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Gideon Exceptionalism?

ABSTRACT. There is no doubt that *Gideon v. Wainwright* is extraordinary, but in thinking about its uniqueness, we are reminded of "American exceptionalism" and the diametrically opposed meanings that advocates have ascribed to the phrase. *Gideon* too is exceptional, in both the laudatory and disparaging sense. As we set forth in this Essay, we think *Gideon* is both a "shining city on a hill" in the world of criminal procedure and something of a sham. We first discuss the extraordinary features of the decision itself, then lay out how it has survived largely intact, unlike virtually all other Warren Court criminal procedure decisions. Then we turn to the bleaker side of the *Gideon* story, first illuminating how the stingy law of ineffective assistance of counsel renders *Gideon*'s "shining city" illusory for many defendants, and then showing how the routine denial of investigative and expert assistance to indigent defendants further undercuts *Gideon*'s promise. We conclude that the mere presence of an attorney is no panacea for the ills of the twenty-first-century criminal justice system. Unless and until the Supreme Court both significantly raises the bar as to the quality of representation that satisfies the Sixth Amendment right to the effective assistance of counsel and takes action by requiring states to provide more than paltry investigative and expert services to indigent defendants, *Gideon* will remain an unfulfilled promise.

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INTRODUCTION

There is no doubt that *Gideon v. Wainwright*[1] is extraordinary. But extraordinariness can come in more than one flavor. In thinking about *Gideon*, we were reminded of "American exceptionalism," and the diametrically opposed meanings that advocates have ascribed to the phrase. American exceptionalism posits that the United States is qualitatively different from other countries, primarily because it has a specific world mission to spread democracy and liberty.

The related image of the United States as a biblical "citty upon a hill" has deep roots, stemming from a sermon by John Winthrop to the Puritan colonists in the Massachusetts Bay Colony.[2] The phrase "American exceptionalism," however, is bipolar, having been employed almost as frequently to disparage as to laud. It became popular in the 1920s when Stalin used it to chastise American communists who heretically claimed that America's superior resources and lack of class distinctions freed it from Marxist laws of history.[3] However, American conservatives and eventually neoconservatives came to use the term—along with the image of the "shining city on the hill"[4]—to assert superiority and exemption from both the historical forces and rigid class immobility that have affected other countries.[5] That view, in turn, has prompted a fierce backlash in this century, including both normative objections that the morally tainted history of the United States precludes any role as an exemplar of virtue,[6] and positive arguments that social

1. 372 U.S. 335 (1963).

2. John Winthrop, Model of Christian Charity (1630), *in* 7 COLLECTIONS OF THE MASSACHUSETTS HISTORICAL SOCIETY 31, 47 (Boston, Freeman & Bolles 3d ed. 1838) ("For wee must consider that wee shall be as a citty upon a hill.").

3. ALBERT FRIED, COMMUNISM IN AMERICA: A HISTORY IN DOCUMENTS 7-8 (1996).

4. In the last half of the twentieth century, two Presidents used this image as well. *See* John F. Kennedy, President-Elect, Address Delivered to a Joint Convention of the General Court of the Commonwealth of Massachusetts (Jan. 9, 1961) ("[O]ur governments, in every branch, at every level . . . must be as a city up on a hill . . . ."); President Ronald Reagan, Remarks Accepting the Presidential Nomination at the Republican National Convention in Dallas, Texas (Aug. 23, 1984) ("We proclaimed a dream of an America that would be a 'shining city on a hill.'").

5. Harold Hongju Koh, *America's Jekyll-and-Hyde Exceptionalism*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 112 (Michael Ignatieff ed., 2005)

6. *See, e.g.*, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES: 1492-PRESENT (1980).

mobility in the United States is less than it is in many other countries.[7]

We don't pretend to have any expertise on American exceptionalism, but we do see parallels to our own thinking about *Gideon*. However, unlike the participants in the American exceptionalism debates, we have trouble deciding whether we find the laudatory or the disparaging meaning of "*Gideon* exceptionalism" more compelling. As set forth below, we think *Gideon* is both a "shining city on a hill" in the world of criminal procedure, and something of a sham. Part I sets forth the extraordinary features of the decision itself, and Part II echoes the aspirational meaning of "*Gideon* exceptionalism," laying out how the decision has survived largely intact, in sharp comparison to other landmark Warren Court criminal procedure decisions. Part III reverses course, examining how the law of ineffective assistance of counsel renders *Gideon*'s "shining city" illusory for many defendants. Part IV concludes by explaining how the routine denial of investigative and expert assistance to indigent defendants further undercuts *Gideon*'s promise.

I. THE *GIDEON* REVOLUTION

A. The Decision

Prior to *Gideon*, the Supreme Court had held that due process required states to provide counsel for indigent defendants under certain narrow circumstances. In 1932, in *Powell v. Alabama*, faced with well-known and outrageous facts, the Court held that "in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him."[8]

But later, in *Betts v. Brady*,[9] the Court explicitly held that the Due Process Clause did not incorporate the Sixth Amendment guarantee of the right to counsel against the states.

Three decades later, *Gideon*, quoting the language of *Powell*, held that even in a noncapital case, a showing of particular incapacity was unnecessary:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and

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7. *See, e.g.*, Paul De Grauwe, *Structural Rigidities in the US and Europe*, VOX (July 2, 2007), http://www.voxeu.org/article/us-vs-europe-structural-rigidities-re-think.

8. 287 U.S. 45, 71 (1932).

9. 316 U.S. 455 (1942).

> educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[10]

B. How Do I Love Gideon*? Let Me Count the Ways*

Gideon may not inspire sonnets, but it does inspire accolades. Praise starts from the ironic underlying facts. An unemployed, uneducated felon who had failed in trying to defend himself against theft charges sent a handwritten note to the Supreme Court. That note, interpreted as a petition for a writ of certiorari, led to the appointment of preeminent lawyer and future Supreme Court Justice Abe Fortas to brief and argue the case. After the Court ruled that the Sixth Amendment requires the appointment of a lawyer, Clarence Gideon was retried and acquitted.[11] As David Cole notes, "Gideon's story reaffirms all that is best in the American justice system. . . . His story illustrates that the justice system can work for the most vulnerable among us . . . ."[12] Or, as Earl Warren's biographer put it, "no tale so affirmed the American democracy. No story broadcast around the world so clearly proclaimed that not just the rich received justice in American courts."[13]

But *Gideon* was not only a symbolic victory. It transformed criminal "justice" for thousands of indigent defendants incarcerated when it was decided. As the state's brief had pointed out, over five thousand criminal defendants who had not been represented by counsel were incarcerated in Florida alone,[14] and there were a number of other states that had not routinely provided counsel. Although the state had urged the Supreme Court that if it

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10. Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (quoting *Powell*, 287 U.S. at 68-69).

11. ANTHONY LEWIS, GIDEON'S TRUMPET 238 (1964).

12. David Cole, Gideon v. Wainwright *and* Strickland v. Washington*: Broken Promises, in* CRIMINAL PROCEDURE STORIES 101, 102 (Carol S. Steiker ed., 2006).

13. ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 405-06 (1997).

14. Brief for Respondent at 53-56, *Gideon*, 372 U.S. 335 (No. 155).

were to decide in Gideon's favor, it should make the decision prospective, the Court declined to do so. Instead, thousands of unrepresented prisoners were released, many of whom could not be retried. Indeed, retroactivity doctrine itself recognizes *Gideon*'s iconic nature; *Gideon* is the only decision ever cited by the Supreme Court as an example of the kind of watershed rule of criminal procedure that so implicates fundamental fairness as to require retroactive application in habeas corpus.[15]

Moreover, with respect to the number of future cases affected, *Gideon* is unparalleled. More than a million felony defendants may be sentenced in a given year,[16] and somewhere between two-thirds and four-fifths are indigent.[17] It is impossible to know how many of the thirteen states that prior to *Gideon* did not require the appointment of counsel for indigent defendants would have done so in its absence, or when those states would have done so. It is also impossible to know whether in the absence of *Gideon*, budget pressures would have led some of the states that had previously required such appointments to regress. It is nonetheless clear that very large numbers of future defendants were affected by the decision. Moreover, although we criticize the application of the standard for ineffective assistance of counsel later in this Essay, without *Gideon*, there would have been absolutely no constitutional floor for the quality of representation provided. All things considered, in a contest for the single most important criminal procedure decision the Supreme Court has ever rendered, *Gideon* has no real competition.[18]

II. *GIDEON*'S PERSISTENCE

In addition to its symbolic and practical significance, *Gideon* stands out among the Warren Court "criminal procedure revolution" decisions for its

15. Teague v. Lane, 489 U.S. 288, 311-12 (1989).

16. *Felony Defendants*, BUREAU OF JUST. STAT., http://bjs.gov/index.cfm?ty=tp&tid=231 (last updated Mar. 25, 2013).

17. These numbers are from older studies because even recent reports on indigent defense cite data from the late 1990s, suggesting that reliable new data is not available. *See, e.g.*, Maureen McGough, *Indigent Defense: International Perspectives and Research Needs*, NAT'L INST. JUST. J., Oct. 2011, at 36.

18. While it is true that the development of the incorporation doctrine, which applies the commands of the Bill of Rights against the states via the Due Process Clause of the Fourteenth Amendment, lays the foundation for *Gideon* and most of the rest of constitutional criminal procedure and thus could be argued to be more foundational, incorporation developed more slowly. Thus no single decision in that line of cases can be seen as a "shining city."

continued vitality. Although the Warren Court decided more than six hundred criminal cases,[19] with the exception of *Gideon*, the best known and most significant of these decisions have been significantly weakened by the Burger, Rehnquist, and Roberts Courts.

A. Mapp v. Ohio*'s Contraction*

Mapp,[20] decided in 1961, and dubbed by Yale Kamisar as "The First Shot Fired in the Warren Court's Criminal Procedure 'Revolution,'"[21] held that "all evidence obtained by searches and seizures in violation of the [Fourth Amendment] is, by that same authority, inadmissible in a state court."[22] The Court relied upon the need for a "deterrent safeguard . . . without which the Fourth Amendment would have been reduced to a 'form of words,'"[23] and the premise that "in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary" to extend the exclusionary rule as well.[24] *Mapp*'s rationale was soon narrowed, however, and over time its sweep sharply curtailed.

First, even before the Warren Court disbanded, the "constitutionally necessary" rationale began to erode; *Linkletter v. Walker* emphasized the deterrence rationale in deciding that *Mapp* was not retroactive to cases that had become "final" prior to *Mapp*.[25] Then the Burger Court, in *United States v. Calandra*,[26] while deciding that grand jury witnesses must answer questions even when based on the fruits of an illegal search, declared that whether the exclusionary rule should be applied was "a question, not of rights, but of remedies," and one whose answer must be determined by weighing the likely costs of the rule against the likely benefits.[27]

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19. Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 519 ("In the sixteen years of Chief Justice Warren's tenure, the Supreme Court decided upwards of 600 criminal cases.").

20. 367 U.S. 643 (1961).

21. Yale Kamisar, Mapp v. Ohio*: The First Shot Fired in the Warren Court's Criminal Procedure "Revolution," in* CRIMINAL PROCEDURE STORIES, *supra* note 12, at 45, 45.

22. 367 U.S. at 655.

23. *Id.* at 648 (quoting *Silverthoen Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

24. *Id.* at 655-56.

25. 381 U.S. 618, 637 (1965).

26. 414 U.S. 338 (1974).

27. *Id.* at 354.

