

INEFFECTIVE ASSISTANCE AT SENTENCING

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Abstract: The legal standards for reviewing claims of ineffective assistance of counsel at sentencing are underdeveloped. In other contexts, defendants seeking to prove ineffective assistance must demonstrate that counsel's performance fell below appropriate professional standards and that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. The doctrinal uncertainty whether that standard applies to sentencing proceedings in non-capital cases, coupled with worries that ineffective assistance at sentencing claims will result in a flood of litigation, has led some courts to require defendants to satisfy stricter prejudice standards in discretionary non-capital sentencing regimes. This Article analyzes the ineffective assistance jurisprudence and concludes that the sufficiency of counsel's performance is largely evaluated against a backdrop of relevant substantive law. The substantive law of non-capital sentencing is not well-developed, which may explain the underdeveloped state of ineffective assistance at sentencing standards. Drawing on several recent ineffective assistance cases in the death penalty context, this Article identifies legal principles and practices that may assist in making the legal assessments necessary to analyze ineffective assistance at sentencing claims. These principles and practices may provide a sufficient legal framework to render unnecessary the crude manipulation of the prejudice showing that some courts have employed.

INTRODUCTION

The U.S. Supreme Court has said that the Sixth Amendment right to counsel includes a right to counsel at sentencing.¹ As the Court has

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¹ *Mempa v. Rhay*, 389 U.S. 128, 137 (1967); see *Glover v. United States*, 531 U.S. 198, 203 (2001).

explained in other contexts, the right to *effective* assistance of counsel is an undisputed feature of the Sixth Amendment right to counsel.² Despite the fact that substantial advocacy occurs during the sentencing process, the standards for what constitutes ineffective assistance of counsel during a non-capital sentencing proceeding are underdeveloped.³

Courts have developed a substantial body of law regarding ineffective assistance in the context of the guilt phase of a criminal trial and in the sentencing phase of a death penalty trial, even though such cases constitute a very small percentage of all criminal cases.⁴ The vast majority of criminal defendants plead guilty rather than stand trial,⁵ and capital cases comprise a tiny fraction of all felony convictions.⁶ The only time that many defendants have an opportunity to observe their attorneys advocate for their interests is at sentencing,⁷ and thus one might

² *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (recognizing that "the right to counsel is the right to the effective assistance of counsel"). In the seminal right to counsel case of *Powell v. Alabama* in 1932, the U.S. Supreme Court described "the failure of the trial court to make an *effective* appointment of counsel." 287 U.S. 45, 71 (1932) (emphasis added). The defendants in *Powell* were represented by counsel who was reportedly an alcoholic and who declared himself to be unprepared and unfamiliar with Alabama law. Michael J. Klarman, *Powell v. Alabama: The Supreme Court Confronts "Legal Lynchings,"* in CRIMINAL PROCEDURE STORIES 1, 3-4 (Carol S. Steiker ed., 2006). This attorney was assisted by an elderly local attorney and was permitted less than half an hour to consult with the defendants before trial began. *Id.* The *Powell* Court held that this representation did not satisfy the Sixth Amendment because the duty to assign counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." 287 U.S. at 71.

³ Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court's "Culture of Death,"* 34 OHIO N.U. L. REV. 861, 879-81 (2008) (arguing that the U.S. Supreme Court has failed "to give sufficient attention to non-capital" sentencing issues).

⁴ See *id.* (describing how the U.S. Supreme Court "devotes extraordinarily too much of its scarce time and energy to reviewing death penalty cases and adjudicating the claims of death row defendants").

⁵ See, e.g., Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1155 n.195 (2008) ("In 2002, the plea rate nationally was 95% for all state court felony convictions . . ."); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2568 (2004) (explaining that in 2000 there was a "federal guilty plea rate of 95%" and "[i]n some federal districts, the rate exceed[ed] 99%"); see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 n.9 (2004) (reporting similar rates); John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 121 n.6 (1992) (same).

⁶ See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1148 (2009); Berman, *supra* note 3, at 876-77.

⁷ Of course, attorneys also serve as advocates during the plea negotiation of non-capital cases, but that advocacy may be less visible to defendants as it does not occur in a courtroom, and thus defendants may not be present when counsel is advocating for their interests. See MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 36-46 (1978) (noting that plea bargaining usually hap-

expect that ineffective assistance at sentencing claims are quite common. In practice, however, there are few published opinions reviewing—and thus little legal guidance regarding—the adequacy of counsel's performance at a non-capital sentencing proceeding.⁸

One explanation for the judicial focus on trial and capital sentencing performance is that the stakes are higher: at trial counsel's performance may result in the conviction of an innocent defendant,⁹ and counsel's poor performance during the penalty phase may be subject to heightened judicial scrutiny because we perceive that "death is different" than non-capital punishment.

But there is an alternative explanation for the underdeveloped law of effective assistance at non-capital sentencing: the effectiveness of counsel's performance is largely evaluated with reference to the governing substantive law, and the substantive law of non-capital sentencing is woefully underdeveloped.¹⁰ Historically, sentencing systems were either fully determinate (i.e., any defendant who commits crime A was sentenced to B years imprisonment) or indeterminate (i.e., the sentencing authority could select any sentence from within a broad range).¹¹ Neither of these systems is particularly conducive to the development of sentencing doctrine or principles. Compounding the

pens in conference rooms, courtroom hallways, or on private telephone calls rather than in open court).

⁸ Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Human Punishment to Constitutional Discourse*, 41 U.C. DAVIS, L. REV. 111, 152 (2007) (contending that non-capital sentencing "surely demand[s] much more than the virtual blank check issued by the Supreme Court to the legislatures").

⁹ Notably, courts will reverse for ineffective assistance when counsel's deficient performance resulted in the conviction of an apparently guilty defendant—for example, if counsel erroneously failed to suppress illegal, but nonetheless trustworthy and incriminating evidence against the defendant. See John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 686–87 (1990) (noting that the U.S. Supreme Court's decision in *Nix v. Whiteside* in 1986 supports a reading of the right to effective assistance of counsel as aiming "to promote reliable outcomes," but that the Court's ruling in *Kimmelman v. Morrison* later that term undercuts that reading).

¹⁰ "Substantive law" is generally understood as those legal rules that create, define, and regulate the rights, duties, and powers of parties. See BLACK'S LAW DICTIONARY 1470 (8th ed. 2004). Procedural law, in contrast, prescribes the steps for having a right or duty judicially enforced. See *id.* at 1241. Of course, whether a particular question involves substantive or procedural law can be the subject of considerable dispute. See generally *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). For the purposes of this Article, however, substantive sentencing law includes the statutory sentencing ranges for particular offenses, as well as any statute, regulation, or common law indicating what factors to consider in selecting a particular sentence from within the available statutory range.

¹¹ See Carissa Byrne Hessick, *Motive's Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 131 (2006).

problem is the historical unavailability of appeals from sentencing decisions. Not only did the absence of appellate review stunt the development of legal rules, it also resulted in fewer explanations by trial judges of the reasons for their decisions. The lack of explanation at sentencing contributed to dissatisfaction with indeterminate sentencing, as sentencing decisions were viewed as little more than the idiosyncratic preferences of individual judges.¹²

In recent decades, some jurisdictions have enacted sentencing statutes or regulations that limit to varying degrees the discretion a sentencing judge has in imposing a particular sentence.¹³ But in discretionary sentencing systems—that is, those that do not limit sentencing discretion through statutes or regulations—a robust standard for effective assistance of counsel at sentencing is impossible in the absence of a shared understanding of the substantive reasons why particular sentences are imposed.

This Article seeks to articulate a legal framework for ineffective assistance claims in discretionary non-capital sentencing systems. Part I describes the two-prong ineffective assistance standard that the U.S. Supreme Court articulated in *Strickland v. Washington*. A defendant who wishes to prove that she received ineffective assistance of counsel must demonstrate (a) that her attorney's performance was unreasonable under prevailing professional norms, and (b) that counsel's deficient performance resulted in prejudice. It then recounts how the Court applied the *Strickland* standard to mandatory non-capital sentencing in *United States v. Glover*.

Part II evaluates the different approaches that courts have taken in assessing prejudice in discretionary non-capital sentencing. In particular, it examines the heightened standards for prejudice that lower courts have imposed. This Part contends that courts should adopt the prejudice standard ordinarily employed for ineffective assistance claims—i.e., a reasonable probability that the outcome would have been different—because discretionary non-capital sentencing systems do not present wholly unique questions of prejudice.

Part II explains that the courts that have adopted heightened prejudice standards appear to have done so as a gate-keeping mechanism. They have expressed concern about the ease with which a defen-

¹² See Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 4–5 (2008).

¹³ As explained in more detail below, the complexity of these limitations on sentencing discretion, as well as the mandatory nature of the statutes or regulations, vary from system to system. See *infra* note 95.

dant could satisfy the ineffective assistance standard by demonstrating that the sentence imposed might have been marginally shorter. This Part argues that these courts have failed to appreciate that the costs associated with a remand for new sentencing—when compared to the costs of a new trial or a new capital sentencing hearing—are limited, and that because most ineffective assistance claims are raised on collateral attack, only those defendants who are serving sentences in excess of several years will have an opportunity to raise such a claim. Thus, gate-keeping concerns may not be as salient as they first appear.

Part III notes that, although discretionary non-capital sentencing systems do not warrant heightened prejudice standards, the application of *Strickland*'s performance inquiry in this context is likely to differ from capital and mandatory systems. Deficient performance will be more difficult for defendants to prove in discretionary non-capital sentencing regimes than in capital or mandatory sentencing regimes. The most successful sentencing ineffective assistance claims—claims of legal error and claims of failure to investigate—often turn on legal considerations.

Part III describes how these legal questions pose unique difficulties in discretionary non-capital sentencing systems because the law in these discretionary systems is less developed than in other sentencing contexts. Some non-mandatory systems, such as advisory guideline systems offer limited substantive law against which to measure counsel's performance. But many systems do not provide such guidance. Ultimately, this Part seeks to identify legal principles and practices in the discretionary non-capital context in order to assist counsel and judges in making the legal assessments necessary to analyze many ineffective assistance claims. Further development of such principles and best practices may also serve to improve the quality of representation at sentencing by educating counsel about successful sentencing practices and serving as a deterrent against poor representation at sentencing.

I. OVERVIEW OF THE COURT'S INEFFECTIVE ASSISTANCE JURISPRUDENCE

A. *The Strickland Standard*

A defendant who wishes to prove that she received ineffective assistance of counsel must satisfy two requirements: first, the defendant must demonstrate that counsel's performance was unreasonable under prevailing professional norms, and she must demonstrate that counsel's

deficient performance resulted in prejudice.¹⁴ This test was adopted by the Supreme Court in *Strickland v. Washington*.¹⁵ The *Strickland* test is notoriously difficult for defendants to meet,¹⁶ and the number of successful ineffective assistance claims is quite low.¹⁷ This is attributable to the fact that courts will generally presume that counsel's performance was adequate, and that the few defendants who are able to overcome this presumption must still satisfy the prejudice standard.¹⁸

¹⁴ See 466 U.S. 668, 687-88 (1984).

¹⁵ *Id.*

¹⁶ See, e.g., Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 ("But does [*Strickland's*] after-the-fact, case-by-case evaluation work? The evidence is not encouraging. Courts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable. In short, any 'lawyer with a pulse will be deemed effective.'" (quoting Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999))); John H. Blume & Stacey D. Neumann, *"It's Like Déjà 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, 134 (2007) ("The standard the Court adopted proved virtually impossible for defendants to meet, and instead of raising the bar for effective counsel, the Court created a bar to nearly all assertions of attorney inadequacy."); William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 AM. CRIM. L. REV. 181, 181 (1984) (noting "the significant burdens that the *Strickland* opinion has placed upon defendants who challenge the adequacy of counsel"); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999) ("[T]he *Strickland* Court interpreted the requirements of the Sixth Amendment's right to effective assistance of counsel in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant."); Thomas J. Marlowe, *Ineffective Assistance of Counsel or "How Can I Satisfy the Sixth Amendment and Still Not Help My Client,"* 3 CAP. DEF. DIG., Nov. 1990, at 29, 29 ("[The *Strickland* test] by its nature places a substantial burden on the defendant. This burden is especially onerous due to the independent nature of each prong of the test."); Charles M. Sevilla, *Investigating and Preparing an Ineffective Assistance of Counsel Claim*, 37 MERCER L. REV. 927, 927 (1986) ("[T]he ineffective assistance of counsel . . . claim, contrary to popular mythology, is rarely successful."); Martin C. Calhoun, Note, *How to Thread the Needle: Towards a Checklist-Based Standard for Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L.J. 413, 427 (1988) ("*Strickland's* basic flaw is that . . . it creates an almost insurmountable hurdle for defendants claiming ineffective assistance."); Elizabeth Gable & Tyler Green, Note, *Wiggins v. Smith: The Ineffective Assistance of Counsel Standard Applied Twenty Years After Strickland*, 17 GEO. J. LEGAL ETHICS 755, 764 (2004) ("[A] *Strickland* challenge is exceptionally hard to win").

¹⁷ See, e.g., Klein, *supra* note 16, at 1471 (citing Victor E. Flango & Patricia McKenna, *Federal Habeas Corpus Review of State Court Convictions*, 31 CAL. W. L. REV. 237, 259-60 (1995)); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 683-84 (2007) (noting that "the number of criminal convictions that courts reverse due to ineffective assistance of trial counsel is strikingly low when compared to the frequency of ineffective assistance in practice"). But see Blume & Neumann, *supra* note 16, at 155-57 (documenting an increase in successful ineffective assistance claims in the U.S. courts of appeals since the U.S. Supreme Court's decision in *Williams*).

¹⁸ See *Strickland*, 466 U.S. at 689.

With respect to the performance prong, *Strickland* stressed that "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional standards"¹⁹ The *Strickland* Court referred to American Bar Association ("ABA") Standards for Criminal Justice as "guides to determining what is reasonable,"²⁰ but also admonished courts that a "particular set of detailed rules" for counsel's performance would be inappropriate.²¹ The Court's more recent decisions have been increasingly hospitable to the use of ABA Standards as benchmarks for assessing attorney performance.²² Some lower courts have interpreted the Court's more recent decisions as a signal that the ABA Standards are an important and widely accepted tool for evaluating defense counsel's performance.²³ But not all lower courts have followed this approach.²⁴

Commentators and judges alike have bemoaned the prevalence of poor counsel performance, especially the performance of counsel appointed for indigent defendants.²⁵ But *Strickland's* statement "that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

¹⁹ *Id.*

²⁰ *Id.* at 688.

²¹ *Id.*

²² See *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); Blume & Neumann, *supra* note 16, at 151 (describing *Williams*, *Wiggins*, and *Rompilla* as "The Return of the Guidelines Approach"); see also Albert W. Alschuler, *Celebrating Great Lawyering*, 4 OHIO ST. J. CRIM. L. 223, 224-25 (2006) (noting a shift in Justice O'Connor's attitude towards the ABA Standards from *Strickland* to *Williams*, *Wiggins*, and *Rompilla*).

²³ See, e.g., *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003) ("[T]he *Wiggins* case now stands for the proposition that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the 'prevailing professional norms' in ineffective assistance cases. This principle adds clarity, detail and content to the more generalized and indefinite 20-year-old language of *Strickland*"); see also, e.g., Blume & Neumann, *supra* note 16, at 157-59 (describing cases).

²⁴ See Blume & Neumann, *supra* note 16, at 159-62 (describing cases).

²⁵ See, e.g., *McFarland v. Scott*, 512 U.S. 1256, 1259, 1264 (1994) (Blackmun, J., dissenting from denial of certiorari); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2 (1973); Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 61 (1986); Genego, *supra* note 16, at 198-99; Klein, *supra* note 16, at 1452; Calhoun, *supra* note 16, at 431-32 (collecting studies). See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994). As Eve Brensike Primus notes, there are instances of "personal ineffectiveness," which are attributable to individual defense attorneys, as well as "structural ineffectiveness," which are attributable to the underfunding of public defense and heavy defender caseloads. Primus, *supra* note 17, at 686-88.

judgment²⁶ has been interpreted by some courts as essentially a shield for counsel's behavior against judicial scrutiny. Seemingly egregious examples of substandard representation—including counsel's concession of her client's guilt,²⁷ counsel's decision to remain essentially silent at trial rather than conducting any real defense,²⁸ counsel's failure to make any closing argument,²⁹ counsel sleeping during the trial,³⁰ counsel referring to client by a racial slur,³¹ counsel representing the defendant while drunk,³² counsel hinting that death is the appropriate punishment for the defendant in closing arguments,³³ and counsel representing the defendant while under the influence of drugs³⁴ or mentally ill³⁵—have been labeled effective assistance by some courts.³⁶

²⁶ 466 U.S. at 690.

²⁷ See Marlowe, *supra* note 16, at 35 (describing cases). But see Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 N.E. L. REV. 425, 449 & n.111 (1996) (collecting cases where "courts have found *per se* ineffective assistance of counsel where counsel admitted their clients' guilt").

²⁸ See Jo Ellen Silberstein, Note, *Silence as a Trial Strategy After Strickland and Cronin: Ineffective Assistance of Counsel?*, 3 Touro L. REV. 263, 275-77 (1987) (describing Warner v. Ford, 752 F.2d 622, 623-24 (11th Cir. 1985), in which counsel essentially relied on counsel for co-defendants to challenge prosecutions case even though co-defendants' strategy was to blame his client); *id.* at 278-79 (describing United States v. Sanchez, 790 F.2d 245, 253 (2d Cir. 1986), in which counsel's participation at trial was limited to an objection to trial *in absentia*, objection to jury instructions, and moving for judgment of acquittal). But see United States v. Cronin, 466 U.S. 648, 659 (1984) ("[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.").

