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Amanda Sweat  
*Trinity College*

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# Sacking Strickland: The Search for Better Standards in Determining Inadequate Counsel for Indigent Defendants

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Amanda Sweat '12

The case of the Scottsboro Nine lives in infamy as one of the most striking and controversial cases concerning inadequacy of legal counsel in the history of the United States. Wrongly accused of raping two conniving white women in search of revenge, these nine indigent African American men were appointed inadequate counsel and subsequently convicted and sentenced to death after three rush trials. With poor legal representation and an all white jury, they were tried three times in lower courts and received guilty verdicts at each stage in their proceedings. It was not until a riot in New York sparked the attention of the International Labor Defense and the NAACP that these innocent boys were provided with adequate counsel. Yet even with this acclaimed legal support, it ultimately took Supreme Court intervention to ensure that the principals of the Sixth Amendment's fair trial guarantees were actually preserved.<sup>1</sup> In a landmark decision that changed the face of Sixth Amendment interpretation in our country, Justice Sutherland claimed:

Under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment...in a capital case, where the defendant is unable to employ counsel and is incapable adequately of making his own defense...it is the duty of the court to assign counsel for him as a necessary requisite of due process of law...<sup>2</sup>

Thirty years later, the Court further expanded the right to indigent defense to cover all criminal cases through their opinion in *Gideon v. Wainwright*. Justice Black argued that although *Sutherland* restricted pro-bono state-provided indigent representation to capital cases, such a fundamental right to adequate counsel could not be so confined. "From the very beginning," claimed Black, "our state [has] laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law."<sup>3</sup> With this enlightening verdict, Clarence Earl Gideon and his attorney, Abe Fortas (later an Associate Justice on the Supreme Court) secured his acquittal and achieved the expansion of

right to pro-bono counsel for all indigent defendants to come.

With two such positive verdicts concerning the rights of poor defendants, it is easy to presume that the justice system has successfully resolved the issue of inadequate counsel and is able to ensure such legal representation in an effective way. Unfortunately, the public defense system currently in place continues to fail thousands of indigent individuals yearly due to decreased funding, a lack of political will to enact fiscal reforms, and unreasonably vague guidelines that too easily fall short of sufficiently screening for such judicial inadequacy. The case of *Strickland v. Washington*,<sup>4</sup> while attempting to better define the parameters determining whether a defendant has received inadequate counsel, created a two-pronged test that makes the ruling of inadequate representation “outcome determinative.” This alteration reverses the burden of proof back to the defendant, forcing them to establish innocence where he or she has essentially already been deemed guilty. The lack of stringent guidelines and the overly vague nature of the Court’s decision is especially troublesome in death penalty cases, where the sentence imposed is irrevocable and fundamentally different from other forms of punishment. Unreasonably harsh and arbitrarily invoked, capital punishment disproportionately affects indigent individuals who lack the economic resources that wealthy citizens are able to use in order to gain the best legal counsel available. As Justice Ginsberg so accurately remarked, “People who are adequately represented at trial do not get the death penalty.”<sup>5</sup> With these deficiencies in mind, this paper will explore where the Court went wrong in the *Strickland* decision and how such a damaging opinion can be altered to fairly ensure adequate counsel for all those represented at trial, especially in capital cases. The standards set in *Strickland v. Washington* fail to properly guarantee Sixth Amendment rights to a fair trial for individuals who are not fortunate enough to be able to secure private representation. Although it may be difficult and time consuming to enforce more exacting standards, failure to do so denies fundamental constitutional rights to a group of people who already lack a political voice to promote the protection of their own well being. Policy changes in terms of guidelines and funding for pro-bono services must be made in order to adequately reform the system and secure fundamental rights for all individuals.

### **I. Indigent Counsel and its Inadequacy**

Public defenders, while well intentioned, are faced with so many adversities in their profession that adequately representing their clients is a virtual impossibility. What with lack of funding, an increasingly wealthy opposition, massive case overloads, and judicial apathy in terms of appointment of counsel, it comes as no surprise that the system is unable to save indigent defendants from facing capital punishment unlike those who are able to afford private attorneys. A Mississippi Supreme Court Justice made the

observation that:

[He] could take every death sentence case that [the Court has] had where [they had] affirmed, give you the facts and not tell you the outcome, and then pull an equal number of murder cases that have been in our system, give you the facts and not tell you the outcome, and challenge you to pick which ones got the death sentence and which ones did not, and you couldn't do it. (Bright, Pg. 7)<sup>6</sup>

