angeles County Public Defender's office. What was particularly startling about the case was that when the types at each genetic location of the three men in the second round of testing were taken together, they presented the same set of types as the defendant's types at the interpretable location—that is, a mixture of four people's types at several genetic locations looked exactly like one person's types at those locations.

367. *Id.*

368. *Id.*

369. *Id.*

lineup.[370] The defense set about getting a re-testing of the rest of the jean sample but, before that could happen, the prosecution's lab conducted a different kind of DNA testing—YSTR (Y chromosome—Short Tandem Repeats).[371] They found that what had appeared to be a 2-person mixture was, in fact, a four-person mixture with an inconclusive result as to the defendant.[372] The case was dismissed.[373]

In 12 of the 49 cases, some sort of lab error, mishandling, or police evidence collection error occurred.[374] Most famously perhaps, the defense in the OJ Simpson homicide case explained the inculpatory DNA evidence as a product of evidence mishandling and tampering by the Los Angeles Police Department.[375] In another case, the defendant was charged with false report based on a claim that he made up an assault when, in fact, he injured himself.[376] The forensic lab analyst testified that all the DNA results were uninterpretable.[377] The defense DNA expert testified that all the DNA results from samples taken from the defendant's wounds and clothing were all consistent with a male attacker not the defendant.[378] The defendant was acquitted.[379]

Not infrequently, these kinds of problems were paired up with a transfer approach. In one Colorado case, the defendant was charged with possession of a weapon by a previous offender and possession of a weapon on school grounds.[380] The firearm was found in a car on the passenger seat where the defendant was sitting.[381] The biological

370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.*
374. *See* Unpublished Survey of news data from New York Daily News filled out by author (on file with author) [hereinafter DNA-Win Case #4]; DNA-Win Case #9, *supra* note 365; Unpublished Survey of news data from Forensics Colleges Blog filled out by author (on file with author) [hereinafter DNA-Win Case #13]; Unpublished Survey of news data from OPB filled out by author (on file with author) [hereinafter DNA-Win Case #19]; DNA-Win Case #21, *supra* note 363; DNA-Win Case #22, *supra* note 365; Unpublished Survey of news data from Manchester Evening News filled out by author (on file with author) [hereinafter DNA-Win Case #24]; DNA-Win Case #25, *supra* note 363; DNA-Win Case #31, *supra* note 161; Unpublished Questionnaire (on file with author) [hereinafter DNA-Win Case #45]; Unpublished Questionnaire (on file with author) [hereinafter DNA-Win Case #48].
375. DNA-Win Case #13, *supra* note 374.
376. Unpublished Questionnaire (on file with author) [hereinafter DNA-Win Case #49].
377. *Id.*
378. *Id.*
379. *Id.*
380. The details of this case are grounded in an e-conversation with a Colorado attorney who has expertise in handling DNA cases. They handled the described case and related the details to the author in an extended e-conversation.
381. *Id.*

sample taken from the gun showed a mixture of four individuals' genetic profile, one of whom was the defendant.[382] During trial, the forensic analyst was reluctant to admit that at least some of the DNA in the mixture could have come from secondary transfer; for example, A shakes hands with B transferring A's DNA to B's hand; B then holds a firearm; A's DNA is transferred to the firearm.[383] The defense expert explained the concept of secondary transfer to the jury.[384] The defendant was acquitted.[385]

The sample confirms that DNA cases are winnable for the defense with effective lawyering. The cases are winnable by re-testing samples. They are winnable by calling defense experts. They are winnable by using a transfer defense. They are winnable by challenging the prosecution's DNA analyst on cross-examination or before trial. They are winnable by challenging the admissibility of the DNA evidence under *Daubert* or *Frye*. All of these ways of winning, and more, appear in cases of all kinds—murder, sexual assault, weapons possession, even false report.

Notably, they happen in circumstances not readily apparent from a quick or superficial look at the DNA evidence in the form of a summary report. They are also not readily apparent from a trial transcript in which such issues were never raised. The case in which the defendant's DNA was found underneath the murder victim's fingernails[386] would appear as a very strong prosecution case to the trial or appellate judge hearing an IAC claim. Effective lawyering by DNA-knowledgeable lawyers who are aggressive in getting underneath the facts of the case as they first appear in discovery can win tough cases. But on the surface, these potential defenses remain easily unnoticed.