²⁹ See Marlowe, *supra* note 16, at 31 (describing Sawyer v. Butler, 848 F.2d 582, 592 (5th Cir. 1988), and Romero v. Lynaugh, 884 F.2d 871, 875-77 (5th Cir. 1989)). But see Sevilla, *supra* note 16, at 935 n.48 (citing Matthews v. United States, 449 F.2d 985, 987 (D.C. Cir. 1971)).

³⁰ See Bright, *supra* note 25, at 1843 n.53 (describing cases); Kirchmeier, *supra* note 27, at 426-27 (describing case from Texas); Klein, *supra* note 16, at 1447-48 (describing cases from Texas and New York). But see Sevilla, *supra* note 16, at 935 (describing Javor v. United States, 724 F.2d 831, 833 (9th Cir. 1984)).

³¹ See Bright, *supra* note 25, at 1843 n.51 (describing cases finding no ineffective assistance subsequently overturned on appeal).

³² See *id.* at 1843 n.54; Kirchmeier, *supra* note 27, at 426; Klein, *supra* note 16, at 1448 (describing People v. Garrison, 765 P.2d 419, 441 (Cal. 1989) (en banc)).

³³ See Bright, *supra* note 25, at 1860 (describing Messer v. Kemp, 760 F.2d 1080, 1096 n.2 (11th Cir. 1985) (Johnson, J., dissenting)).

³⁴ See Kirchmeier, *supra* note 27, at 426; Gable & Green, *supra* note 16, at 769 (describing Smith v. Ylst, 826 F.2d 872, 874 (9th Cir. 1987)).

³⁵ See Gable & Green, *supra* note 16, at 769 (describing Smith, 826 F.2d at 876).

³⁶ Although many of these attorneys were ultimately deemed to have rendered ineffective assistance, they nonetheless garnered at least one judicial decision declaring their actions not deficient.

In short, courts generally presume that defense counsel's performance was sound,³⁷ and they will often refuse to second-guess counsel's decisions on the theory that "under the circumstances, the challenged action 'might be considered sound trial strategy.'"³⁸ There are, however, two categories of ineffective assistance claims in which the Court has been more active in evaluating counsel's decisions.³⁹ One category is where counsel's decision was based on a misunderstanding or ignorance of the law.⁴⁰ The seminal case is *Kimmelman v. Morrison*.⁴¹ Counsel in that case failed to file a suppression motion because he was unaware of the state's search and the evidence it had discovered.⁴² Counsel's lack of awareness was due to the fact that he had failed to conduct pre-trial discovery.⁴³ As the Court explained:

Counsel's failure to request discovery . . . was not based on "strategy," but on counsel's mistaken beliefs that the State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense and that the victim's preferences would determine whether the State proceeded to trial after an indictment had been returned.⁴⁴

The Court held that counsel's performance was inadequate, noting that the justifications counsel offered for his failure to file a suppression motion "betray a startling ignorance of the law—or a weak attempt to shift blame for inadequate preparation."⁴⁵

The second category of ineffective assistance claim where the Court has aggressively reviewed counsel performance is when counsel

³⁷ "Counsel's competence . . . is presumed." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986).

³⁸ *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). For criticism of the courts' seemingly unabated deference to strategic decisions or trial tactics, see Bazelon, *supra* note 25, at 37–38; Berger, *supra* note 25, at 71; Marlowe, *supra* note 16, at 36.

³⁹ It appears that the Court is also more active in evaluating claims of ineffective assistance in capital than in non-capital cases. But that is a distinction based on type of case, rather than type of ineffective assistance claim.

⁴⁰ *But see* Blume & Neumann, *supra* note 16, at 148 (stating that the Court found no ineffective assistance in *Darden v. Wainwright*, 477 U.S. 168, 185 (1986), despite evidence that trial counsel misunderstood relevant law).

⁴¹ See 477 U.S. 365 (1985).

⁴² *Id.* at 368–69.

⁴³ *Id.* at 369.

⁴⁴ *Id.* at 385.

⁴⁵ *Id.*

has failed to conduct an adequate investigation.⁴⁶ *Wiggins v. Smith* is an example of inadequate investigation in a capital case.⁴⁷ In *Wiggins*, trial counsel elected to focus its mitigation case on a theory that the defendant did not kill the victim himself, and thus was not eligible for the death penalty under state law.⁴⁸ Counsel did not conduct an adequate investigation into the defendant's personal history, which would have revealed that the defendant had suffered "severe sexual and physical abuse" as a child.⁴⁹ The presentence report included references to a distressing childhood, but counsel failed to conduct any further investigation into the defendant's personal history, despite the fact that it was "standard practice" at the time to commission a social history report and that there were funds available for that purpose.⁵⁰ Although

⁴⁶ See Blume & Neumann, *supra* note 16, at 148, 158–59 (noting a "transition in the rigor of the Court's review of claims that trial counsel conducted an inadequate investigation" and describing cases where courts held counsels' investigations to be inadequate); Joel Jay Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1086–88 (1973) (describing pre-*Strickland* cases); Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1656–61 (2008) (describing a modern trend toward heightened scrutiny of mitigation investigations); Marlowe, *supra* note 16, at 31 (noting "the principle that defense counsel must perform reasonable investigations" to discover possible mitigating evidence); Robert R. Rigg, *The T-Rex Without Teeth: Evolving Strickland v. Washington and the Test for Ineffective Assistance of Counsel*, 35 PEPP. L. REV. 77, 94 (2007) (noting that the Court's recent decisions in *Williams*, *Wiggins*, and *Rompilla* have resulted in lower courts conducting "detailed analysis of trial counsel's preparation and investigation, especially in death penalty cases"); *id.* at 104 ("It is clear that the United States Supreme Court has tightened counsel's duty to investigate . . ."). But see Blume & Neumann, *supra* note 16, at 147–51 (describing inadequate investigations excused in the U.S. Supreme Court's earlier cases).

⁴⁷ 539 U.S. 510, 527–28 (2003).

⁴⁸ *Id.* at 515.

⁴⁹ *Id.* at 516. According to a report prepared for post-conviction relief:

[P]etitioner's mother, a chronic alcoholic, frequently left Wiggins and his siblings home alone for days, forcing them to beg for food and to eat paint chips and garbage. Mrs. Wiggins' abusive behavior included beating the children for breaking into the kitchen, which she often kept locked. She had sex with men while her children slept in the same bed and, on one occasion, forced petitioner's hand against a hot stove burner—an incident that led to petitioner's hospitalization. At the age of six, the State placed Wiggins in foster care. Petitioner's first and second foster mothers abused him physically . . . and . . . the father in his second foster home repeatedly molested and raped him. At age 16, petitioner ran away from his foster home and began living on the streets. He returned intermittently to additional foster homes, including one in which the foster mother's sons allegedly gang-raped him on more than one occasion. After leaving the foster care system, Wiggins entered a Job Corps program and was allegedly sexually abused by his supervisor.

Id. at 516–17 (internal citations omitted).

⁵⁰ *Id.* at 523–24.

courts ordinarily defer to a strategic decision by counsel not to present every conceivable mitigation defense, the Court held that, given the limited information contained in the presentence report, it was unreasonable for counsel to end the investigation into the defendant's personal history because it rendered "a fully informed decision with respect to sentencing strategy impossible."⁵¹

The rare defendant who is able to demonstrate that counsel's performance was deficient will not prevail on an ineffective assistance claim unless she can also demonstrate prejudice.⁵² The *Strickland* Court adopted the following standard for prejudice: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁵³ According to the Court, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."⁵⁴ The Court said that a reasonable probability is more stringent than a standard where the defendant would "show that the errors had some conceivable effect on the outcome of the proceeding," and less stringent than a "more likely than not" standard.⁵⁵

Like the performance prong, the prejudice prong has also been the subject of criticism, most of which claims that the prong is too difficult to satisfy.⁵⁶ Stephanos Bilbas, for example, has suggested that psychological biases—specifically the perception of inevitability—may make the prejudice prong a difficult hurdle for defendants because these biases make it hard for judges to imagine that cases could have come out differently.⁵⁷ Eve Brensike Primus has observed that ineffective assistance of counsel claims often are based on what the trial attorney failed to do; proving prejudice in those cases raises "serious practical problems" because of "the delay in presenting the claim," during which time evidence and witnesses for the defendant may have deteriorated or disappeared.⁵⁸ Others have criticized the prejudice standard

⁵¹ *Id.* at 527–28.

⁵² *Strickland*, 466 U.S. at 687.

⁵³ *Id.* at 694.

⁵⁴ *Id.*

⁵⁵ *Id.* at 693.

⁵⁶ Perhaps in response to the criticism of the prejudice prong, the State of Hawaii has rejected the prejudice prong as a "requirement almost impossible to surmount." See *Briones v. State*, 848 P.2d 966, 976 n.11 (Haw. 1993).

⁵⁷ See Bilbas, *supra* note 16.

⁵⁸ Primus, *supra* note 17, at 695; see *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) (expressing a similar concern); Adam M. Gershowitz, *Get in the Game or Get Out of the Way: Fixing the Politics of Death*, 94 VA. L. REV. IN BRIEF 51, 53 (2008) (same).

because all defendants are entitled to effective representation, even if it would not alter the outcome of trial⁵⁹; otherwise, the right to effective assistance will be vindicated only for the innocent.⁶⁰

B. *Ineffective Assistance at Sentencing*

The Supreme Court has not yet decided what standard applies to ineffective assistance at sentencing claims in discretionary non-capital sentencing systems. Although *Strickland* involved the effectiveness of counsel during the sentencing phase of a capital case, the Court framed its opinion as governing counsel's performance at trial and expressed reservations about whether a different standard might govern in non-capital sentencing.⁶¹ The Court reasoned that unlike "in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance," counsel's role during capital sentencing "is comparable to counsel's role at trial."⁶² The *Strickland* Court may have originally thought that non-capital sentencing required a different standard of performance because of the traditional understanding in the early twentieth century that "[s]entencing . . . is wholly the judge's province,"⁶³ and thus counsel's role is not that of a traditional advocate. Today, however, sentencing has become a proceeding in which defense counsel and prosecution advocate for particular sentences.⁶⁴ It is therefore unsurprising that "[m]ore trial rights apply at sentencing than many have supposed"⁶⁵ and that most lower federal courts apply the same two-prong

⁵⁹ Blume & Neumann, *supra* note 16, at 138-39, 164 (describing and endorsing the argument of Judge Bazelon in *United States v. Decoster*, 624 F.2d 196, 288 (D.C. Cir. 1976) (Bazelon, J., dissenting)).

⁶⁰ Klein, *supra* note 16, at 1468.

⁶¹ See 466 U.S. at 686-87.

⁶² *Id.*

⁶³ Richard H. Kuh, *For a Meaningful Right to Counsel on Sentencing*, 57 A.B.A. J. 1096, 1096 (1971).

⁶⁴ See Sanford H. Kadish, *The Advocate and the Expert—Counsel in the Peno-Correctional Process*, 45 MINN. L. REV. 803, 807 (1961) (noting that the Supreme Court "has on several occasions recognized the 'invaluable aid' a lawyer can render at [the sentencing] stage in calling the court's attention to mitigating circumstances which might result in a lighter penalty").

⁶⁵ Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1774 (2003). Michaels argues that the Supreme Court's "sentencing rights decisions" can be explained as "consistent with a conception of sentencing as constitutionally mandating a balanced and thorough effort to determine the 'right' sentence, within the range of prescribed penalties." *Id.* at 1775-76.

standard to non-capital sentencing.⁶⁶ The U.S. Supreme Court ultimately did the same in *Glover v. United States*.⁶⁷

Glover addressed the question of what the proper prejudice standard ought to be in mandatory non-capital sentencing systems.⁶⁸ The circuits had split on whether a non-capital defendant merely had to demonstrate a reasonable probability that counsel's deficient performance led to *any* increase in her sentence,⁶⁹ or whether she had to demonstrate that, but for counsel's deficient performance, her "non-capital sentence would have been *significantly* less harsh."⁷⁰ At *Glover*'s sentencing his counsel failed to contest in a meaningful way the government's claim that various offenses should not be grouped together under U.S. Sentencing Guidelines section 3D1.2.⁷¹ Having decided that *Glover*'s offenses should not be grouped, the district court determined that the appropriate sentencing range under the Sentencing Guidelines was seventy-eight to ninety-seven months in prison.⁷² The court sentenced *Glover* to eighty-four months imprisonment.⁷³ Had the offenses been grouped, *Glover* would have been subject to a sentencing range of sixty-three to seventy-eight months imprisonment under the Guidelines.⁷⁴ The Seventh Circuit denied the claim of ineffective assistance at sentencing, reasoning that, regardless of the merits of the grouping argument, the six to twenty-one month decrease that the defendant might have received in sentencing was "not sufficiently significant to be cognizable on collateral attack."⁷⁵

⁶⁶ See *id.* at 1791.

⁶⁷ 531 U.S. 198, 203-04 (2001).

⁶⁸ *Id.* at 199-200.

⁶⁹ See *United States v. Granados*, 168 F.3d 343, 344-45 (8th Cir. 1999); *United States v. Thompson*, 27 F.3d 671, 677-78 (D.C. Cir. 1994); *United States v. Headley*, 923 F.2d 1079, 1083-84 (3d Cir. 1991). Two circuits appear to have found prejudice when there was only a possibility of an enhanced sentence if petitioner were later arrested and sentenced under a repeat offender statute. See *Jackson v. Leonardo*, 162 F.3d 81, 86 (2d Cir. 1998); *United States v. Palomba*, 31 F.3d 1456, 1465-66 (9th Cir. 1994).

⁷⁰ *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993); see also *United States v. Murray*, No. 97-6735, 1999 WL 187192, at *5 (4th Cir. Apr. 6, 1999) ("[W]e conclude that the potential change in sentence was sufficiently significant to render the proceeding unfair."); *Martin v. United States*, 109 F.3d 1177, 1178 (7th Cir. 1996) (holding that the potential change of sentence must be a significant amount in order to satisfy the prejudice prong); *United States v. Kissick*, 69 F.3d 1048, 1056 (10th Cir. 1995) ("[W]hen counsel's constitutionally deficient performance results . . . in a significantly greater sentence, the prejudice element of *Strickland* is satisfied.");

⁷¹ See *Glover*, 531 U.S. at 200-01.

⁷² *Id.* at 201.

⁷³ *Id.*

⁷⁴ *Glover v. United States*, No. 98-421, 1999 WL 511523, at *1 (7th Cir. July 15, 1999).

⁷⁵ *Id.*

Because the lower courts had not addressed the merits of the grouping argument (and thus, by extension, also did not address the performance prong of the *Strickland* test), the Supreme Court limited its review in *Glover* to the prejudice issue.⁷⁶ The Court rejected the substantial prejudice test, reasoning that "any amount of actual jail time has Sixth Amendment significance."⁷⁷ But although the *Glover* Court apparently assumed that the *Strickland* test applies to non-capital sentencing,⁷⁸ the opinion explicitly limited its holding to mandatory sentencing regimes:

Although the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, *under a determinate system of constrained discretion such as the Sentencing Guidelines* it cannot serve as a bar to a showing of prejudice.⁷⁹

This limitation has taken on greater significance because, since the Court decided *Glover* in 2001, the law surrounding mandatory sentencing systems has changed dramatically. Specifically, the Court has placed serious restrictions on the use of mandatory sentencing schemes.

The change in mandatory sentencing began with *Apprendi v. New Jersey*.⁸⁰ *Apprendi* involved a statutory sentencing enhancement that provided for an increase in the maximum sentence for the unlawful possession of a firearm if the sentencing judge found that the defendant possessed the firearm to intimidate someone because of her race.⁸¹ The

⁷⁶ *Glover*, 531 U.S. at 202, 205.

⁷⁷ *Id.* at 203.

⁷⁸ See Michaels, *supra* note 65, at 1792 (noting that the *Glover* "opinion assumed, without discussing, that the *Strickland* right to effective assistance of counsel applied at non-capital sentencing proceedings, so the opinion provides no explanation of why *Strickland* applies at sentencing"); see also Davis v. Grigas, 443 F.3d 1155, 1159 (9th Cir. 2006) (Graber, J., concurring) (noting that the U.S. Supreme Court applied the *Strickland* standard in *Glover*). But see Davis, 443 F.3d at 1158 (observing that the Court has "not delineated a standard which should apply to ineffective assistance of counsel claims in noncapital sentencing cases"); Cooper-Smith v. Palmateer, 397 F.3d 1236, 1244 (9th Cir. 2005) ("Since *Strickland*, the Supreme Court has not decided what standard should apply to ineffective assistance of counsel claims in the noncapital sentencing context. Consequently, there is no clearly established law in this context.").

⁷⁹ *Glover*, 531 U.S. at 204 (emphasis added); see Note, *Prejudice and Remedies: Establishing a Comprehensive Framework for Ineffective Assistance Length-of-Sentence Claims*, 119 HARV. L. REV. 2143, 2149 (2006) [hereinafter *Prejudice and Remedies*].

⁸⁰ See 530 U.S. 466, 490-92 (2000).

⁸¹ *Id.* at 468-69.