This narrowed rationale in turn facilitated a total disregard of *Mapp*'s broadly inclusive "inadmissible in a state court" language, transforming the exclusionary rule into a barrier limited to criminal cases and forfeiture proceedings;[28] it did not apply in any civil cases,[29] not even in deportation proceedings[30] or parole revocation hearings.[31] Second, the Burger Court crafted the so-called "good-faith" exception to the exclusionary rule in criminal cases where evidence was obtained by officers acting in good-faith reasonable reliance upon a search warrant issued by a neutral magistrate despite the absence of probable cause.[32] Moreover, as the Roberts Court decided, if an officer reasonably believes there is an outstanding arrest warrant, even if that belief is erroneous and caused by another police officer's negligence, fruits of that unconstitutional arrest are exempt from the exclusionary rule.[33] Finally, it should be observed that this catalogue of exclusionary rule cutbacks has been accompanied by sharp cutbacks in the substantive contours of the Fourth Amendment, thus decreasing the number of cases to which *Mapp* might apply.

B. Miranda v. Arizona*'s Contraction*

Miranda[34] held that the Fifth Amendment prohibits the admission of statements obtained from a suspect interrogated in custody unless he has been informed of his right to remain silent and his right to the assistance of counsel, as well as the fact that statements he makes may be used against him, and that if he cannot afford an attorney, one will be appointed for him at state expense.[35] *Miranda* also constrains police in what they must do after providing warnings if resulting statements are to be admissible: seek a knowing and intelligent waiver of Fifth Amendment rights, and upon assertion of the right to counsel, cease all questioning.[36]

Miranda, unlike *Gideon* but like *Mapp*, has been at least as much excoriated

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28. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).
29. United States v. Janis, 428 U.S. 433, 437 (1976) (noting that the exclusionary rule has never been applied to a civil proceeding, state or federal).
30. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
31. Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1986).
32. United States v. Leon, 468 U.S. 897 (1984).
33. Herring v. United States, 555 U.S. 135 (2009).
34. 384 U.S. 436 (1966).
35. *Id.*
36. *Id.*

as praised.[37] Also unlike *Gideon*, but like *Mapp*, its protection was soon pruned. In *Rhode Island v. Innis*, the Court determined that the "interrogation" sufficient to trigger the protection of *Miranda* was limited to questions or their functional equivalent, and then held that the functional equivalent of questions was "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response."[38] As Justice Stevens pointed out in his dissent, questions are not "reasonably likely" to elicit a response, let alone an *incriminating* response, but are merely *intended* to do so.[39] Hence, *Innis* substantially narrowed the ordinary meaning of questioning. Moreover, the facts of *Innis* made it quite clear that the majority was prepared to require an awful lot before finding remarks "reasonably likely" to elicit an incriminating response, given the officer's statement, "[T]here's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves."[40] As Justice Marshall's dissent pointed out,

> One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. . . . As a matter of fact, the appeal to a suspect to confess for the sake of others, to "display some evidence of decency and honor," is a classic interrogation technique.[41]

Justice Marshall cited an interrogation handbook containing that technique[42]—the very handbook cited by the *Miranda* Court.[43] Additionally, the other prerequisite to *Miranda*'s protections—custody—also was defined with increasing stringency in *Beckwith v. United States*[44] and *Berkemer v. McCarty*,[45]

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37. *See, e.g.*, John H. Blume, Sheri Lynn Johnson & Ross Feldmann, *Education and Interrogation: Comparing* Brown *and* Miranda, 90 CORNELL L. REV. 321, 337-42 (2005).

38. 446 U.S. 291, 301 (1980).

39. *Id.* at 312-14 (Stevens, J., dissenting).

40. *Id.* at 294-95.

41. *Id.* at 306 (Marshall, J., dissenting) (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 60-62 (2d ed. 1967)).

42. *Id.*

43. Miranda v. Arizona, 384 U.S. 436, 449 n.10 (1966) (citing FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS 1 (1962)).

44. 425 U.S. 341 (1976) (rejecting the broader "focus" test of *Escobedo v. Illinois*, 378 U.S. 478 (1964), despite apparent approval of that test in *Miranda*).

45. 468 U.S. 420 (1984).

the latter holding that roadside questioning of a motorist forcibly detained pursuant to a traffic stop does not constitute interrogation. Finally, in addition to adopting a "routine booking question exception" to *Miranda*,[46] the Court adopted a "public safety" exception to *Miranda* in *New York v. Quarles*,[47] holding that when objective facts establish that "overriding considerations of public safety justify the officer's failure to provide *Miranda* warnings," admission of the resulting statement does not violate the Fifth Amendment.[48]

C. Wade v. United States's[49] *Limitation*

Wade is less well known than *Gideon*, *Miranda*, or *Mapp*, but worth noting here because it—like *Gideon* but unlike *Miranda* and *Mapp*—initially promised not only protection of constitutional rights, but also protection against wrongful conviction. Nonetheless, *Wade*'s rationale and value were eviscerated by subsequent cases.

Reasoning that a lineup compelled confrontation "between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial," *Wade* imposed the right to counsel upon post-indictment lineups.[50] *Wade* also required suppression of any identification that took place at an uncounseled post-indictment lineup, as well as suppression of subsequent in-court identification unless the state can prove that the in-court identification had an independent source.[51]

Subsequent cases did not erode the literal holding of *Wade*, but they cannot be reconciled with its rationale. In *Kirby v. Illinois*, the Burger Court held that a pre-indictment lineup did not entitle the defendant to the presence of counsel,[52]

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46. Pennsylvania v. Muniz, 496 U.S. 582 (1990).

47. 467 U.S. 649 (1984).

