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The Impact of Race on Strickland Claims in Federal Courts in the South

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The Impact of Race on Strickland Claims in Federal Courts in the South

by

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Abstract

The primary goal of this study was to examine the legal and extralegal factors that lead to positive outcome Strickland claims. Specifically, the initial purpose of the research was to test whether a defendant's race affects his/her likelihood of receiving a positive outcome Strickland claim in the South. Prior literature has indicated that black defendants are more likely to receive the death penalty than white defendants, but this study did not find that race is a significant factor in determining the likelihood of a positive outcome Strickland claim in Southern circuits. Of the 207 Strickland claims studied across the Fourth, Fifth, and Eleventh Circuits, there were only eight cases of positive case outcomes. All eight of the favorable outcomes came from the Fifth and Eleventh Circuits, with no positive case outcomes coming out of the Fourth Circuit. When testing all relevant legal and extralegal factors in each case, there were no significant predictors of positive outcome Strickland claims.

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Chapter 1- Introduction

Though a half century has passed since the decision in *Gideon v. Wainwright* (372 U.S. 335, 1963) was handed down, there is still chaos surrounding indigent defense systems across the South. The right to some form of legal defense is guaranteed by the Sixth Amendment of the United States Constitution. Indigent defense, the representation by a licensed attorney of a criminal defendant who cannot afford to retain a private attorney, has been a subject of debate since the years leading up to *Betts v. Brady* (316 U.S. 455, 1943). *Gideon v. Wainwright* settled the issue for felony cases in 1963 when the United States Supreme Court unanimously ruled that indigent defendants have the right to receive a public defender. This right to an assistance of counsel carries with it very little assurance that the appointed attorney will be sufficiently competent to properly handle a given case, and in capital cases the immeasurably-high stakes of representation may fall on the shoulders of ineffective or inadequate counsel (Bright 1990; Bright 1994). From Alabama's contract defender system to the public missteps of the state of Georgia in the case of Jamie Ryan Weis, the problems that plague indigent defense in the South are nearly impossible to miss and most can be traced to the same source, a lack of funding (Ala. Code § 12-19-252; Steiker, 2013; *Weis v. State*, 2010).

Indigent defense systems in the South have long presented problems of constitutional proportions. Many of these states, including Alabama, Mississippi, South Carolina, and Georgia, present remarkably different systems for funding their indigent

defense systems. According to the Spangenberg Project at The Center for Justice, Law, and Society at George Mason University, the lack of adequate resources drives states, judicial circuits, and counties to appoint sub-par attorneys to indigent defendants (Stevens, Sheppard, Spangenberg, Wickman, & Gould, 2010). The Spangenberg Project's study shows how much variance exists between states when funding indigent defense programs.

In Alabama, there are 41 judicial circuits and each circuit court creates a system of rules that determines how they deliver indigent defense (Ala. Code § 15-12-2; Ala. Code § 15-12-4; Ala. Code § 15-12-26). Most districts in the state use an appointed counsel model in which private attorneys sign up to periodically represent indigent defendants for a fixed hourly wage. This method is preferable to the contract defender system used by approximately ten circuits in the state of Alabama. The contract defender system awards contracts of indigent defense to the lowest bidder. This almost incomprehensible method of appointing counsel raises ethical red flags (Bright & Lucas, 2010), but the state of Alabama continues to use contract defense.

Alabama is also the only state in which indigent death row inmates are not provided counsel after they have exhausted their initial appeals. An appeal by these capital defendants to the United States Supreme Court to receive counsel after their appeals were exhausted was denied certiorari in 2007.

Though Mississippi has an indigent defense system that is mostly funded by counties, the State has set up offices specifically to represent indigent defendants in capital trial and appeals processes. Because the Mississippi Office of Capital Defense Counsel and Mississippi Office of Capital Post-Conviction Counsel moved from general

fund agencies to special fund agencies in 2007, they derive their funding from fees and fines collected by the State. Upon switching the source of funding, Mississippi started appropriating funds to these offices through an increase in criminal assessment fees and fines on all violations, including traffic tickets, fish and game, felonies, DUI, and other misdemeanors (Stevens et al., 2010).