Court held that this enhancement violated the Sixth Amendment right to a jury trial,⁸² explaining that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."⁸³ The Court extended this holding to mandatory sentencing guideline regimes in *Blakely v. Washington*.⁸⁴ The *Blakely* Court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."⁸⁵ In other words, if a state wanted to create a mandatory sentencing regime that limited a sentencing judge's discretion to a range narrower than the statutory range, then factual findings that permitted a judge to sentence above that narrow range had to be submitted to a jury.⁸⁶ If a sentencing court was only permitted to sentence above that range based on judge-found facts, then, the Court held, the sentencing regime violated the Sixth Amendment.⁸⁷

After the decision in *Blakely*, some states sought to modify their sentencing systems to avoid constitutional problems. Some states elected to adopt jury-fact-finding at sentencing, while others responded by stating that their sentencing guidelines were voluntary, rather than mandatory.⁸⁸

The federal sentencing system has also changed significantly since *Glover*. In *United States v. Booker*, the Court extended *Apprendi* to hold that the Federal Sentencing Guidelines ran afoul of the Sixth Amendment.⁸⁹ The Court solved the Sixth Amendment problem by making the Guidelines advisory, rather than mandatory.⁹⁰ In other words, to avoid the Sixth Amendment problem, the Court restored sentencing discretion to trial judges.⁹¹ This solution avoids the constitutional prob-

⁸² *Id.* at 490–92.

⁸³ *Id.* at 490.

⁸⁴ 542 U.S. 296, 303 (2004).

⁸⁵ *Id.*

⁸⁶ *See id.* at 303–04.

⁸⁷ *See id.* at 304–05.

⁸⁸ *See* Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 799–800 (2008) (listing states that have responded to *Blakely* by sending sentencing facts to the jury and those that have responded by interpreting their guidelines as voluntary).

⁸⁹ *See* *United States v. Booker*, 543 U.S. 220, 245 (2003).

⁹⁰ *See id.* (invalidating 18 U.S.C. § 3553(b)(1) (2006)).

⁹¹ *See* Hessick & Hessick, *supra* note 12, at 28 (characterizing the *Booker* remedy as "leav[ing] sentencing to district court discretion by making the Guidelines advisory and

lem identified in *Apprendi* and *Blakely* because a factual finding is no longer required to sentence above the Guideline range.⁹²

Discretionary systems, such as the post-*Booker* federal system and the post-*Blakely* systems adopted in some states, are nothing new. Discretionary sentencing has a long history in the United States.⁹³ In the late 1970s and early 1980s, a movement to limit the discretion of sentencing judges⁹⁴ resulted in several states and the federal criminal justice system adopting various types of mandatory sentencing systems.⁹⁵

[promoting] the uniformity intended by Congress through appellate review for reasonableness").

⁹² See *Booker*, 543 U.S. at 245.

⁹³ Exactly when discretionary sentencing was adopted in the United States is a matter of some dispute. There is, however, agreement that discretionary sentencing was the American norm by the late nineteenth century. Hessick, *supra* note 11, at 131 n.183.

⁹⁴ Critics of discretionary sentencing argued that defendants' sentences varied wildly depending on the identity of the judge imposing the sentence, the temperament of the judge on a particular day, or unwarranted prejudices held by the sentencing judge. See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 12-49 (1973). For a historical account of this movement and the major players, see KATE STITH & JOSÉ CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 29-48 (1998).

⁹⁵ The binding effect of various systems differed from jurisdiction to jurisdiction. Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196-1206 (2005); Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 156-71 (2005). Some states provided judges with advisory guidelines about sentence lengths, see Frase, *supra*, at 1198 (listing "voluntary" guidelines jurisdictions, where sentences are not subject to appeal), while others developed presumptive sentencing guidelines. In these presumptive systems, legislatures or sentencing commissions identify a narrow presumptive sentence for the "ordinary case" of a given crime. Judges retain power to sentence above or below the presumptive sentence in an unusual case, but these sentencing decisions are subject to appellate review. Kevin R. Reitz, *Sentencing Reform in the States: An Overview of the Colorado Law*, 64 U. COLO. L. REV. 645, 647 & n.10 (1993). The presumptive sentence often depends not only on the offense of conviction, but also on an offender's prior record of convictions. Examples of such systems include Arizona, California, and Washington, which created presumptive, mitigated and aggravated sentences. See ARIZ. REV. STAT. ANN. §§ 13-604, 13-702 (2001 & Supp. 2008); WASH. REV. CODE ANN. § 9.94A.535 (West 2003 & Supp. 2009); see also *Cunningham*, 549 U.S. at 276-79 (describing the California system).

On the federal level, Congress enacted the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.), which dramatically restricted the discretion of federal sentencing judges by creating a sentencing commission to develop binding regulations named guidelines. The Federal Sentencing Guidelines assigned narrow sentencing ranges for particular cases within the broader statutory sentencing limits. These Guideline ranges were based on a number of variables, including the offense of conviction, other circumstances surrounding the offense, and the defendant's prior criminal convictions. The Guidelines provided for various adjustments to the sentencing range based on the specific facts of the case, such as the amount of drugs transported by a defendant found guilty of drug possession or a defendant's motive in committing a crime. Judges were statutorily obligated to make factual

Although discretionary non-capital sentencing was *de rigueur* for much of the twentieth century, the law regarding ineffective assistance at sentencing in those systems was not well developed—perhaps because the shift to mandatory sentencing regimes coincided with the Court's articulation of its ineffective assistance standard in *Strickland*.⁹⁶

As noted above, *Booker* rendered the Federal Sentencing Guidelines advisory and restored substantial discretion to sentencing judges. And if states do not want to submit sentencing facts to a jury, then judges must have the discretion to sentence up to the statutory maximum without making any additional factual finding.⁹⁷ In the wake of these changes to sentencing regimes across the country—which rendered several sentencing systems discretionary (at least in some sense of the word)—it has become increasingly important to determine the proper standard for reviewing the effectiveness of counsel in discretionary sentencing systems. Because defendants are entitled to counsel at a sentencing hearing,⁹⁸ they are entitled to the effective assistance of counsel at that hearing.⁹⁹ However, the Supreme Court has twice suggested that ineffective assistance claims in discretionary or informal sentencing regimes may be assessed differently.¹⁰⁰ In at least one case it appears that the government has argued that *Glover* does not apply to post-*Booker* ineffective assistance at sentencing claims,¹⁰¹ and, as discussed below, some lower courts have indeed employed different standards for assessing claims from mandatory sentencing systems or from trial. The following sections address the appropriate standard for

findings to determine whether these adjustments applied, and they were permitted to sentence outside the Guideline range only under very limited circumstances. See Hessick & Hessick, *supra* note 12, at 5.

⁹⁶ *Strickland* was decided in 1984, the same year that Congress passed the Sentencing Reform Act.

⁹⁷ See generally Casey McTigue, Note, *The Problem of Post-Cunningham Judicial Review: The Impact of Gall, Kimbrough and Senate Bill 40 on California Sentencing*, 13 BERKELEY J. CRIM. L. 199 (2008) (discussing California's adoption of a discretionary sentencing system in the wake of *Cunningham*).

⁹⁸ See *Mempa v. Rhay*, 389 U.S. 128, 137 (1967); *Townsend v. Burke*, 334 U.S. 736, 739–41 (1948).

⁹⁹ Cf. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (recognizing that “the right to counsel is the right to the effective assistance of counsel”).

¹⁰⁰ See *Glover*, 531 U.S. at 204; *Strickland*, 466 U.S. at 686–87.

¹⁰¹ See *Jebara v. United States*, No. 06-C-1137, 2007 WL 1183937, at *2 (E.D. Wis. Apr. 19, 2007) (“Noting that *Glover* arose under the ‘determinate system of constrained discretion’ of the pre-*Booker* federal sentencing guidelines, the government argues that mere guideline errors do not result in prejudice in the post-*Booker* world, in which the court has greater discretion to impose a sentence outside the guidelines range.” (citation omitted)).

prejudice and the appropriate performance standard in discretionary non-capital sentencing systems.

II. EVALUATING PREJUDICE AT SENTENCING

Because many sentencing systems are no longer mandatory in the wake of *Blakely v. Washington* and *United States v. Booker*, it is increasingly important to determine the proper ineffective assistance standard for discretionary (or advisory) sentencing systems. Language in *Strickland v. Washington* and *Glover v. United States* suggests that a different ineffective assistance standard may be appropriate in discretionary non-capital sentencing systems, and several courts have concluded that a heightened prejudice standard is appropriate in such systems. The courts that have imposed these heightened standards appear to have done so because of a lack of substantive law restricting decision making in discretionary non-capital sentencing systems, and because the sentencer can make incremental sentencing decisions (e.g., increase or decrease a sentence by small amounts).¹⁰² Those courts that have adopted more rigorous prejudice requirements appear to be concerned about the ease with which a defendant could demonstrate that her sentence might have been marginally shorter.¹⁰³ In other words, these courts are heightening the prejudice standard in order to serve a gatekeeping function.

As explained below, any defendant who can demonstrate a reasonable probability that her sentence was increased by any amount of actual jail time should be deemed to have satisfied the prejudice prong of her ineffective assistance claim. The hesitation to apply the "any amount of actual jail time" standard for prejudice derives from courts' view that prejudice is somehow different in discretionary sentencing. But, as this Part explains, discretionary non-capital sentencing systems do not present wholly unique questions of prejudice. And, even if the prejudice standard proves easier to satisfy in practice for defendants in discretionary non-capital sentencing systems, courts should not try to further heighten the standard for demonstrating ineffective assistance at sentencing because the costs associated with ordering a new non-capital sentencing are relatively low. Also, given the procedural posture of most ineffective assistance claims (i.e., that they are ordinarily brought as a

¹⁰² See, e.g., *Buckley v. State*, 76 S.W.3d 825, 832 (Ark. 2002); *Young v. State*, 699 S.W.2d 398, 399 (Ark. 1985).

¹⁰³ See, e.g., *Buckley*, 76 S.W.3d at 832.

collateral attack), only those defendants serving relatively lengthy sentences will bring ineffective assistance at sentencing claims.

A. Establishing a Prejudice Standard for Discretionary Non-capital Sentencing Systems

If the prejudice standard for discretionary non-capital sentencing systems were no different from the Court's present prejudice standard, then any defendant who can demonstrate a reasonable probability that her sentence was increased by any amount of actual jail time should be deemed to have satisfied the prejudice prong of her ineffective assistance claim.¹⁰⁴ There are two major challenges posed to the application of this prejudice prong by discretionary non-capital sentencing systems: (a) the discretion possessed by the sentencer, and (b) the chronological nature of sentencing decisions that allows sentencers to select any sentence from within a range of time. Neither of these features is unique to discretionary non-capital sentencing, as capital sentencers possess considerable discretion, and chronological determinations are a feature of mandatory systems. However, unlike capital sentencing and mandatory noncapital sentencing discretionary non-capital sentencing systems possess both features.

In a mandatory sentencing system, the sentencer has little or no discretion and thus the prejudice inquiry is relatively easy: because the sentencing judge is bound to sentence according to certain rules and standards, most deficiencies in counsel's performance will have an easily identified effect on the defendant's sentence.¹⁰⁵ The effect of counsel's performance on a defendant's sentence will be more difficult to assess in a discretionary sentencing system because a judge may elect to impose a particular sentence for any number of reasons, and it may not be clear—even to the sentencing judge—how much weight was assigned to various sentencing factors.¹⁰⁶ If a reviewing court cannot say with certainty how any particular argument or evidence affected a sen-

¹⁰⁴ This test is simply a combination of *Strickland's* "reasonable probability" that the outcome would have been different language, *Strickland*, 466 U.S. at 694, and *Glover's* statement that "any amount of actual jail time has Sixth Amendment significance," *Glover*, 531 U.S. at 203.

¹⁰⁵ See *Prejudice and Remedies*, *supra* note 79, at 2150 (noting the "clear causal links" that exist in determinate sentencing systems "between a sentence and defense counsel's conduct at the sentencing hearing").

¹⁰⁶ See *id.* ("Traditionally, judges in discretionary regimes have had great flexibility in choosing a punishment within a broad range of possible sentences, without having to provide any explanation for their decision.").

tence, then it is difficult to assess the impact of counsel's performance. In other words, because there are "fewer definite causal links" between counsel's performance and the sentence imposed, the prejudice inquiry will be less straight-forward than in mandatory systems.¹⁰⁷

But the uncertain connection between counsel's performance and the sentence imposed does not make ineffective assistance at sentencing in discretionary systems unique. Similar uncertainty exists in the capital-sentencing context and in the context of decisions made at trial.¹⁰⁸ Capital sentencing juries possess extraordinary discretion in deciding whether to impose a sentence of life or death. Indeed, the Supreme Court specifically stated that a capital sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."¹⁰⁹ Because juries do not articulate the reasoning behind their decisions, there is no definite answer in capital cases whether counsel's performance affected the sentence imposed, nor is there a definite answer whether counsel's performance during the liability phase affected the jury's decision regarding guilt or innocence. Indeed, it is why the *Strickland* Court framed the prejudice inquiry in terms of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."¹¹⁰ This "reasonable probability" standard is easily applied to non-capital discretionary sentencing: in order to assess prejudice, the Court need only determine "the probability that a defendant would have received a shorter sentence" had she received effective assistance.¹¹¹ This prejudice analysis requires a court to "reweigh the evidence in aggravation against the totality of available mitigating evidence."¹¹²

¹⁰⁷ See *id.*

¹⁰⁸ See, e.g., *Lockett*, 438 U.S. at 604-05.

¹⁰⁹ *Id.* (emphasis omitted).

¹¹⁰ 466 U.S. at 694.

¹¹¹ *Prejudice and Remedies*, *supra* note 79, at 2149; see *id.* at 2152 ("Strickland should be understood to require only a reasonable probability of a shorter sentence for length-of-sentence claims based on errors made at sentencing in a discretionary regime.").

¹¹² *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); see *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000). But see Helen Gredd, Comment, *Washington v. Strickland: Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544, 1567-68 (1983) ("A sentencing decision is made by weighing the aggravating and mitigating evidence in a case; the specific weight to be accorded that evidence is left to the sentencer. The result of the balancing is known to the reviewing court but not the particular means by which that result was achieved. Consequently, any attempt to determine the likelihood that additional elements would have altered that balance necessarily is speculative." (footnotes omitted)).

But although capital sentencing juries have significant discretion, sentencing in capital systems differs in another important respect from discretionary non-capital systems—capital sentencing is essentially a binary inquiry: should the defendant receive a sentence of the death penalty or not? This binary nature is similar to the liability phase, where the decisionmaker must only determine whether the defendant is guilty or not guilty. A judge in a discretionary non-capital system, in contrast, (or, in a few states, a sentencing jury)¹¹³ has the discretion to impose any sentence on a particular defendant within the (often broad) statutory range set by the legislature.¹¹⁴ Because criminal sentences are measured chronologically, the non-capital sentencing judge can adjust a defendant's sentence up or down by varying amounts to account for various aggravating or mitigating factors.¹¹⁵

Mandatory systems also contain some binary determinations—e.g., whether a defendant qualifies for a particular reduction or enhancement.¹¹⁶ In addition, however, some mandatory non-capital sentencing systems allow limited flexibility for the sentencer to select a sentence within a particular range.¹¹⁷ The pre-*Booker* Federal Sentencing Guidelines, for example, permitted sentencing judges to select a sentence from within a specified range.¹¹⁸ Although the range was relatively circumscribed—the highest available sentence was generally no more than twenty-five percent higher than the lowest available sentence—judges enjoyed essentially unfettered discretion in selecting a sentence within that range.¹¹⁹ And if a judge elected to depart from the Guidelines range, the amount of the departure (i.e., the difference in the sentence imposed and the relevant sentencing range) was also largely

¹¹³ See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va. L. Rev. 311, 314 & n.16 (2003) (noting that six states currently employ jury sentencing in non-capital cases). But cf. Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 897 (2004) ("Like so many other procedural rights, particularly those associated with jury trial, the defendant's right to [non-capital] sentencing by jury is in most cases not exercised but bargained away.")

¹¹⁴ See FRANKEL, *supra* note 94, at 7 (noting the "broad statutory ranges" and the significant sentencing power thus left to judges).

¹¹⁵ See Hessick, *supra* note 11, at 132.

¹¹⁶ See, e.g., STITH & CABRANES, *supra* note 94, at 83 ("Each step of a sentence calculation under the [pre-*Booker* federal] Guidelines represent what mathematicians call a 'minimal pair': The judge must decide whether a given factor deemed relevant by the Sentencing Commission is present or absent in the case at hand.")

¹¹⁷ See, e.g., COLO. REV. STAT. § 18-1.3-401 (2008); KAN. STAT. ANN. § 21-4719(b) (2007).

¹¹⁸ STITH & CABRANES, *supra* note 94, at 127 ("[T]he Guidelines explicitly require judges to exercise discretion in setting the precise sentence within a particular Guidelines range.")

¹¹⁹ *Id.* at 3, 127.

left to the discretion of the sentencing judge.¹²⁰ This (admittedly limited) chronological freedom in mandatory systems resembles the ability of sentencers in discretionary systems to select any sentence within a statutory range.¹²¹

Having established that non-capital discretionary sentencing is not unique in the discretion it affords sentencers nor in the non-binary nature of sentencing decisions, it is worth conceptualizing how the prejudice determination might work in a discretionary system. If counsel, for example, incorrectly overstates the number of prior convictions at a sentencing hearing, and the judge later refers to this number when imposing the sentence, then there is little doubt that the defendant has been prejudiced.¹²² Even if the sentencing judge does not refer to the defendant's prior convictions in issuing the sentence, there is still a strong argument that defense counsel's performance likely increased the defendant's sentence. That is because information on prior convictions is ordinarily considered an important sentencing factor.¹²³ Thus, even though there is no *direct* evidence that counsel's error resulted in a longer sentence, there is nonetheless a "reasonable probability" that the defendant would have received a shorter sentence but for counsel's deficient performance.