The "guilty anyway" syndrome combined with the risk of "easily unnoticed" defenses mean that the *Strickland* standard, with its layered presumptions and deference, as it is currently used in DNA cases, is unlikely to pick up what is actually ineffective assistance of counsel. Tangible, minimum standards as to how to handle a DNA case to which a reviewing court in an IAC DNA claim can refer would be quite valuable. Such standards would act as a proxy for the court actually looking for the easily unnoticed defenses. A court could simply

382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*
386. *See supra* text accompanying notes 358–362.

ask whether the defense lawyer took a basic set of measures to investigate the DNA portion of the case. In the language of *Strickland* jurisprudence, a court would be able to evaluate well whether a lawyer made an informed choice of a trial strategy.

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Individually, each of these slices of empirical evidence do not conclusively establish that a system-wide, serious problem exists with counsel performance in DNA cases that IAC claims cannot pick up.

The DNA-cases-are-winnable empirical evidence is of a different, more subjunctive, type. It documents to some extent the answer to the question of what the result might have been had the trial played out with DNA-informed and aggressive trial counsel. That said, it is indirect evidence of the answer to that question. It suggests that these are not the only DNA cases that could have been won and it suggests that courts have no appreciation for this realistic outcome.

Finally, one must be careful not to equate those cases in which a defendant has been exonerated by post-conviction DNA testing with the presence of ineffective assistance of counsel. *Strickland* does not require that factual innocence be at risk by virtue of counsel's deficient performance.[387] A defense lawyer's goal at trial is to establish a reasonable doubt as to the prosecution's case, not to prove factual innocence. No doubt, many defendants have been acquitted who are not factually innocent. *Strickland*'s approach calls only for an inquiry into whether counsel's deficient performance may have altered the outcome, rather than whether the performance resulted in a factually innocent person being convicted.[388] Ineffective assistance of counsel can occur when counsel failed to engage in conduct that would have raised a reasonable doubt, whether the defendant was factually innocent or not.

V. RECOMMENDATIONS

Strickland and its progeny built significant procedural and substantive hurdles for defendants/petitioners into the decisional architecture it created for judges in IAC cases. The Court called for strong deference in the form of a set of presumptions as to the strategic decisions of the trial lawyer. It did not want to interfere with the autonomy of the lawyer. It did not want to second guess their decisions. A further

387. Strickland v. Washington, 466 U.S. 668, 687–88 (1984).
388. *Id.* at 694.

hurdle operated if the case went to federal court where a court accorded state court decisions additional deference. In theory, the layers of presumption and deference were balanced against a flexible directive for IAC courts to measure the lawyer's conduct against standards and prevailing professional norms. That balance was to insure that a lawyer would make informed strategic choices and a fundamentally fair trial would result.

The examination of a pool of IAC cases in Part III found that that balance did not exist. Courts are, more often than not, analyzing the claims superficially. Sometimes, they do not engage in the analytical work for which *Strickland* calls. Sometimes, they over-relied, too superficially, on the deference built into the *Strickland* standard or the double-deference embodied in the EDPA. Sometimes they implicitly seemed to adopt an over-valuation of the irrefutability and power of forensic DNA evidence. Perhaps most notably, they never referred to substance of standards and prevailing professional norms.

These failings presented a real concern that defendants in cases with DNA evidence may be the victims of ineffective lawyering. Worse, the decisional architecture of *Strickland* was not picking up that ineffective lawyering. Part IV investigated that concern and produced empirical evidence that wrongful convictions occur in the criminal justice system. They occur even in cases with forensic evidence, and they occur because of ineffective assistance of counsel. And the mistakes are sometimes not picked up by IAC claims. More specifically, the examination produced cases like Josiah Sutton's in which DNA was used at trial, the defendant filed an IAC claim that was denied, and years later the defendant was exonerated by post-conviction DNA testing.[389] Finally, the evidence showed that DNA cases were winnable. Effective lawyering by DNA-knowledgeable lawyers can win tough cases even though, on the surface, the potential defenses remain easily unnoticed.

