

COUNSEL AS “CRYSTAL GAZER”:
DETERMINING THE EXTENT TO WHICH THE SIXTH
AMENDMENT REQUIRES THAT DEFENSE ATTORNEYS
PREDICT CHANGES IN THE LAW

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INTRODUCTION

In 1943, the chairman of IBM remarked, “I think there is a world market for maybe five computers.”¹ Time magazine opined in the late 1960’s that “remote shopping, while entirely feasible, will flop.”² Three days before the Stock Market Crash of 1929, economist Irving Fisher observed, “[s]tock prices have reached what looks like a permanently high plateau.”³

Prognosticating consumer tastes, technological developments, or the stock market is no easy task. Predicting future developments in the law can be just as arduous. As the Texas Court of Criminal Appeals has noted, “what an attorney thinks the law is today may not be what a court decides tomorrow.”⁴

The Sixth Amendment of the U.S. Constitution guarantees criminal defendants the right to effective assistance of counsel at various stages of the criminal adjudication process.⁵ Both state and federal convicts may challenge their convictions by arguing that their counsel

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¹ David Pogue, *Use It Better: The Worst Tech Predictions of All Time*, SCIENTIFIC AMERICAN (Jan. 18, 2012), <http://www.scientificamerican.com/article/pogue-all-time-worst-tech-predictions/>.

² Robert J. Szczerba, *15 Worst Tech Predictions of All Time*, FORBES (Jan. 5, 2015, 7:55 PM), <http://www.forbes.com/sites/robertszczerba/2015/01/05/15-worst-tech-predictions-of-all-time/>.

³ Jennifer Latson, *The Worst Stock Tip in History*, TIME (Sept. 3, 2014), <http://time.com/3207128/stock-market-high-1929/>.

⁴ *Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005).

⁵ See *infra* Part I.C for an overview of constitutional right to effective assistance of counsel.

provided ineffective assistance.⁶ As a general rule, defense counsel cannot be deemed ineffective for failing to raise an argument contrary to controlling law⁷ at the time of counsel's representation. Importantly, however, a more difficult question arises when a legal proposition or argument (1) is not specifically dictated by controlling precedent at the time of the attorney's action, or inaction, but (2) is not specifically contrary to existing law; and (3) subsequent to the attorney's action, or inaction, becomes law.⁸

Some courts have concluded that counsel can be deemed ineffective even where (1) controlling law was silent on the merits of the argument or proposition but where (2) persuasive, non-binding authority supporting the argument or controlling "foreshadowing" authority existed.⁹ Still other courts have appeared to simply reiterate a *per se* rule that counsel can never be expected to be "clairvoyant."¹⁰ The treatment of the issue by both federal and state courts has been decidedly hodgepodge. The Supreme Court has not yet addressed the issue. Additionally, no scholarly treatment of the issue yet exists.¹¹

This Article argues that the Supreme Court should provide much needed guidance and consistency. The Supreme Court should reject the *per se* approach given the inherently predictive nature of common law decision-making as well as the adverse consequences that result from defense counsel's failure to preserve and argue a legal argument.¹² Rejection of a *per se* approach comports with Supreme Court jurisprudence concerning ineffective assistance of counsel claims.¹³ In developing a framework, the Supreme Court should consider the

⁶ See *infra* Part I.A for an overview of how defendants may challenge convictions.

⁷ See *infra* Part I.B for an overview of precedent.

⁸ See *infra* Part I.D.1-D.7 for a discussion of this question.

⁹ See *infra* Part I.D.4-D.5.

¹⁰ See *infra* Part I.D.7.

¹¹ Some scholarship has discussed unsettled law within the context of legal malpractice actions. See, e.g., J. Mark Cooney, *Benching the Monday-Morning Quarterback: The "Attorney Judgment" Defense to Legal-Malpractice Claims*, 52 WAYNE L. REV. 1051, 1055 (2006). The civil-liability standard for malpractice claims is distinct from the constitutional standard for ineffective assistance of counsel claims. See, e.g., *Smith v. Singletary*, 170 F.3d 1051, 1054 (11th Cir. 1999) (noting distinction) (citing *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992)).

¹² See *infra* Part II.A.2-A.3 for a discussion of these justifications for a rejection of the *per se* rule.

¹³ See *infra* Part II.A.1 for an explanation of why rejection of *per se* rule is not inconsistent with Supreme Court jurisprudence.

importance of a defense attorney’s judgment, established constraints on retroactivity, and the societal interest in finality.¹⁴

This Article proposes that the Supreme Court craft a “totality of the circumstances” analysis. Under this analysis, a defendant claiming the ineffective assistance of defense counsel must cite to a specific and subsequent case or statute that (1) if it had existed at the time of trial or appeal, would have been controlling precedent, and (2) would have been outcome-determinative.¹⁵ Additionally, the defendant should be limited to presenting such an “attorney clairvoyance” claim only during his or her initial collateral review proceedings.¹⁶ Furthermore, the analysis must provide guidance as to what constitutes objectively reasonable predictive indicators at the time of counsel’s action, or inaction.¹⁷ These predictive factors must provide a reasonably clear indicator of the future. Thus, the analysis should apply an objectively reasonable “foreshadowing” or “foreseeable” standard.¹⁸ Additionally, given the inherent differences between statutory authority and common law authority, any proposed analysis should distinguish between instances in which the subsequent authority is statutory rather than common law.¹⁹ In assessing defense counsel’s conduct, courts should also consider other factors including whether counsel’s “anticipatory” action (or inaction) would have produced any strategic “downsides.”²⁰

I. OVERVIEW OF CURRENT LAW

The following concepts are useful to understanding the dilemma of whether an attorney can ever be expected to “predict” future changes in the law.

¹⁴ See *infra* Part II.B.1-3 for a discussion of these considerations.

¹⁵ See *infra* Part II.C.1 for a discussion of these proposed requirements.

¹⁶ See *infra* Part II.C.2 for a discussion of this proposed temporal limitation. Initial collateral review proceedings would be, for example, a first-round *habeas* petition for a federal inmate or a first-round post-conviction relief petition for a state inmate.

¹⁷ See *infra* Part II.C.3 for an explanation of proposed relevant “predictive factors.”

¹⁸ See *infra* Part II.C.4 for a discussion of how clear the predictive factors must be.

¹⁹ See *infra* Part II.C.5 for an explanation of this proposed distinction.

²⁰ See *infra* Part II.C.6 for a discussion of these other factors.

A. *The Framework for Challenging Convictions*

After a defendant is convicted in federal district court of a federal crime, he or she may seek direct appellate review of the federal conviction in the federal courts of appeals.²¹ If unsuccessful on direct appeal, the federal convict may petition the federal district court for collateral relief in the form of federal habeas review under 28 U.S.C. § 2255.²²

Likewise, after a defendant is convicted in state court, a defendant may seek direct appellate review of the conviction in the appellate courts of the state in which he or she was convicted.²³ Additionally, nearly every state has “collateral review” procedures through which state convicts can raise “post-appeal challenges to their convictions and sentences on . . . limited grounds.”²⁴ After unsuccessfully litigating any federal constitutional claims through state procedures, a state convict may petition for habeas corpus relief in federal district court under 28 U.S.C. § 2254.²⁵

As a general rule, a defendant may raise, on direct appeal, only claims that appear within the trial record; consequently, direct appeal claims are most often allegations of trial court error.²⁶ Ordinarily, if an attorney fails to make an objection or present a specific legal argument during trial, the objection or specific legal argument is waived and cannot be raised on appeal.²⁷ Similarly, if an attorney fails to raise a claim on appeal, an appellate court, as a general rule, will not

²¹ 28 U.S.C. § 1291 (2012) (granting the courts of appeals jurisdiction over all final decisions from the district courts).

²² 28 U.S.C. § 2255 (2012) (“An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.”).

²³ See, e.g., *Lackawanna Cty. Dist. Att’y v. Coss*, 532 U.S. 394, 402 (2001).

²⁴ WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 1333 (5th ed. 2009).

²⁵ 28 U.S.C. § 2254(b)(1) (2012) (“The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”).

²⁶ LAFAVE ET AL., *supra* note 24, at 1315-18 (detailing the four step analysis for determining if a trial court error is subject to plain error review); see, e.g., *Henderson v. United States*, 133 S. Ct. 1121, 1124 (2013) (instructing that federal appellate courts “normally will not correct a legal error made in criminal trial court proceedings unless the defendant first brought the error to the trial court’s attention”); *Commonwealth v. Grant*, 813 A.2d 726, 733 (Pa. 2002) (explaining that appellate courts “routinely decline to entertain issues raised on appeal for the first time”).

²⁷ See, e.g., *United States v. Joseph*, 730 F.3d 336, 341-42 (3d Cir. 2013).

address the matter.²⁸ During collateral review proceedings, however, a defendant may present certain types of new evidence which was absent from the trial record.²⁹

B. *Source of Law: Case Law vs. Legislation*

In the American legal system, “the legislature and the judiciary exercise concurrent power to accomplish legal change.”³⁰ As one scholar has explained:

Where case law analysis calls on the lawyer to move upward from specific facts to a general principle to discern how the solution in one case can guide the resolution of another, the interpretation of legislation requires reasoning from the general to the specific, to determine whether and how a rule claiming wide application in fact governs an individual controversy.³¹

Examples of such legislation include statutes enacted by state legislatures as well as administrative regulations and municipal ordinances.³² Importantly, “Legislation does not simply declare rules; it expresses them in specific language. With legislation, every word (indeed, every punctuation mark) counts.”³³ Legislative bodies, unlike courts, are “not limited to the facts of an individual controversy, or by the rules of evidence applicable to the courts. The legislature need not wait for a problem to be brought to it, as courts must do.”³⁴ Unlike case law, statutes may originate suddenly and without prior precedent in a “big bang” fashion.³⁵ Additionally, statutes, in

²⁸ See, e.g., *United States v. Walters*, 269 F.3d 1207, 1210 n.1 (10th Cir. 2001) (instructing that defendant waived issue of whether police violated his constitutional rights during arrest when he failed to raise issue on appeal).

²⁹ See LAFAYE ET AL., *supra* note 24, at 1315-18.

³⁰ OTTO J. HETZEL, MICHAEL E. LIBONATI & ROBERT F. WILLIAMS, *LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS* 3 (3d ed. 2001).

³¹ JANE C. GINSBURG, *LEGAL METHODS: CASES AND MATERIALS* 29 (2d ed. 2003).

³² *Id.* at 30.

³³ *Id.* at 29.

³⁴ HETZEL ET AL., *supra* note 30, at 3.