This sick game of “Death Penalty roulette” speaks to the fundamental unfairness that exists within the justice system in our country, a disequilibrium based on the fiscal differences between indigent defendants and wealthy government operated defense systems. While District Attorneys’ offices and Attorneys General are provided with experienced lawyers, special forensic experts, mental health professionals, medical examiners, and professional witnesses in order to build their cases,<sup>7</sup> public defenders are forced to fight tooth and nail to achieve extra funding in order to acquire such professional aid. Often they are required to submit extensive documentation of need in order to obtain the assistance of these skilled professionals, without which they have little chance of convincing presiding judges to rule in their favor. Ironically, such documentation is almost impossible to assemble without the very professionals the defenders are attempting to obtain. Bright states:

Courts often refuse to authorize funds for investigation and experts by requiring an extensive showing of need that frequently cannot be made without the very expert assistance that is sought. Many lawyers find it impossible to maneuver around this ‘Catch22,’ but even when a court recognizes the right to an expert, it often authorizes so little money that no competent expert will get involved. (Bright, Pg. 13)

With such an obvious advantage, the government attorneys have an exceedingly easy time outshining the defense. As a result, overcoming such a stacked deck is almost impossible and denies the defendant their right to a fair trial, as such unequal forms of representation clearly skew the results of the verdict in favor of the State.

Beyond inequalities in the resources available to public defenders, pro-bono counselors also receive wages falling well below the level needed to serve as efficient representation. Depending on the number of hours spent investigating and filing briefs on behalf of a specific defendant and on the base pay they receive for each case, public defenders may receive just above the minimum wage while representing a death penalty case. For instance, Alabama provides \$20 per hour for outside investigation with a limit of \$1,000 in total compensation. Under this system, two public defenders that

represented an indigent defendant spent so much time outside of the case investigating on behalf of their client that their wages fell to between \$4 and \$5 per hour.<sup>8</sup> The same is true in states such as Texas, which allots a maximum of \$800 for each capital punishment case.<sup>9</sup> Considering the rate at which Texas convicts and executes death row inmates, this exceedingly low compensation is outrageous and easily explains the high conviction rate in the state. The lack of sufficient compensation for public defenders deters competent attorneys from choosing pro-bono counsel as a career option. In addition, because the poor incentive system keeps the number of public defenders low, it forces unmanageable caseloads upon lawyers who are mostly inexperienced and apathetic towards such an inadequately rewarded profession. Although the American Bar Association (ABA) technically sets maximum caseloads for public defenders nationwide, the majority of defender offices are locally controlled and so overwhelmed by the number of incoming suits that they ignore such standards and push more cases onto a dwindling number of attorneys. This growing problem has been made worse by the recent economic crisis in our country. In fact, major budget cuts have slashed already struggling public defender programs, a fact that further exacerbating the case load issue while simultaneously diminishing what little compensation these attorneys formerly received.

The aforementioned budget problems could possibly be ameliorated by the addition of private lawyers who are willing to donate a portion of their time to pro-bono cases, such as those who are occasionally called upon by judges to serve as counsel for indigent defendants at the expense of their own firm. However, this system, while theoretically beneficial, is fundamentally flawed on many levels. Judges appointing such private attorneys often refrain from selecting the most qualified lawyers with the excuse that they have more important cases to handle and cannot afford to waste their time on pro-bono defense. The attorneys who are chosen are those who are either selected by means of nepotism, in order for judges to maintain advantageous connections with politicians vital to judicial reelection, or are actively sought out on the basis of poor performance.<sup>10</sup> Invoking the assistance of attorneys in the latter category also bolsters judicial attempts at re-election in terms of conviction rates. Since public opinion often supports the death penalty in many states, the public is likely to be assuaged when those convicted of atrocious murders are seemingly “brought to justice.” Bright states:

Judges either are intentionally appointing lawyers who are not equal to the task or are completely inept at securing competent counsel in capital cases. The reality is that popularly elected judges, confronted by a local community that is outraged over the murder of a prominent citizen or angered by the facts of a crime, have little incentive to protect the constitutional rights of the one accused in such a killing. (Bright, Pg. 24)

With the aforementioned difficulties apparent in the public defender programs as they exist in our country today, it is clear that a more exacting standard of adequacy is needed in order to provide some remedy to the astounding inequities inherent in this system. Justice Sandra Day O'Connor's Strickland test does nothing to combat the aforementioned inequities. In fact, the decision is so fundamentally flawed in terms of the way the opinion relates to the actuality of court appointed counsel that even if it were to provide some amelioration, the defendant's Sixth Amendment rights would still be violated.