48. The Burger and Rehnquist Courts also expanded exceptions to the fruit-of-the-poisonous-tree doctrine, thereby limiting further the applicability of *Mapp* and *Miranda*. With respect to *Miranda*, the Court went even further, exempting from fruit-of-the-poisonous-tree analysis both the physical fruit of a *Miranda* violation, United States v. Patane, 542 U.S. 630 (2004), and a Mirandized "second" confession that followed an unwarned confession, Oregon v. Elstad, 470 U.S. 298 (1985), except where the technique of using successive unwarned and warned phases is consciously employed to avoid the constraints of *Miranda*, Missouri v. Seibert, 542 U.S. 600 (2004).

49. 388 U.S. 218 (1967).

50. *Id.* at 228.

51. *Id.* at 227-43.

52. 406 U.S. 682 (1972).

despite the unanswered and unanswerable retort of the dissenters that "there inhere in a confrontation for identification conducted after arrest the identical hazards to a fair trial that inhere in such a confrontation conducted 'after the onset of formal prosecutorial proceedings.'"[53] Then *United States v. Ash* held that *Wade* only applied to corporeal lineups, not photographic arrays, even after indictment[54]—a holding that any focus on avoiding wrongful conviction would seem to preclude, given that experts on identification viewed photographic identifications as less reliable than corporeal identifications. Justice Brennan complained that the majority concluded that "a pretrial lineup identification is a 'critical stage' of the prosecution because counsel's presence can help to compensate for the accused's deficiencies as an observer, but that a pretrial photographic identification is not a 'critical stage' of the prosecution because the accused is not able to observe at all."[55]

D. Gideon*'s Expansion*

Gideon itself did not specifically describe the crimes to which the right to appointed counsel applies, but in *Argersinger v. Hamlin*,[56] the Court held that no person may be imprisoned for a crime without being offered the assistance of counsel, reasoning that the rationale of *Powell* and *Gideon* "has relevance to any criminal trial in which an accused is deprived of his liberty."[57] Although the Court refused to further extend *Gideon* to misdemeanor cases in which imprisonment was a possible sanction but not actually imposed,[58] and has permitted the use of uncounseled misdemeanor convictions to enhance sentences in subsequent counseled sentencing proceedings,[59] it has prohibited the imposition of either a suspended sentence or probation absent the provision of counsel.[60] Moreover, since *Gideon* was decided, the right to counsel's attachment has been pushed back in time to the first formal

53. *Id.* at 697-98 (Brennan, J., dissenting) (footnote omitted) (quoting *id.* at 690 (majority opinion)).

54. 413 U.S. 300 (1973).

55. *Id.* at 343-44 (Brennan, J., dissenting).

56. 407 U.S. 25 (1972).

57. *Id.* at 32.

58. Scott v. Illinois, 440 U.S. 367 (1979).

59. Baldasar v. United States, 446 U.S. 222 (1980).

60. Alabama v. Shelton, 535 U.S. 654 (2002).

proceedings on a charge.[61]

Thus, whether one focuses on symbolic value, practical effect, or staying power, *Gideon* stands alone, an "exceptional" beacon in the positive sense.

III. THE SHAM(E) OF INEFFECTIVE COUNSEL

A. The Importance of Adequate Assistance of Defense Counsel

Before allowing *Gideon* to rest on its legal laurels, we feel compelled, as some might say is our contrarian nature, to make the case that it is only partially a success story, especially if one examines *Gideon*'s impact using two highly relevant measures: the right to the effective assistance of counsel and the right of an indigent defendant to investigative and expert services. Put differently, *Gideon* may not be immune to the forces of anticrime sentiment and a reactionary Supreme Court any more than the United States has been immune to class immobility or free from moral taint.

The Supreme Court has repeatedly stated that the Sixth Amendment right to counsel includes the right to the effective assistance of counsel.[62] In other words, representation by counsel is a necessary but not sufficient condition to satisfy the *Gideon* right. Both the Court's calibration of the legal standard for testing the constitutional quality of counsel's representation, and the application of that standard in cases (cases in which the Court both grants and denies review) must be considered before rendering a final verdict on *Gideon*'s success. This is so because the right to counsel is only as strong as the underlying commitment to the quality of representation provided by attorneys for indigent defendants.

B. The Legal Standard for Adequate Assistance

In *Strickland v. Washington*,[63] the Court established the now familiar two-pronged test for assessing claims of ineffective assistance of counsel. The first inquiry—the performance prong—asks whether counsel's conduct fell outside

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61. United States v. Gouveia, 467 U.S. 180 (1984). Recently, the Roberts Court clarified that initiation of formal proceedings, even in the absence of involvement by a prosecutor, triggers attachment of that right. Rothgery v. Gillespie County, 554 U.S. 191 (2008).

62. *See, e.g.*, McMann v. Richardson, 397 U.S. 759 (1970); Powell v. Alabama, 287 U.S. 45 (1932).

63. 466 U.S. 668 (1984).

the "wide range of professionally competent assistance."[64] The second inquiry—the prejudice prong—asks whether, but for counsel's acts or omissions, there is a reasonable possibility that the result of the proceeding would have been different.[65] In fleshing out the scope of the two inquires, both in *Strickland* and subsequent cases, the Court has made clear that the "[j]udicial scrutiny of counsel's performance must be highly deferential,"[66] and that the standard is, and is supposed to be, difficult to satisfy.[67] The Court created a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[68] Reviewing courts have been admonished that strategic decisions made after an adequate investigation are virtually unassailable, and that courts should make "every effort . . . to eliminate the distorting effect of hindsight."[69]

As numerous scholars have noted, the *Strickland* standard has proven to be a formidable obstacle to defendants alleging that they were deprived of their Sixth Amendment right to the effective assistance of counsel.[70] Not only is *Strickland*'s substantive standard onerous, but there are also practical and legal barriers to successfully challenging the adequacy of counsel's representation.[71] While in the last decade the Court has loosened the legal stranglehold to some

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64. *Id.* at 690.