Judges in DNA IAC claims are too often missing the presence of ineffective assistance of counsel by lawyers who do not have the understanding, knowledge, and experience to try DNA cases. They themselves are "ineffective" in handling IAC DNA cases. Absent the kind of capacity to try a DNA case, lawyers make uninformed or ill-informed strategic choices. They fail to request full discovery of the case

389. *Josiah Sutton*, *supra* note 3; Sutton v. State, No. 14-99-00951-CR, 2001 WL 40349, at *1 (Tex. App. Jan. 18, 2001).

file. They do not consult with an experienced DNA lawyer or an expert. They do not request additional DNA testing. They simply choose another defense without the necessary information to make an informed choice.

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Judicial "ineffectiveness" in evaluating DNA IAC claims is fixable. Judges should:

1. Follow *Strickland*'s command to consider the existing standards and prevailing professional norms for criminal defense lawyers in assessing whether counsel's performance was deficient;
2. More specifically, recognize that prevailing professional norms for a lawyer making informed strategic choices in DNA cases call for a non-deficient lawyer to:
    a. Obtain and examine the full DNA case file through the discovery process;
    b. Engage in a preliminary conversation with an experienced DNA lawyer, an expert or obtain sufficient training to understand and tentatively evaluate the issues the case file may present, regardless of the nature and quality of the other, non-DNA evidence in the case;
    c. Explicitly consider retaining an expert for trial preparation for cross-examination and/or direct testimony;
    d. Explicitly consider a request for additional DNA testing.
3. Dispense with deference/presumptions in evaluating an IAC claim if the defendant/petitioner makes a showing that one or more of the four criteria in # 2 above have not been met; and
4. If requested, require additional DNA testing and/or production of and an independent analysis of case file as a part of assessing a DNA IAC claim if the defendant/petitioner makes a showing that one or more of the four criteria in # 2 above have not been met.

The adoption of these narrowly tailored recommendations will open the door to identifying unjust results at the trial level without turning those doors into floodgates that overwhelm the courts with evaluating IAC DNA claims.

1. Consider Existing Standards

The *Strickland* Court preferred guidelines that acknowledged the wide range of professionally competent assistance, rather than adopting specific standards.[390] In several cases, they have made reference to a number of standards including the ABA Standards for the Defense Function and the NLADA Professional Guidelines for Criminal Defense Representation.[391] By contrast, not one IAC DNA court in the sample examined earlier made any reference to the ABA Standards for DNA Evidence or to the NLADA Professional Guidelines.[392]

The ABA Standards for the Defense Function and the NLADA Professional Guidelines both describe basic principles for competent defense counsel representation. In the context of handling any case, they lay out the basics of what a competent lawyer should do. For example, Section 4-4.1 of the ABA Standards, "Duty to Investigate and Engage Investigators," mimics some of the non-DNA *Strickland* jurisprudence in its emphasis on conducting thorough investigation for the purpose of making informed strategic choices.[393]

These standards emphasize that an uniformed strategic choice to devise a non-DNA defense is inadequate; that a choice not to investigate the DNA aspect of the case because of the overwhelming nature of the prosecution's evidence, a too common refrain, is inadequate; and a failure to obtain any DNA discovery is inadequate. The NLADA Professional Guidelines also emphasize the importance of investigation and of obtaining discovery in Guidelines 4.1 and 4.2.[394] Engaging

390. *Strickland*, 466 U.S. at 687–88.

391. Williams v. Taylor, 529 U.S. 362, 396 (2000); Wiggins v. Smith, 539 U.S. 510, 522 (2003); Rompilla v. Beard, 545 U.S. 374, 387 (2005); Padilla v. Kentucky, 559 U.S. 356, 367 (2010).

392. *See supra* note 167.

393. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-4.1 (4th ed. 2017).

394. For example, in a footnote to the Commentary accompanying Guideline 4.1 regarding investigation and obtaining material from the state, the Guidelines say:

> Counsel must decide in each case whether defense testing will help the defendant or merely corroborate test results already obtained by the state. But counsel's decision should be based on knowledge about the testing procedures in question, not on a mere assumption that state test results are accurate. "Without such knowledge, we will consistently fail to impeach chemo forensic [or other expert] testimony based on faulty testing procedures."

Performance Guidelines for Criminal Defense Representation: Guideline 4.1 Commentary, NAT'L LEGAL AID & DEF. ASS'N n.24, https://www.nlada.org/defender-standards/performance-guidelines [https://perma.cc/J7KY-T7AH].