## II. Strickland and its Failures

The case of David Washington does not differ factually from many death penalty cases and it presents no obvious distinguishing characteristics that would cause it to stand out among capital cases of its kind. Yet *Strickland v. Washington* established a standard of review so lackluster and vague that the majority opinion does indeed deserve recognition and review. Washington, a frustrated man in financial debt who was overwhelmed by his inability to provide for his family, confessed to committing three brutal murders against the advice of his court appointed counsel. He waived his right to a jury trial and insisted on an en banc hearing after being encouraged by the presiding judge's statement that he had "a great deal of respect for people who [were] willing to step forward and admit their responsibility."<sup>11</sup> Feeling helpless and unable to prevail considering the circumstances, Washington's attorney failed to call forth witnesses on his client's behalf, neglected to have him mentally examined, and declined to investigate any other mitigating factors concerning his emotional state at the time of the murder, all of which may have caused the judge to reconsider his decision to rule in favor of capital punishment. In the absence of strong mitigating factors, the Judge discovered numerous aggravating factors that easily pointed to a death penalty verdict despite his former statement of respect for the defendant's honesty.

In her majority opinion, Justice O'Connor, a moderate justice with a tendency to toe the middle line, established a test in order to determine whether counsel would be deemed ineffective. This standard was constructed in a way that was so deferential to counsel's judgment that the Sixth Amendment rights of the defendant were easily superseded. Her two-pronged approach to review of pro-bono representation states:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be

said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. (Strickland, Pg. 466 U.S. 699)<sup>12</sup>

This two-pronged approach was left intentionally ambiguous so as to ensure that professional decisions made in the name of “case strategy” are not automatically deemed characteristic of inefficient counsel. An indigent defendant must demonstrate that counsel’s action was not based in tactical litigation and was instead directly detrimental to the outcome of the case. Such a difficult barrier to breach was intended to “reflect the profound importance of finality in criminal proceedings.” It was determined that a stringent review would prevent excessive rehashing of cases that have already been examined and closed, thus eliminating some of the burden on the appellate courts. She also states that the vagueness of the standards employed are meant to prevent the discouragement of public defenders in taking on such difficult cases, as implementing more exacting standards might “dampen the ardor” of attorneys who would then be less willing to accept future indigent cases. All of these arguments led the Court to decide that Washington was provided with adequate counsel and would not be granted review of his case; he was executed July 13, 1984 by means of the electric chair.

While the facts of David Washington’s claim to ineffective counsel may not be particularly strong, the implications of this decision for other indigent defendants is frightening, and the ruling severely underestimates the danger that ineffective representation truly poses to poor individuals charged with capital crimes. Justice O’Connor’s emphasis on the result oriented prejudice test perpetuates the “guilty anyhow” syndrome, in which the ends justify the means: as long as the defendant is actually guilty of the crime, injustice is said to have been avoided by this test. Her standard also assumes that a court or judge is able to accurately determine what the result of the verdict would have been had effective counsel been offered, an impossibility that clearly distorts the test’s accuracy. Finally, Justice O’Connor’s emphasis on the finality of the judgment places too much importance on the desire to prevent an increase of inefficiency challenges and wrongly denies Sixth Amendment protections to those who need it most.

According to Richard R. Gabriel,<sup>13</sup> O’Connor’s interpretation of the Sixth Amendment:

Is inadequate because it suggests that the end justifies the means in the precise circumstance where the legitimacy of the end is dependent on the legitimacy of the means. One who is clearly guilty, the Court implies, should not be exonerated because counsel was clearly ineffective. (Gabriel, Pg. 1266)