65. *Id.* at 694.

66. *Id.* at 689; *see also* Premo v. Moore, 131 S. Ct. 733, 740 (2011) ("[T]he standard for judging counsel's representation is a most deferential one.").

67. Padilla v. Kentucky, 130 S. Ct. 1472, 1485 (2010) ("Surmounting *Strickland*'s high bar is never an easy task.").

68. *Strickland*, 466 U.S. at 689. According to the *Strickland* majority, "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.*

69. *Id.*

70. *See, e.g.*, John H. Blume & Stacey D. Neumann, *"It's Like Deja Vu All Over Again":* Williams v. Taylor, Wiggins v. Smith, Rompilla v. Beard *and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel*, 34 AM. J. CRIM. L. 127, 129 (2007); *see also* Sanjay K. Chhablani, *Detangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1, 2-4 (2009); Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 455-56 (2011).

71. As for practical barriers, in many jurisdictions, for example, inmates have no right to postconviction counsel and thus must challenge trial counsel's competency, if at all, without an attorney's assistance. An additional legal barrier when ineffective assistance claims are raised in the federal habeas corpus context, as they commonly are, is 28 U.S.C. § 2254(d), which limits a federal court's ability to grant the writ of habeas corpus to cases where the state court's resolution of the constitutional issue was "unreasonable." The Supreme Court has made clear that when federal courts review a state court's rejection of an ineffective assistance of counsel claim on federal habeas, its review should be "doubly deferential." Knowles v. Mirzayance, 556 U.S. 111, 123 (2009).

degree and in some contexts—e.g., capital cases involving trial counsel who fail to investigate, develop, and present mitigating evidence[72]—shockingly poor representation is often approved by the Supreme Court of the United States, the lower federal courts, and the state courts during plea bargaining, trial, and on direct appeal. While a detailed canvassing of ineffective assistance of counsel cases is beyond the scope of this Essay, we will discuss one of the Court's most recent cases in more detail, *Harrington v. Richter*.[73] We do so both to critique several critical implications of the legal standard governing such claims and to provide context for the discussion in Part IV of a defendant's right to expert assistance.

C. Judicial Approval of Inadequate Assistance

Joshua Richter was charged with murder and related crimes in Sacramento County, California. Patrick Klein was shot and killed, and his friend Joshua Johnson, an admitted drug dealer, was shot twice but survived.[74] Johnson identified Richter and another man, Christian Branscombe, as the perpetrators.[75] The prosecution built its case on Johnson's testimony and other circumstantial evidence, including ballistics evidence matching a bullet and a shell casing to ammunition found in Richter's home.[76] Blood samples were also

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72. *See, e.g.*, Sears v. Upton, 130 S. Ct. 3259, 3261 (2010) (per curiam) (holding that the state court used an incorrect prejudice inquiry when reviewing Sears's claim that trial counsel failed to develop and present evidence of "significant frontal lobe brain damage" and drug and alcohol dependence); Porter v. McCollum, 558 U.S. 30 (2009) (per curiam) (finding that trial counsel's failure to develop and present evidence regarding Porter's military service in Korea and other psychological impairments was unreasonable); Rompilla v. Beard, 545 U.S. 374 (2005) (holding that trial counsel's failure to discover evidence regarding the defendant's social history and mental impairments, including possible fetal alcohol syndrome, was unreasonable); Wiggins v. Smith, 539 U.S. 510 (2003) (holding that trial counsel's failure to properly investigate the defendant's history of physical and sexual abuse, homelessness, and diminished mental state was unreasonable); Williams v. Taylor, 529 U.S. 362 (2000) (holding that trial counsel's failure to discover mitigating evidence of the defendant's childhood abuse, mental retardation, and helpfulness to prison officials was unreasonable). It is important to note, however, that during the same time period the Court has also reversed the decisions of a number of federal courts of appeals that had concluded that death-sentenced inmates were denied the effective assistance of counsel. *See, e.g.*, Smith v. Spisak, 558 U.S. 139 (2009); Wong v. Belmontes, 558 U.S. 15 (2009) (per curiam); Bobby v. Van Hook, 558 U.S. 4 (2009) (per curiam).

73. 131 S. Ct. 770 (2011).

74. *Id.* at 781.

75. *Id.*

76. *Id.*

taken from several locations in the house, but, for reasons still unknown, not from a blood pool found in the doorway of the victim's bedroom.[77] Richter's attorney also failed to retain an expert to evaluate the blood spatter or the source of the blood.[78]

In his opening statement, trial counsel laid out the defense theory that Branscombe had fired on Johnson in self-defense, and that Klein had been killed not on the living-room couch where his body was found, but in the doorway near the pool of blood by crossfire between Branscombe and Richter.[79] Counsel also criticized the police for conducting a deficient investigation, specifically highlighting the failure to analyze the blood spatter patterns and the pool of blood found in the doorway where defense counsel alleged Klein was shot.[80] Quite predictably, the prosecution immediately had the blood analyzed and also called a forensic expert in blood pattern evidence.[81] Richter testified in his own defense that his codefendant shot in self-defense, but trial counsel presented no forensic expert testimony. The jury found Richter guilty of all charges, and he was sentenced to life without parole.[82] Richter then challenged his convictions, arguing that trial counsel's failure to secure forensic expert assistance constituted ineffective assistance of counsel. Richter supported his claim with expert affidavits in serology and blood spatter that, in sum, supported his self-defense assertion and undermined Johnson's account of the incident.[83] Eventually, the Ninth Circuit agreed with Richter that trial counsel's performance was deficient and prejudicial. The Supreme Court granted certiorari and reversed.[84]

After the now-standard boilerplate about *Strickland*'s "high bar" and the "harsh light of hindsight,"[85] the Court concluded that "[e]ven if it had been apparent that expert blood testimony could support Richter's defense, it would be reasonable to conclude that a competent attorney might elect not to use it."[86] In the majority's view, concentrating on the blood pool carried "serious

77. *Id.*

78. *Id.* at 783.