³⁵ Robert F. Williams, *Statutory Law in Legal Education: Still Second Class After All These Years*, 35 *MERCER L. REV.* 803, 829-30, 833-35 (1984).

contrast to case law, “do not explain the reasoning process that led to the conclusions they contain”³⁶

By contrast, the common law is “[t]he body of law derived from judicial decisions, rather than from statutes or constitutions”³⁷ The common law provides courts with two main purposes: “to decide the instant case” and “to lay down a rule which may afford some guidance in the future.”³⁸ Consequently, common law decision-making provides “continual opportunities for incremental change”³⁹

In deciding a case, courts “*must* confine their inquiry to what is before them; they *cannot* consider issues external to a particular dispute. In other words, courts cannot determine the outcome of future cases prior to their adjudication.”⁴⁰ “Precedent” or “binding precedent” refers to “the holding in a judicial decision that must be followed in subsequent cases raising the same issue.”⁴¹ A “precedential” decision “announces a rule of law that is both necessary to the holding of the prior case (i.e., it is a ‘holding’), and ‘on point’ (i.e., it is relevant) to the decision in the subsequent court.”⁴²

A court will generally “apply the law in effect at the time it renders its decision.”⁴³ With few exceptions, “lower courts within a geographical jurisdiction are bound by relevant precedent announced by

³⁶ *Id.* at 833; *see also generally* William Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 *passim* (1990) (discussing the use, as well as criticism of the use, of legislative history to interpret statutory text).

³⁷ *Common Law*, BLACK’S LAW DICTIONARY 293 (8th ed. 2004).

³⁸ Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL’Y 811, 838 (2003) (quoting Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 3 (1960)). Thus, “Rules of law have traditionally been applied to the parties to the case in which those rules were announced as well as in later cases” *Id.* at 816.

³⁹ Nuno Garoupa & Andrew P. Morriss, *The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements*, 2012 U. ILL. L. REV. 1443, 1488 (2012); *see also* HETZEL ET AL., *supra* note 30, at 3 (noting the judiciary has the “power to develop the common law in response to changed circumstances.”).

⁴⁰ Shannon, *supra* note 38, at 839. More specifically, “Courts make law, but they do so only through the adjudication of cases. The focus must remain on the parties and the issues before the court, and the law announced must be the law that is applied to those parties in resolution of those issues.” *Id.* at 874.

⁴¹ Amada Frost, *Inferiority Complex: Should State Courts Follow Lower Federal Court Precedent on the Meaning of Federal Law?*, 68 VAND. L. REV. 53, 62 n.27 (2015); *see generally* Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 59-61 (2009) (discussing precedent and stare decisis as binding authority); Shannon, *supra* note 38, at 845-46.

⁴² Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460 (2010).

⁴³ Shannon, *supra* note 38, at 840 (comparing holding and dicta as precedent) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994)).

higher courts within that jurisdiction (‘vertical’ or ‘hierarchical’ precedent)”⁴⁴ Courts are also largely bound “by prior relevant decisions issued by their own court (‘horizontal’ precedent or ‘stare decisis’).”⁴⁵ Concomitantly, however, “[a] court that follows precedents mechanically or too strictly will at times perpetuate legal rules and concepts that have outlived their usefulness.”⁴⁶

Dicta are “pronouncements” within a court opinion that “may be persuasive but are not binding.”⁴⁷ Specifically, “dictum is any statement in a judicial opinion not necessary to the decision of the case actually before the court.”⁴⁸ Although it does not wield the precedential weight of a holding, dicta can “communicate the contemplation of legal change”⁴⁹

Furthermore, “persuasive precedent” refers to “prior on-point holdings that are neither stare decisis nor binding precedent.”⁵⁰ Persuasive authority can include the decisions of other courts outside of the court’s own jurisdiction, law review articles, or other state statutes.⁵¹ As one scholar has noted, “There is a great deal of uncertainty concerning the value of this persuasive authority and its justification. After all, why should a court defer to a court from a different jurisdiction or to one with a lesser degree of authority?”⁵² Nonetheless, “American appellate courts exhibit a marked degree of mutual respect for each other’s decisions.”⁵³

Courts and attorneys “cite to precedent to argue what the courts should do. Their argument is that because a court has done *X* in a

⁴⁴ Dobbins, *supra* note 42, at 1455, 1460-61.

⁴⁵ *Id.* at 1455, 1461-62.

⁴⁶ GINSBURG, *supra* note 31, at 3.

⁴⁷ *Id.* at 108; *see also* Shannon, *supra* note 38, at 846 (noting cases have both holding and dicta). *OBITER DICTUM*, Black’s Law Dictionary (10th ed. 2014) (“obiter dictum . . . Latin ‘something said in passing’ A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive). — Often shortened to *dictum* or, less commonly, *obiter*.”).

⁴⁸ GINSBURG, *supra* note 31, at 108; *see also* Shannon, *supra* note 38, at 875 (stating that everything in a judicial opinion outside the matter of the case must be dicta or the cases become merely a way for courts to legislate).

⁴⁹ Shannon, *supra* note 38, at 849.

⁵⁰ *Id.*; *see generally* Flanders, *supra* note 41, at 55-88 (discussing persuasive authority generally).

⁵¹ Flanders, *supra* note 41 at 63; *see also* Hillel Y. Levin, *A Reliance Approach to Precedent*, 67 GA. L. REV. 1035, 1074 (2013) (noting that “[c]ourts look to the decisions of sister and lower courts as sources of what is referred to as persuasive authority”).

⁵² Levin, *supra* note 51, at 1074.

⁵³ GINSBURG, *supra* note 31, at 11.

previous case, it should do *X* (or something similar to it) in a new case. In other words, the existence of a precedent is a reason in itself for a court to hold one way or another.”⁵⁴ At the same time, however, reasonably minded judges and attorneys frequently disagree as to what the law is.⁵⁵ Jurists may have very different opinions about how narrowly or how broadly to interpret the scope of a prior judicial holding or the correct interpretation of ambiguous language in a statute.⁵⁶

C. Strickland *Standard for Ineffective Assistance of Counsel*

The Sixth Amendment of the U.S. Constitution guarantees criminal defendants the right to “effective” counsel at various stages of the criminal adjudication process.⁵⁷ Legal representation for accused persons ensures the protection of their other important constitutional rights.⁵⁸ The Sixth Amendment right to counsel “is the foundation of our adversary system. Defense counsel tests the prosecution’s case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged.”⁵⁹

An accused, therefore, has a constitutional right to effective counsel during “critical stages of a criminal proceeding.”⁶⁰ These critical stages include trial proceedings as well as the appellate process.⁶¹ The right to effective assistance of counsel also applies to the pre-trial process, including “arraignments, postindictment [sic] interrogations, postindictment [sic] lineups, and the entry of a guilty plea.”⁶² Similarly, in both capital and noncapital cases, a defendant has the right to effective counsel during his sentencing hearing.⁶³

⁵⁴ Levin, *supra* note 51, at 1040-41.

⁵⁵ See Frost, *supra* note 41, at 62.

⁵⁶ See, e.g., Shannon, *supra* note 38 at 846.

⁵⁷ U.S. CONST. amend. VI; *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).

⁵⁸ *United States v. Cronin*, 466 U.S. 648, 653 (1984).

⁵⁹ *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)); see, e.g., *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) (citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)) (“The right of an accused to counsel is beyond question a fundamental right.”).

⁶⁰ *Lafler*, 132 S. Ct. at 1385.

⁶¹ *Evitts v. Lucey*, 469 U.S. 387, 397 (1985).

⁶² *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012).

⁶³ *Lafler*, 132 S. Ct. at 1385-86. Nonetheless, there is no Sixth Amendment right to counsel in federal or state post-conviction collateral review proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); see, e.g., 28 U.S.C. § 2254(i) (2012) (“The ineffectiveness or incompetence

A convicted defendant may challenge his or her conviction by alleging that defense counsel provided ineffective assistance in violation of the Sixth Amendment.⁶⁴ Most jurisdictions require that convicts raise ineffective assistance of counsel claims during collateral review proceedings – and not on direct appeal.⁶⁵ As the Supreme Court has explained:

A layman will ordinarily be unable to recognize counsel’s errors and to evaluate counsel’s professional performance; consequently a criminal defendant will rarely know that he has not been represented competently until after trial or appeal, usually when he consults another lawyer about his case. Indeed, an accused will often not realize that he has a meritorious ineffectiveness claim until he begins collateral review proceedings, particularly if he retained trial counsel on direct appeal.⁶⁶

In its 1984 *Strickland v. Washington*⁶⁷ decision, the Supreme Court provided a two-part test to determine whether a conviction should be vacated as a result of ineffective assistance: (1) deficient performance and (2) prejudice as a result of this deficient performance.⁶⁸ Consequently, “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process” that the proceeding did not produce a “just result.”⁶⁹

As to the “deficient performance” element, courts presume that “counsel . . . rendered adequate assistance and made all significant

of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.”).

⁶⁴ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

⁶⁵ See, e.g., LAFAYE ET AL., *supra* note 24, at 1315; Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301, 312-13 (2009).

⁶⁶ *Kimmelman v. Morrison*, 477 U.S. 365, 378 (1986) (internal citations omitted) (citing *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

⁶⁷ 466 U.S. at 684 (“grant[ing] certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel.”).

⁶⁸ *Id.* at 687; see, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993); *Nix v. Whiteside*, 475 U.S. 157, 164 (1986). A criminal defendant satisfies the *Strickland* prejudice standard where he or she demonstrates “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694 (noting “reasonable probability is a probability sufficient to undermine confidence in the outcome”).

⁶⁹ *Strickland*, 466 U.S. at 686.

decisions in the exercise of reasonable professional judgment.’”⁷⁰ Reviewing courts must judge the conduct based on the specific facts of the case, “viewed as of the time of counsel’s conduct.”⁷¹ Therefore, “‘judicial scrutiny of a counsel’s performance must be highly deferential’ and [] ‘every effort’ must ‘be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’”⁷²

The defendant bears the burden of demonstrating that “‘counsel’s performance was deficient’”⁷³ To establish deficient performance, the defendant “must demonstrate that counsel’s representation fell below an objective standard of reasonableness.”⁷⁴ As the Supreme Court has instructed, “defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence.”⁷⁵

Nonetheless, the Supreme Court has “declined to articulate specific guidelines for appropriate attorney conduct,” instead instructing that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”⁷⁶ The “deficient performance” element “is necessarily linked to the practice and expectations of the legal community[.]”⁷⁷ To that extent, the *Strick-*

⁷⁰ *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (noting that a reviewing court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance”)); *Bullock v. Carver*, 297 F.3d 1036, 1044, 1046 (10th Cir. 2002) (noting that in analyzing attorney performance, courts “give considerable deference to an attorney’s strategic decisions”); *Hazard v. State*, 968 A.2d 886, 892 (R.I. 2009) (noting strong presumption that counsel’s conduct was adequate).