Of course, as with any ineffective assistance claim, to determine the existence of prejudice a court must "consider the totality of the evidence" that was presented at a non-capital sentencing.¹²⁴ When assessing prejudice at a capital sentencing, for example, courts compare the aggravating evidence against the available mitigating evidence.¹²⁵ This analysis weighs not only the number of aggravating and mitigating factors, but also the quality or weight of those factors.¹²⁶

Because the standards for prejudice established in *Strickland* and *Glover* appear feasible for discretionary non-capital sentencing systems, courts should find any defendant who can demonstrate a reasonable

¹²⁰ *Id.* at 127.

¹²¹ *Id.*

¹²² See *Prejudice and Remedies*, *supra* note 79, at 2151 (noting that a defendant is prejudiced when "compelling case-specific circumstances suggest that defense counsel's errors negatively affected the sentence").

¹²³ See *infra* note 275 and accompanying text.

¹²⁴ *Strickland*, 466 U.S. at 695; see *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986).

¹²⁵ *Graham*, *supra* note 46, at 1665.

¹²⁶ *Id.* ("The presence or absence of overwhelming aggravating evidence is an important part of this analysis, but whether prejudice will be found typically depends more on the quality of the mitigating evidence that counsel inexplicably failed to discover or present." (footnote omitted)).

probability that her sentence was increased by any amount of actual jail time to have satisfied the prejudice prong.

B. Assessing Other Prejudice Standards

In the wake of *Glover*, some courts have applied heightened prejudice standards in discretionary non-capital sentencing systems. The Arkansas state courts, for example, have held that only a defendant who is sentenced to the statutory maximum sentence is capable of demonstrating prejudice.¹²⁷ The Fifth Circuit continues to employ its pre-*Glover* prejudice standard in its review of discretionary state sentencing regimes—that is, it requires a state defendant to demonstrate that, but for counsel's deficient representation, she would have received a "significantly less harsh" sentence.¹²⁸ The only plausible explanation for these heightened standards is to help dispose of (i.e., deny) many ineffective assistance claims. But such systems are in clear tension with *Glover*'s pronouncement that, in the ineffective assistance context, "any amount of actual jail time has Sixth Amendment significance."¹²⁹ In any event, as explained below, the need for such a gatekeeping function may well be overstated.

The State of Arkansas has a discretionary non-capital sentencing system. The state uses a bifurcated jury system in which the jury that convicts a defendant then hears arguments and deliberates regarding the appropriate sentence.¹³⁰ Although there is some statutory guidance regarding relevant sentencing evidence, the statutory provision does not purport to exclude evidence as irrelevant to sentencing.¹³¹ The Arkansas Supreme Court has held that prejudice at sentencing cannot be demonstrated if the defendant "received less than the maximum sentence for the offense charged."¹³² Thus, even in cases where counsel's performance falls below constitutionally minimal standards, an ineffective assistance claim will be denied if the defendant received less than

¹²⁷ See, e.g., *Buckley*, 76 S.W.3d at 832.

¹²⁸ See, e.g., *Ward v. Dretke*, 420 F.3d 479, 498 (5th Cir. 2005).

¹²⁹ 531 U.S. at 203 (citing *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)).

¹³⁰ ARK. CODE ANN. § 16-97-101 (2006). A defendant who pleads guilty "with the agreement of the prosecution and the consent of the court, may be sentenced by a jury impaneled for purposes of sentencing only." *Id.* § 16-97-101(6). Any defendant may waive sentencing by jury, with the agreement of the prosecution and the consent of the court "in which case the court shall impose sentence." *Id.* § 16-97-101(5).

¹³¹ ARK. CODE ANN. § 16-97-103 ("Evidence relevant to sentencing by either the court or a jury may include, but is not limited to, the following . . .").

¹³² *Smith v. State*, 249 S.W.3d 119, 122 (Ark. 2007).

the statutory maximum sentence.¹³³ The Arkansas courts that have applied this "less than statutory maximum" standard have not provided much of an explanation for the rule.¹³⁴ In 2007, the Arkansas Supreme Court suggested that this prejudice rule derives from the difference between capital and non-capital cases.¹³⁵ However, the Arkansas courts do not appear to have explained why the prejudice rule they have adopted is appropriate in non-capital cases.

When a defendant argued that the Arkansas prejudice rule conflicted with the Supreme Court's "any amount of actual jail time"¹³⁶ standard from *Glover*, the Arkansas Supreme Court stated:

¹³³ See *id.* Arkansas is not the only state that appears to place some emphasis on whether the defendant received the statutory maximum sentence when analyzing prejudice. Other courts have identified the fact that a defendant's sentence fell below the statutory maximum as suggestive that the defendant did not suffer prejudice. See, e.g., *Madden v. State*, 991 So.2d 1231, 1238 (Miss. Ct. App. 2008); *People v. Hemmings*, 808 N.E.2d 336, 340 (N.Y. 2004). Similarly, courts in other states have also stated that the imposition of a maximum sentence is indicative of prejudice. See, e.g., *Gonzalez v. State*, 115 S.W.3d 278, 286 (Tex. App. 2003); *State v. Pote*, 659 N.W.2d 82, 95 (Wis. Ct. App. 2003). However, courts ordinarily will not end the prejudice inquiry at a finding that the defendant received the maximum statutory sentence. A defendant must still show a reasonable probability that she would have received a shorter sentence, and in cases where significant aggravating factors were present, courts are unlikely to find such a probability. See *Wood v. State*, 158 P.3d 467, 474 (Okla. Crim. App. 2007); *Chapman v. State*, Nos. 05-05-01349-CR, 05-05-01350-CR, 2007 WL 10560, at *3 (Tex. App. Jan. 3, 2007).

¹³⁴ Most cases employing this prejudice standard simply cite previous cases. See, e.g., *Bond v. State*, No. CR-08-224, 2008 WL 4482233, at *5 (Ark. Oct. 2, 2008). Two cases in particular are frequently cited. See *Buckley*, 76 S.W.3d at 832; *Young*, 699 S.W.2d at 399. Prior to 2002, Arkansas courts sometimes found prejudice in cases where the jury had not imposed the maximum sentence. See, e.g., *Shells v. State*, 733 S.W.2d 743, 746-47 (Ark. Ct. App. 1987). The earliest case that indicates a maximum sentence is necessary for a finding of prejudice simply states (without citation): "the jury subsequently returned a sentence of fourteen years, which was within the statutory range for either a class A or a class Y felony. As a result, petitioner suffered no actual prejudice from the error." *Young*, 699 S.W.2d at 399.

¹³⁵ *Small v. State*, 264 S.W.3d 512, 520 (Ark. 2007) ("For claims of ineffective assistance in the sentencing phase, in cases that do not involve the death penalty, a defendant who has received a sentence less than the maximum sentence for the offense cannot show prejudice from the sentence itself."). Arkansas courts have often stated, in assessing sentencing ineffective assistance claims, that "death cases are inapposite where the circumstances of the case before the court concern charges that do not subject the defendant to the possibility of the death penalty." *Smith*, 249 S.W.3d at 122. Many Arkansas Supreme Court opinions appear to make this statement when distinguishing the performance analysis of *Strickland* rather than the prejudice prong. See *id.* at 123; *State v. Franklin*, 89 S.W.3d 865, 870 (Ark. 2002). The *Small* opinion, however, characterized the distinction as relevant to the prejudice inquiry. See 264 S.W.3d at 520.

¹³⁶ 531 U.S. at 203.

In reversing the lower court's ruling, the [*Glover*] Court specifically noted a distinction between the situation in *Glover* and a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. The distinction noted in *Glover* is precisely what is at issue here—a matter of trial strategy. There was no error in the calculation of the sentence itself; appellant argues that he would have received a less harsh sentence if his attorney had chosen a different tactic concerning the evidence submitted to the jury.¹³⁷

The Arkansas Supreme Court was, of course, correct that *Glover* represented a case of undeniable prejudice—counsel's performance in *Glover* resulted in a sentencing ruling that, if erroneous, could have been corrected on appeal. But *Glover* does not state that appealable error is the only situation where a defendant is prejudiced; nor does it state that a decision by counsel that leads to a harsher sentence is not itself prejudicial.¹³⁸ Indeed, because this language from *Glover* is speaking in terms of "trial strategy," it is arguably drawing a contrast about counsel's performance, rather than a contrast about prejudice. Any number of counsel's choices at trial or at sentencing may result in prejudice to the defendant—i.e., an unfavorable verdict or a longer sentence—but, if such choices are deemed reasonable strategy, then a court will not label counsel's *performance* deficient; it will not affect any determination regarding *prejudice*. Most important, nothing in *Glover* suggests that a non-capital defendant must receive the maximum available sentence in order to demonstrate prejudice.¹³⁹

Another possible explanation for Arkansas's prejudice rule is that, when defendants are sentenced under a discretionary scheme, they are not entitled to any particular sentence within the statutory range. If you

¹³⁷ *Buckley v. State*, No. CR 06-172, 2007 WL 1509323, at *5 (Ark. May 24, 2007) (citing *Glover*, 531 U.S. at 204).

¹³⁸ *Glover* simply states:

We hold that the Seventh Circuit erred in engrafting this additional requirement onto the prejudice branch of the *Strickland* test. This is not a case where trial strategies, in retrospect, might be criticized for leading to a harsher sentence. Here we consider the sentencing calculation itself, a calculation resulting from a ruling which, if it had been error, would have been correctable on appeal.

531 U.S. at 204.

¹³⁹ To the contrary, the defendant in *Glover* received a sentence in the middle of what the trial court believed to be the appropriate sentencing range. See 531 U.S. at 201. Because the *Glover* Court nonetheless found prejudice, *Glover* is arguably inconsistent with the Arkansas approach.

have no right to something, then it cannot serve as the basis for a claim of prejudice.¹⁴⁰ Indeed, one could argue that the U.S. Supreme Court's statement in *Lockhart v. Fretwell* that prejudice exists only where counsel's performance "deprive[d] the defendant of any substantive or procedural right to which the law entitles him,"¹⁴¹ suggests that a straightforward application of the *Glover* standard to discretionary systems is inappropriate. That is because, in contrast to a defendant in a discretionary system who has no expectation regarding sentence (aside from the statutory range), a defendant in a mandatory system arguably has a right to a particular sentence.¹⁴² This argument, however, proves too much: Arkansas courts will find prejudice only when the sentencing jury imposed the maximum sentence, but the defendant's exposure upon conviction extends up to *and including* the statutory maximum.¹⁴³ Thus, if prejudice exists only when the defendant has been deprived of something to which she is entitled, then a statutory maximum sentence also would not qualify as prejudice.¹⁴⁴ This reasoning would necessarily mean that there could be no prejudice in discretionary systems. But if the right to counsel implies a right to effective counsel,¹⁴⁵ then there must be a right to effective assistance in discretionary sentencing proceedings. In sum, either this argument based on the language in *Lock-*

¹⁴⁰ See *Cornetti v. State*, 267 P. 869, 871 (Okla. Crim. App. 1928) (citing *Bishop v. State*, 14 S.W. 88, 88 (Ark. 1890) for this proposition).

¹⁴¹ 506 U.S. 364, 372 (1993).

¹⁴² Cf. *Harris v. United States*, 536 U.S. 545, 566 (2002). The Court explained:

The Fifth and Sixth Amendments ensure that the defendant will never get *more* punishment than he bargained for when he did the crime, but they do not promise that he will receive anything less than that. If . . . the trial jury has found . . . all the facts necessary to impose the maximum, . . . [t]he judge may select any sentence within the range

Id. (internal quotation marks omitted). Justice Scalia has also argued:

I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of 30 years—and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge But the criminal will never get *more* punishment than he bargained for when he did the crime

Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

¹⁴³ See, e.g., *Buckley*, 76 S.W.3d at 832.

¹⁴⁴ This entitlement argument would equally apply to a "significant" or "substantial" difference in a sentence, which, as explained *infra*, is the heightened standard that has been adopted by the Fifth Circuit.

¹⁴⁵ See *supra* note 2.

hart must be completely disregarded, or there can be no prejudice requirement for discretionary systems.¹⁴⁶

One other possible explanation for the Arkansas rule may be found in the fact that Arkansas has not only a discretionary sentencing system, but also a system in which juries decide non-capital sentences.¹⁴⁷ When a sentence is imposed by a judge, there may be a record of the judge's decision-making process that a reviewing court can analyze for prejudice.¹⁴⁸ Such a record is not available in cases where juries impose the sentence, and thus Arkansas courts may simply be using the statutory maximum as a default to account for the lack of record.¹⁴⁹ In other words, the Arkansas prejudice rule may simply be designed to dispense with the weighing of aggravating and mitigating evidence presented at sentencing, which facilitates quick disposition of cases.¹⁵⁰

Indeed, facilitation of quick disposition of ineffective assistance claims seems to be the motivating factor behind the Fifth Circuit's heightened prejudice standard for discretionary non-capital sentencing systems. Prior to the Supreme Court's decision in *Glover*, the Fifth Circuit was one of the jurisdictions that employed a "significantly less harsh" standard for the prejudice prong of ineffective assistance claims.¹⁵¹ After the decision in *Glover* was announced, the Fifth Circuit acknowledged that "the Supreme Court arguably cast doubt on the *Spriggs* 'significantly less harsh' rule and may have impliedly rejected it

¹⁴⁶ There is another reason to discount this reading of *Lockhart*. In *Williams v. Taylor*, the U.S. Supreme Court characterized this language from *Lockhart* as requiring a defendant to show not "a substantive or procedural right" to receive a less severe sentence (in that case, a sentence of life rather than death), but rather a right to provide the sentencer with the mitigating evidence that "trial counsel either failed to discover or failed to offer." 529 U.S. 362, 393 (2000).

¹⁴⁷ ARK. CODE ANN. §16-97-101 (2006); see Iontcheva, *supra* note 113, at 314 & n.16 (noting that Arkansas is one of only six states that currently employs jury sentencing in non-capital cases).

¹⁴⁸ See, e.g., *State v. Dickinson*, No. 03 CO 52, 2004 WL 2726057, at *3 (Ohio Ct. App. Nov. 26, 2004).

¹⁴⁹ No Arkansas decisions explicitly make this distinction, but at least one Kentucky case appears to employ a similar standard of prejudice, *Fraser v. Commonwealth*, 59 S.W.3d 448, 457 (Ky. 2001) ("The fact that Appellant received the maximum sentence for the offense to which he pled guilty satisfies the requirement of prejudice."), and Kentucky is another state that uses sentencing juries, KY. REV. STAT. ANN. § 532.055 (LexisNexis 1999).

¹⁵⁰ Cf. *McClish*, 962 S.W.2d at 334 ("Moreover, this Court has noted its unwillingness to review the imposition of a sentence simply where the defendant maintains that his sentence is excessive, when the sentence is within the range prescribed by statute for the offense in question." (citing *Hill v. State*, 887 S.W.2d 275, 278 (Ark. 1994)) (emphasis added)).

¹⁵¹ See *Spriggs v. Collins*, 993 F.2d 85, 88 (5th Cir. 1993).

in total.”¹⁵² The Fifth Circuit eventually concluded that *Glover* required it to abandon the “significantly less harsh” rule in cases sentenced under the Federal Sentencing Guidelines,¹⁵³ however, the court elected to retain this rule in “[s]tate sentencing regimes [that] tend to be more discretionary than the lockstep and predictable federal system.”¹⁵⁴ The Fifth Circuit justified the retention of this standard on administrability grounds—i.e., a concern that “in jurisdictions without sentencing guidelines, where courts typically possess a wide range of sentencing discretion, reversal without a showing that ‘the sentence would have been significantly less harsh’ would lead to an automatic rule of reversal.”¹⁵⁵

This same gatekeeping concern was one reason given in some pre-*Glover* cases for requiring “substantial prejudice.”¹⁵⁶ Courts expressed concern that *Strickland* could turn into “an automatic rule of reversal in the non-capital sentencing context.”¹⁵⁷ The Seventh Circuit explained, “almost any of counsel’s actions has a potential effect on the sentence. Small failings by counsel are not enough to turn a probable acquittal into a probable conviction; equally slight failings could turn a 115 month sentence into a 120 month sentence.”¹⁵⁸ The Seventh Circuit also expressed a concern that, unless courts employ a significant prejudice standard in non-capital cases, the Sixth Amendment “becomes the

¹⁵² *Reinhart*, 357 F.3d at 531; *Daniel v. Cockrell*, 283 F.3d 697, 706 (5th Cir. 2002).

¹⁵³ See *United States v. Grammas*, 376 F.3d 433, 437–38 (5th Cir. 2004).

¹⁵⁴ *Id.* at 438 n.4; see *Ward*, 420 F.3d at 498 n.55 (noting that “*Spriggs* still applies in cases involving state sentencing regimes”).

¹⁵⁵ *Reinhart*, 357 F.3d at 531 (internal quotation marks omitted); see *Ward*, 420 F.3d at 498.

¹⁵⁶ Courts also adopted this substantial prejudice standard on the theory that because *Lockhart* “reject[ed] the equation between causation and prejudice,” the mere fact that counsel’s deficient performance caused a different sentencing decision was “not enough, because not all effects are of equal weight.” *Durrie v. United States*, 4 F.3d 548, 550–51 (7th Cir. 1993). But these pre-*Glover* decisions failed to recognize that the *Lockhart* decision to deny an ineffective assistance of counsel claim was made in a very narrow context—i.e., when the only prejudice defendant can demonstrate is that “he might have been denied a ‘right the law simply does not recognize.’” *Lockhart*, 506 U.S. at 375 (O’Connor, J., concurring) (quoting *Nix v. Whiteside*, 475 U.S. 157, 186 (1986) (Blackmun, J., concurring in the judgment)). Following that decision, the Supreme Court clarified that a difference in outcome would ordinarily satisfy the prejudice prong of the *Strickland* test, and that the contrary result in *Lockhart* could be explained by the unique factual situation in that case. *Williams*, 529 U.S. at 391–93; see *Lockhart*, 506 U.S. at 374 (O’Connor, J., concurring) (characterizing the decision in *Lockhart* as a “narrow holding” and asserting that the decision “will, in the vast majority of cases, have no effect on the prejudice inquiry under *Strickland v. Washington*”).