79. *Id.* at 782.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 783.

84. *Id.*

85. *Id.* at 788-89 (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010); Bell v. Cove, 535 U.S. 685, 702 (2002)) (internal quotation marks omitted).

86. *Id.* at 789.

risks" because forensic analysis could have "demonstrated that the blood came from Johnson alone," thus exposing Richter's story as an "invention."[87] The Court further explained that "making a central issue out of blood evidence would have increased the likelihood of the prosecution's producing its own evidence on the blood pool's origins and composition; and once matters proceeded on this course, there was a serious risk that expert evidence could destroy Richter's case."[88] *Strickland*, the Court stated, "does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense."[89] Rather, in many cases, "cross-examination will be sufficient to expose defects in an expert's presentation."[90]

The Court's reasoning was almost as shoddy as trial counsel's representation. Had Richter's trial counsel not stood up in his opening statement and attacked the failure of the police and prosecution to do any forensic analysis of the blood pool and spatter, it might be possible to argue that the Richter's trial counsel's representation was minimally constitutionally sufficient.[91] But he did challenge the integrity of the investigation. Any competent lawyer would have understood that the prosecution would react in exactly the manner it did in Richter's case and immediately have the forensic experts that serve at its beck and call analyze the evidence. Making such an attack, without having any idea what the inevitable forensic analysis of the blood pool and blood spatter analysis might produce, was gross

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87. *Id.*

88. *Id.* at 790.

89. *Id.* at 791.

90. *Id.* As to prejudice, the Court concluded that Richter's claim failed because his expert evidence established only a "theoretical possibility" that Klein's blood was intermixed with Johnson's blood and did not counter every conclusion reached by the prosecution's experts. *Id.* at 792. The Court also believed that there was "sufficient conventional circumstantial evidence pointing to Richter's guilt." *Id.* Thus there was not a reasonable probability that the outcome would have been different. *Id.*

91. The obstacle to such an argument is that before selecting a defense strategy, competent counsel would—at a minimum—have consulted with a serologist and a blood spatter expert. While some types of analysis would have required access to the samples in the possession of law enforcement which, arguably, an attorney might not have wanted to request in order to "let sleeping dogs lie," other types of analysis—i.e., an examination of the size of the blood pool and the blood spatter patterns—could have been conducted using the crime scene photographs which were in trial counsel's possession. There is no plausible justification for failing to do so.

incompetence.[92]

Thus, as to the first measure we believe is relevant to assessing the Supreme Court's true commitment to *Gideon*—ensuring quality representation by attorneys appointed to represent indigent defendants—both the Court's articulation and application of the legal rules governing claims of ineffective assistance of counsel have resulted in judicial sanctioning of widespread, substandard representation by defense counsel. In many cases, the right guaranteed by *Gideon* is ephemeral, and will continue to be as long as courts tolerate representation like that provided by Richter's trial counsel.

To be clear, and to avoid the criticism that we paint with too broad a brush, we do not mean to malign all, or even nearly all, criminal defense counsel. Some are excellent, many are very good, and most work under difficult conditions with unmanageable caseloads and grossly inadequate resources.[93] Numerous studies have demonstrated that only a fraction of public funds poured annually into the American criminal justice system by the federal government as well as state and local governments are allotted for indigent defense.[94] And many public defender offices, and private counsel who specialize in the representation of indigent defendants, have caseloads that are simply crushing.[95] The sad reality is that, due to a convergence of

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92. As noted previously, there are numerous other cases involving very poor representation sanctioned by courts, including the Supreme Court, relying upon the *Strickland* standard. We refer any reader who may suspect we "cherrypicked" *Richter* to Blume & Neumann, *supra* note 70, at 159-64, for a discussion of other cases. *See also* John H. Blume, *The Dance of Death or (Almost) "No One Here Gets Out Alive": The Fourth Circuit's Capital Punishment Jurisprudence*, 61 S.C. L. REV. 465, 476-79 (2010) (discussing unsuccessful ineffective assistance of counsel claims in the Fourth Circuit); Sheri Lynn Johnson, John H. Blume & Patrick M. Wilson, *Racial Epithets in the Criminal Process*, 2011 MICH. ST. L. REV. 755, 768-72 (discussing ineffective assistance of counsel cases based on defense counsel's racial animus).

93. *See* Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

94. *See, e.g.*, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 38 (2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf (finding that funding for indigent defense services is "shamefully inadequate"); Backus & Marcus, *supra* note 93, at 1045 (2005) ("By every measure, in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced."); Note, *Effectively Ineffective: The Failure of Courts To Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734 (2005) (noting that indigent defense systems receive only two percent of total state and federal criminal justice expenditures).

95. *See* NORMAN LEFSTEIN, ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 14 (2011),

circumstances, many criminal defense attorneys lack basic competence and routinely deprive their clients of constitutionally adequate representation. Nonetheless, regardless of who bears responsibility for the shame of poor representation, it *is* a shame, and it renders the promise of *Gideon* a sham to those defendants unfortunate enough to receive no real assistance from the counsel appointed to represent them.

IV. COUNSEL'S NEED FOR ASSISTANCE

Even when his counsel is competent and diligent, a defendant may be deprived of the promise of *Gideon* due to a lack of investigative and expert services. A lawyer, even a very skilled and highly competent lawyer, is no longer enough. Prosecutors have at their disposal police investigators, experts in a wide array of forensic sciences, and mental health professionals to assist in the prosecution of criminal cases. There are literally hundreds of "crime laboratories" funded by the FBI, states, counties, and cities, as well as medical examiners' and coroners' offices, and federal, state, and local psychiatric and mental health centers, which serve the prosecution.[96] Access to similar types of services on the defense side, however, is much more limited.