⁷¹ *Strickland*, 466 U.S. at 690.

⁷² *Bell v. Cone*, 535 U.S. 685, 698 (2002) (emphasis added) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)); *see, e.g., United States v. Davies*, 394 F.3d 182, 189 (3d Cir. 2005) (noting same); *Commonwealth v. Spatz*, 896 A.2d 1191, 1238 (Pa. 2006) (noting “it is well established that the effectiveness of counsel is examined under the standards existing at the time of performance rather than at the point when an ineffectiveness claim is made”); *Commonwealth v. Daniels*, 104 A.3d 267, 314 (Pa. 2014) (noting same).

⁷³ *Titlow*, 134 S. Ct. at 10, 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)); *see also Bullock*, 297 F.3d at 1046 (noting that “petitioner raising an effective assistance of counsel claim carries a ‘heavy burden’”).

⁷⁴ *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)) (internal quotation marks omitted).

⁷⁵ *Hinton v. Alabama*, 134 S. Ct. 1081, 1087-88 (2014).

⁷⁶ *Wiggins*, 539 U.S. at 521 (quoting *Strickland v. Washington*, 466 U.S. 668, 688) (internal quotation marks omitted); *see also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010), *Strickland*, 466 U.S. at 696 (rejecting “mechanical rules.”).

⁷⁷ *Hinton*, 134 S. Ct. at 1088.

land standard “provides sufficient guidance for resolving virtually all” claims of ineffective assistance, even though the particular circumstances of each claim may differ.⁷⁸

As one observer has aptly commented, “There are as many ways to be ineffective as there are lawyers and defendants in the criminal justice system.”⁷⁹ Attorney ineffectiveness may include failure to interview an important eyewitness,⁸⁰ failure to request that the court exclude inadmissible evidence,⁸¹ or failure to adequately advise a client about whether to accept a plea offer.⁸² A defense attorney’s “ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.”⁸³ As the Tenth Circuit has observed, “Certainly, an attorney’s ignorance will affect a court’s ineffective assistance of counsel analysis. An attorney’s demonstrated ignorance of law directly relevant to a decision will eliminate *Strickland*’s presumption that the decision was objectively reasonable”⁸⁴

⁷⁸ *Chaidez v. United States*, 133 S. Ct. 1103, 1107-08 (citing *Williams v. Taylor*, 529 U.S. 362, 391 (2000)). Therefore, “garden-variety applications” of the *Strickland* test do not produce new rules for purposes of the *Teague* retroactivity analysis. *Id.* at 1107. See *infra* Part III.B.2 for a discussion of the *Teague* retroactivity analysis.

⁷⁹ Tom Zimpleman, *The Ineffective Assistance of Counsel Era*, 63 S.C. L. REV. 425, 439-41 n.81 (2011). Concomitantly, however, “[t]here are countless ways to provide effective assistance in any given case.” *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

⁸⁰ See *Anderson v. Johnson*, 338 F.3d 382, 393-94 (5th Cir. 2003).

⁸¹ See *Kimmelman v. Morrison*, 477 U.S. 365, 372-73 (2012).

⁸² See *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

⁸³ *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (citing *Williams v. Taylor*, 529 U.S. 362, 395 (2000); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (2012)).

⁸⁴ *Bullock v. Carver*, 297 F.3d 1036, 1044, 1048-49 (10th Cir. 2002) (noting, however, “attorney’s unawareness of relevant law at the time he made the challenged decision does not, in and of itself, render he attorney’s performance constitutionally deficient.”); see, e.g., *Smith v. Singletery*, 170 F.3d 1051, 1054 (11th Cir. 1999) (noting that “[i]gnorance of well-defined legal principles is nearly inexcusable”); *Kennedy v. Maggio*, 725 F.2d 269, 272 (5th Cir. 1984) (holding, pre-*Strickland*, that “although counsel need not be a fortune teller, he must be a reasonably competent legal historian. Though he need not see into the future, he must reasonably recall (or at least research) the past”) (internal citations omitted).

D. *Uncertainty Concerning Counsel's Conduct Where Law is "Unsettled"*

As a general rule, defense counsel cannot be deemed ineffective for failing to raise an argument contrary to controlling law.⁸⁵ For example, "counsel cannot be held ineffective for failing to request a jury instruction that was affirmatively prohibited by [controlling] law at the time of trial."⁸⁶ As the Pennsylvania Supreme Court has explained, counsel is not ineffective by "failing to argue for a change in settled law."⁸⁷ The Fifth Circuit has similarly instructed that "there is no general duty on the part of defense counsel to anticipate changes in the law . . . [C]ounsel is not ineffective for failing to raise a claim that . . . courts [of the jurisdiction] have rejected repeatedly."⁸⁸

Importantly, however, a more difficult question arises where a defense attorney fails to act in accordance with a legal proposition or argument that (1) is not specifically dictated by controlling precedent at the time of the attorney's action, or inaction, but (2) is not specifically contrary to existing law; and (3) subsequent to the attorney's action, or inaction, becomes law. The dilemma may appear, for example, in the context of trial counsel's failure to preserve a legal argument at trial or where appellate counsel fails to raise a legal argument on direct appeal. The dilemma is also relevant where a defendant alleges that he relied upon his defense counsel's understanding of the law in deciding whether to plead guilty or proceed to trial.⁸⁹

⁸⁵ See, e.g., *Turner v. Calderon*, 281 F.3d 851, 872 (9th Cir. 2002) (instructing that attorney is generally not ineffective for failing to raise untenable issues on appeal); *Commonwealth v. Baumhammers*, 92 A.3d 708, 728-29 (Pa. 2014) (noting that "[t]rial counsel's performance is evaluated under the standards in effect at the time of trial"). As the Texas Court of Criminal Appeals has noted:

A defendant will have difficulty in establishing that his counsel provided constitutionally deficient legal advice when that advice is precisely in accord with many of the justices of our state's intermediate appellate courts. Surely, a reasonably prudent attorney in Texas is not constitutionally deficient if he relies upon pertinent judicial opinions in assessing the validity of a legal proposition.

Ex parte Chandler, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005).

⁸⁶ *Baumhammers*, 92 A.3d at 728-29.

⁸⁷ *Id.* at 728; see also *Commonwealth v. Fletcher*, 986 A.2d 759, 801 (Pa. 2009) (noting that counsel cannot be ineffective "for failing to request [jury] instruction . . . where counsel's actions were predicated on well-established Pennsylvania law prohibiting the grant of such requests or for failing to predict that the law would change") (citing *Commonwealth v. Rios*, 920 A.2d 790, 819-20 (Pa. 2007)).

⁸⁸ *Green v. Johnson*, 116 F.3d 1115, 1125 (5th Cir. 1997).

⁸⁹ See, e.g., *Smith*, 170 F.3d at 1054 (noting that "clarity or lack of clarity of Florida law about the use of an out-of-state conviction to enhance a defendant's sentence under the habit-

Some courts have concluded that counsel can be deemed ineffective even where (1) controlling law was silent on the legal proposition’s or argument’s merits but where (2) persuasive, non-binding authority supports the proposition or argument or where (3) controlling “foreshadowing” authority existed.⁹⁰ By contrast, other courts have reiterated a *per se* rule that counsel can never be expected to be “clairvoyant.”⁹¹ The treatment of the issue by both federal and state courts has been, at best, “patchwork.”⁹²

1. No Direct Supreme Court Guidance

The Supreme Court has not yet addressed this issue. The 1986 Supreme Court decision in *Smith v. Murray*⁹³ tangentially referred to the issue of attorney clairvoyance in the context of the procedural default bar to federal habeas review of state convictions.⁹⁴ As a gen-

ual-violent-felony-offender provision . . . is important in determining whether the advice given by . . . counsel was reasonable *when it was given*”); *Bolarinho v. State*, 2012 WL 2375305, at *4 (R.I. Super. Ct., June 20, 2012) (assessing adequacy of counsel’s advice to plead guilty and concluding that “[i]t is wholly unrealistic, impractical and contrary to law to require that criminal defense attorneys forecast future changes in immigration laws”).

⁹⁰ See, e.g., *United States v. Demeree*, 108 F. App’x 602, 604 (10th Cir. 2004); *Thompson v. Warden*, 598 F.3d 281, 288 (6th Cir. 2010) (instructing that defense counsel’s “‘failure to raise an issue whose resolution is clearly foreshadowed by existing decisions might constitute ineffective assistance of counsel.’” (quoting *Lucas v. O’Dea*, 179 F.3d 412, 420 (6th Cir. 1999))).

⁹¹ See, e.g., *United States v. Fields*, 565 F.3d 290, 294 (5th Cir. 2009) (instructing that “counsel is not ineffective for failing to raise a claim that courts in the controlling jurisdiction have repeatedly rejected . . .”) (citing *Green v. Johnson*, 116 F.3d 1115, 1125 (5th Cir. 1997)); *Commonwealth v. Bennett*, 57 A.3d 1185, 1201 (Pa. 2012) (noting that “counsel will not be faulted for failing to predict a change in the law.”); *State v. Brennan*, 627 A.2d 842, 846 (R.I. 1993) (noting that “[f]ailure to anticipate a change in the existing law does not constitute ineffective assistance.”). To illustrate, in its pre-*Strickland* decision in *People v. Lane*, the New York Supreme Court instructed:

[Counsel should not] be held accountable to a standard of clairvoyance, to anticipate disposition as to novel issues well in advance of consideration by any appellate court in the State. Neither may the appropriateness of counsel be tested through hindsight by finding, under today’s standards, that a motion made in 1977 should have included as an additional ground for relief a legal principle which had not been announced or considered by an appellate court until some years later, in 1979.

People v. Lane, 93 A.2d 92, 94 (N.Y. 1983).

⁹² Richard P. Rhodes, *Strickland v. Washington: Safeguard of the Capital Defendant’s Right to Effective Assistance of Counsel?*, 12 B.C. THIRD WORLD L.J. 121, 130 (1992).

⁹³ 477 U.S. 527, 536 (1986).