¹⁵⁷ *Spriggs*, 993 F.2d at 88; see *Durrie*, 4 F.3d at 551.

¹⁵⁸ 4 F.3d at 550.

means of vindicating on collateral attack all manner of arguments under rules and statutes.”¹⁵⁹ Arguably, this more stringent prejudice standard is even more important in discretionary sentencing systems because “non-capital sentencing hearings, particularly in jurisdictions without sentencing guidelines, typically involve wide sentencing discretion” and “when the discretionary sentencing range is great, practically any error committed by counsel could have resulted in a harsher sentence.”¹⁶⁰

This gatekeeping concern is essentially a concern about finality—that is, a concern that repeated claims about ineffective assistance will waste scarce judicial resources.¹⁶¹ But finality concerns do not counsel against revisiting *any* issue on collateral attack; rather finality counsels that collateral attacks in criminal cases must strike a balance between obtaining “correct” or fair outcomes and minimizing costs associated with re-visiting issues that have already been litigated.¹⁶² The costs associated with resentencing are minimal,¹⁶³ especially as compared to the costs of a new trial or the costs of a new capital sentencing proceeding.¹⁶⁴ Thus, the desire to obtain a “correct” or fair sentence (that is, a sentence imposed after adequate representation) need not be compromised in order to conserve resources, because the resources at stake are minimal.

In any event, the need for a heightened prejudice standard is likely overstated. For one thing, because the review of ineffective assistance review is largely limited to collateral attacks,¹⁶⁵ those defendants serving

¹⁵⁹ *Id.*

¹⁶⁰ *Spriggs*, 993 F.2d at 88.

¹⁶¹ For well-known examples of commentators who have stressed the importance of finality to conserve judicial resources, see Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 148–49 (1970).

¹⁶² For example, when procedural default has “probably resulted in the conviction of one who is actually innocent” the U.S. Supreme Court has loosened its standards for when habeas relief is available. See Jeffries & Stuntz, *supra* note 9, at 685–86 (quoting *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

¹⁶³ See *United States v. Williams*, 399 F.3d 450, 461 (2d Cir. 2005); CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 856 (3d ed. 2004).

¹⁶⁴ See Stephen F. Smith, *The Supreme Court and the Politics of Death*, 94 VA. L. REV. 283, 375 (2008) (noting the legal and factual complexity of capital cases, including the “limitless scope of a capital sentencing trial, with the whole range of potential arguments for leniency available”).

¹⁶⁵ As Eve Brensike Primus has explained:

Although defendants can theoretically raise ineffective assistance of trial counsel claims on direct appeal, the vast majority of jurisdictions do not allow

shorter sentences will be released before they can raise an ineffective assistance at sentencing claim.¹⁶⁶ For another thing, as explained in Part III, the gatekeeping function for ineffective assistance in discretionary sentencing claims is likely to be served by the performance prong of the *Strickland* test.

III. EVALUATING PERFORMANCE AT SENTENCING

Demonstrating deficient attorney performance is likely to prove difficult in discretionary non-capital sentencing systems because there is little substantive law in such systems.¹⁶⁷ As explained below, the two most successful types of deficient performance claims—cases where counsel based a decision on ignorance or misunderstanding of applicable law, and cases where counsel failed to conduct an adequate investigation—both will depend in many circumstances on an evaluation of counsel's conduct in light of relevant governing law. Mandatory sentencing systems are replete with substantive law that constrains sentencing discretion; and, although capital sentencers possess significant sentencing discretion, capital sentencing law has received sustained attention from courts and commentators, resulting in well-developed capital sentencing law and principles.

defendants to open or supplement the trial court record to support these claims. This prohibition has a devastating effect on defendants' ability to establish that they were deprived of adequate trial representation. Quite often, ineffective assistance of counsel claims are based on what the trial attorney failed to do. Therefore, information outside of the record is essential to support the claim and to show why the defendant was prejudiced as a result of the trial attorney's deficient performance.

Primus, *supra* note 17, at 689. In 2003, in *Massaro v. United States*, the U.S. Supreme Court noted that, because ineffective assistance claims often require defendants to supplement the trial record, such claims typically should be raised for the first time on collateral review. 538 U.S. 500, 505 (2003). Although this statement from *Massaro* "was dicta and was made in a federal supervisory decision rather than a constitutionally grounded one, many lower federal courts have adopted its approach. In fact, most state courts . . . requir[e] defendants to raise ineffective assistance of trial counsel claims in collateral review proceedings rather than on appeal." Primus, *supra* note 17, at 692.

¹⁶⁶ Primus, *supra* note 17, at 693 ("[M]ost defendants have served their full sentences by the time they reach the collateral review stage. Under the current system, only defendants sentenced to more than four or five years in prison have an incentive to challenge their convictions on collateral review, because it takes that long to exhaust the appellate process in many jurisdictions.").

¹⁶⁷ Douglas A. Berman, *From Lawlessness to Too Much Law? Exploring the Risk of Disparity from Differences in Defense Counsel Under Guidelines Sentencing*, 87 IOWA L. REV. 435, 441 (2002) ("[T]he fundamental problem with traditional discretionary sentencing was the absence of any defined sentencing law.").

There is an irony associated with ineffective assistance claims at sentencing: the greater the discretion afforded to the sentencing judge to identify mitigating factors and determine the final sentence, the more important defense counsel's performance may be in reducing her client's sentence.¹⁶⁸ But the more discretion the sentencing judge has, the more difficult it becomes for a defendant to obtain judicial review of the adequacy of counsel's performance at sentencing. However, as explained below, it is possible to construct a legal backdrop against which to evaluate counsel's performance in discretionary non-capital systems. In particular, ABA Standards, prevailing professional norms, and other evidence of the perceived importance of or usual success rate for particular mitigating arguments, though not sources of substantive sentencing law, arguably provide additional information to assess the adequacy of counsel's performance.¹⁶⁹

A. *The Role of Substantive Law in Evaluating Performance*

The two types of ineffective assistance claims for which courts appear most willing to question attorney performance are claims involv-

¹⁶⁸ See Kadish, *supra* note 64, at 808 (noting that "the very latitude of the power possessed by the sentencing court has been suggested as augmenting, rather than reducing, the need for representation" at the sentencing stage of a criminal proceeding); Richard H. Kuh, *Trial Techniques: Defense Counsel's Role in Sentencing*, 14 CRIM. L. BULL. 433, 433 (1978) ("As long as judges in criminal matters retain broad discretion in imposing sentences, defense counsel's role may, if intelligently performed, do much to minimize that sentence that the court may impose."); see also MOLLY LIZABETH ROTH, ADMIN. OFFICE OF THE U.S. COURTS, *FOUR STEPS TOWARDS BETTER ADVOCACY: APPROACHING YOUR CLIENT'S SENTENCING AFTER BOOKER, RITA, GALL, AND KIMBROUGH 1* (2008), available at [http://www.fd.org/pdf_lib/Four Step Guide to Sentencing Hearing Preparation2.pdf](http://www.fd.org/pdf_lib/Four%20Step%20Guide%20to%20Sentencing%20Hearing%20Preparation2.pdf) ("Now that the federal sentencing guidelines are advisory, representing your client at his or her sentencing hearing entails both greater freedom and greater responsibility. . . . This freedom renews and increases the responsibility defense lawyers have to present mitigating evidence on behalf of their clients in creative, informative, and persuasive ways."); cf. *Carter v. Illinois*, 329 U.S. 173, 178 (1946). The U.S. Supreme Court explained that:

[T]he imposition of sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. . . . It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge.

Id. But cf. Berman, *supra* note 167, at 445 (noting that mandatory sentencing systems that are overly detailed or complex create many opportunities for counsel error).

¹⁶⁹ See, e.g., AM. BAR ASS'N, *STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION*, standard 4-8.1(a) (3rd ed. 1993) [hereinafter *STANDARDS FOR CRIMINAL JUSTICE*].

ing legal error and claims involving failure to investigate.¹⁷⁰ Because these claims turn on the substantive law in effect at the time of representation, their resolution depends in large part on how much "law" there is in a particular sentencing system. The more guidance is given to judges regarding how to exercise their sentencing discretion, the more likely it becomes for a challenge to an attorney's performance to succeed. In truly discretionary sentencing systems, therefore, where there is little or no sentencing "law" to apply, almost any sentencing decision can be labeled a sentencing "strategy," and thus shielded from judicial review.¹⁷¹

The Supreme Court in *Strickland v. Washington* indicated that the ineffective assistance inquiry should perhaps look different for non-capital sentencing than for trial or capital sentencing proceedings.¹⁷² One concern the *Strickland* Court expressed is a matter of procedural formality, as it noted that "an ordinary sentencing . . . may involve informal proceedings."¹⁷³ In formal proceedings, such as capital sentencing and trial, "counsel's role in the proceeding is . . . to ensure that the adversarial testing process works to produce a just result under the standard governing decision."¹⁷⁴ Although in the decades prior to *Strickland* sentencing was seen as a proceeding built on the "modern philosophy" of rehabilitation and thus procedural protections were deemed less important,¹⁷⁵ modern sentencing, at least in some jurisdic-

¹⁷⁰ See *supra* notes 37-51 and accompanying text.

¹⁷¹ See Berger, *supra* note 25, at 71 (explaining how "the broad exception for (or perhaps more accurately, deference to) defense counsel's strategy and tactics" ensured that "the route to reversal on the ground of attorney inadequacy would continue to be as narrow as the camel's proverbial path through the eye of the needle").

¹⁷² 466 U.S. 668, 686 (1984). Citing this language from *Strickland*, the Ninth Circuit held that "the Supreme Court has not delineated a standard which should apply to ineffective assistance of counsel claims in noncapital sentencing cases. Therefore, . . . there is no clearly established federal law as determined by the Supreme Court in this context." Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006); see Cooper-Smith v. Palmateer, 397 F.3d 1236, 1244 (9th Cir. 2005) (same).

¹⁷³ 466 U.S. at 686.

¹⁷⁴ *Id.* at 687.

¹⁷⁵ See, e.g., Williams v. New York, 337 U.S. 241, 247-48 (1949) (rejecting Due Process Clause challenge to death sentence based on hearsay allegations that defendant was not given the opportunity to challenge prior to sentencing on the ground that looser evidentiary rules were necessary at sentencing to achieve the progressive goals of "[r]eformation and rehabilitation of offenders" through individualized sentencing). As Doug Berman has explained, during this time, "[s]entencing was conceived procedurally as a form of administrative decisionmaking in which sentencing experts, aided by complete information about offenders . . . were expected to craft individualized sentences almost like a doctor or social worker exercising clinical judgment." Douglas A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 4 (internal quotation marks omitted). Berman notes:

tions, has rejected rehabilitation as the dominant penal philosophy and has become more formal over time.¹⁷⁶ Convicted defendants are entitled to various constitutional protections at sentencing,¹⁷⁷ and some jurisdictions provide further procedural protections through rules or common law.¹⁷⁸ Notably, there is a constitutional right to counsel at sentencing,¹⁷⁹ and it is generally understood that the prosecutor and

[T]his model of sentencing was formally and fully conceptualized around the rehabilitative ideal. Trial judges were afforded broad discretion in the imposition of sentencing terms, and parole officials exercised similar discretion concerning prison release dates, for a clear and defined purpose: to allow sentences to be tailored to the rehabilitation prospects and progress of each individual offender.

Id. at 3–4 (internal quotation marks omitted).

¹⁷⁶ See e.g., Berman, *supra* note 175, at 8–15; Michaels, *supra* note 65, at 1772–76; see also Kuh, *supra* note 168, at 434–35 (describing modern progression towards allowing counsel to be present at presentence interview and defense counsel's right to inspect the presentence report).

¹⁷⁷ See, e.g., *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (holding that, other than fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to jury and proved beyond reasonable doubt); *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (establishing the right to remain silent at non-capital sentencing proceeding); *Pollard v. United States*, 352 U.S. 354, 361 (1957) (assuming *arguendo* that the Sixth Amendment's speedy trial guarantee applies at sentencing); see also *United States v. Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994) (holding that a defendant has a Sixth Amendment right to be physically present at sentencing); *Boardman v. Estelle*, 957 F.2d 1523, 1525 (9th Cir. 1992) (finding that a defendant has a constitutional right to allocute at sentencing); *Bae v. Peters*, 950 F.2d 469, 477 (7th Cir. 1991) (recognizing that the "narrowly limited" right to trial counsel of choice applies at sentencing); *In re Wash. Post Co.*, 807 F.2d 383, 389 (4th Cir. 1986) (holding that the public right to an open trial extends to cover sentencing proceedings); *Havrilenko v. Duckworth*, 661 F. Supp. 454, 461 (N.D. Ind. 1987) (concluding that defendant had a right under *Faretta v. California*, 422 U.S. 806, 819–20 (1975), to proceed pro se at sentencing); *United States v. Feeney*, 501 F. Supp. 1324, 1335 (D. Colo. 1980) (requiring the government to disclose material that could potentially mitigate the defendant's sentence). See generally Michaels, *supra* note 65.

¹⁷⁸ See *Pens v. Bail*, 902 F.2d 1464, 1466 (9th Cir. 1991) (applying the exclusionary rule at sentencing); *Marshall v. State*, 27 S.W.3d 392, 394 (Ark. 2000) (noting that the introduction of evidence during the sentencing stage "must be governed by our rules of admissibility and exclusion; otherwise, these proceedings would not pass constitutional muster"); see also FED. R. CRIM. P. 32(i)(1)(C) (requiring that the parties be given an opportunity "to comment on the probation officer's determinations and other matters relating to an appropriate sentence"); MICH. CT. R. 6.425(E)(1)(c) (giving defendant a right to allocute at sentencing); PA. R. CRIM. P. 703 (instructing that counsel be given access to all presentence reports and related reports, and providing for correction of "any factual inaccuracy" in such reports); HARRY I. SUBIN, BARRY H. BERKE & ERIC A. TIRSCHWELL, *THE PRACTICE OF FEDERAL CRIMINAL LAW: PROSECUTION AND DEFENSE* 484–505 (2006) (describing procedural aspects of the federal sentencing process).

¹⁷⁹ *Glover v. United States*, 531 U.S. 198, 203 (2001); *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

defense counsel function as advocates during the sentencing proceeding so that the sentencing authority will engage in "a balanced and thorough effort to determine the 'right' sentence, within the range of prescribed penalties."¹⁸⁰

The presence of procedural differences in non-capital sentencing proceedings was not the only reason the *Strickland* Court identified as possibly distinguishing the proper assessment of counsel's performance.¹⁸¹ The Court also noted that the "standardless discretion in the sentencer . . . may require a different approach to the definition of constitutionally effective assistance."¹⁸² Whether performance is reasonable depends on the rules proscribed by law.¹⁸³ When increased discretion vested in the sentencing judge corresponds to a lesser amount of substantive law, there is less law to control the sentencing proceeding, and consequently, the performance evaluation of counsel.

In mandatory sentencing systems the performance inquiry is relatively straightforward: there is a "correct" sentence or range of sentences, and if defense counsel failed to provide information relevant to the calculation of that sentence or range or if she failed to object to the sentencing judge's miscalculation, then counsel provided deficient representation. Under the pre-*Booker* federal guidelines, for example, a defendant's sentence depended upon an assessment of facts surrounding the offense and a calculation of the defendant's criminal history.¹⁸⁴ There were a finite set of enumerated reasons for which a defendant's sentence could be adjusted either up or down.¹⁸⁵ If defense counsel failed to identify a reason for a downward adjustment, or if she failed to object to an erroneous upward adjustment, then her performance almost always would be judged deficient.¹⁸⁶

¹⁸⁰ Michaels, *supra* note 65, at 1776; see *Mempa*, 389 U.S. at 135 (noting that "the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances and in general aiding and assisting the defendant to present his case as to sentence is apparent").

¹⁸¹ See 466 U.S. at 686.

¹⁸² *Id.*

¹⁸³ See *infra* text accompanying notes 199–209.

¹⁸⁴ See *id.*

¹⁸⁵ See Hessick & Hessick, *supra* note 12, at 5.