In a decision rendered almost three decades ago, the Supreme Court recognized in *Ake v. Oklahoma* that "when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense."[97] The Court further explained that because "mere access to the courthouse doors does not by itself assure" a fair trial, the state has the responsibility to provide "the raw materials integral to the building of an effective defense."[98] Consequently, the Court held, the Due Process Clause requires states to provide indigent defendants with the "basic tools" of an adequate defense.[99] But in the years

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http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf ("While the most frequent and worst examples of out-of-control caseloads are among public defenders, private lawyers who provide indigent defense services sometimes take on way too much work as well.").

96. *See* Matthew R. Durose, Kelly A. Walsh & Andrea M. Burch, *Census of Publicly Funded Forensic Crime Laboratories, 2009*, BUREAU OF JUST. STAT. (2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpffc09.pdf.

97. 470 U.S. 68, 76 (1985).

98. *Id.* at 77.

99. *Id.* The Court overturned Glen Burton Ake's conviction and death sentence because his request for psychiatric assistance to both develop an insanity defense and rebut the state's sentencing assertion that he presented a future danger was denied, thus depriving him of due process. *Id.* at 86-87.

since *Ake*, most courts have interpreted "basic tools" to mean an investigative or expert service that is absolutely necessary to the defense.[100] This is a showing that is frequently impossible to make without access to the very services that counsel for the defendant is requesting. As the adage goes, "you don't know what you don't know." And, despite numerous invitations to do so, the Supreme Court has refused to clarify the scope of the right created in *Ake*,[101] leaving its promise of something approaching parity unfulfilled.

This is not only disappointing but somewhat surprising given the Court's decisions in other constitutional contexts. In the Confrontation Clause context, for example, the Court has required that state forensic examiners whose work is to be introduced as evidence must be subject to cross-examination, noting that "[f]orensic evidence is not uniquely immune from the risk of manipulation."[102] Citing a National Academy of Sciences report calling into question the neutrality of crime laboratories, most of which are administered by law enforcement agencies, the Court noted that "[a] forensic analyst responding to a request from a law enforcement agency may feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."[103] The risk of error, mistake, or manipulation is heightened by the "wide variability across forensic science disciplines with regard to techniques, methodologies, reliability, types and numbers of potential errors, research, general acceptability, and published material."[104] The Court also relied upon a study of wrongful convictions that concluded "invalid forensic testimony" contributed to the conviction in sixty percent of the cases.[105] Thus, the Court deemed confrontation of the witness to be an essential tool in "weed[ing] out not only the fraudulent analyst, but the incompetent one as well."[106]

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100. *See, e.g.*, STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 802 (6th ed. 2000) ("Generally speaking the courts have read *Ake* narrowly, and have refused to require appointment of an expert unless it is absolutely essential to the defense.").

101. Carlton Bailey, Ake v. Oklahoma *and an Indigent Defendant's 'Right' to an Expert Witness: A Promise Denied or Imagined?*, 10 WM. & MARY BILL RTS. J. 401, 401 (2002).

102. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 318 (2009).

103. *Id.* The report referenced by the Court is NAT'L RESEARCH COUNCIL OF THE NAT'L ACAD., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD (2009).

104. *Melendez-Diaz*, 557 U.S. at 320-21 (quoting NAT'L RESEARCH COUNCIL OF THE NAT'L ACAD., *supra* note 103, at 6-7 (internal quotation marks omitted)).

105. *Id.* at 319 (citing Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 14 (2009)).

106. *Id.*

We have no quarrel with the Court guaranteeing a defendant's right to confront an expert witness called by the prosecution, but it simply highlights the inadequacy of the defendant's right to expert services.[107] First, in many cases, without access to an independent expert, the confrontation right itself will be inadequate. Setting aside problems with the general competence of many criminal defense lawyers discussed in Part III,[108] the highly technical nature of many forensic sciences—e.g., DNA evidence—makes it difficult, if not impossible, for even an effective, motivated attorney to prepare and conduct a meaningful cross-examination.[109] In some instances counsel will be able to discern areas to probe during cross-examination by reviewing the forensic analyst's report and the underlying data and by consulting secondary sources such as treatises and manuals. In the majority of cases, however, without access to someone with actual substantive knowledge of the underlying discipline, counsel will simply not know what questions to ask the prosecution's expert witness.[110] Thus defense counsel will have two unattractive options: ask little to nothing on cross-examination, or, in violation

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107. Moreover, even the right to confront prosecution experts was diminished last term in *Williams v. Illinois*, 132 S. Ct. 2221 (2012). In *Williams*, the Court, in a four-one-four decision, found no Confrontation Clause violation when a state forensic expert was able to report the results of DNA testing conducted by another examiner at another laboratory. The extent to which the right was limited, however, is unclear given that five Justices did not agree on any single theory as to why there was no Confrontation Clause violation. *See* Jeffrey Fisher, *The Holdings and Implications of* Williams v. Illinois, SCOTUSBLOG (June 20, 2012, 2:20 PM), http://www.scotusblog.com/?p=147095.

108. *But see* Elmore v. Ozmint, 661 F.3d 783, 792 (4th Cir. 2011) (finding that counsel's failure to challenge the prosecution's forensic evidence was unreasonable and prejudicial because "the need for scrutiny of the forensic evidence was indisputable"). The court's decision in *Elmore* is the exception, not the rule, and the result was driven by the strong likelihood that Elmore was wrongfully convicted.