⁹⁴ Procedural default constitutes the sanction for a § 2254 petitioner’s failure to exhaust state remedies properly. *Martinez v. Ryan*, 132 S. Ct. 1309, 1316 (2012) (citing *Coleman v. Thompson*, 501 U.S. 722, 747-48 (1991)). Nonetheless, a state convict may obtain § 2254 review of a procedurally defaulted claim “by showing cause for the default and prejudice.” *Id.* Alterna-

eral rule, a defense attorney's ineffective failure to properly preserve a claim for review in state court may constitute cause to excuse a procedural default.⁹⁵ Yet, "the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default."⁹⁶

At the *Smith* defendant's murder trial in a Virginia court, his trial counsel had unsuccessfully objected to the admission of certain psychiatric testimony; however, counsel "consciously elected not to pursue that claim" on state direct appeal.⁹⁷ Counsel had assumed "that the claim had little chance of success in the Virginia courts."⁹⁸ Yet, subsequent to the *Smith* defendant's appeal, controlling authority changed, and counsel's "perception proved to be incorrect."⁹⁹

Holding that the attorney's conduct failed to constitute "cause," the Supreme Court noted, "[i]t will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule."¹⁰⁰ Citing *Strickland*, the Supreme Court added, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."¹⁰¹

tively, the petitioner must demonstrate that a fundamental "miscarriage of justice" will result without federal habeas review. *Id.*

⁹⁵ See, e.g., *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

⁹⁶ *Smith v. Murray*, 477 U.S. 527, 535 (1986) (quoting *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986)).

⁹⁷ *Id.* Specifically, trial counsel argued that the prosecutor could not elicit testimony from a mental health professional concerning the content of an interview conducted to explore possibility of psychiatric defenses at trial. *Id.* at 534.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 536.

¹⁰¹ *Smith v. Murray*, 477 U.S. 527, 536 (1986) (emphasis in original) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)) (viewing counsel's decision "in light of Virginia law at the time" of appeal in *Smith*).

2. Example: Foreshadowing *Blakely* and *Booker* after *Apprendi*

The issue of “clairvoyance” was notable within the context of the *Apprendi*, *Blakely*, and *Booker* cases.¹⁰² In 2000, the Supreme Court held in *Apprendi v. New Jersey*¹⁰³ 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.”¹⁰⁴ In its 2004 *Blakely v. Washington*¹⁰⁵ decision, the Supreme Court, relying on *Apprendi*, invalidated the sentencing system in Washington state; the state sentencing system erroneously permitted the imposition of a sentence above the statutory maximum based on facts not “reflected in the jury verdict or admitted by the defendant [in a guilty plea].”¹⁰⁶ Applying both *Blakely* and *Apprendi*, the 2005 Supreme Court decision in *United States v. Booker*¹⁰⁷ invalidated the federal sentencing statute requiring federal judges to apply a sentence under the Federal Sentencing Guidelines.¹⁰⁸

The “overwhelming majority of circuits” concluded that the failure of defense counsel to anticipate in the “wake of *Apprendi*, the rulings in *Blakely* and *Booker* [did] not render counsel constitutionally ineffective.”¹⁰⁹ In holding, for example, that appellate counsel was not ineffective for failing to raise an *Apprendi* claim on direct appeal in anticipation of *Blakely*, the Arizona Court of Appeals instructed, “Counsel’s failure to predict future changes in the law, and in particular the *Blakely* decision, is not ineffective because

¹⁰² See, e.g., *United States v. Johnson*, 53 F. App’x 43, 45 (10th Cir. 2002) (concluding within context of *Apprendi* that “counsel’s failure to predict future development in the law does not constitute constitutionally deficient performance.”).

¹⁰³ 530 U.S. 466 (2000).

¹⁰⁴ *Id.* at 490.

¹⁰⁵ 542 U.S. 296 (2004).

¹⁰⁶ *Id.* at 301-10, 313-14.

¹⁰⁷ 543 U.S. 220 (2005).

¹⁰⁸ *Id.* at 226.

¹⁰⁹ *United States v. Fields*, 565 F.3d 290, 296 (5th Cir. 2009); see, e.g., *Thompson v. Warden*, 598 F.3d 281, 288 (6th Cir. 2010) (concluding that appellate counsel did not perform deficiently by failing to raise a *Blakely*-type claim prior to *Blakely*); *State v. Simpson*, 627 S.E.2d 271, 275 (N.C. App. 2006) (concluding that counsel was not ineffective for failing to anticipate *Blakely* and noting that “[o]ther jurisdictions have found no ineffective assistance of counsel in similar circumstances.”); see also *State v. Febles*, 115 P.3d 629, 631 (Ariz. Ct. App. 2005) (concluding counsel was not ineffective for failing to “predict future changes in the law, and in particular the *Blakely* decision”).

‘[c]lairvoyance is not a required attribute of effective representation.’”¹¹⁰ The Arizona Court of Appeals added, “[t]here is a difference between ignorance of controlling authority and ‘the failure of an attorney to foresee future developments in the law.’”¹¹¹

Reaching a similar conclusion in *United States v. Fields*, the Fifth Circuit emphasized “the absence of case law at the time [of counsel’s action]” that would have indicated “the impending legal sea-change” of *Booker*.¹¹² The court in *Fields* noted that the attorney had declined to make an *Apprendi* objection to the federal sentencing guidelines given that all of the federal appellate courts had concluded that *Apprendi* did not invalidate the federal sentencing guidelines.¹¹³

Nonetheless, in the Sixth Circuit case *Nichols v. United States*, a dissenting opinion persuasively argued that an attorney provided ineffective assistance for failing to raise a *Booker*-type challenge prior to *Booker*.¹¹⁴ The dissent in *Nichols* noted that *Apprendi* “made clear that the Federal Sentencing Guidelines stood on uncertain ground in the wake of *Apprendi*”¹¹⁵ The dissent explained that several law review articles had predicted that the Federal Sentencing Guidelines “might not survive *Apprendi*.”¹¹⁶ The dissent in *Nichols* concluded:

[A]ny counsel whose performance satisfied an “objective standard of reasonableness,” would have at least been cognizant of possible applications of *Apprendi* to challenge the federal [sic] Sentencing Guidelines and the necessity of preserving those challenges in case the Supreme Court struck down the Guidelines while the defendant’s case was pending on direct review.¹¹⁷

¹¹⁰ *Febles*, 115 P.3d at 637 (quoting *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1541-42 (10th Cir. 1995)).

¹¹¹ *Id.* (quoting *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995)).

¹¹² *Fields*, 565 F.3d at 298.

¹¹³ *Id.* at 298 (asserting that “[t]he fact that the Supreme Court later held *Apprendi* applicable to judicially-found facts that increase punishment under the Federal Sentencing Guidelines is of no moment in light of the absence of case law at the time indicating the impending legal sea-change.”).

¹¹⁴ *Nichols v. United States*, 563 F.3d 240, 254 (6th Cir. 2009) (Moore, J., dissenting).

¹¹⁵ *Id.* at 255.

¹¹⁶ *Id.* at 254 (citing, e.g., Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615, 621-25 (2002)).

¹¹⁷ *Id.* at 255 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)) (citations omitted).

The dissent in *Nichols* added, “given the uncertain state of the law, the significant potential benefit to [the defendant], and the insignificant costs—strategic or otherwise—required to preserve the claim, adequate counsel would have preserved the [*Booker*-type] challenge on appeal.”¹¹⁸ As the *Nichols* dissent explained, “anyone who surveyed the legal landscape from 2002 to 2004 would have seen that the tide had shifted on determinate sentencing guidelines and need only have applied the Supreme Court precedent established in *Apprendi* to raise an argument that the enhancement of [the defendant’s] Guidelines range by judge-found facts” was unconstitutional.¹¹⁹

3. The Tenth Circuit: An Example of Inconsistency

As a more general matter, many courts apply an inconsistent approach. The Tenth Circuit demonstrates the often internally inconsistent consideration of the issue in many jurisdictions.

In *United States v. Demeree*,¹²⁰ a federal district court in the Tenth Circuit convicted the defendant of drug trafficking and other related offenses after a 1997 jury trial; she filed a federal habeas petition challenging her conviction.¹²¹ She argued that her trial counsel was ineffective for failing to request a jury instruction requiring jury unanimity as to the predicate violations for her Continuing Criminal Enterprise (CCE) conviction.¹²² At the time of the defendant’s trial in *Demeree*, the Tenth Circuit had not yet addressed the issue of whether a jury instruction was required; furthermore, the other federal courts of appeals “were divided” on the issue.¹²³

After the Tenth Circuit affirmed the *Demeree* defendant’s conviction on direct appeal, the Supreme Court held in *Richardson v. United States* that a jury “must unanimously agree not only that the defendant committed some ‘continuing series of violations’ but also that the defendant committed each of the individual ‘violations’ necessary to make up that ‘continuing series[.]’¹²⁴ The Supreme Court additionally

¹¹⁸ *Id.* at 256.

¹¹⁹ *Id.*; see also *Robinson v. United States*, 636 F.Supp.2d 605, 609 (E.D. Mich. 2009) (concluding that appellate counsel was ineffective for failing to raise *Booker*-type challenge pre-*Booker*).

¹²⁰ 108 F. App’x 602 (10th Cir. 2004).

¹²¹ *Id.* at 604.

¹²² *Id.*

¹²³ *Id.* at 605.

¹²⁴ *Id.* at 604 (quoting *Richardson v. United States*, 526 U.S. 813, 815 (1999)).

held that the *Richardson* rule applied retroactively to cases in which the direct appeal process had already concluded.¹²⁵

The Tenth Circuit decided that the *Demeree* defendant's trial counsel was ineffective for failing to request a unanimity instruction given "the [then-existing] circuit split" and the Tenth Circuit's "silence [on the issue]."¹²⁶ As the Tenth Circuit explained, "Although we do not require clairvoyance, counsel is obligated to research relevant law to make an informed decision whether certain avenues will prove fruitful."¹²⁷

Nonetheless, the Tenth Circuit applied a different approach in *Bullock v. Carver*.¹²⁸ The *Bullock* defendant had been convicted in Utah court of sexual offenses.¹²⁹ After he unsuccessfully exhausted state remedies, the defendant sought federal habeas review under 28 U.S.C. § 2254.¹³⁰ He argued that his trial attorney was ineffective for failing to make specific arguments concerning the competency of the children who testified as prosecution witnesses.¹³¹ The Tenth Circuit noted that the *Bullock* defendant's argument "relie[d] upon a decision handed down by the Utah Supreme Court five months after his trial."¹³² Terming the defendant's citation of the intervening case "unconvincing," *Bullock* explained, "[w]hen reviewing an ineffective assistance of counsel claim, we must make every effort 'to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.'"¹³³ The Tenth Circuit added, "we have rejected ineffective assistance claims where a defendant 'faults his former counsel not for failing to find existing law, but for failing to predict future law' and have warned 'that clairvoyance is not a required

¹²⁵ *United States v. Barajas-Diaz*, 313 F.3d 1242, 1245 (10th Cir. 2002) (holding for purposes of *Teague* analysis that *Richardson* applied retroactively). See *infra* notes 197-208 and accompanying text for an overview of *Teague* retroactivity.