In South Carolina, circuit public defenders are state employees, not private attorneys or contracted counsel. These public defenders must be licensed to practice law in South Carolina. They are nominated by a selection panel of attorneys from each of the counties in a district. Upon nomination, circuit public defenders are appointed to a term of four years by the South Carolina Commission on Indigent Defense (3rd Circuit Public Defender Office, 2012). Funding for each circuit's public defenders comes from the State and each county in the district. South Carolina law states, "When private counsel is appointed pursuant to this chapter, he must be paid a reasonable fee to be determined on the basis of forty dollars an hour for time spent out of court and sixty dollars an hour for time spent in court. The same hourly rates apply in post-conviction proceedings. Compensation may not exceed three thousand five hundred dollars in a case in which one or more felonies is charged and one thousand dollars in a case in which only misdemeanors are charged." (S.C. Code Ann. § 17-3-50).

Like South Carolina, the state of Georgia has offices for state-employed public defenders in each of the state's 49 judicial circuits, as set forth by the Georgia Indigent Defense Act, O.C.G.A. § 17-12-8 (2003). In 2003, the Georgia General Assembly voted to reform the state's indigent defense programs by creating the Georgia Public Defender Standards Council. This reform was spearheaded by the Chief Justice of the Georgia

Supreme Court, Norman S. Fletcher. Chief Justice Fletcher established the Chief Justice's Commission on Indigent Defense. They determined that indigent defense services should be funded primarily by the state and that greater oversight and accountability would be attained with the establishment of judicial circuit public defender offices (Stevens et al., 2010). The statewide indigent defense system took effect on January 1, 2003, replacing Georgia's previous system in which counties funded and ran their own indigent defense offices. The Georgia Public Defender Standards Council's intent was to provide training, policies, and standards for public defenders in each district. The changes introduced by the Standards Council have not resolved the problems of the indigent defense system in Georgia, as seen in the case of Jamie Ryan Weis.

Weis was arrested for the murder of Catherine King, an elderly woman, in 2006. He did not have money for an attorney, so the state of Georgia appointed two public defenders to represent Weis in his subsequent proceedings. After several months with Weis, the public defenders were pulled from the case by the Georgia Public Defender Standards Council and replaced with private attorneys who had extensive backgrounds in capital cases. The new attorneys, Citronberg and West, fought for their client for roughly six months, filing motions on Weis's behalf and investigating the case until they ran out of funding. The Georgia Public Defender Standards Council refused to pay for expert witnesses, investigators, and eventually, the attorneys themselves. When they were no longer paid for their work, the council's attorneys removed themselves from Weis's legal team and were replaced with the same public defenders that represented Weis six months earlier (Orr, 2010).

Weis refused to work with the public defenders that were assigned to his case and eventually the judge approved the reinstatement of Citronberg and West, though the Georgia Public Defender Standards Council still refused to pay them. Three years and four months after Weis's arrest, his attorneys filed a motion for acquittal based on the violation of their client's right to a speedy trial. At the evidentiary hearing one month later, the council agreed to pay Citronberg and West for their work, but they were to be paid at a rate that was much lower than they believed to be necessary for an adequate defense due to the State's lack of available funding for indigent defense (*Weis v. State*, 2010).

The Georgia Supreme Court did not believe that the state was responsible for Weis's inability to receive a speedy trial. They blamed Weis himself for refusing to work with the public defender that was appointed to him after Citronberg and West removed themselves from the case. The Georgia Supreme Court did not give ample consideration to the key factor in play throughout the Weis case: the fact that it was repeatedly held up by a lack of funding. The State admitted that a lack of funding stalled the trial of Weis, but the Court did not believe that this was enough of a reason to believe that there was a "systemic breakdown in the public defender system" (*Vermont v. Brillon*, 2009).

One of the key attorneys who helped defend Weis pro bono in his trial, Stephen Bright, is also a leading proponent of increased funding for indigent defense programs. Stephen Bright is the president and senior counsel for the Southern Center for Human Rights. Bright (1994) published an article in the Yale Law Journal entitled "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer" which is highly critical of indigent defense programs in the South. He also points out that the

engine driving indigent defense programs into the ground is a lack of funding. This lack of funding has led to a number of problems, including a breakdown of the adversarial system.

For a publicly-funded adversarial system to work correctly in cases of indigent defense, both sides must have the proper skills, training, manpower and resources available to oppose each other in court. This becomes a problem when it is the duty of the State to provide adequate representation for a defendant. If the State is unable to ensure that its public defenders are as competent as the prosecution's attorneys then the prosecution automatically has the upper hand in the trial. An adversarial system cannot function properly if an imbalance exists at the onset of the proceedings.