Although the preservation of law and order is a worthy goal, such an

interpretation of the fundamental right to a fair trial goes against the very nature of our judicial system. If the process through which a trial is conducted is deemed unfair, any verdict stemming from that process must also be said to be unjust, regardless of the implications. This devolution of the adversarial system appears to fly directly in the face of the cornerstone principle of “innocent until proven guilty” and essentially asserts that as long as culpability is established, other factors cannot be said to overcome such faults. Gabriel identifies this as the “guilty anyhow” syndrome which is heavily supported by Justice O’Connor’s statement in *Strickland* asserting, “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed.”<sup>14</sup> Essentially, Justice O’Connor has ruled that if a court finds that the defendant’s verdict would not have reasonably been altered by the presence of more efficient counsel, the court is then allowed to pass over the first prong of the test and dismiss the defendant’s claim to inefficient counsel merely because he would have been guilty anyway. Such a sweeping and detrimental statement “allows reviewing courts to excuse acts and omissions of counsel with the ‘magic words ‘tactical decision,’ without inquiring as to whether the lawyer even thought about the problem.”<sup>15</sup> This backwards standard pushes the burden of proof back onto the defendant and creates an unreasonably high bar that is almost impossible to overcome because of the subverting effects of Justice O’Connor’s “prejudice first” attitude. Although the desire to reduce review of claims to inefficiency of counsel is reasonable, such deference to the “finality” of a verdict unfairly deprives indigent defendants of the full protections provided in the Constitution’s assurance of a fair trial. As Gabriel rightly asserts, “An unjust conviction cannot be upheld solely in the interest of the finality of the proceeding, for the ultimate goal of a criminal justice system is to do justice in all cases.”<sup>16</sup>

### III. Possible Solutions

Failing to protect the right to a fair trial for indigent defendants can be characterized as a denial of equal protection under the Fourteenth Amendment of the Constitution. Effective counsel should not be held to such a low standard as the “mirror test” under which an attorney that is merely present and breathing is assumed to be capable of providing adequate representation. Such a vague and unfair system as the one we have now must be altered in order to ensure that the liberties enumerated in our Constitution are adequately preserved for all citizens, regardless of their economic standing. Equality may come about in one of two ways: either through a reformation of the standards concerning inadequate counsel or through a fiscal equalization of public defender resources and compensation. Although the creation of a more exacting standard of review would require less political effort and resources, permanent solutions to the public defender problem will never come to fruition unless financial remedies are also put into place.



Attempts should first be made at altering the set of guidelines used to determine the efficiency of counsel so as to alter the problem internally and evade difficulties in acquiring funds. Instead of Justice O'Connor's two pronged standard, Gabriel suggests a "hybrid test" of review in which the defendant is only burdened with the task of proving that his or her representation "failed to make decisions that were objectively reasonable" considering the circumstances. Unlike Justice O'Connor's second prejudice prong, Gabriel asserts that "once a defendant meets the burden of proof," he or she has successfully proven that counsel was inefficient and should be provided with some form of remedy. This reformed standard speaks to the fact that fairness in the judicial process is the foremost concern of the courts and such justice should not depend on the ultimate outcome of the case. In addition to this increased deference to the defendant, it would also be prudent to create stricter guidelines in terms of performance of counsel to further combat apathetic representation. Courts should only appoint attorneys who have had experience in capital cases to work in this area. For example, a set number of cases, perhaps two or three, could be used as the benchmark. This would ensure that attorneys taking on such difficult cases are not dealing with foreign concepts and thereby further disadvantaging their clients. They should also be required to spend a minimum number of hours in securing witnesses, mental health examinations, and in investigating the personal history of their clients before they can be deemed to have sufficiently represented their indigent defendant. That being said, these standards would place more strain on an already fragile system; requiring prior capital case experience would severely limit the number of attorneys judges are able to appoint to indigent cases, and hour requirements without increased compensation would result in a severe decrease in salary for already underpaid individuals. Thus a restructuring of guidelines must necessarily be accompanied by fiscal reforms before any true change is able to occur.

As stated previously, state DAs and Attorney General offices receive an increasing level of resources each year to represent the state in death penalty cases. If the government is able to provide such high standards for their attorneys, should they not also be required to provide the same extraordinary resources to pro-bono attorneys, especially considering public defenders are also state funded? The disequilibrium denies equal rights to all citizens and unjustly favors the rights of the victims and their families over the rights of the defendant. While it is true that the burden of proof lies with the State and they must therefore employ more effort in order to demonstrate their claim, such inequalities between the two sides clearly indicate that the balance is too heavily tipped in their favor in an attempt to more easily villainize the defendant. The government should therefore ensure equal resources to public defenders and district attorneys such that the right to a fair trial is preserved. Increasing the compensation for public defenders will raise incentives to enter

this line of work, subsequently reducing caseloads on those attorneys already working for public defender offices and allowing counsel to spend more time with each client. As a result, they will be able to fully investigate all mitigating factors and provide their clients with a fair chance at avoiding the death penalty.