¹²⁶ *Demeree*, 108 F. App'x at 605.

¹²⁷ *Id.* Yet, affirming the denial of federal habeas relief, the Tenth Circuit concluded that the *Demeree* defendant had failed to demonstrate prejudice as a result of her counsel's ineffective assistance. *Id.*

¹²⁸ 297 F.3d 1036 (10th Cir. 2002).

¹²⁹ *Id.* at 1051.

¹³⁰ *Id.* at 1040.

¹³¹ *Id.* at 1051.

¹³² *Id.* at 1051 (citations omitted) (citing *State v. Fulton*, 742 P.2d 1208 (Utah 1987)).

¹³³ *Id.* at 1052 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

attribute of effective representation.’”¹³⁴ The Tenth Circuit consequently deemed the *Bullock* defendant’s ineffectiveness claim to be meritless.¹³⁵

4. The Foreshadowing Approach of the Sixth Circuit

By contrast, the Sixth Circuit in *Lucas v. O’Dea* adopted a “foreshadowing” approach.¹³⁶ The Sixth Circuit in *Lucas* explained, “[C]ounsel’s failure to raise an issue whose resolution is *clearly foreshadowed* by existing decisions might constitute ineffective assistance of counsel.”¹³⁷ *Lucas* added, “‘Only in a rare case’ will a court find ineffective assistance of counsel based upon a trial attorney’s failure to make an objection that would have been overruled under the then-prevailing law.”¹³⁸

5. Multi-Factor Test of the Third Circuit

The Third Circuit applied a highly fact-dependent approach in *Virgin Island v. Forte*.¹³⁹ In *Forte*, the defendant was convicted of raping a female of a different race.¹⁴⁰ At trial, the prosecution used peremptory challenges to excuse all or almost all of the potential jurors of the defendant’s race; defense counsel failed to object.¹⁴¹ After the

¹³⁴ *Bullock v. Carver*, 297 F.3d 1036, 1052 (10th Cir. 2002) (quoting *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995); *Sherrill v. Hargett*, 164 F.3d 1172, 1175 (10th Cir. 1999)). *Bullock* alternatively noted that the intervening case would not have “unequivocally support[ed] [the defendant’s] argument.” *Id.*

¹³⁵ *Id.* at 1052-53. Similarly the Tenth Circuit, in *United States v. Harms*, instructed, “The Sixth Amendment does not require counsel for a criminal defendant to be clairvoyant.” *United States v. Harms*, 371 F.3d 1208, 1212 (10th Cir. 2004). *Harms* added, “Precedent from both the Supreme Court and our sister circuits clearly holds that counsel’s failure to raise or recognize a potential legal argument does not automatically render counsel’s performance constitutionally deficient.” *Id.*

¹³⁶ 179 F.3d 412, 420 (6th Cir. 1999).

¹³⁷ *Id.* (citing *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989)); see *Thompson v. Warden*, 598 F.3d 281, 288 (6th Cir. 2010) (citing *Lucas v. O’Dea*, 179 F.3d 412, 420 (6th Cir. 1999)).

¹³⁸ *Id.* at 420 (quoting *Brunson v. Higgins*, 708 F.2d 1353, 1356 (8th Cir.1983)); see also *Range v. United States*, 25 F.3d 1049, 1049 (6th Cir. 1994) (rejecting defendant’s contention that counsel was ineffective for failing to raise a claim where codefendant later “succeeded on a similar claim”).

¹³⁹ 865 F.2d 59 (3d Cir. 1989).

¹⁴⁰ *Id.* at 60.

¹⁴¹ *Id.*

trial, the Supreme Court held in *Batson v. Kentucky*¹⁴² that prosecutors cannot use peremptory challenges in a criminal case to exclude members of a defendant's race for racial reasons.¹⁴³ The defendant filed a federal habeas petition alleging that his trial counsel's failure to object constituted ineffective assistance; at the time of trial, the Supreme Court was considering *Batson*.¹⁴⁴

The Third Circuit instructed in *Forte*, “[o]nly in a rare case can an attorney’s performance be considered unreasonable under prevailing professional standards when she does not make an objection which could not be sustained on the basis of the existing law as there is no general duty on the part of defense counsel to anticipate changes in the law.”¹⁴⁵ *Forte* noted that some courts have held “that an attorney at a trial before *Batson* was not ineffective for failing to raise a *Batson* type objection because *Batson* was an explicit and substantial break with the prior precedent of [the Supreme Court].”¹⁴⁶

Nonetheless, *Forte* concluded that the defendant’s counsel provided ineffective assistance.¹⁴⁷ The Third Circuit emphasized that co-counsel and the defendant both had recommended that counsel object to the prosecutor’s actions.¹⁴⁸ The Third Circuit added that an objection would have required “little effort” and would not have been a reprehensible or unprofessional act.”¹⁴⁹ Noting that *Batson*-like objections “were being made at the time in other cases[,]” *Forte* reasoned, “Accordingly, even discounting for our advantage of hindsight, we think that an attorney prior to *Batson* should not have been startled at the suggestion that the Supreme Court would hold the practice of [prosecutorial peremptory challenges] . . . on racial grounds to be unconstitutional.”¹⁵⁰

¹⁴² 476 U.S. 79 (1986).

¹⁴³ *Id.* at 97-98.

¹⁴⁴ *Virgin Islands v. Forte*, 865 F.2d 59, 60-61 (3d Cir. 1989).

¹⁴⁵ *Id.* at 62; *see also* *United States v. Davies*, 394 F.3d 182, 190 (3d Cir. 2005) (concluding that defense counsel was not ineffective for failing to predict change in law); *Gattis v. Snyder*, 278 F.3d 222, 231 (3d Cir. 2002) (noting same); *Fountain v. Kyler*, 420 F.3d 267, 274 (3d Cir. 2005) (concluding attorney not ineffective for failing to predict future developments in law).

¹⁴⁶ *Forte*, 865 F.2d at 62 (citing *Poole v. United States*, 832 F.2d 561, 565 (11th Cir. 1987)).

¹⁴⁷ *Id.* at 64.

¹⁴⁸ *Id.* at 60.

¹⁴⁹ *Id.* at 63.

¹⁵⁰ *Id.* at 63 (emphasis added).

6. The Eighth Circuit’s “Dictated by Precedent” Approach

The Eighth Circuit has applied a “dictated by precedent” approach. The Eighth Circuit has emphasized that the relevant law governing counsel’s action is the “law at the time of [counsel’s action].”¹⁵¹ As the Eighth Circuit indicated in *Driscoll v. Delo*, a critical question is whether the law subsequent to the attorney’s action was “dictated by the precedent existing at the time of . . . [counsel’s action].”¹⁵²

Similarly, the Texas Court of Criminal Appeals in *Ex Parte Chandler* asserted, “Because the law is not an exact science and it may shift over time, ‘the rule that an attorney is not liable for an error in judgment on an unsettled proposition of law is universally recognized.’”¹⁵³ *Chandler* added, “Ignorance of well-defined general laws, statutes and legal propositions is not excusable and such ignorance may lead to a finding of constitutionally deficient assistance of counsel, but the specific legal proposition must be ‘well considered and clearly defined.’”¹⁵⁴ As the Eighth Circuit noted in *Chandler*, “[a] bar card does not come with a crystal ball attached.”¹⁵⁵

7. Per Se Approach in the Eleventh and Fifth Circuits

Many courts have appeared to adopt a *per se* approach.¹⁵⁶ For example, the Eleventh Circuit has instructed, “[A]s an acknowledgment that law is no exact science, ‘the rule that an attorney is not liable for an error of judgment of an unsettled proposition of law is universally recognized. . . .’”¹⁵⁷ The Eleventh Circuit broadly added, “[C]ounsel’s inability to foresee future pronouncements [by the

¹⁵¹ See, e.g., *Driscoll v. Delo*, 71 F.3d 701, 713-14 (8th Cir. 1995).

¹⁵² *Id.* at 713 (noting, however, that courts “cannot require trial counsel to be clairvoyant of future Supreme Court decisions in order to provide effective assistance.”).

¹⁵³ *Ex parte Chandler*, 182 S.W.3d 350, 358 (Tex. Crim. App. 2005).

¹⁵⁴ *Id.* (emphasis added) (quoting 3 RONALD E. MALLEN & JEFFREY M. SMITH LEGAL MALPRACTICE § 18.17, at 8 (5th ed. 2000)).

¹⁵⁵ *Id.* at 359.

¹⁵⁶ See, e.g., *Jameson v. Coughlin*, 22 F.3d 427, 429 (2d Cir. 1994) (instructing that counsel cannot “be deemed incompetent for failing to predict that [the appellate court] would later overrule [previously] reasonable interpretation of [state law].”) (citing *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993) (concluding that Sixth Amendment “does not require counsel to forecast changes or advances in the law”)).

¹⁵⁷ *Smith v. Singletary*, 170 F.3d 1051, 1054 (citing *Pitts v. Cook*, 923 F.2d 1568, 1573-74 (11th Cir. 1991)).

courts] . . . does not render counsel's representation ineffective. Clairvoyance is not a required attribute of effective representation."¹⁵⁸

The language of the Fifth Circuit in *United States v. Fields* also suggests a *per se* approach.¹⁵⁹ Noting that the Fifth Circuit has "never adopted the position that counsel might render ineffective assistance by failing to raise an objection whose favorable resolution is foreclosed by existing law[.]" the Fifth Circuit instructed in *Fields*, "there is no general duty on the part of defense counsel to anticipate changes in the law"¹⁶⁰ In its 2014 *Enderle v. State* decision, the Iowa Court of Appeals similarly directed "that counsel has no obligation to anticipate changes in the law."¹⁶¹ *Enderle* added, "Counsel need not be a crystal gazer; it is not necessary to know what the law will become in the future to provide effective assistance of counsel."¹⁶²

II. AUGURING A SOLUTION

The Supreme Court should resolve the disagreement among courts and provide some much needed consistency concerning the extent to which criminal defense counsel must predict changes in the law in order to provide effective assistance. As a preliminary matter, the Supreme Court should reiterate the general rule that defense counsel cannot be deemed ineffective for acting in accordance with controlling law at the time of counsel's representation.¹⁶³ Nonetheless, the Supreme Court should reject the *per se* approach of some jurisdictions.