Guideline 4.2 Formal and Informal Discovery commentary states that: "Independent investigation of the case by defense counsel, while necessary, is not sufficient preparation for

in independent investigation supplemented by what information the prosecution already has—for example the laboratory case file—is a baseline for making informed strategic choices.

In recognition of the unique importance and power of DNA evidence in the criminal justice system, the ABA approved specific standards for DNA evidence in 2006.[395] The standards are a broad treatment of DNA evidence from practice of police, labs, and prosecutors to defense lawyers and courts. Standard 16-4.1, for example, focuses on the importance on the provision of discovery, and 16-4.2 focuses on the importance of the defense lawyer having the ability to inspect and test the DNA evidence.[396]

Strickland also commanded that counsel had a fundamental "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."[397] As guidance, it said only that counsel owed reasonable performance under the prevailing norms.[398] The *Strickland* Court did not want to require perfect performance by trial counsel. Nor did it appear to allow for "no performance" by trial counsel. Its language captured a deference to prevailing professional norms to find the kind of minimal performance necessary for constitutionally adequate performance. Part III shows that, at least in DNA cases, IAC judges are not considering the prevailing norms at all when measuring what constitutes the necessary minimally adequate performance, let alone deferring to such norms as a measuring tool.

Part II shows that DNA cases require a particular intensity of focus on a very specialized area quite different than other parts of a case. It takes a measure of understanding, knowledge, and experience just to assess what possibilities for the exclusion of the DNA evidence or for an acquittal may exist in a case. An IAC judge should be assessing whether a lawyer in a DNA case has the capacity and ability to make an informed strategic choice as to handling the DNA part of a case. As with the benefit of consulting standards, the benefit of consulting

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determining whether to go to trial, or for the trial itself. Counsel needs to know what information (whether correct or incorrect) the prosecution may be relying on." *Performance Guidelines for Criminal Defense Representation: Guideline 4.2 Commentary*, NAT'L LEGAL AID & DEF. ASS'N, https://www.nlada.org/defender-standards/performance-guidelines [https://perma.cc/8Y5U-HU42].

395. AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: DNA EVIDENCE, at iii (2007).

396. *Id.*, Standards 16-4.1(a), 16-4.2(a), 16-4.3(a), at 81.

397. Strickland v. Washington, 466 U.S. 668, 688 (1984).

398. *Id.*

prevailing norms is that the IAC judge has the means to assess in an area that mixes complex science and the law that is either very unfamiliar to them or which has been informed only by a one-sided presentation at trial.

One example of how different and complex the area of forensic DNA is lies in the practices of public defender programs around the country. A short survey of 15 public defender programs reveals that when a program begins to handle enough DNA cases, it dedicates specialized attorney resources to such cases.[399] The Los Angeles County Public Defender program, the Cook County Public Defender program, and the Public Defender Service in Washington, D.C. each have specialized forensic units that handle DNA cases. Other programs that do not have specialized units have lawyers experienced in handling DNA cases with whom trial counsel can either consult or co-counsel. All of these programs offer training or access to training as do programs too small to have a dedicated unit or a cadre of experienced lawyers. These various approaches to helping attorneys handle DNA cases are examples of prevailing professional norms in practice.

As Part II establishes, forensic DNA evidence is a sophisticated and complex type of scientific evidence. Challenges that may lead to the exclusion of evidence or to an acquittal are not readily apparent from a case summary provided by the prosecution. Such challenges are even less apparent to judges in DNA IAC cases. They are most often limited to that which only one side has presented at trial. The defendant/petitioner before them has even fewer resources than the lawyer who represented them before and during trial.

Attention to standards like the ABA Standards and the NLADA Performance guidelines provide an IAC judge with an ability to independently measure the baseline competence of a defense lawyer handling a DNA case. They don't have to rely exclusively on that which the prosecution has presented, a presentation that is, by design, one-sided. They don't have to depend on the presentation in an IAC petition or at a hearing by a defendant/petitioner without resources and frequently without a lawyer. Standards provide a framework for a

399. The author surveyed a number of public defender programs around the country as to how the managed representation in DNA cases. Those unpublished results are on file with the author. The author also relied on their personal knowledge born of experience over thirty years as to how some larger public defenders' offices manage representation in DNA cases.

better-grounded perspective on the impending decision. Prevailing professional norms put meat on the bones of those standards.