¹⁸⁶ See, e.g., *United States v. Lockart*, Nos. 05cr30, 08cv141, 2008 WL 4372862, at *4 (N.D. Fla. Sept. 23, 2008) ("Although the initial error was that of the probation officer, the *Brown* case which the government and the probation officer concede are controlling was decided two years before defendant's sentencing and could have been the basis for a successful objection to the application of the § 2K2.1 (b)(5) adjustment at sentencing. Counsel was therefore constitutionally ineffective for his failure to object, and defendant is entitled to be resentenced."); *United States v. Buckmaster*, No. 1:06 CR 0038, 2008 WL 2497586, at *2 (N.D. Ohio Apr. 15, 2008) ("Counsel's legal error which results in an in-

In contrast, discretionary sentencing systems do not prescribe any particular sentence for a defendant. Because sentencing judges in discretionary systems possess the discretion to select from a variety of sentences, and because the sentence selected may be based on a variety of reasons, it is not nearly as easy to identify circumstances where an attorney's performance can be labeled deficient. When assessing the performance prong in discretionary sentencing systems, however, it is important to keep in mind that not all discretionary sentencing systems are the same. The more structure a system has, the easier it should be for a court to measure the reasonableness of counsel's performance. Take, for instance, sentencing systems that "channel" the discretionary sentencing power of a judge. In the post-*Booker* federal system, judges are required to calculate the sentencing range prescribed by the Federal Sentencing Guidelines.¹⁸⁷ Although a judge is not bound by that range, the post-*Booker* sentencing regime presumes that this range serves as the starting point or initial benchmark for the judge's ultimate sentencing decision, and if a judge fails to begin her sentencing analysis with a proper Guidelines calculation, then the sentence is reversible for procedural error.¹⁸⁸ To the extent that defense counsel fails to provide effective assistance in connection with the calculation of the advisory range,¹⁸⁹ or other procedural requirements,¹⁹⁰ then her performance will be judged deficient.¹⁹¹

crease in his client's prison sentence constitute both deficient performance and prejudice under *Strickland*."). *But see* United States v. Quackenbush, 369 F. Supp. 2d 958, 965 n.4 (W.D. Tenn. 2005) ("For purposes of this order, the Court assumes that any failure to object to an error in the presentence report . . . satisfies the first prong of *Strickland*. In light of the complexity of the guidelines at issue here, and the fact that any error by the experienced probation officer who prepared the report overlooked by the Government and this judge, it is far from clear that that assumption is correct.").

¹⁸⁷ See, e.g., Gall v. United States, 128 S. Ct. 586, 596 (2007) ("[A] district court should begin all sentencing proceedings by correctly calculating the applicable guidelines range.").

¹⁸⁸ See Gall, 128 S. Ct. at 596; Rita v. United States, 127 S. Ct. 2456, 2465 (2007). *But see* United States v. Abbas, 560 F.3d 660, 666–67 (7th Cir. 2009) (finding harmless error in the erroneous application of U.S. Sentencing Guidelines Manual § 2C1.1 (2008)); United States v. Quinlan, No. 08-1388, 2008 WL 5395981, at *2 (7th Cir. Dec. 23, 2008) (finding harmless error in the event that the defendant was improperly denied credit for acceptance of responsibility).

¹⁸⁹ E.g., Potts v. United States, 566 F. Supp. 2d 525, 539–41 (N.D. Tex. 2008). *But see supra* note 101.

¹⁹⁰ See Gall, 128 S. Ct. at 597 (discussing possible procedural errors in post-*Booker* sentencing).

¹⁹¹ E.g., Lockhart, 2008 WL 4372862, at *4; Buckmaster, 2008 WL 2497586, at *2; cf. Roth, *supra* note 168, at 2 ("[S]ince the guidelines are one factor of many which must be considered by courts, lawyers must be able to navigate through them.").

Discretionary non-capital sentencing systems that explicitly identify relevant aggravating and mitigating sentencing factors also provide an easy standard against which to measure counsel's performance at sentencing.¹⁹² North Carolina, for example, provides for the mitigation of a defendant's sentence if she "has been honorably discharged from the United States armed services."¹⁹³ If a defendant proves this mitigating factor, a court's refusal to consider it or failure to indicate that the factor has been considered may result in an appellate finding of error and remand for a new sentencing hearing.¹⁹⁴ In these two examples—the calculation of the advisory sentencing range in the federal system and the identification of prior military service in the North Carolina system—the deficiency in counsel's performance is indistinguishable from a deficiency in a mandatory sentencing system. If it would be legal error for the sentencing court not to impose a lower sentence, then counsel's failure to raise the argument that would have resulted in the lower sentence likely rendered her performance deficient.¹⁹⁵

Even in systems that do not *require* sentencing judges to consider particular types of evidence or information at sentencing, there may nonetheless be some substantive sentencing law that guides their sentencing discretion. For example, the Tennessee state courts have identified a defendant's "honorable military service" as a mitigating sentencing factor.¹⁹⁶ Although Tennessee courts are *permitted* to consider prior military service as a mitigating factor, in contrast to the North Carolina system, Tennessee courts are not obligated to impose a shorter sentence.¹⁹⁷ If Tennessee sentencing counsel neglects to investigate

¹⁹² See, e.g., N.C. GEN. STAT. § 15A-1340.16(e)(14) (2007).

¹⁹³ *Id.*

¹⁹⁴ See *State v. Clark*, 377 S.E.2d 54, 68 (N.C. 1989); *State v. Heath*, 335 S.E.2d 350, 355–56 (N.C. Ct. App. 1985); *State v. Hanes*, 334 S.E.2d 444, 446 (N.C. Ct. App. 1985).

¹⁹⁵ Cf. *Glover*, 531 U.S. at 204 (noting that the issue in question was counsel's performance during a "sentencing calculation . . . a calculation resulting from a ruling which, if it had been error, would have been correctable on appeal").

¹⁹⁶ See, e.g., *State v. Hill*, No. M2004-00597-CCA-R3-CD, 2005 WL 544710, at *9 (Tenn. Crim. App. June 27, 2005). Although the relevant state sentencing statute does not mention military service, the Tennessee appellate courts have read a statutory catch-all provision as permitting a sentencing court to consider an offender's military service. See *id.* (citing TENN. CODE ANN. § 40-35-113(13) (2006)); see also Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1117 (2008).

¹⁹⁷ E.g., *State v. White*, No. W2006-00655-CCA-R3CD, 2007 WL 836812, at *5 (Tenn. Crim. App. Aug. 13, 2007) ("[W]hile the trial court may consider military service as a mitigating factor, this court has held that a trial court's refusal to mitigate a defendant's sentence based on past military service was not error. Thus, the trial court was within its discretion in refusing to consider the defendant's military service as a mitigating factor." (internal citations omitted)).

whether the defendant served in the armed forces, the defendant would presumably have a viable failure to investigate claim (assuming that the defendant had, in fact, rendered "honorable military service"). Even though it would not have been legal error for the sentencing court to disregard the military service when imposing sentence, because such service has been identified as potentially mitigating then counsel's failure to investigate is likely to be deemed deficient performance. That is because the identification of military service as an available mitigating factor suggests that a court is likely to reduce a defendant's sentence if she has rendered such service, and counsel has an obligation to conduct investigations that are likely to be fruitful.¹⁹⁸

Fully discretionary systems—i.e., systems where a judge's sentencing discretion is not limited or guided in the manners described above—pose the greatest challenge for the performance prong of the *Strickland* standard because where a judge can rely on any number of considerations in making her sentencing decision, there are an infinite number of arguments that counsel could make in an attempt to influence that decision.¹⁹⁹ In this respect, counsel's performance at fully discretionary sentencing proceedings more resembles trial performance than it resembles sentencing proceedings for mandatory or guided discretion sentencing systems. At trial, counsel can ordinarily select from any number of approaches to defend her client. Courts will rarely question counsel's trial decisions because when counsel selects between a number of possible arguments, courts ordinarily defer to that decision as a matter of trial strategy.²⁰⁰ Although this does not mean counsel cannot render deficient performance at sentencing, the dearth of substantive sentencing law in fully discretionary sentencing systems will

¹⁹⁸ "Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith*, 539 U.S. 510, 533 (2003). *Strickland* does, however, require counsel "to make reasonable investigations." 466 U.S. at 691. The reasonableness of counsel's investigatory efforts appear to be assessed according to whether "a reasonably competent attorney [would have] investigate[d] further." *Wiggins*, 539 U.S. at 534. And because attorneys are most concerned about obtaining a favorable outcome for their clients, reasonably competent attorneys presumably conduct investigations that are most likely to yield evidence that will assist in that goal.

¹⁹⁹ As of 2005, only eighteen states and the District of Columbia had adopted sentencing guidelines, voluntary, advisory, or mandatory. See Frase, *supra* note 95, at 1191.

²⁰⁰ See Richard Van Rhee, *Inequitable Treatment of Ineffective Assistance Litigants*, 19 IND. L. REV. 159, 159 (1986) ("The courts will not . . . question an attorney's conduct if it is based on reasoned trial tactics or strategies."); see also *supra* note 38.

limit the ability of defendants to demonstrate that a failure to investigate was unreasonable or that counsel committed legal error.²⁰¹

To understand the unique challenges raised by fully discretionary systems, it may be most fruitful to begin with legal error challenges. Those claims are successful when a defendant can demonstrate that her attorney's decisions were based, not on strategy, but on a misunderstanding or lack of knowledge of relevant law. In fully discretionary systems, there is little substantive sentencing law—i.e., laws indicating what are appropriate or inappropriate sentencing considerations.²⁰² The only limitation on the length of a sentence in fully discretionary sentencing systems is that a defendant may not receive a sentence above the maximum penalty specified by statute nor, when applicable, below the statutory minimum. A sentencer may select any sentence within the statutory range so long as it is not based on materially false information or on constitutionally impermissible considerations, such as race.²⁰³ In such a system, an attorney could make a legal error with respect to sentencing procedures (such as failing to file objections to the presentence report), or might mistakenly believe that the law limited the evidence that could be presented to the sentencing judge.²⁰⁴ But, aside from these procedure-related errors, where there is little law governing a situation, it is difficult to run afoul of that law.²⁰⁵

In contrast to legal error claims, ineffective assistance claims involving counsel's failure to investigate are not wholly dependent on the existence of substantive law. For example, if defense counsel were completely unfamiliar with the facts of her client's case and failed either to present any case in mitigation or to rebut the prosecution's aggravation case due to that ignorance, courts would likely conclude that such utter lack of preparation constituted deficient performance.²⁰⁶ But although

²⁰¹ As mentioned above, these are the most successful forms of deficient performance claims. See *supra* notes 14–60 and accompanying text.

²⁰² See Berman, *supra* note 167, at 441.

²⁰³ See Hessick & Hessick, *supra* note 12, at 4.

²⁰⁴ For example, some federal courts have found deficient performance where counsel failed to raise the issue that *Booker* permitted sentencing judges discretion to sentence below the Federal Sentencing Guidelines. See *Stallings v. United States*, 536 F.3d 624, 625 (7th Cir. 2008) (holding that counsel's performance on direct appeal was deficient because she failed to raise a claim under *Booker*); *Richardson v. United States*, 477 F. Supp. 2d 392, 399 (D. Mass. 2007) (finding deficient performance where counsel failed to file supplemental briefs on appeal regarding *Booker*).

²⁰⁵ In contrast, mandatory sentencing systems that are overly detailed or complex create many opportunities for counsel error. See Berman, *supra* note 167, at 445.

²⁰⁶ See, e.g., *In re Morris*, 658 P.2d 1279, 1280 (Wash. App. 1983) (holding that defendant is entitled to counsel familiar with her case at sentencing hearing).

substantive law may not be relevant to cases of utter lack of preparation, it may play a significant role in cases where a defendant claims that an attorney's failure to conduct a particular type of investigation or to investigate a particular type of evidence constituted deficient performance. In discretionary non-capital systems, one of the main difficulties in assessing failure to investigate claims will be the identification of what types of mitigation arguments defense attorneys *should be* investigating. That is because "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing."²⁰⁷ Thus, substantive law may be indispensable in the evaluation of some failure to investigate claims because unless the defendant demonstrates that counsel failed to investigate evidence that would likely have been treated as mitigating, the failure to investigate is not unreasonable.²⁰⁸ However, the Supreme Court's analysis of failure to investigate claims in recent death penalty cases suggests that there may be other sources that identify mitigating evidence, aside from substantive law, that a defendant could use to support a failure to investigate claim. These other non-substantive law sources allow courts to evaluate the reasonableness of counsel's decision not to investigate mitigating evidence based on the perceived importance or usual success rate of a particular mitigating argument.²⁰⁹

There is some substantive law identifying aggravating and mitigating factors in capital-sentencing systems. States are constitutionally required to identify aggravating sentencing factors that may result in the imposition of the death penalty.²¹⁰ Although there is no similar constitutional requirement for mitigating factors, many capital-sentencing statutes identify a limited number of mitigating factors and also include a "catchall" provision that permits the sentencer to consider any other

²⁰⁷ *Wiggins*, 539 U.S. at 533.

²⁰⁸ See, e.g., *Potts*, 566 F. Supp. 2d at 536–37. At this point the questions of performance and prejudice appear to merge a bit, but courts often (though not always) treat questions of what counsel should have investigated as questions of performance rather than questions of prejudice, and thus this Article will do the same.

²⁰⁹ The Court suggested as much in *Glover*, when it noted that "the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance." 531 U.S. at 204.

²¹⁰ *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("[O]ur cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement . . .").

potentially mitigating facts.²¹¹ Although states are required to limit their identification of capital aggravating factors in order to ensure that the death penalty is not imposed in an arbitrary manner,²¹² states are required to permit capital sentencers to consider any aspect of the defendant's background, character, or crime as a mitigating factor.²¹³ One might think that *Strickland's* admonition that counsel need not investigate "every conceivable line of mitigating evidence" would limit failure to investigate claims to the types of mitigating evidence identified in a particular jurisdiction's capital sentencing statute. However, in its recent ineffective assistance at capital sentencing cases—*Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard*—the Supreme Court found deficient performance even though some of the mitigating evidence counsel failed to investigate and discover was not identified as a mitigating factor in the relevant state statute.²¹⁴ The Court held that counsels' fail-

²¹¹ James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 339–41 (1994); Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out! Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 848 (1992).

²¹² See *Maynard*, 486 U.S. at 362.

²¹³ See *Penry v. Lynaugh*, 492 U.S. 302, 318–19 (1989); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion); see also Steiker & Steiker, *supra* note 211, at 839; Hessick, *supra* note 196, at 1126 ("The Court's definition of mitigating factors . . . places virtually no substantive limitations on the concept of mitigation.").

²¹⁴ In *Williams v. Taylor*, the Supreme Court faulted counsel's failure to investigate Williams' "nightmarish childhood," or discover that Williams was "borderline mentally retarded," had committed several good deeds in prison (including helping to crack a prison drug ring and returning a guard's wallet), and was considered by prison officials as the "least likely to act in a violent, dangerous or provocative way." 529 U.S. 362, 395–96 (2000). Because counsel failed to investigate these factors, the Court held that counsel's performance was deficient. Two of these factors—deprived childhood and post-offense good acts—were not included as potential mitigating factors in the operative Virginia statute. See VA. CODE ANN. § 19.2-264.4(B) (2008).

In *Wiggins v. Smith*, the Supreme Court held that counsel was ineffective in failing to investigate Wiggins' family and social history. 539 U.S. at 534–535. The Court also referenced time that Wiggins spent homeless and "his diminished mental capacities" as "further augment[ing] his mitigation case." *Id.* at 535. The Court noted that evidence of a defendant's "troubled history" may be "relevant to assessing a defendant's moral culpability." *Id.* The relevant state statute identified diminished mental capacity as a mitigating factor, but did not identify either deprived childhood or homelessness as mitigating factors. See MD. CODE ANN., CRIM. LAW § 2-303(h) (2) (LexisNexis 2002).

In *Rompilla v. Beard*, the Supreme Court criticized counsel's failure to investigate Rompilla's abusive childhood and mental health. 545 U.S. 374, 391–92 (2005). But although the state capital-sentencing statute identified a defendant's substantially impairment "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" as a relevant mitigating factor, family and social background was not identified. 42 PA. CONS. STAT. ANN. § 9711(e) (West 2006).

ure to investigate in those cases was deficient, not because they failed to uncover evidence that the substantive law identified as mitigating, but because ABA Standards, prevailing professional norms, and the Court's own decisions had identified either the method of investigation or the particular piece of undiscovered evidence as important.

The perceived importance or usual success rate of a particular mitigating argument may be more difficult to identify in non-capital systems than in capital systems. That is because the legal landscape surrounding capital punishment is far better developed than the law surrounding discretionary non-capital systems.²¹⁵ The Court requires states to promulgate substantive law to guide the discretion of capital juries.²¹⁶ Specifically, jurisdictions must provide a finite list of specific aggravating factors that warrant application of the death penalty in order to "minimize the risk of wholly arbitrary and capricious" sentencing decisions,²¹⁷ and to ensure that the death penalty is only given to "the worst of the worst."²¹⁸ The Court has also forbidden the application of a mandatory death penalty,²¹⁹ and it conducts rigorous proportionality review to determine whether the imposition of the death penalty is inconsistent with the Eighth Amendment under various circumstances.²²⁰ These limitations on the imposition of capital punishment stand in stark contrast to the Court's non-capital jurisprudence: legislatures may limit non-capital sentencing discretion (or not) as they see fit;²²¹ the Court has repeatedly affirmed the constitutionality of non-capital man-

²¹⁵ Cf. Berman, *supra* note 3, at 868 ("After having virtually no capital cases on its merits docket for most of its history, the Supreme Court has over the last three decades adjudicated, on average, six capital cases each and every term.").

²¹⁶ See *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (plurality opinion); see also Barkow, *supra* note 6, at 8–10; Steiker & Steiker, *supra* note 211, at 859–64.

²¹⁷ *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (3-3-1-2 decision) (Stewart, Powell, and Stevens, JJ., announcing the judgment of the Court).

²¹⁸ See Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1604 & n.40 (2001) (collecting sources using this phrase).

²¹⁹ *Sumner v. Shuman*, 483 U.S. 66, 77–78 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (Stewart, Powell, and Stevens, JJ., announcing the judgment of the Court); see Barkow, *supra* note 6, at 10–11; Steiker & Steiker, *supra* note 211, at 842–44.

²²⁰ For a recent example of the Court's searching proportionality review in capital cases, see *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649–65 (2008). See also Barkow, *supra* note 6, at 11–14; Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 688–92 (2005).