Instead, the Supreme Court should hold that there are, in fact, very limited instances in which defense counsel can be ineffective for failing to act in accordance with a legal proposition that is not specifically dictated by controlling authority at the time of the attorney's action but where the legal proposition later becomes law. The Supreme Court should provide clear guidance as to what can consti-

¹⁵⁸ *Id.* (citing *Pitts v. Cook*, 923 F.2d 1568, 1573-74 (11th Cir. 1991)) (noting that "giving of legal advice that later is proven to be incorrect, therefore, does not necessarily fall below the objective standard of reasonableness").

¹⁵⁹ 565 F.3d 290, 294 (5th Cir. 2009).

¹⁶⁰ *Id.* at 298 (quoting *Green v. Johnson*, 116 F.3d 1115, 1125 (5th Cir. 1997)).

¹⁶¹ 847 N.W.2d 235, 237 (Iowa App. 2014) (noting "[o]ur focus is not on counsel's ability to predict the outcome of a case.").

¹⁶² *Enderle*, 847 N.W.2d at 237 (quoting *Snethen v. State*, 208 N.W.2d 11, 16 (Iowa 1981)).

¹⁶³ *See, e.g., Commonwealth v. Baumhammers*, 92 A.3d 708, 728-29 (Pa. 2014).

tute these limited circumstances based on the following considerations.

A. *Why a Per Se Rule Should be Rejected*

The Supreme Court should reject the *per se* approach that courts such as the Fifth and Eleventh Circuits have appeared to follow. Rejection of a *per se* rule is not inconsistent with Supreme Court jurisprudence. Furthermore, a rule that admits of some (albeit limited situations) in which an attorney can be ineffective for failing to predict the law properly recognizes the adverse consequences of waiving a legal argument as well as the predictive nature of common law decision making.

1. Rejection of *Per Se* Rule Not Inconsistent with Supreme Court Jurisprudence

Rejection of a *per se* rule would not contradict existing Supreme Court jurisprudence. The Supreme Court has instructed that courts reviewing ineffective assistance of counsel claims must assess counsel’s conduct on the basis of the facts of the particular case, “viewed as of the time of counsel’s conduct.”¹⁶⁴ Under the *Strickland* standard, “judicial scrutiny of a counsel’s performance must be highly deferential and [] every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.”¹⁶⁵

Certainly, it could be argued that these clear Supreme Court directives proscribe any possibility that an attorney can be ineffective for failing to anticipate changes in the law. Nonetheless, as some courts have aptly recognized, even when counsel’s conduct is evaluated based on his or her “perspective at the time,” it is possible that counsel should have reasonably anticipated a change in law at the time of his or her action, or inaction.¹⁶⁶ Nothing within Supreme Court case law militates against this possibility.

¹⁶⁴ *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

¹⁶⁵ *See, e.g., Bell v. Cone*, 535 U.S. 685, 698 (2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)).

¹⁶⁶ *See, e.g., Virgin Islands v. Forte*, 865 F.2d 59, 60-61 (3d Cir. 1989).

Importantly, the Supreme Court's language in *Smith v. Murray* pertained to the very limited cause exception to the procedural default bar—not a substantive claim of attorney ineffectiveness.¹⁶⁷ Specifically, a defense attorney's ineffective failure to properly preserve a claim for review in state court may constitute cause to excuse a procedural default.¹⁶⁸ Yet, “the mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default.”¹⁶⁹

To that extent, the “cause” exception defines attorney ineffectiveness in a manner that is considerably narrower than a substantive claim of attorney ineffectiveness. A defense attorney's failure “to recognize the factual or legal basis for a claim” or “failure to raise the claim despite recognizing it” would, in fact, constitute a viable substantive claim of attorney ineffectiveness.¹⁷⁰ Consequently, the reasoning in *Smith* does not preclude the possibility that a defense attorney's failure to anticipate a change in law may constitute ineffective assistance of counsel.

2. The Adverse Consequences of Failure to Preserve and Argue a Legal Argument

A *per se* rule should be rejected because of the profoundly detrimental consequences of an attorney's failure to recognize, and act in accordance with, a legal proposition, even if it is of an “arguable” nature. Thus, if an attorney fails to make an objection or present a specific legal argument during trial, the objection or specific legal argument generally cannot be raised on appeal.¹⁷¹ Thus, rights, including constitutional rights, “may be forfeited in criminal . . . cases

¹⁶⁷ 477 U.S. 527, 537-39 (1986).

¹⁶⁸ See *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

¹⁶⁹ *Smith v. Murray*, 477 U.S. at 535 (quoting *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986)).

¹⁷⁰ *Id.* at 535 (quoting *Murray v. Carrier*, 477 U.S. 478, 486-87 (1986)); see, e.g., *Benning v. Warden*, 345 F. App'x 149, 157-58 (6th Cir. 2009) (holding appellate counsel ineffective for failing to raise claim).

¹⁷¹ See, e.g., *LAFAVE ET AL.*, *supra* note 24, at 1315-18; *United States v. Joseph*, 730 F.3d 336, 341-42 (3d Cir. 2013).

by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.’”¹⁷²

In these circumstances, a defendant, to have any court address the omitted substantive legal issue will have to satisfy the added burden of demonstrating that his counsel was ineffective for failing to raise or argue the omitted substantive legal issue. For example, where a trial court erroneously admits hearsay evidence but defense counsel fails to object, the claim will be waived for appellate review. Therefore, the defendant will have to demonstrate that defense counsel was ineffective for failing to raise and, therefore, preserve the issue of whether the trial court erred in erroneously admitting the hearsay evidence.

Additionally, state convicts who raise ineffective assistance of counsel claims on federal habeas review under 28 U.S.C. § 2254 must satisfy a “doubly deferential” standard.¹⁷³ Subsection (d) of § 2254 provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings *unless the adjudication of the claim*—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.¹⁷⁴

Therefore, § 2254 presents “a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.”¹⁷⁵ As the Supreme Court has explained, “[i]f this standard is difficult to meet’ – and it is – ‘that is because it was meant to be.’”¹⁷⁶

When a federal habeas court reviews a state convict’s *Strickland* claim, “[t]he pivotal question is whether the state court’s application

¹⁷² *Henderson v. United States*, 133 S. Ct. 1121, 1126 (2013) (quoting *United States v. Olano*, 507 U.S. 725, 731 (1993)).

¹⁷³ *Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011) (citing *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009)) (noting “doubly deferential” standard that federal habeas courts apply to *Strickland* claims on § 2254 review).

¹⁷⁴ 28 U.S.C. § 2254(d).

¹⁷⁵ *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013).

¹⁷⁶ *Id.* (citing *Harrington v. Richter*, 562 U.S. 86, 102 (2011)).

of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard."¹⁷⁷ Thus, "[e]stablishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult" than is establishing only ineffective assistance.¹⁷⁸

Admittedly, the mere difficulty of obtaining relief does not, by itself, justify rejecting the *per se* approach that courts such as the Fifth Circuit have applied. Nonetheless, these barriers to relief as a result of defense counsel's mistakes are certainly relevant to any discussion of the extent to which defense counsel can be constitutionally ineffective for failing to anticipate a change in law.

3. The Predictive Nature of Common Law Decisionmaking

Ordinarily, the common law "assume[s] that those who face and must comply with new legal duties must have anticipated them."¹⁷⁹ As one scholar has explained, "A basic function of law and judicial opinions is to allow members of society to predict the future, thereby guiding them on how to order their lives"¹⁸⁰ Courts must "discover and apply extant social principles that the parties would reasonably have contemplated at the time of their acts or omissions."¹⁸¹ Often, even a "nascent rule" will be "rooted in standards that the disputants either knew or had reason to know at the time of their transaction, albeit standards that had perhaps not previously been officially recognized as legal rules."¹⁸²

To that extent, "the inherent characteristic of our common law" is "to encourage parties and their lawyers to speculate about and then predict the rules applicable to a particular transaction or occurrence, absent the existence of clear doctrine."¹⁸³ Therefore, it is not wholly unreasonable to expect defense counsel to at least anticipate changes

¹⁷⁷ *Harrison v. Richter*, 562 U.S. 86, 101 (2011).

¹⁷⁸ *Id.* at 88.

¹⁷⁹ Nim Razook, *Obeying Common Law*, 46 AM. BUS. L.J. 55, 90 (2009).

¹⁸⁰ Levin, *supra* note 51, at 1054 (arguing that "understandings generated from judicial opinions" create "reliance interests").

¹⁸¹ Razook, *supra* note 179, at 75.

¹⁸² *Id.*

¹⁸³ *Id.* at 76; *see also id.* at 69 (noting that "[i]f actors are typically aware of and influenced by societal mores (if less so about the potential consequences of disobedience), then one may assume that they typically fold these standards into their conduct").

in the law—particularly where those changes occur through judicially-crafted common law.

B. *Considerations in Developing a Rule*

In creating a solution to the issue of whether defense counsel can ever be ineffective for failing to anticipate changes in the law, the Supreme Court should consider factors such as the importance of sound judgment for an attorney, well-established constraints on retroactivity, and the societal interest in finality.

1. Respecting the Attorney’s Judgment

Any proposed solution should respect an attorney’s decision-making function.¹⁸⁴ The “decision-making process” is a critical component of lawyering.¹⁸⁵ As some observers have explained, “[g]ood judgment causes us to do ‘precisely the right thing at precisely the right moment.’”¹⁸⁶

Attorneys frequently ascertain “what the law is” by consulting “appellate opinions.”¹⁸⁷ Lawyers must use “inductive reasoning to discover the principles which flow from the cases. After inducting the law from the decided cases, the lawyer applies those principles deductively to the prediction and decision of the case at hand.”¹⁸⁸

Thus, a certain degree of “anticipatory” thinking and behavior comports with effective lawyering. Studies have shown that the more

¹⁸⁴ See Donald P. Robin, Ernest W. King & R. Eric Reidenbach, *The Effect of Attorney’s Perceived Duty to Client on Their Ethical Decision Making Process*, 34 AM. BUS. L.J. 277, 279 (1996) (seeking to provide empirical basis to assess attorney’s decision-making on ethical issues); see also *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) (noting that “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant”).

¹⁸⁵ Alexander Scherr, *Lawyers and Decisions: A Model of Practical Judgment*, 47 VILL. L. REV. 161, 163, 184, 279 (2002) (discussing “what the topics, processes and scope of the lawyering judgment are and what they ask of lawyers.”); see also, e.g., Angela Olivia Burton, *Cultivating Ethical, Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15, 15 (2004) (noting “exercise of judgment in legal decision-making and problem-solving is inherently complex”).