2. Prevailing Professional Norms in DNA Cases

A number of sources exist for determining what are the prevailing professional norms regarding constitutionally non-deficient counsel conduct in a DNA case. The National Institute of Justice has provided a valuable primer directly targeted at criminal defense lawyers, entitled DNA for the Defense Bar.[400] It provides a comprehensive look at what a lawyer should be doing in a case with DNA evidence. As noted previously, the National Association of Criminal Defense Lawyers (NACDL), the premier bar association for criminal defense lawyers, has over twenty CLE training sessions on video for both members and non-members centered on litigating DNA cases.[401]

The website, forensic bioinformatics.com, has an extensive array of articles, presentations, and other resources that identify the basics (and more) of handling a DNA case.[402] The literature on forensic DNA evidence is extensive[403] and includes basic primers for lawyers on trying DNA cases, like "Evaluating Forensic DNA Evidence: Essential Elements of a Competent Defense Review," and "Winning Despite DNA: The Truth You Must Reveal," both in the NACDL's quarterly magazine, The Champion.[404] And, many public defender programs host training sessions for their lawyers as well as other lawyers in the criminal defense community.[405]

400. NAT'L INST. OF JUST., *supra* note 29, at iii. The 2012 publication was a product of the work of defense lawyers, forensic scientists, and lawyers. It is one of a series of four publications by the NIJ about DNA evidence in the courtroom including *Principles of Forensic DNA for Officers of the Court*, NAT'L INST. OF JUST. (2006), https://nij.ojp.gov/library/publications/principles-forensic-dna-officers-court [https://perma.cc/ZAS7-VL6A]; *DNA: A Prosecutor's Practice Notebook*, NAT'L INST. OF JUST., https://prosecutor.training.nij.gov/usermanagement/login_form [https://perma.cc/9JRP-6GZW]; *DNA for Law Enforcement Decision Makers*, NAT'L INST. OF JUST. (Jan. 1, 2010), https://nij.ojp.gov/events/forensic-dna-law-enforcement-decisionmakers.

401. *NACDL Store*, NAT'L ASS'N CRIM. DEF. LAWS., https://nacdl.inreachce.com/SearchResults?searchType=1&category=fddb39d3-01ac-4689-97e6-d9f57f641f4c&sortBy=recentlyadded [https://perma.cc/L8Z4-3NFW].

402. FORENSIC BIOINFORMATICS, *supra* note 109.

403. *See supra* note 29.

404. Sheffield, *supra* note 111, at 18; William C. Thompson et al., *Part 2: Evaluating Forensic DNA Evidence—Essential Elements of a Competent Defense Review*, THE CHAMPION, May 2003, at 24.

405. *Trace Evidence Presentation at Public Defender Forensic Science Conference*, MICROTRACE LLC, https://www.microtrace.com/trace-evidence-presentation-at-public-defender-forensic-science-conference/ [https://perma.cc/8S2Z-SCKG]. The Cook County Public Defender's office has held an annual forensic science training session which includes DNA evidence in

These resources are excellent training materials. More importantly, they operate as a valuable source of prevailing professional norms. A thorough analysis of their content reveals an emphasis on four essential components to constitutionally non-deficient representation in a DNA case:

1. Obtain and examine the full DNA case file through the discovery process;
2. Engage in a preliminary conversation with an experienced DNA lawyer, an expert, or obtain sufficient training to understand and tentatively evaluate the issues the case file may present, regardless of the nature and quality of the other, non-DNA evidence in the case;
3. Explicitly consider retaining an expert for trial preparation for cross-examination and/or direct testimony and document that consideration; and
4. Explicitly consider a request for additional DNA testing and document that consideration.

A. Obtain and Examine the Full Case File

This requirement is the *sine qua non* of constitutionally adequate representation. A defense lawyer cannot make any strategic choices without knowing what options are available. It cannot be an "informed strategic choice" to decide what to do about the DNA evidence without an examination of the complete case file. As William Thompson et al. commented:

> These records [the electronic files] can reveal a variety of problems in testing that a forensic laboratory may fail to notice or choose not to report, such as failure of experimental controls, multiple testing of samples with inconsistent results, re-labeling of samples (which can flag potential sample mix-ups or uncertainty about which sample is which), and failure to follow proper procedures.[406]

Chicago for close to twenty years. The author has been a presenter at DNA training seminars in New Hampshire, Vermont, and Florida and has attended numerous DNA training seminars around the country over the last thirty years.