²²¹ See *Lockett*, 438 U.S. at 603 (plurality opinion) ("[L]egislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in non-capital cases . . ."); see also Barkow, *supra* note 6, at 9–10.

datory sentences;²²² and although the Court has purported to apply a "narrow proportionality principle" to non-capital sentences,²²³ it has interpreted this principle so narrowly that it "all but defines the right against excessive punishment out of existence."²²⁴ In addition to providing more protection for capital defendants at sentencing, the Court's decisions in these areas have also resulted in a robust capital sentencing jurisprudence. This well-developed substantive law allows for more searching judicial review of the adequacy of counsel's performance in capital cases.

In addition to the lopsided development of substantive law, the professional standards for representing non-capital defendants are not as well developed as the standards for representation of capital defendants. The ABA has "made a concerted effort to improve the quality of representation afforded capital defendants," including the promulgation of "detailed guidelines for attorneys representing capital defendants."²²⁵ Although the ABA has also promulgated guidelines for the representation of non-capital defendants, the standards for capital representation are significantly longer and more specific.²²⁶ For example, although the non-capital standards generally advise counsel to "submit to the court and the prosecutor all favorable information relevant to sentencing,"²²⁷ the capital standards specifically recommend various types of witnesses that counsel should consider calling at the sentencing phase, as well as a list of potential mitigation topics counsel should consider raising.²²⁸

²²² See, e.g., *Ewing v. California*, 538 U.S. 11, 30-31 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 995-96 (1991).

²²³ *Ewing*, 538 U.S. at 20.

²²⁴ Lee, *supra* note 220, at 695; see Barkow, *supra* note 6, at 16 (noting that in reality, "the Court has rejected noncapital sentences in only a small handful of cases, all of which are decades old and all but one of which involve facts that go beyond the term of incarceration").

²²⁵ WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH* 3-4 (2006) ("Among other things, [the ABA] has promulgated detailed guidelines for attorneys representing capital defendants, and it has persuaded state legislatures to adopt provisions designed to improve the quality of capital defense lawyers' representation.").

²²⁶ Compare ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES GUIDELINE 10.11-12 (2003), with ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4.81 (3d ed. 1993).

²²⁷ ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4.81(b).

²²⁸ ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES GUIDELINE 11.8.3(F) (1989). The reference to "potential mitigation topics" in the 1989 version of the ABA's Guidelines was omitted from the most recent version of the Guidelines.

Nonetheless, as described in the subsequent section, some guidance regarding counsel's performance at discretionary non-capital sentencing proceedings either exists or could be created. Such extra-statutory guidance for counsel's performance and mitigation evidence could allow courts to better review claims of deficient performance on the part of sentencing counsel. And, more importantly, it may also serve an educative function that could improve performance of counsel at sentencing, rather than simply improving the judicial review of ineffective assistance claims—that is, help sentencing counsel to render effective assistance in the first instance.

B. Looking Beyond Substantive Law for Performance Standards

As explained above, because there is little substantive law in discretionary non-capital sentencing systems, the performance prong is likely to prove difficult for defendants with ineffective assistance at sentencing claims to satisfy if they were sentenced in such systems. The Supreme Court's willingness to review counsel's performance in the capital sentencing context—where the sentencing jury retains wide discretion—demonstrates, however, that this dearth of substantive law does not make deficient performance impossible to prove. In the recent capital cases of *Williams*, *Wiggins*, and *Rompilla*, the Court judged counsel's representation to be deficient because counsel failed to investigate various mitigating evidence, even though the relevant substantive law (i.e., the states' capital sentencing statutes) did not indicate that such evidence was necessarily mitigating.²²⁹ In these cases, the Court appears to have been comfortable judging the adequacy of counsel's performance because one or more of the following were present: (a) ABA Guidelines regarding the tasks attorneys should undertake, (b) prevailing practice in the location at the time suggesting that the tasks were necessary or appropriate, or (c) existing case law noting the importance of the missing evidence in capital sentencing decisions. As discussed below, similar guidance either exists in some form or could be created for discretionary non-capital sentencing, so as to permit similar review of counsel's performance at non-capital sentencing proceedings.

Before explaining how this review could be conducted in the discretionary non-capital systems, a word of caution is appropriate. Although the Supreme Court's use of the *Strickland* standard in *Glover v.*

²²⁹ See *supra* note 214.

United States, suggests by implication that it will evaluate capital and non-capital ineffective assistance claims similarly,²³⁰ ineffective assistance may ultimately be one of the areas where the judiciary treats capital cases differently than non-capital cases.²³¹ It has oft been repeated that "death is different,"²³² and the Supreme Court's "capital sentencing jurisprudence departs from its noncapital sentencing case law in the most fundamental ways."²³³ Indeed, some commentators have concluded that the Court is, at least in practice, employing a higher level of scrutiny for ineffective assistance at sentencing claims in capital cases.²³⁴

The Supreme Court's tendency to hear a disproportionately high number of death penalty cases²³⁵ has resulted in the development a relatively robust Eighth Amendment jurisprudence for capital (but not non-capital) cases.²³⁶ The Court relied on that jurisprudence in *Wiggins* when assessing the reasonableness of counsel's performance. Specifically, the *Wiggins* Court noted that counsel's failure to investigate the defendant's personal history resulted in the oversight of evidence that defendant had suffered extreme physical and sexual abuse—"the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."²³⁷ Because non-capital sentencing has historically

²³⁰ See *supra* note 78.

²³¹ The first effective assistance of counsel case, *Powell v. Alabama*, lends support to this hypothesis. See generally 387 U.S. 45 (1932). Although the Supreme Court intervened to prevent the imposition of the death penalty on defendants who appeared to be innocent of the crime of which they were accused, it declined to review the defendants' case on a subsequent occasion when the penalty imposed after retrial was less than death. See Klarman, *supra* note 2, at 4, 14, 27–28.

²³² See Note, *supra* note 218, at 1599 ("That 'death is different' from other penalties the state may impose has become an axiom of American law."). For discussions of the origins of this concept and phrase, see *id.* at 1599 n.1. See also Barkow, *supra* note 6, at 3 n.1.

²³³ Barkow, *supra* note 6, at 3.

²³⁴ E.g., Erwin Chemerinsky, Keynote Address at the Honorable James J. Gilvary Symposium on Law, Religion & Social Justice: Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?, in 29 U. DAYTON L. REV. 201, 217 (2004); Gershowitz, *supra* note 58, at 53; Smith, *supra* note 164, at 370; see Eric M. Freedman, Giarrantano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings, 91 CORNELL L. REV. 1079, 1100 (2006) (noting that death penalty cases are the only recent cases in which the Court has found ineffective assistance, and that the findings in those cases are attributable to the Court's "[h]aving been thoroughly persuaded of the importance of effective advocacy at the penalty phase" of capital trials).

²³⁵ See Berman, *supra* note 3, at 869.

²³⁶ Barkow, *supra* note 6, at 5 ("In 2004, more than one million adults received non-capital sentences versus 115 people who received death sentences. The Court has focused on the one percent of cases it views as the most sympathetic and created a special jurisprudence for them. With those cases off the table as a cause for concern, the Court can—and has—ignored the rest.").

²³⁷ See 539 U.S. at 535.

received less attention than capital sentencing—in particular, the Court and commentators²³⁸ have not developed similar analysis regarding what constitutes appropriate mitigating evidence—it may be more difficult to identify what mitigation evidence for non-capital defendants would trigger counsel's duty to investigate.

And, perhaps more importantly, given the overwhelmingly large number of non-capital convictions and sentencings that occur every year,²³⁹ courts may be simply unwilling to devote the same level of time and resources that they allocate to capital cases.²⁴⁰ As noted above, resource allocation concerns appear to have prompted some courts to adopt heightened prejudice standards for ineffective assistance claims in discretionary non-capital sentencing systems.

But if one puts aside the "death is different" analysis and the resource allocation concerns—indeed, the Supreme Court has not mentioned them²⁴¹—it is hard to see why courts should not evaluate non-capital sentencing performance in light of the recent decisions of *Williams*, *Wiggins*, and *Rompilla*. Following the analysis from those cases, this subsection attempts to either identify or roughly articulate the following potential sources of extra-statutory sentencing law that ought to inform evaluations of counsel's performance at sentencing proceeding: ABA Standards, prevailing professional norms, and information regarding what mitigation arguments tend to succeed in fully discretionary systems. These sources are examined with the recognition that in order to enforce a meaningful standard for performance at sentencing, we must first seek to articulate and better develop the law and practice of non-capital sentencing.

1. ABA Standards

The Supreme Court has become increasingly receptive to the use of ABA Standards for representation as "guidelines" to evaluate counsel's performance.²⁴² Although the standards are more developed for

²³⁸ The death penalty is the subject of a significant amount of academic commentary. Berman, *supra* note 3, at 868 n.41.

²³⁹ *Id.* at 866–67.

²⁴⁰ See Barkow, *supra* note 6, at 4–5 ("By not having to consider criminal sentencing questions under the same constitutional rules, the Court can scrutinize death cases more closely without taking on the burden of policing all criminal cases. The Court has an interest in doing this because it allows the Court to feel better about its role in capital punishment's administration without paying much of a price.").

²⁴¹ See Smith, *supra* note 164, at 371.

²⁴² See *supra* note 22 and accompanying text.

the representation of capital defendants, the ABA does provide some specific advice regarding the representation of non-capital defendants. Several courts have relied explicitly on ABA Guidelines in assessing counsel's performance in non-capital cases.²⁴³ Specifically, the ABA advises counsel to be familiar with all of the sentencing law and procedures, including available sentences in the jurisdiction, as well as the ordinary sentences imposed for the defendant's offense.²⁴⁴ Defense counsel is directed to "present to the court any ground which will assist in reaching a proper disposition favorable to the accused."²⁴⁵ To achieve this objective, counsel is expected to attend the defendant's interview with the probation officer,²⁴⁶ to review the presentence report or summary, if available, and to "seek to verify the information contained in it and should be prepared to supplement or challenge it if necessary."²⁴⁷ Counsel must also "submit to the court and the prosecutor all favorable information relevant to sentencing and in an appropriate case, with the consent of the accused, be prepared to suggest a program of rehabilitation based on defense counsel's exploration of employment, educational, and other opportunities made available by community services."²⁴⁸ Counsel is also directed to consult with her client and to advise her of various rights and other information.²⁴⁹

²⁴³ See, e.g., *United States v. Russell*, 221 F.3d 615, 620-21 (4th Cir. 2000); *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994); *United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990).

²⁴⁴ The ABA explains:

Defense counsel should, at the earliest possible time, be or become familiar with all of the sentencing alternatives available to the court and with community and other facilities which may be of assistance in a plan for meeting the accused's needs. Defense counsel's preparation should also include familiarization with the court's practices in exercising sentencing discretion, the practical consequences of different sentences, and the normal pattern of sentences for the offense involved, including any guidelines applicable at either the sentencing or parole stages.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-8.1(a).

²⁴⁵ *Id.* at 4-8.1(b).

²⁴⁶ *Id.* at 4-8.1(c).

²⁴⁷ *Id.* at 4-8.1(b).

²⁴⁸ *Id.*

²⁴⁹ "The consequences of the various dispositions available should be explained fully by defense counsel to the accused." *Id.* at 4-8.1(a). "Defense counsel should also insure that the accused understands the nature of the presentence investigation process, and in particular the significance of statements made by the accused to probation officers and related personnel." *Id.* at 4-8.1(c). "Defense counsel should alert the accused to the right of allocution, if any, and to the possible dangers of making a statement that might tend to prejudice an appeal." *Id.* at 4-8.1(d).

These standards are far from detailed. Aside from the standard that encourages counsel to prepare a program of rehabilitation, the ABA does not provide substantive guidance to defense counsel. Unlike the ABA's death penalty standards, which recommend specific types of witnesses and mitigating arguments, the non-capital standards are task-based: they direct sentencing counsel to familiarize herself with the sentencing law, procedures, and practice; they require familiarity with the underlying facts of the offense and offender (through the presentence report process); and they generally admonish counsel to present "favorable information relevant to sentencing."²⁵⁰

The Supreme Court's recent reliance on ABA Standards notwithstanding, heavy reliance on ABA Standards arguably runs afoul of *Strickland's* explicit statement that the ABA Standards should be treated only as "guides to determining what is reasonable"²⁵¹ because a "particular set of detailed rules" for counsel's performance would be inappropriate.²⁵² The *Strickland* Court cautioned against detailed rules for counsel's performance on the theory that such rules would "interfere with the constitutionally protected independence of counsel."²⁵³ The Court never explained this statement, except to cite to *United States v. Decoster*,²⁵⁴ a case decided by the District of Columbia Circuit in 1976. The *Decoster* majority counseled against "a wide-ranging inquiry, even after trial, into the conduct of defense counsel," reasoning that the prosecution would "ask to oversee defense counsel's conduct at trial—to ensure against reversal" and that such oversight would transform our adversarial system (which is designed to protect the rights of the accused) into an inquisitorial system.²⁵⁵ This reasoning from *Decoster* seems highly suspect. That defense counsel's performance could result in reversal hardly compels the conclusion that the prosecution be permitted to "oversee" defense counsel. Trial courts, for instance, make countless decisions that undoubtedly may result in the reversal of conviction. Yet no one would think to argue that the prosecution be permitted to "oversee" the trial court in its decisionmaking processes. And even if a prosecutor did request such oversight of defense counsel, courts could obviously reject such a request.

²⁵⁰ ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-8.1(d).

²⁵¹ 466 U.S. at 688.

²⁵² *Id.* at 688–89.

²⁵³ *See id.* at 689.

²⁵⁴ *Id.* (citing *United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir. 1976)).

²⁵⁵ 624 F.2d at 208.

The *Strickland* Court also cautioned against particular detailed rules for counsel's performance because such rules could possibly "distract counsel from the overriding mission of vigorous advocacy of the defendant's cause."²⁵⁶ Some commentators have criticized these reservations about performance standards, noting that the "need to make individualized strategic decisions . . . does not preclude the development of effective performance standards."²⁵⁷ That is because performance standards "would not mandate particular decisions; instead such standards would identify the factors that competent lawyers must consider in exercising professional judgment."²⁵⁸

2. Prevailing Professional Norms

In addition to written guidelines, the reasonableness of an attorney's performance may also be gauged by reference to prevailing professional norms.²⁵⁹ Expert opinions may help courts assess what the prevailing local norms of practice are (or were at the time of conviction). State bar rules or professional responsibility codes could also indicate prevailing professional norms in a community. The Court referred to prevailing local norms in *Wiggins* when finding that counsel's limited investigation constituted unreasonable performance.²⁶⁰ A survey of the literature on sentencing indicates that there are a number of prevailing norms with respect to counsel's performance at sentencing that compliment and elaborate on the ABA Standards discussed in the previous section.²⁶¹

Defense counsel has a clear duty at sentencing—"to advocate the least restrictive and least burdensome [sentence] that is realistic, given the facts and circumstances of the case."²⁶² To fulfill this duty, counsel is expected to undertake a series of tasks. First, counsel should be aware

²⁵⁶ 466 U.S. at 689.

²⁵⁷ Genego, *supra* note 16, at 206.

²⁵⁸ Calhoun, *supra* note 16, at 437-40.

²⁵⁹ See Sevilla, *supra* note 16, at 940-41.

²⁶⁰ *Wiggins*, 539 U.S. at 524 (noting that counsel's investigation "fell short of the professional standards that prevailed in Maryland in 1989"). The Court appears to have based this determination on an admission by trial counsel. *Id.*

²⁶¹ See, e.g., Genego, *supra* note 16, at 207 ("There are, for example, some obligatory actions which should be taken in all cases, while in other cases, the attorney would be expected to take specific actions unless he or she had sound strategic reasons for not doing so.").

²⁶² *Id.*; see SUBIN, BERKE & TIRSCHWELL, *supra* note 178, at 490 (stating that a "defense lawyer's obligations in connection with sentencing" are to "do whatever is legally and ethically permissible to achieve for the client the most lenient sentence possible").

of the potential sentence that the client is facing, including applicable fines or restitution.²⁶³ Second, the attorney should be aware of the relevant sentencing procedures,²⁶⁴ including any discretion that the sentencing judge or jury has in the particular case.²⁶⁵ Third, counsel should be familiar with the facts of the offense and the background of the defendant.²⁶⁶ Fourth, counsel should investigate the aggravating evidence introduced by the prosecution and, where feasible, challenge that evidence.²⁶⁷ Fifth, counsel should investigate potential mitigating evidence²⁶⁸ and, where appropriate, introduce that evidence at a sentencing hearing.²⁶⁹

The prevailing sentencing norms also make explicit certain duties that are only implicit in the ABA Standards.²⁷⁰ For example, rather than simply directing counsel to review the presentence report or summary, if available, and to "seek to verify the information contained in it and

²⁶³ See Michael A. Feit, "Before Sentence Is Pronounced . . .", 9 CRIM. L. BULL. 140, 141 (1973); Genego, *supra* note 16, at 207-08.

²⁶⁴ See SUBIN, BERKE & TIRSCHWELL, *supra* note 178, at 491; Genego, *supra* note 16, at 208.

²⁶⁵ See Feit, *supra* note 263, at 145; Genego, *supra* note 16, at 207; Calhoun, *supra* note 16, at 439.

²⁶⁶ See Correll v. Ryan, 465 F.3d 1006, 1011 (9th Cir. 2006) (stating that, in capital cases, sentencing counsel should undertake inquiries into "social background and evidence of family abuse, potential mental impairment, physical health history, and history of drug and alcohol abuse," including "examination of mental and physical health records, school records, and criminal records"); Morris, 658 P.2d at 1280; Kuh, *supra* note 168, at 435 ("[P]resentence reports should be carefully examined by defense counsel.").