¹⁸⁶ STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS: INTERVIEWING, COUNSELING, NEGOTIATION, AND PERSUASIVE FACT ANALYSIS* 9 (4th ed. 2011).

¹⁸⁷ Scherr, *supra* note 185, at 166.

¹⁸⁸ *Id.* at 166-67.

open-minded a person is, the better his or her predictions are.¹⁸⁹ Furthermore, “rushing” to a decision produces bad predictions; instead, deliberating longer as an individual or group produces a more accurate forecast.¹⁹⁰ Additionally, experience and a willingness to revise previous assumptions aid in making better predictions.¹⁹¹

Moreover, any proposed solution should distinguish between the conduct of appellate counsel and trial counsel. Trial counsel has the ability to raise a larger number of issues at trial and, therefore, preserve issues for appeal. By contrast, appellate counsel must “winnow[] out” weaker potential appellate issues, focusing “at most on a few key issues.”¹⁹² Furthermore, to provide constitutionally effective assistance, appellate counsel does not need to raise “[a]ll colorable state law arguments” on direct appeal.¹⁹³

2. Respecting Established Constraints on Retroactivity

Rules of law announced in judicial decisions are inherently applied retroactively.¹⁹⁴ Nonetheless, “[a] problem often arises, though, when a court considers the application of a rule of law that seems ‘new’ in some significant way.”¹⁹⁵ A legal framework that countenances ineffectiveness due to a failure to anticipate a change in the law should not function as a means to avoid well established limits on the retroactivity of “new” rules.

Specifically, a state or federal convict (1) whose direct appeal process has ended and has, therefore, become “final” and, (2) who is seeking federal habeas review under either 28 U.S.C. § 2254 or 28 U.S.C. § 2255 ordinarily cannot benefit from a “new rule” of criminal procedure announced by the Supreme Court after a conviction has

¹⁸⁹ Walter Frick, *What Research Tells Us About Making Accurate Predictions*, HARVARD BUS. REV. (Feb. 2, 2015), <https://hbr.org/2015/02/what-research-tells-us-about-making-accurate-predictions>.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Jones v. Barnes*, 463 U.S. 745, 751-52 (1983).

¹⁹³ *Sellan v. Kuhlman*, 261 F.3d 303, 310 (2d Cir. 2001) (quoting *Jameson v. Coughlin*, 22 F.3d 427, 428 (2d Cir. 1994)) (stating “counsel made a ‘reasonable, strategic’ decision not to raise an argument based upon state law before the New York Appellate Division”); *see also* *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (noting appellate attorney “need not advance every argument, regardless of merit”).

¹⁹⁴ Shannon, *supra* note 38, at 812.

¹⁹⁵ *Id.* at 813.

become final.¹⁹⁶ As the Supreme Court explained in *Teague v. Lane*,¹⁹⁷ federal habeas relief is unavailable if granting the relief would require retroactive application of a “new” constitutional rule of criminal procedure or the application of a rule that would “break[] new ground or impose[] a new obligation on the States or the Federal Government.”¹⁹⁸

Thus, “a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”¹⁹⁹ The question of retroactivity is dependent on whether a Supreme Court “criminal procedure decision” is “novel.”²⁰⁰ In making the “newness” determination, a federal court hearing habeas petitions “surveys the legal landscape” existing at the time that the defendant’s conviction became final.²⁰¹ The federal court hearing a habeas petition must then assess whether a court considering the claim at the time the conviction became final “would have felt compelled by existing precedent to conclude that the rule [the defendant] seeks was required”²⁰² The question of “dictated by then-existing precedent” asks “whether no other interpretation was reasonable.”²⁰³ The *Teague* framework “validates reasonable, good-faith interpretations of existing precedents . . . even though they are shown to be contrary to later decisions.”²⁰⁴

Where a Supreme Court case is “merely an application of the principle that governed” a prior decision to “a different set of facts,” the case does not announce a “new” rule.²⁰⁵ Where the “beginning point” of the analysis is a rule of “general application, a rule designed

¹⁹⁶ See, e.g., *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997) (outlining retroactivity analysis) (citing *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *O’Dell v. Netherland*, 521 U.S. 151, 156 (1997)) (noting that habeas petitioner must demonstrate as a threshold matter that the Supreme Court decision from which “he seeks the benefit is not ‘new.’”).

¹⁹⁷ 489 U.S. 288 (1989).

¹⁹⁸ *Teague v. Lane*, 489 U.S. 288, 301 (1989); see also, *Butler v. McKellar*, 494 U.S. 407, 415 (1990) (instructing that where a result is merely “controlled” or “governed” by prior decisions, it is not enough to be a new rule under *Teague*).

¹⁹⁹ *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (citing *Teague v. Lane*, 489 U.S. 288, 301 (1989)).

²⁰⁰ *Id.* at 1107.

²⁰¹ *Lambrix*, 520 U.S. at 527 (citing *Graham v. Collins*, 506 U.S. 461, 468 (1993)).

²⁰² *Id.* (citing *Saffle v. Parks*, 494 U.S. 484, 488 (1999)).

²⁰³ *Id.* at 527-28, 538 (explaining that question is whether conclusion would have been “apparent to all reasonable jurists.”).

²⁰⁴ *O’Dell v. Netherland*, 521 U.S. 151, 156 (1997) (emphasis added) (citing *Butler v. McKellar*, 494 U.S. 407, 414 (1990)).

²⁰⁵ *Chaidez*, 133 S. Ct. at 1107 (citing *Teague v. Lane*, 489 U.S. 288, 307 (1989)).

for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.”²⁰⁶

A “new” rule will be applied retroactively only where (1) the rule is substantive or (2) the rule is a “watershed rule[] of criminal procedure” implicating fundamental fairness by mandating procedures central to an accurate determination of innocence or guilt.²⁰⁷

Teague does not circumscribe the authority of a state court “to grant relief for violations of new rules of constitutional law [announced by the Supreme Court] when reviewing its own State’s convictions”²⁰⁸ Nonetheless, many states similarly foreclose state convicts whose cases are in the state collateral review stage of litigation from benefiting from new rules of criminal procedure.²⁰⁹

Most defendants raise ineffectiveness claims on collateral review—well after a conviction has become final.²¹⁰ Therefore, any solution to the attorney clairvoyance dilemma has the potential to intersect with the *Teague* rule. A well-crafted solution to the problem of attorney clairvoyance should not undermine the *Teague* rule but should instead accommodate the reasonable constraints on retroactive relief that *Teague* imposes.

3. Respecting Societal Interest in Finality

Any solution to the issue of defense counsel clairvoyance must recognize the important societal interest in the finality of convictions.²¹¹ As the Supreme Court has cautioned:

An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest

²⁰⁶ *Id.*

²⁰⁷ *O’Dell*, 521 U.S. at 156; see also *Chaidez*, 133 S. Ct. at 1107 n.3 (discussing two exceptions); *Teague v. Lane*, 489 U.S. 288, 311 (1989).

²⁰⁸ *Danforth v. Minnesota*, 552 U.S. 264, 278-82 (2008).

²⁰⁹ See, e.g., *Commonwealth v. Spatz*, 896 A.2d 1191, 1243-45 (Pa. 2006) (citing *Commonwealth v. Hughes*, 865 A.2d 761, 780 (Pa. 2004)) (applying *Teague*).

²¹⁰ See Thomas M. Place, *Deferring Ineffectiveness Claims to Collateral Review: Ensuring Equal Access and a Right to Appointed Counsel*, 98 KY. L.J. 301, 301-03 (2009).

²¹¹ See generally Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the “Interest of Finality”*, 2013 UTAH L. REV. 561 (2013) (discussing the importance of finality in convictions).

“intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve.²¹²

To that extent, any solution to the “counsel clairvoyance” difficulty must prudently balance the “societal interests in finality, comity, and conservation of scarce judicial resources” and “the individual interest in justice”²¹³

C. *Proposed Multi-Factor Test*

As many courts have correctly noted, it should be a “rare case” in which a court will conclude that counsel was ineffective for failing to make a legal argument whose merits are not specifically dictated by controlling authority.²¹⁴ The Supreme Court has “declined to articulate specific guidelines for appropriate attorney conduct[.]”²¹⁵ Under the *Strickland* performance element, courts analyze “whether counsel’s assistance was reasonable considering all the circumstances.”²¹⁶ Thus, a totality of the circumstances test would be best suited to determine when if ever, an attorney is ineffective for failing to anticipate changes in the law.

1. Timing Restrictions

Any such “counsel clairvoyance” claim should be raised only during the pendency of a state convict’s first-round state collateral review²¹⁷ or during a federal convict’s first-round federal collateral review. The convict must raise the claim in accordance with estab-

²¹² *Harrison v. Richter*, 562 U.S. 86, 105 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 689-90 (1984)).

²¹³ *Schlup v. Delo*, 513 U.S. 298, 324 (1995) (referring to “miscarriage of justice exception” to procedural default rule). Some observers argue that restricting defendant’s right on post trial review is beneficial:

First, it allows the state to conserve the considerable judicial, prosecutorial, and public defense resources that posttrial review consumes. Second, it increases incentives on defense counsel to prevent error in the first place, improving the quality of representation defendants receive. Third, it improves deterrence by increasing the certainty and severity of punishment people can expect to receive for breaking the law.

Kim, *supra* note 211, at 563.

²¹⁴ See *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989).

²¹⁵ *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

²¹⁶ *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (emphasis added).

²¹⁷ If the ineffectiveness claim has been adequately preserved during state proceedings, the state convict should also be permitted to raise the claim during a first-round habeas petition.

lished state or federal procedures for challenging the effectiveness of trial or appellate counsel. At the time that convicts raise such a challenge, they must satisfy all other jurisdictional requirements for review.²¹⁸

As a temporal matter, the first round collateral review proceeding generally occurs within a few years of the defendant's conviction. As with most predictive undertakings, the further into the future that an attorney must predict, the more difficult it is for an attorney to predict accurately.²¹⁹ Therefore, this limitation eliminates imposing an unreasonable burden on an attorney to predict what the law might be in ten—or more—years.

If a subsequent case were to occur after the defendant's first-round collateral review proceedings have ended, then the defendant should be confined to the difficult task of raising a stand-alone claim arguing that the subsequent case (1) is not a "new rule" and (2) therefore applies retroactively under *Teague*.