On the appellate level, Bright points out that in the state of Georgia, specialists for the Attorney General and District Attorney offices both file briefs for the state. An indigent capital defendant in Georgia could be represented by an attorney who has no background in appeals, no familiarity with capital punishment law, and little or no reason to represent the defendant with vigor (Bright, 1994). Regardless of the amount of money a state, judicial circuit, or county budgets toward indigent defense, defendants who cannot afford an attorney have a right to a public defender under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, as stated in the Gideon decision. Though no one disputes this constitutional right, the practical application of a defendant's right to an attorney has baffled states for the last fifty years.

The confusion surrounding the assurances that are inherent to a defendant's right to an attorney sparked a debate over the competence level that was necessary for a public defender to constitutionally assist his/her client (Hall, 2003). In 1999, a settlement was

reached in a lawsuit by the American Civil Liberties Union against the State of Connecticut. Connecticut's public defender system was not sufficiently staffed or funded prior to the lawsuit, but the settlement ensured that compensation for public defenders would double and the number of public defenders and staff would increase. It also called for an increase in training, supervision, and monitoring in Connecticut's public defense system. (*Rivera v. Rowland*, 1999)

The decision in *Strickland v. Washington* (466 U.S. 668, 1984) was intended to end this debate by setting forth a two-pronged test that would attempt to determine whether a defendant's counsel was ineffective in a trial. First, a defendant must show that an attorney's performance on the case was deficient. Second, a defendant must show that the attorney's deficient performance prejudiced the outcome. This second part of this test is unusually difficult to prove in the court of law because there is no counterfactual that shows what would have happened if the attorney's performance had met the required standards of efficiency. As a result, the test that was intended to create clarity for states regarding the constitutional level of competency required for an attorney to represent a defendant left states with less clarity and more room to maneuver out of an "ineffectiveness of counsel" claim.

Ineffectiveness of counsel is perhaps most difficult to identify in plea deals because attorneys do not have to fight through trial, sentencing, and appeals proceedings with their clients in these cases. There is some evidence that plea bargaining has reached an epidemic level and the nature of our "innocent until proven guilty" system of justice has faded as plea deals have risen. The rise in population across the United States over the last decade, the increase in the number of laws on the books, and a lack of funding for

indigent defense programs in states, judicial circuits, and counties lead to overworked and underpaid attorneys who are often forced by a lack of time and money to offer plea deals for their clients (Fisher, 2003).

The two-pronged test in *Strickland* makes it difficult for public defenders to take on and fight every case that they receive with a reasonable level of competence. As such, the offices of public defenders are often plea mills which seek to lighten their impossibly heavy case load by convincing their clients to enter guilty pleas in lieu of trial, sentencing, and appeals proceedings. It is not uncommon for public defenders to represent several hundred defendants in a year. A 2001 New York Times article on the topic of indigent defense stated that one public defender in New York City represented 1,600 clients in the year 2000 (Fritsch & Rohde, 2001). An increase in funding for indigent defense programs would subsequently increase the resources that public defenders have to fight cases and add attorneys to the programs in an effort to lighten the caseload, as was the case in *Rivera v. Rowland* (1999).

This research proposes to examine the indigent defense systems for Alabama, Georgia, Mississippi, and South Carolina in order to highlight areas of concern surrounding ineffectiveness of counsel. The question that informs this research is:

1. Does a defendant's race affect his/her likelihood of receiving a positive judicial outcome?

In the pages that follow, I will examine the empirical and legal literature on indigent defense in Alabama, Georgia, Mississippi, and South Carolina. Additionally, I will review the history of *Strickland* claims and literature on racial tension in the South in

an attempt to determine whether minority defendants are less likely to receive positive Strickland claim outcomes than white defendants.