406. Thompson et al., *supra* note 405, at 24.

B. Engage in Preliminary Evaluation with Expert or DNA-Experienced Lawyer

Obtaining the case file and reviewing it without the necessary understanding, knowledge, and experience is not constitutionally adequate representation. Such an approach will not result in informed strategic choices. A defense lawyer must engage in preliminary conversations about the strengths and weaknesses of the DNA analysis evident in the case file with an expert of some sort. That person may be an experienced DNA lawyer or they may be a DNA expert. It may be that the preliminary conversations and evaluation leads to a conclusion of no significant issues. But a conclusion that the DNA evidence is un-challengeable and that another theory of the case has a better chance of success without having engaged in at least preliminary conversations and evaluation of the case file with an experienced lawyer or expert cannot lead to informed strategic choices.[407]

C. Explicitly Consider Formally Retaining an Expert for Trial Preparation

Apart from preliminary evaluation of a case, if counsel decides to proceed with undermining or aggressively attacking the DNA evidence at trial, they must at least consider retaining an expert or consulting with an experienced DNA lawyer in order to adequately prepare for cross-examination of the prosecution's expert and/or for presentation of their own expert.

While it is not necessary in all cases to call an expert to mount an attack, at least considering this option, including evaluating the cost and likelihood of obtaining the necessary funds for doing so, is important. Counsel's documentation of their informed decision-making process must include this explicit consideration in light of and with reference to the types of issues they intend to raise at trial as to the DNA evidence. Such documentation dramatically improves the ability of an IAC DNA judge to thoughtfully evaluate the conduct of trial counsel without deference, presumption, surmise, or speculation.

D. Explicitly Consider a Request for Additional DNA Testing

A request for additional DNA testing may or may not be the best choice in the context of a case that already has DNA testing. In Josiah

407. *Id.* at 27.

Sutton's case, it would have saved him five years in prison for an offense he did not commit. In other cases, inculpatory results of additional testing might reinforce the prosecution's case.

Whether it is the right choice in a particular case depends on a number of case-specific factors: the revealed weaknesses in the prosecution's case file; the availability of such additional test results to the prosecution; the possibility as revealed by an investigation of the nonforensic aspects of the case that the DNA evidence is mistaken or has an innocent explanation; the likelihood of obtaining funds for such testing; the substance of counsel's conversations with their client, etc.

Trial counsel cannot make this determination without the understanding, knowledge and experience to evaluate the existing DNA evidence and advise their client as to the risks of seeking additional DNA testing. Gut instinct, assumptions and/or speculation is not a constitutionally sufficient replacement for at least an informed consideration seeking additional DNA testing. And documentation of that consideration complete with an explicit evaluation of the existing test results relieves the IAC DNA judge from making a decision based on deference, presumption, surmise, or speculation.

3. Dispense with Deference/Presumptions in Evaluating an IAC Claim

Part III established that an over-reliance on defense and presumption resulted in a superficial evaluations of IAC DNA claims that were likely missing constitutionally deficient trial performance by counsel in DNA cases. The deference and presumptions embedded in *Strickland* jurisprudence generally have value in preventing second-guessing trial counsel's trial strategies. But, if trial counsel in DNA cases does not engage in the basics of constitutionally adequate representation as described in 2(a)–(d) above, an IAC DNA judge must directly and explicitly consider the risk that inadequate representation has occurred.

Such an approach offers targeted and informed guidance to an IAC DNA judge who may not be conversant enough in the specialized area of forensic DNA evidence to make an otherwise informed assessment. The approach does not overly intrude on trial counsel's prerogatives to make informed strategic choices. It simply establishes an explicit foundation for making such choices. And, in the longer term, if IAC DNA judges adopt this approach, trial counsel in DNA cases will engage in better foundational conduct.

4. If Requested, Require Post-Conviction DNA Testing

An IAC DNA judge is not infrequently confronted with a claim accompanied by a virtually empty record. By adopting Recommendations #1–4, it will become much more likely that the records in IAC DNA cases will be more robust and thereby easier to make a well-grounded and thoughtful decision. Too often an IAC DNA judge is also confronted with the inability to make a grounded decision under the second prong of the *Strickland* standard because the DNA record is empty as to whether counsel's deficient performance would have made a difference in the case. The emptiness of the record for a second-prong decision is most often a result of the unavailability of either collateral-attack counsel or an expert consultation for collateral claims by pro se defendant/petitioners.