2. Identifying Subsequent Controlling Authority

Additionally, the defendant must be able to cite to a specific and subsequent case or statute that, if it had existed at the time of the defendant's trial or appeal, would have been (1) controlling precedent and (2) outcome-determinative. Furthermore, consistent with the *Strickland* prejudice standard, the defendant must demonstrate that had his trial counsel or appellate counsel anticipated the subsequent case or statute, a reasonable probability exists that the outcome of the trial or appeal would have been different.²²⁰

Under this proposed solution, the defendant can cite subsequent legal authority even if it qualifies as a "new rule" under *Teague* and therefore would not ordinarily apply retroactively to convictions that have already become final. If a defendant were limited to only "*Teague*-retroactive" rules, there would be no need for the defendant to present the claim as a claim of ineffective assistance. Furthermore, as the Supreme Court explained in *Kimmelman v. Morrison*, (1) a

²¹⁸ 28 U.S.C. § 2254 (2012) (mandating jurisdictional requirements such as "custody").

²¹⁹ *Cf. Smith v. Murray*, 477 U.S. 527, 536 (1986) (noting that "even the most informed counsel" will not "anticipate a state appellate court's willingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule.").

²²⁰ *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (discussing prejudice standard).

claim alleging a constitutional error, and (2) a claim that trial or appellate counsel was ineffective “for failing to preserve or litigate the constitutional error have “separate identities and reflect different constitutional values.”²²¹

3. Relevant Predictive Factors

First, the defendant should be required to establish that at the time of his or her counsel’s conduct, the circumstances in then existing-law would have suggested to a reasonably competent attorney that a change in law was imminent. Consequently, the proper analysis should focus on the following objective indicia – not the subjective beliefs of the attorney.

Objective indicia could include whether the Supreme Court is currently considering the legal issue. To illustrate, in *Virgin Islands v. Forte*,²²² the Third Circuit found it significant that the Supreme Court had accepted certiorari in *Batson v Kentucky* and was about to issue a decision.²²³ Likewise, the pending consideration of the legal issue by an appellate court within the jurisdiction should be relevant.

A court assessing counsel’s conduct should also consider discussions of the legal question by legal commentators in law review articles and other publications existing at the time of the attorney’s action.²²⁴ Likewise, dicta reasoning in controlling case law within the jurisdiction may be a relevant predictive factor so long as the dicta provides a direct, on-point discussion of the legal issue. Although not dispositive, these materials might provide some objective guidance as to the reasonableness of the attorney’s action or inaction.

Furthermore, on-point discussions of the legal issue by other jurisdictions should be a relevant objective factor. Where this predictive precedent does not contradict any reasoning within the controlling authority of the jurisdiction in which the defendant’s case is being adjudicated, the persuasive precedent will be especially helpful in assessing counsel’s effectiveness.

Importantly, however, the approach that the Tenth Circuit applied in *United States v. Demeree* may require an inordinate amount

²²¹ 477 U.S. 365, 375 (1986).

²²² 865 F.2d 59 (3d Cir. 1989).

²²³ *Id.* at 61.

²²⁴ *See, e.g., Nichols v. United States*, 563 F.3d 240, 254-55 (6th Cir. 2009) (Moore, J., dissenting).

of “crystal ball gazing” by counsel. *Demeree* concluded that trial counsel was ineffective for failing to request a particular jury instruction “because of the circuit split and our silence.”²²⁵ Yet, by itself, the mere existence of a circuit split (or disagreement among state courts) about a particular legal issue would likely be insufficient to objectively trigger counsel’s awareness about a potential impending change in law. Nonetheless, the existence of the circuit split (or disagreement among state courts) may provide a critical objective factor that, when considered with other objective factors, would render ineffective an attorney who fails to anticipate a change in law.

4. How Clear Should the “Coffee Grounds” Be?

Importantly, the jurisdictions that have rejected a *per se* rule disagree about how clear the objective indicia should be to require attorney clairvoyance. The Eighth Circuit applies a “dictated by precedent approach.”²²⁶ By contrast, the Sixth Circuit has articulated a “foreshadowing” approach.²²⁷ The Third Circuit suggested that a reasonable attorney at the time of counsel’s action (or inaction) would not have been “startled” at the possibility that the law would change.²²⁸

The “dictated by precedent” approach is unhelpful. Notably, the “dictated by precedent” approach is the same standard that courts use to assess whether a rule is “new” for purposes of *Teague*.²²⁹ As a practical matter, the “dictated by precedent” approach is akin to the *per se* rule—an attorney can never be ineffective for failing to foresee a change in law. If a legal proposition is “dictated by precedent,” then it is already the law at the time of the attorney’s action.

Therefore, the Sixth Circuit’s “foreshadowing” approach, when informed by the Third Circuit’s “startled” approach, provides more meaningful guidance. As the Sixth Circuit explained in *Lucas v. O’Dea*, a defense attorney’s “failure to raise an issue whose resolution

²²⁵ *United States v. Demeree*, 108 F. App’x 602, 605 (10th Cir. 2004).

²²⁶ *See Driscoll v. Delo*, 71 F.3d 701, 713-14 (8th Cir. 1995).

²²⁷ *Lucas v. O’Dea*, 179 F.3d 412, 420 (6th Cir. 1999).

²²⁸ *Virgin Islands v. Forte*, 865 F.2d 59, 63 (3d Cir. 1989) (concluding that “an attorney prior to *Batson* should not have been startled at the suggestion that the Supreme Court would hold the practice of [prosecutorial peremptory challenges] . . . on racial grounds to be unconstitutional”).

²²⁹ *See supra* notes 197-209 and accompanying text for an overview of *Teague* retroactivity.

is clearly foreshadowed by existing decisions might constitute ineffective assistance of counsel.”²³⁰

Foreseeability, as a legal matter, is the “quality of being reasonably anticipatable.”²³¹ In tort law, foreseeability “is an element of proximate cause.”²³² Similarly, foreseeability is a critical element of causation in the context of criminal liability.²³³ Thus, a foreseeability standard is not wholly unreasonable given its presence in other aspects of the law. Its objective nature would not impose any unreasonable burdens on a defense attorney.

5. Distinguishing Between Counsel’s Failure to Foresee Statutes Versus Common Law

Any solution must distinguish between situations in which the “anticipatory” law is statutory and where the “anticipatory” law is judicially crafted. In the American legal system, “the legislature and the judiciary exercise concurrent power to accomplish legal change.”²³⁴ Nonetheless, “[a]ny credible justification for the doctrine of precedent must distinguish between courts and legislatures. That is, to be persuasive, a rationale must account for why a court should defer to its precedents but a legislature is free to reject its earlier laws.”²³⁵

In common-law systems, it is appropriate “for the courts to develop the law and to acknowledge that they are doing so. Legiti-

²³⁰ *O’Dea*, 179 F.3d at 412; see *Thompson v. Warden*, 598 F.3d 281, 288 (6th Cir. 2010).

²³¹ *Foreseeability*, Black’s Law Dictionary 676 (8th ed. 2004).

²³² *Id.* Proximate cause exists where a plaintiff’s injuries are a foreseeable consequence of the defendant’s negligent conduct. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 100 (N.Y. 1928) (providing traditional explanation of proximate cause). Within the proximate cause analysis, foreseeability asks “whether ‘the defendant’s conduct foreseeably and substantially caused the specific injury that actually occurred’ within the ‘specific, narrow factual details of the case.’” Susan S. Bendlin, *Cocktails on Campus: Are Libations a Liability?*, 48 SUFFOLK U. L. REV. 67, 91 (2015) (quoting *McCain v. Fla. Power Corp.*, 593 So.2d 500, 502-03 (Fla. 1992)); see also Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. U. L. REV. 77, 85-87 (2012) (providing more discussion of proximate cause and foreseeability dimension).

²³³ See, e.g., *Commonwealth v. Devine*, 26 A.3d 1139, 1148 (Pa. Super. Ct. 2011). Furthermore, under the Federal Sentencing Guidelines, in cases involving “jointly undertaken criminal activity,” a defendant’s sentence may be increased based on “all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” U.S. SENTENCING GUIDELINES MANUAL § 1B1.3(a)(1)(B) (U.S. SENTENCING COMM’N 2004).

²³⁴ HETZEL ET AL., *supra* note 30, at 3.

²³⁵ Levin, *supra* note 51, at 1057.

mate development is genuinely development; it is an evolutionary working-out of solutions to new problems in terms of the internal logic and pre-existing content of the law as a whole.”²³⁶ By contrast, the legislature may change the law in a more sudden fashion.²³⁷

Therefore, it is more difficult for an attorney to anticipate changes in legislation than it is to anticipate changes in the common law. Courts reviewing a defense counsel’s effectiveness under *Strickland* should be cognizant of this distinction.

6. Other Factors that Courts Should Apply in Assessing Counsel’s Performance

In assessing counsel’s failure to anticipate a change in law, courts should consider whether counsel’s anticipatory actions would have had any “downsides.”²³⁸ Furthermore, whether a client requested that his counsel raise an issue may be relevant but should not be determinative. In *United States v. Forte*, the Third Circuit emphasized that the defendant-client had asked his attorney to raise a *Batson* claim pre-*Batson*.²³⁹ Yet, as the Supreme Court observed in *Gideon v. Wainwright*, “lawyers in criminal courts are necessities, not luxuries.”²⁴⁰ Justice George Sutherland explained in the 1932 U.S. Supreme Court case *Powell v. Alabama*, “[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law . . . [h]e lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one”²⁴¹

CONCLUSION

As one scholar has explained, “forecasting looks at how hidden currents in the present signal possible changes in direction for companies, societies, or the world at large.”²⁴² A reasonably competent defense attorney should not be required to predict the law with the

²³⁶ Peter Gordon Ingram, *Justiciability*, 39 AM. J. JURIS. 353, 365 (1994).

²³⁷ See, e.g., Williams, *supra* note 35, at 829-30.

²³⁸ Cf. *Virgin Islands v. Forte*, 865 F.2d 59, 63 (3d Cir. 1989) (noting that objection would have required “little effort” and would not have been a “reprehensible or unprofessional act.”).

²³⁹ *Id.* at 62-63.

²⁴⁰ 372 U.S. 335, 344 (1963).

²⁴¹ 287 U.S. 45, 68-69 (1932).

²⁴² Paul Saffo, *Six Rules for Effective Forecasting*, HARV. BUS. REV. (July-Aug. 2007), <https://hbr.org/2007/07/six-rules-for-effective-forecasting>.

certainty of the Oracle of Delphi. Nonetheless, in certain circumstances, a reasonably competent defense attorney should anticipate a possible change in law based on objective predictive factors. A framework that recognizes this reality will meaningfully effectuate not only an accused’s Sixth Amendment right to counsel, but also all of the constitutional safeguards in a criminal prosecution that the right to counsel inherently protects.