Chapter 2- Literature Review

The Sixth Amendment's promise of assistance of counsel to all who are criminally prosecuted means little on paper if it is not a legally-enforced reality. Assistance of counsel, a term loaded with ambiguity, has been redefined numerous times by courts in order to broaden or limit the rights of the accused. The Supreme Court of the United States first explained the necessity of assistance of counsel as laid out in the Sixth Amendment in *Powell v. Alabama* (287 U.S. 45, 1932), but the Court did not provide specific guidelines for determining the differences between effective assistance of counsel and ineffective assistance of counsel until *Strickland v. Washington* (466 U.S. 668, 1984) and *Wiggins v. Smith* (539 U.S. 510, 2003). In an ideal adversarial system, a defendant's counsel would not impact trial outcomes. Counsel would effectively follow procedure and the facts of the case would be the sole determinant of guilt or innocence. Unfortunately attorneys, like people of any other profession, exist on a continuum from most effective to least effective (Anderson & Heaton, 2012). Defendants cannot rest assured that their counsel will be effective in their representation. Liebman, Fagan, West & Llyod (1999), for example, found that between the years of 1973 and 1995 the number one factor contributing to the wrongful conviction of criminal defendants in capital cases was ineffective assistance of counsel. Indigent defendants have less assurance than those with retained attorneys that their counsel will be effective and motivated to vigorously represent them (Citron, 1991; Gould, Carrano, Leo & Young, 2013). This disadvantage for indigent defendants stems from the fact that indigent defense systems in the United

States are underfunded and undereducated (Gould et al., 2013; National Legal Aid & Defender Association, 2010).

The magnitude of the problem posed by inadequate counsel has not escaped the attention of numerous legal commentators or the United States Supreme Court. The two-prong test set forth by *Strickland v. Washington* (466 U.S. 668, 1984) to address ineffectiveness of counsel does not truly get at the causes of the ineffectiveness. The Supreme Court's plan for combating ineffective assistance is a back-end attempt at solving a problem that could be better approached from the front end with more funding and education (Bibas, 2004). The main cause of ineffectiveness of counsel is inadequate funding for indigent defense programs that are burdened with large caseloads and low pay (American Bar Association, 2006).

Though there is no existing formula for measuring what an adequate level of funding for all public defense programs would look like, some courts have acknowledged the problem that inadequate funding poses to public defense and they have attempted to initiate some degree of change with various court rulings that have mandated increased funding. *State v. Peart* (621 So. 2d 780 La., 1993) was an attempt by a trial court to push the City of New Orleans legislature to appropriate more funding for the purpose of indigent defense. The ruling called on legislators to fund more investigators, attorneys, library materials, secretaries, paralegals, law clerks, and expert witnesses (*State v. Peart*, 1993). This decision was not greeted well by the Louisiana Supreme Court, as they reversed the trial court's ruling while still acknowledging that the indigent defense system in New Orleans was broken, overworked, and underfunded. The *Peart* decision created enough of a stir in Louisiana for the Louisiana State Legislature to increase

funding for indigent defense, but the controversy quickly died down and funding for indigent defense was returned to a place of inadequacy (Bibas, 2004). While judges have the ability to make sweeping changes to indigent defense programs, they often refrain from doing so due to their beliefs regarding the role of courts in policy-making (Feeley & Rubin, 2000).

Inadequate funding for indigent defense is not the only suggested front-end solution to the problem of ineffective assistance of counsel. Some indigent defenders and scholars have proposed the idea of a degree program that would provide education to equip indigent defenders with the educational tools they need to effectively defend their clients. Such a program would be led by expert faculty who understand the pressures of large workloads and insufficient funding that are inherent to indigent defense (National Legal Aid & Defender Association, 2010). Although there is currently no degree program designed specifically for public defenders, the National Legal Aid & Defender Association's National Defender Leadership Institute offers leadership training for public defenders at all levels of the system, including Chief Public Defenders, public defender supervisors, assigned counsel and contract attorneys (National Legal Aid & Defender Association, 2014). These training sessions teach public defenders how to obtain the resources that they need to efficiently and effectively represent their clients, how to provide the highest quality representation possible, and how to establish themselves as equal partners in the eyes of other actors in the criminal justice system. Although the National Defender Leadership Institute has been sustained through the donation of time and resources by leaders in the public defense community, a lack of funding has forced the group to put on pause their goals of national training programs for the purpose of

bringing agencies together to improve the overall quality of the public defense system (National Legal Aid & Defender Association, 2010).