109. *See* Steve Mills, *Weak DNA Evidence Could Undermine Justice, Experts Say*, CHI. TRIB., July 5, 2012, http://articles.chicagotribune.com/2012-07-05/news/ct-met-dna-questions-20120705_1_forensic-dna-analysis-dna-profile-dna-scientists (discussing the wrongful conviction of Cleveland Barrett after the prosecution presented DNA evidence that defense counsel vigorously attacked on cross-examination but the jury nevertheless credited). Speaking about the case, a leading scientist, William Thompson, noted that juries can give DNA evidence "too much weight." *Id.*

110. We would also note that most lawyers went to law school for a reason, and proficiency in science is not that reason. As a result, much prosecution forensic evidence is effectively ex parte which the defense cannot challenge in anything other than a pro forma manner due to the lack of a defense expert. Paul C. Giannelli & Kevin C. McMunigal, *Prosecutors, Ethics, and Expert Witnesses*, 76 FORDHAM L. REV. 1493, 1534 (2007).

of the cardinal rule of cross-examination,[111] ask questions to which she does not know the answer.

Even an informed, vigorous cross-examination is often no substitute for a defense expert witness. What is more likely to deter the fraudulent or incompetent state forensic examiner—the prospect of being cross-examined by a potentially ill-informed defense attorney, or the fact that the work will be reviewed by a competent, independent scientist? The fear of cross-examination did not deter Fred Zain of West Virginia, Joyce Gilchrist of Oklahoma, or Michael West of Mississippi, three now-disgraced state forensic examiners who engaged in literally hundreds of acts of forensic fraud that led to a number of known wrongful convictions.[112] Their incompetence and fraud went undetected for years. Even the so-called gold standard of crime laboratories—the FBI crime lab—has had its fair share of scandals and incompetent examiners that, again, went unexposed, in some instances for more than a decade.[113] No one can say with certainty which of these individuals would have been deterred had they had known their work would be reviewed by an independent, competent expert in the field, but it seems likely that some of them would.

It is the rare criminal case today in which investigative and expert services are not a "basic tool" of an adequate defense.[114] Often, expert assistance is needed to analyze the results obtained by the prosecution's forensic examiners, to conduct similar or additional testing, and possibly to provide testimony in rebuttal at trial.[115] In other cases, expert assistance is needed to analyze evidence

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111. James W. McElhaney, *Cross-Exam Surprises: If You Don't Look for Them, They Can Blow Up in Your Face*, A.B.A. J., Oct. 24, 2006, http://www.abajournal.com/magazine/article/cross_exam_surprises.

112. *See* Giannelli & McMunigal, *supra* note 110, at 1497-1506 (2007) (detailing numerous cases in which forensic examiners presented false, incomplete, or highly misleading testimony).

113. *See* John Solomon, Associated Press, *FBI Lab Work Under Serious Scrutiny*, CBS NEWS (Feb. 11, 2009), http://www.cbsnews.com/2100-201_162-544209.html (discussing, among other issues in the lab, the indictment of former FBI scientist Kathleen Lundy for knowingly giving false testimony about lead-bullet analysis); *see also* JOHN F. KELLY & PHILLIP K. WEARNE, TAINTING EVIDENCE: INSIDE THE SCANDALS AT THE FBI CRIME LAB (1998).

114. Stephen Breyer, *Science in the Courtroom*, ISSUES SCI. & TECH. ONLINE, Summer 2000, http://www.issues.org/16.4/breyer.htm ("Scientific issues permeate the law."); *see also* Paul C. Giannelli, Ake v. Oklahoma*: The Right to Expert Assistance in a Post-*Daubert*, Post-DNA World*, 89 CORNELL L. REV. 1305, 1326 (2004) (noting the "dramatic increased use of scientific evidence").

115. *Cf.* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 4.1(7) (noting that defense counsel should secure the assistance of

that law enforcement overlooked or did not deem sufficiently relevant to evaluate, but which may be valuable, if not essential, to the defense.[116] Expert assistance may be needed to provide context to the jury to explain why the prosecution's evidence may not be as incriminating as it seems—for example, the fallibility of eyewitness identification evidence or the markers of a false confession.[117] Finally, mental health experts are frequently needed to determine whether the defendant has a mental illness or impairment that may be relevant to competency, criminal responsibility, or to sentencing.[118]

Yet despite the clear needs that indigent defendants have if they are to be provided with the "basic tools" of an adequate defense, they are often forced to run the gauntlet with only an attorney—and in many cases not a very good one—to assist them. To date, the Supreme Court and the lower state and federal courts have allowed this unfair disparity in resources to persist.[119]

CONCLUSION

We end this Essay on a pessimistic note. It is true that compared with many of the other groundbreaking criminal procedure decisions of the Warren Court, *Gideon* is a success story. The Court established a fully retroactive right to counsel for indigent defendants, and it did not in subsequent years and cases eviscerate that right with exceptions and other limitations as it did in other areas of criminal procedure. *Gideon*'s core guarantee of counsel remains fully intact. Thus, in that sense, *Gideon* is exceptional. But the mere presence of an attorney is no panacea for the ills of the twenty-first-century criminal justice system. Until the Supreme Court both significantly raises the bar as to the quality of representation that satisfies the Sixth Amendment right to the effective assistance of counsel and requires states to provide more than paltry investigative and expert services to indigent defendants, *Gideon* will remain an unfulfilled dream of what could and should have been. We are far from

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experts where it is necessary or appropriate to prepare the defense, understand the prosecution's case, or rebut the prosecution's case).

116. *Id.*

117. *See, e.g.*, Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identification and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 772 (2007) (noting that because jurors conflate certainty and accuracy, cross-examination is not effective in casting doubt on erroneous eyewitness identifications).

118. *See* ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS §§ 7-1.1, -3.3, -4.2 (all noting the critical role mental health professionals play to defense counsel on issues of competency, criminal responsibility and sentencing).

119. For a comprehensive discussion of the variety of types of expert assistance requested by counsel for criminal defendants and (often) denied by courts, see Giannelli, *supra* note 114.

neoconservatives, and equally far from John Winthrop, but we would be happy to tout the "shining city on a hill" when its light actually shines on all indigent defendants.