Some states have attempted to rule on questions of public defender funding and have seen relative success in the actual decisions of the court. In *Louisiana's State v. Peart*,<sup>17</sup> the court ruled that the Orleans Indigent Defense Program was unconstitutional because of its lack of funding and the inability of its attorneys to adequately represent clients due to overwork. The trial court ordered the caseload for the specific attorney involved to be reduced and suggested long-term funding initiatives to further reform the system. Even after the Supreme Court of Louisiana reversed the opinion concerning the unconstitutionality of the system, the State continued to assert that indigent defendants were being inadequately represented and ruled that the court should adhere to a new standard. Instead of the previous system in which courts assumed the effectiveness of government appointed attorneys, judges would now automatically assume that poor individuals had suffered from inefficient counsel and would require the state to prove otherwise, thus reversing the burden of proof once more to the State.<sup>18</sup> Similar holdings were addressed in *State v. Lynch*<sup>19</sup> in Oklahoma and *State v. Smith*<sup>20</sup> in Arizona, both of which initially spurred legislative reform to the public defender system and required the State to comply with certain guidelines and levels of funding that attempted to equalize the system. Although these three cases provided temporary relief, their decisions failed to bring about true reform in these states. While the new review system established in *Peart* demonstrated a step forward, the court continued to ignore claims to inadequate counsel, asserting that they did not rise to the *Peart* standard of review. Oklahoma's fiscal reforms provided initial relief to their struggling system but have dwindled in recent years due to the economic crisis. These judicial initiatives towards reforming the public defender system, while demonstrating the desire to equalize both sides of litigation in trials, fail to fully remedy the situation, a fact largely due to political apathy and lack of legislative clout.

Despite attempts to enact federal legislation concerning public defender reform, such efforts have been thwarted by legislators and prosecutors who claim that the suggested programs would be too costly and would also intrude on our country's principles of federalism. Bright states:

What is lacking is not money, but the political will to provide adequate counsel for the poor in capital and other criminal cases. Adequate representation and fairness will never be achieved as long as it is accepted that states can pay to prosecute a capital case without paying to defend one. Adequate representation and

fairness will never be achieved until ensuring justice in the courts becomes a priority equal to public concern for roads, bridges, schools, police protection, sports, and the arts. (Bright, Pg. 39)

Beneath this guise of “costliness” runs an underlying indication of vehement opposition to the idea that these so called “criminals” should receive equal justice for the atrocious crimes they committed against innocent victims. Legislators, hoping to appear “tough on crime,” are forced to renounce personal Sixth Amendment rights in order to appease voters who demonstrate strong approval for the death penalty and are encouraged by its implementation (regardless of the actual effects of such a verdict). The lack of strong political leadership in these initiatives represents a lack of knowledge on behalf of the public that supports such an unjust system and apathy on the part of legislators who, although supposedly protecting and promoting our constitutional rights, are in fact preventing equal justice for thousands of indigent individuals.

If our government is unable to increase resources and provide equal opportunity for justice in the public defender system, the only remaining step forward is to abolish the death penalty as a punishment altogether. How can a punishment so irrevocable and severe be imposed in the face of such an unjust system of representation? As Bright so aptly states:

If a local trial court cannot comply with the most fundamental safeguard of the Constitution by providing a capable attorney to one whose life is at stake, it should not be authorized to extinguish life. The solution is not to depreciate human life and the Bill of Rights by accepting what is available. Many small communities do not have surgeons, yet they do not rely on chiropractors to perform heart surgery. (Bright, Pg. 44)

In fact, even if these changes are made, there is no guarantee that they will be properly implemented and maintained, as is demonstrated by the failures in Louisiana, Oklahoma, and Arizona. The death penalty as a punishment is archaic and contradicts our country’s promotion of fundamental human rights. Although public opinion may indicate strong support for such a punishment, these statistics also reflect a tremendous lack of knowledge concerning indigent defense and an inability to fully comprehend the multitude of issues associated with our justice system. While the aforementioned solutions will absolutely be costly and difficult to implement because of legislative hurdles, price tags and political apathy should not be accepted as reasons for the judicial system’s failure to equally distribute justice to its citizens.

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