Historical Context

Indigent defense, and the systemic legal issues that are raised due to its many inadequacies, has been a much discussed issue in the criminal justice system since the 1930's when the Supreme Court first decided *Powell v. Alabama* (287 U.S. 45, 1932). The *Powell* decision was the first time that the United States Supreme Court intervened to reverse a state criminal conviction that violated the Fifth, Sixth, or Eighth Amendments of the United States Constitution. This decision was handed down during the time period between the First and Second World Wars, when the South was wrestling with issues of racial discrimination (Klarman, 2000). Importantly, the Supreme Court took judicial notice of the fact that black criminal defendants were unable to secure counsel in cases across the South, especially in capital cases. This decision, and others during this time period, ushered in an era of heightened Court scrutiny of practices that would deny black defendants basic rights in the criminal justice system that literally could be the difference between life and death.

The Scottsboro trial, a series of cases that yielded decisions in both *Powell v. Alabama* (287 U.S. 45, 1932) and *Norris v. Alabama* (294 U.S. 587, 1935), was the “poster child” for the racial discrimination that plagued courts in the 1930's South. Briefly stated, the Scottsboro trial arose from an altercation with a group of seven white men and two white women on a train. The Scottsboro Boys were later accused of rape by the two women. The accused, consisting of nine black teenagers ranging in age from 13 to 19, were arrested in Paint Rock, Alabama by a search party that was ordered by a local

sheriff to “capture every Negro on the train and bring them to Scottsboro” (Linder, 2000). Not long after their arrests and arrival in Scottsboro, the nine accused teenagers had to be protected by the National Guard because of a lynch mob that had gathered outside of the Scottsboro jail (Anker, Braugher & Goodman, 2000).

The lynching mentality in the South is perhaps the best way to describe cases of white-on-black criminal accusations in the 1920’s and 1930’s. Duru (2003) explains how lynching, the killing of a person or persons who are suspected of a crime without a formal trial, was commonplace during this time period. When black men were actually given a trial, the proceedings were often dominated by mobs of whites whose presence would intimidate jurors into returning a guilty verdict, as was the case in *Moore v. Dempsey* (261 U.S. 86, 1923). In *Moore*, twelve black men were sentenced to death following The Elaine Riot, a clash between whites and blacks in Arkansas that resulted in “many Negroes and some whites killed” (*Moore v. Dempsey*, 1923). Over 100 other black men were convicted of crimes in connection to the race riot. During their trials, white men and women filled courthouse. Their presence pressured jurors into returning verdicts of guilty, some of which were returned with less than four minutes of deliberation. Justice Holmes delivered the majority opinion for the Court and indicated that affidavits and allegations showed that there was “never a chance for the petitioners to be acquitted; no jurymen could have voted for an acquittal and continued to live in Phillips County, and if any prisoner by any chance had been acquitted by a jury, he could not have escaped the mob” (*Moore v. Dempsey*, 1923).

Murder trials were not the only proceedings that included mobs of whites calling for the convictions of blacks. Black men were often accused of rape and given rushed

trials before being put to death or lynched by the community. As Thomas Nelson Page (1904) stated, the goal of lynching was to “put an end to the ravishing of [white] women by an inferior race”. The paranoia surrounding the rape of white women by black men caused the collective concept of rape to reach beyond the legal definition to include attempted rape, aggravated assault, and even common incidents of nudging (Brundage, 1993). The very fact that black men were brought to trial instead of being lynched in a rape case involving a white women was a step toward justice. Unfortunately, trials in the South were marred with racial discrimination, making the step toward justice a small one (Duru, 2004). Though the Scottsboro Boys escaped the fate of lynching, the legal process which they were subjected to amounted to a formalized process of “lynching”.

Only one of the nine Scottsboro Boys, thirteen year-old Roy Wright, escaped the sentence of death due to a mistrial resulting from the prosecution’s inability to ask for the death penalty in his case (Duru, 2004). The national outcry that resulted from the clear injustices surrounding the case of the Scottsboro Boys was in stark contrast to the number of citizens in Alabama who believed that they had followed the rule of law at every point in the case and tried the men legally (Bright, 1994). Fortunately, the outcry for justice was enough to make the Supreme Court of the United States intervene in *Powell v. Alabama* (1932).