Additionally, an IAC DNA judge confronts a claim in which the one-sided DNA evidence offered at trial appears overwhelming, perhaps in combination with other, non-DNA evidence. That one-sidedness may be a function of a deficient trial counsel that resulted in a wrongful conviction, or, it may be a function of an actual overwhelming prosecution case. Access to post-conviction DNA testing would also dramatically improve the efficiency of the criminal justice system. Forensic DNA testing is now inexpensive and quick. A judge who orders post-conviction DNA testing will likely see a much quicker resolution to the case than one who does not order testing. Without testing, the probability of protracted litigation focused on imperfectly recreating the circumstances of the challenged legal representation increases.[408] And without testing, the likelihood of a "Josiah Sutton" set of circumstances without the dramatic, positive outcome increases. Accessible forensic DNA testing in many circumstances improves the efficiency and accuracy of final outcomes in the criminal justice system.

Recommendation #5 in combination with #1–4 means that an IAC DNA judge will ground their prong-two decision in many cases

408. An experienced forensic DNA lawyer who specializes in post-conviction litigation involving DNA evidence described a case to the author in which the defendant's request for post-conviction DNA testing was presented along with an IAC claim. During several layers of litigation, there were repeated objections by the prosecution to post-conviction testing. Eventually, a new trial was granted based on the IAC claim, and DNA testing was conducted. The testing produced compelling evidence that the crime scene sample was left there by the defendant. The repeated objections by the prosecution and the bias against post-conviction testing in that jurisdiction resulted in a costly and inefficient confirmation of trial result.

in an approach other than that of an in-the-absence-of-a-record one. It is important that a judge be able to take this step, if the record, such as it may be, supports a finding that Recommendations #2 (a)–(d) have not occurred. Though judicial economy and non-interference with trial counsel's strategic choices are important, the likely failure to pick up conduct leading to a wrongful conviction without the application of this Recommendation is more concerning.

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DNA cases are winnable before trial and at trial. Judges who evaluate IAC claims must understand the minimal foundational conduct in which counsel must engage to assess how realistic this strategic option is. Counsel must engage in this minimal foundational conduct. Both must do so because we know that both unjust results and wrongful convictions occur without such conduct.[409]

The extended analysis above also suggests that courts must take a deeper look at how they assess all IAC cases, not just those with DNA evidence. The exonerations cataloged by the National Registry and the National Innocence Project combined with the analysis here strongly suggest that deficient lawyering has occurred in cases that did not involve DNA evidence or in which such testing was unavailable at the time and that IAC courts did not pick up those deficiencies.

Particularized reasons do exist in DNA cases for ineffective performance by both lawyers and IAC judges as suggested above. But it is likely not the case that IAC judges in non-DNA cases regularly refer to the ABA standards or make an effort to determine the prevailing professional norms. It is likely not the case that IAC judges in non-DNA cases dispense with deference or presumption when no evidence exists of an informed strategic choice by counsel, rather than deferring to speculative back-filling.

This Article demonstrates that, at the least, IAC DNA judges are often ineffective in applying *Strickland*. Further empirical research needs to be done to document and assess whether judges in non-DNA IAC cases are engaging in the ineffectiveness found in IAC DNA cases. A more fundamental inquiry into whether the *Strickland* standard actually accomplishes what it is designed to accomplish is also in order.

409. For these purposes, an "unjust result" means that, with non-deficient counsel conduct a not-guilty verdict probably would have occurred because counsel made a real challenge to the evidence. A "wrongful conviction" means a person who was factually innocent was convicted.

An IAC claim invokes the Sixth Amendment. It represents a fundamental and unique protection for a criminal defendant. Without it, deficient lawyering creates profound harm to a defendant that the legal system leaves unremedied. Neither a legal malpractice action nor a professional conduct complaint brings any remedy for that profound harm. Without a well-enforced IAC system for picking up deficient lawyering that caused harm to a defendant, the Sixth Amendment right to effective assistance of counsel renders a defendant an unarmed prisoner sacrificed to a gladiator.