²⁶⁷ See Summerlin v. Schirio, 427 F.3d 623, 630 (9th Cir. 2005) (en banc); Taylor v. State, 840 N.E.2d 324, 342 (Ind. 2006); cf. *Rompilla*, 545 U.S. at 385-86 (stating that counsel had a duty to learn about aggravating evidence that the prosecution intended to introduce in order "to discover any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating evidence the Commonwealth would emphasize").

²⁶⁸ See Marlowe, *supra* note 16, at 31 (describing *Tyler v. Kemp*, 755 F.2d 741, 744-46 (11th Cir. 1985), as illustrating "the principle that defense counsel must perform reasonable investigations to discover possible mitigating evidence").

²⁶⁹ See ROTH, *supra* note 168, at 2; Feit, *supra* note 263, at 149, 157; Kuh, *supra* note 168, at 436; Calhoun, *supra* note 16, at 439; see also JOE A. CANNON ET AL., LAW AND TACTICS IN SENTENCING 8-9 (1970) ("Prior to the actual imposition of sentence, counsel should attempt to relate to the sentencing judge his recommendation for sentencing along with supporting reasons."). But see CANNON ET AL., *supra*, at 9 ("There may not be a need to communicate with the sentencing judge prior to sentence in every case. In those cases where the sentence to be imposed is a foregone conclusion due to a mandatory provision or otherwise, counsel may be well advised not to abuse this privilege so that he may exercise it more effectively in those cases where the decision as to sentence is not so easily arrived at.").

²⁷⁰ Cf. Calhoun, *supra* note 16, at 419 (asserting a "basic premise that certain identifiable actions by counsel are essential to effective representation").

... supplement or challenge it if necessary,²⁷¹ the norms identify three separate duties—(a) familiarity with the facts of the offense and the background of the defendant, (b) investigation and adversarial testing of aggravating evidence introduced by the prosecution, and (c) investigation and presentation of potential mitigating evidence—each of which is implicit in the ABA Standards direction regarding presentence reports.

In addition to these specific tasks, it is also important that counsel begin her work on sentencing issues as early as possible in the proceeding, both because sentencing issues may affect questions of liability (such as whether the defendant should consider a guilty plea), and also because counsel who begins contemplating sentencing issues only after conviction may not have sufficient time to prepare a comprehensive mitigation case on behalf of her client.²⁷²

3. Perceived Importance or Success Rate of Mitigating Evidence

Even in the absence of sentencing statutes or guidelines, it may still be possible to identify what mitigating evidence is considered particularly powerful in various jurisdictions. In the capital context, commentators have noted that courts weigh different mitigating evidence differently in ineffective assistance claims.²⁷³ Similar patterns can be discerned in non-capital sentencing.²⁷⁴ A defendant's prior convictions, for example, are considered highly relevant to non-capital sentencing decisions.²⁷⁵ Thus, if defense counsel rendered deficient performance with respect to a prior conviction—e.g., if counsel failed to correct untrue information regarding the defendant's previous convictions that resulted in a misperception by the sentencer that the criminal history was more serious—then counsel's performance should be deemed un-

²⁷¹ ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-8.1(b).

²⁷² "From the moment counsel undertakes representation of a criminal defendant, he should begin to prepare for the sentencing process." CANNON ET AL., *supra* note 269, at 1.

²⁷³ See Graham, *supra* note 46, at 1665-66.

²⁷⁴ Local defense bars or national organizations—such as the Federal Defenders or the National Association of Criminal Defense Lawyers—could collect information about sentencing practices, such as the success rates of various mitigating arguments.

²⁷⁵ See George W. Pugh & M. Hampton Carver, *Due Process and Sentencing: From Mapp to Mempa to McGutha*, 49 TEX. L. REV. 25, 28, n.27 (1970) ("[T]he defendant's criminal record has traditionally been considered an especially important factor in the fixing of sentence."); see also Hessick, *supra* note 196, at 1110-11 ("At sentencing, prior convictions ... are treated as one of the most important pieces of sentencing information.").

reasonable even in completely discretionary sentencing systems.²⁷⁶ And if counsel failed to correct other "materially untrue information" about the defendant's past, that failure may also constitute ineffective assistance even in fully discretionary systems.²⁷⁷

Defendants in fully discretionary systems could also reference substantive sentencing law—such as statutes or sentencing guidelines—from other jurisdictions as evidence that particular mitigating evidence is ordinarily perceived as relevant to sentencing decisions. Some mitigating factors that have been considered particularly powerful in various jurisdictions include whether the defendant played only a minor role in the commission of a crime;²⁷⁸ whether the defendant is unlikely to reoffend;²⁷⁹ whether the defendant's actions caused only minor

²⁷⁶ The U.S. Supreme Court has held that the absence of counsel during sentencing after a plea of guilty coupled with materially untrue assumptions concerning the defendant's criminal history constitute a deprivation of due process. See *Townsend v. Burke*, 334 U.S. 736, 740–41 (1948); see also *Taylor*, 840 N.E.2d at 341–42 (appellate counsel rendered deficient performance for failing, *inter alia*, to challenge trial court's decision to place too much weight on defendant's criminal history, which was "not particularly grave or related to" the instant offense); *State v. Allen*, 20 P.3d 747, 750 (Kan. Ct. App. 2001) ("When previous misdemeanor convictions are being used to enhance a defendant's sentence [in a guidelines system], defendant's counsel should make some inquiry about the validity of the convictions . . .").

²⁷⁷ See *United States v. Colon*, 884 F.2d 1550, 1552 (2d Cir. 1989) ("Prior to passage of the Sentencing Reform Act, appellate review of sentences was unavailable unless they exceeded statutory limits, resulted from material misinformation or were based upon constitutionally impermissible considerations.") (emphasis added); Judge Irving R. Kaufman, U.S. Court of Appeals for the Second Circuit, Introductory Remarks of the Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit: Appellate Review of Sentences (Sept. 24, 1962) ("A sentence will be vacated when a reviewing tribunal finds that it is based upon information which is so clearly incorrect or upon criteria so improper as to constitute a violation of the defendant's right to due process."); cf. *Pugh & Carver*, *supra* note 275, at 28 (arguing that "due process is violated when a defendant not represented by counsel is sentenced on the basis of materially untrue information").

²⁷⁸ See U.S. SENTENCING GUIDELINES MANUAL § 3B1.2 (2008); ALASKA STAT. § 12.55.155(d)(1), (2) (2008); ARIZ. REV. STAT. ANN. § 13-701(E)(4) (Supp. 2008); CAL. R. CT. 4.423(a)(1); FLA. STAT. ANN. § 921.0016(4)(b) (West 2006) (repealed 1998); KAN. STAT. ANN. § 21-4716(c)(1)(B) (2007); N.C. GEN. STAT. § 15A-1340.16(e)(2) (2007); TENN. CODE ANN. § 40-35-113(4) (2006); WASH. REV. CODE ANN. § 9.94A.535(1)(f) (West 2003 & Supp. 2009); *State v. Guerard*, 682 N.W.2d 12, 25–26 (Wis. 2004). But see *State v. Studler*, 213 N.W.2d 24, 25–26 (Wis. 1973) (holding that the sentence was not excessive even though defendant's accomplice, who pled guilty before another judge to the same crime, who appeared to be more culpable than this defendant, and who had no better criminal record than that of defendant, had received a lesser sentence).

²⁷⁹ See HAW. REV. STAT. ANN. § 706-621(2)(e)–(h) (LexisNexis 2007); IDAHO CODE ANN. § 19-2521(2)(g)–(i) (2004); 730 ILL. COMP. STAT. ANN. § 5/5-5-3.1(a)(7)–(10) (West 2007); IND. CODE ANN. § 35-38-1-7.1(c)(6)–(8) (LexisNexis 1998 & Supp. 2007); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(28)–(30) (2008); N.J. STAT. ANN. § 2C:44-1(b)(7)–(10)

harm, or were intended to cause only minor harm;²⁸⁰ whether the defendant has made (or will make) restitution to the victim;²⁸¹ and whether the defendant assisted or cooperated with authorities.²⁸² Some jurisdictions will mitigate sentences based on age,²⁸³ or when imprisonment would constitute a "hardship" for the defendant or her family.²⁸⁴ Many jurisdictions also consider imperfect defenses as strong mitigating factors,²⁸⁵ such as conduct by the victim that contributed to the crime,²⁸⁶ imperfect claims of coercion and duress,²⁸⁷ and diminished capacity.²⁸⁸

(West 2005 & Supp. 2009); N.C. GEN. STAT. § 15A-1340.16(e)(20); N.D. CENT. CODE § 12.1-32-04(7)-(10) (1997); TENN. CODE ANN. § 40-35-113(11).

²⁸⁰ See ALASKA STAT. § 12.55.155(d)(12); CAL. R. CT. 4.423(a)(6); HAW. REV. STAT. ANN. § 706-621(2)(a); IDAHO CODE ANN. § 19-2521(2)(a)-(b); 730 ILL. COMP. STAT. ANN. § 5/5-5-3.1(a)(1), (2) (West 2007 & Supp. 2008); IND. CODE ANN. § 35-38-1-7.1(c)(1) (LexisNexis 1998 & Supp. 2007); KAN. STAT. ANN. § 21-4716(c)(1)(E); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(22), (23); N.J. STAT. ANN. §§ 2C:44-1(b)(1)-(2) (West 2005 & Supp. 2009); N.C. GEN. STAT. § 15A-1340.16(e)(9); N.D. CENT. CODE §§ 12.1-32-04(1), (2); OHIO REV. CODE ANN. § 2929.12(C)(3) (West 2006); TENN. CODE ANN. § 40-35-113(1).

²⁸¹ See CAL. R. CT. 4.423(b)(5); FLA. STAT. ANN. § 921.0016(4)(h); IDAHO CODE ANN. § 19-2521(2)(f); 730 ILL. COMP. STAT. ANN. § 5/5-5-3.1(a)(6); IND. CODE ANN. § 35-38-1-7.1(c)(9) (LexisNexis 1998 & Supp. 2007); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(27); N.J. STAT. ANN. § 2C:44-1(b)(6) (West 2005 & Supp. 2009); N.C. GEN. STAT. § 15A-1340.16(e)(5); N.D. CENT. CODE § 12.1-32-04(6); TENN. CODE ANN. § 40-35-113(5); WASH. REV. CODE ANN. § 9.94A.535(1)(b) (West 2003 & Supp. 2009).

²⁸² See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5K1.1, p.s.; ALASKA STAT. § 12.55.155(d)(11); FLA. STAT. ANN. § 921.0016(4)(i) (West 2006) (repealed 1998); N.J. STAT. ANN. § 2C:44-1(b)(12) (West 2005 & Supp. 2009); N.C. GEN. STAT. § 15A-1340.16(e)(7); N.D. CENT. CODE §§ 12.1-32-04(14); TENN. CODE ANN. § 40-35-113(9), (10).

²⁸³ See FLA. STAT. ANN. § 921.0016(4)(k) (West 2006) (repealed 1998); N.C. GEN. STAT. § 15A-1340.16(e)(4); N.D. CENT. CODE § 12.1-32-04(12); TENN. CODE ANN. § 40-35-113(6).

²⁸⁴ See HAW. REV. STAT. ANN. § 706-621(2)(i); 730 ILL. COMP. STAT. ANN. § 5/5-5-3.1(a)(11) (West 2007 & Supp. 2008); IND. CODE ANN. § 35-38-1-7.1(c)(10) (LexisNexis 1998 & Supp. 2007); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(31); N.J. STAT. ANN. § 2C:44-1(b)(11) (West 2005 & Supp. 2009); N.D. CENT. CODE § 12.1-32-04(11); see also N.C. GEN. STAT. § 15A-1340.16(e)(17) (2007) (identifying as mitigating whether the defendant supports her family).

²⁸⁵ See, e.g., HAW. REV. STAT. ANN. § 706-621(2)(c) (LexisNexis 2007); IDAHO CODE ANN. § 19-2521(2)(d) (2004); 730 ILL. COMP. STAT. ANN. § 5/5-5-3.1(a)(4); IND. CODE ANN. § 35-38-1-7.1(b)(4) (LexisNexis 1998 & Supp. 2007); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(25) (2008); N.J. STAT. ANN. § 2C:44-1(b)(4) (West 2005 & Supp. 2009); N.D. CENT. CODE § 12.1-32-04(4) (1997); OHIO REV. CODE ANN. § 2929.12(C)(4); TENN. CODE ANN. § 40-35-113(3) (2006).

²⁸⁶ See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5K2.10, p.s.; ALASKA STAT. § 12.55.155(d)(6), (7) (2008); CAL. R. CT. 4.423(a)(2); FLA. STAT. ANN. § 921.0016(4)(f) (West 2006) (repealed 1998); HAW. REV. STAT. ANN. § 706-621(2)(b), (d); IDAHO CODE ANN. § 19-2521(2)(c), (e); 730 ILL. COMP. STAT. ANN. § 5/5-5-3.1(a)(3); IND. CODE ANN. § 35-38-1-7.1(b)(3), (5) (LexisNexis 1998 & Supp. 2007); KAN. STAT. ANN. § 21-4716(c)(1)(A) (2007); LA. CODE CRIM. PROC. ANN. art. 894.1(B)(24), (26); N.J. STAT. ANN. § 2C:44-1(b)(3), (5) (West 2005 & Supp. 2009); N.C. GEN. STAT. § 15A-1340.16(e)(8); N.D. CENT. CODE § 12.1-32-

CONCLUSION

Discretionary sentencing enjoys a long history in the United States. Yet the legal standards and principles for assessing the effectiveness of counsel's performance at discretionary non-capital proceedings are underdeveloped. Courts have repeatedly intimated that standards should be different, referencing gatekeeping concerns and noting that discretionary sentencing is not necessarily a formal, adversarial proceeding. As this Article demonstrates, courts have overstated the need for heightened ineffective assistance standards for gatekeeping purposes, and modern sentencing has become an increasingly formal process where defense counsel serves an important advocacy role—i.e., advocating the least harsh sentence for her client.

To understand the true challenge that ineffective assistance at sentencing claims present, it is first necessary to acknowledge how important substantive law is to the evaluation of counsel's performance. As explained above, the most successful ineffective assistance claims—legal error claims and failure to investigate claims—require an assessment of counsel's performance against the backdrop of the relevant substantive law. The prevalence of substantive sentencing law differs in different types of systems: mandatory sentencing systems use substantive law to limit or channel the sentencing decisions of judges; fully discretionary

04(3), (5); OHIO REV. CODE ANN. § 2929.12(C)(1), (2) (West 2006); TENN. CODE ANN. § 40-35-113(2); WASH. REV. CODE ANN. § 9.94A.535(1)(a) (West 2003 & Supp. 2009).

²⁸⁷ See, e.g., U.S. SENTENCING GUIDELINES MANUAL §5K2.12, p.s.; ALASKA STAT. § 12.55.155(d)(3); ARIZ. REV. STAT. ANN. § 13-701(E)(3); CAL. R. CT. 4.423(a)(4); FLA. STAT. ANN. § 921.0016(4)(g) (West 2006) (repealed 1998); N.C. GEN. STAT. § 15A-1340.16(e)(1); TENN. CODE ANN. § 40-35-113(12); WASH. REV. CODE ANN. § 9.94A.535(1)(c) (West 2003 & Supp. 2009).

²⁸⁸ See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 5K2.13, p.s.; ALASKA STAT. § 12.55.155(d)(18); ARIZ. REV. STAT. ANN. § 13-701(E)(2) (Supp. 2008); FLA. STAT. ANN. § 921.0016(4)(c) (West 2006) (repealed 1998); KAN. STAT. ANN. § 21-4716(c)(1)(C); N.C. GEN. STAT. § 15A-1340.16(e)(3); TENN. CODE ANN. § 40-35-113(8); WASH. REV. CODE ANN. § 9.94A.535(1)(e) (West 2003 & Supp. 2009); see also *United States v. Jackson*, 747 F.3d 786, 795 (7th Cir. 2008) (“[D]iminished mental capacity is a ‘ground of recognized legal merit’ in seeking a lower sentence.” (quoting *United States v. Cunningham*, 429 F.3d 673, 679 (7th Cir. 2005))); Timothy Cone, *Developing the Eighth Amendment for Those “Least Deserving” of Punishment: Statutory Mandatory Minimums for Noncapital Offenses Can Be “Cruel and Unusual” When Imposed on Mentally Retarded Offenders*, 34 N.M. L. REV. 35, 44–45 & nn.78–83 (2004) (collecting sources). But see *Vega v. Comm’r of Corr.*, 930 A.2d 75, 77–78 (Conn. App. Ct. 2007) (holding that trial counsel’s failure to present mitigating evidence of psychiatric report of defendant did not constitute deficient performance that prejudiced defendant, as required to support claim of ineffective assistance of counsel, because psychiatric report could have reinforced discretionary determination that maximum sentence was necessary to protect public).

sentencing systems leave the identification and relative weight of sentencing factors to the sentencer; and in between these two extremes are systems that guide the discretion of sentencers by identifying some factors that the sentencing judge either may or must consider.

But a jurisdiction's substantive sentencing law is not the only backdrop against which counsel's performance may be measured. In three recent capital ineffective assistance cases, the Supreme Court looked beyond the governing sentencing statutes to additional sources—including ABA Standards, prevailing professional norms, and the Court's own decisions—that identify important mitigating evidence. Such sources exist and should be further developed for non-capital sentencing. This development would provide not only doctrinal clarity for ineffective assistance at sentencing claims, but also may serve to improve the quality of representation at sentencing. These other sources of mitigating evidence would assist counsel in fully discretionary systems by helping to identify successful mitigation arguments and evidence from the apparently infinite number of potential arguments available.