In *Powell* (287 U.S. 45, 1932), the United States Supreme Court ruled that the Scottsboro Boys were deprived of their due process rights. The Court based its ruling on three main principles: 1) the nine men were not given a fair, impartial, and deliberate trial, 2) they were denied their right to assistance of counsel due to the fact that they were not given time to consult with their attorneys and prepare for trial, and 3) they were not

tried by a jury of their peers (*Powell v. Alabama*, 1932). More importantly, the Supreme Court's ruling forced states to provide counsel to indigent defendants in capital cases and opened the door to assistance of counsel challenges in cases that did not involve the death penalty.

Along with the *Powell* decision, the Scottsboro trial produced the 1935 Supreme Court decision of *Norris v. Alabama* (294 U.S. 587, 1935). In *Norris* (1935), the Supreme Court found that the exclusion of members of a particular race from a grand jury pool from which a defendant is indicted, or the petit jury pool that tries a defendant, is unconstitutional. Such exclusions based on race or skin color are a violation of the Equal Protection Clause of the Fourteenth Amendment. After the *Norris* (1935) decision, courts across the South were forced to ban the overt displays of racism (e.g., lynching, excluding a particular race from a jury) that had been common until this time. Unfortunately, racism did not die with the *Norris* decision. Instead, overt racism gave way to subtle, unconscious forms of racism.

The Effect of Subtle Racism on Courts in the South

Successful challenges to the overtly racist trials of *Moore v. Dempsey* (1923), *Powell v. Alabama* (1932), and *Norris v. Alabama* (1935) gave Southern blacks a reason to be optimistic about the possibility of a future of racial equality in the courts system (Klarman, 2000). While racism in courts became less apparent, the presence of racism did not leave courts entirely. The type of racism left behind after blatant forms of racism were banned is known as unconscious racism. Unconscious racism in the courts system occurs when courts employ subtle, passive tactics that promote discrimination and biases based on race (Lawrence, 1987). These biases are much less difficult to detect than the

obviously discriminatory practices of lynching and the denial of minorities from jury selections; however, the existence of unconscious racism is important to identify and understand in order to link racism to the modern-day courts system.

Because of our nation's well-documented history with racism, it is a part of the culture of the United States. The passage of laws to protect minorities from racism will not solve the issue entirely, though it is a step in the right direction. Unconscious racism will continue to exist long after overt racism because it stems from the learned process of attaching significance to race that is internalized from a young age (Lawrence, 1987). Everyone experiences unconscious racism because it is a shared part of our history. Charles R. Lawrence, III shows that psychoanalytic theory can explain the way that subtle forms of unconscious racism make their way into the mind of an individual. He states that although everyone experiences some racism in their mind, the Ego (the conscious part of the mind) must suppress or hide racist attitudes that come from the Id (part of the mind that operates unconsciously) in order to appear to be in line with what is morally and socially acceptable (Lawrence, 1987). Even with the help of the Id, many people unintentionally let their learned racism show outwardly through unconscious racism. Such racism poses a problem for lawmakers and those in power because it occurs without intent. If unconscious racism in courts lead to disadvantages for minorities, an ethical issue arises. Must intent to discriminate exist in order for a law to be found unconstitutional? According to the United States Supreme Court, the answer is yes. In *Washington v. Davis* (426 U.S. 229, 1976), the Supreme Court ruled that a law that results in a racially-discriminatory effect is not a violation of the Constitution as long as the intent of the law was not racially-discriminatory. This puts the burden on minorities

to not only show that a law negatively affects them, but that the effect is a result of a racially-discriminatory purpose. The issue was revisited in *McCleskey v. Kemp* (481 U.S. 279, 1987) when the Supreme Court considered evidence out of Georgia, known as the Baldus study, which showed that defendants on trial for the murder of a white individual are 4.3 times more likely to receive the death penalty than defendants on trial for the murder of a black individual. Although the racist effect is clearly shown in the statistics provided by the Baldus study, the Court again ruled that there was no obviously conscious, clear bias on the part of the courts system to invalidate the current state of law (*McCleskey v. Kemp*, 1987). Racism may not have an obvious source or intent, but the existence of even the most subtle racism keeps courts fundamentally unfair and puts minorities at a distinct disadvantage.

The lack of equality for minorities in the courts system is just one of many examples of how racial stratification enables the race with the most social and political power to have an advantage over minorities (Bonilla-Silva, 1999). Although the black population in the United States does not have to deal with lynching and other forms of overt racism that stood out in the early 1900's, the effect of subtle and unconscious racism in the courts system leaves the fight for racial justice unfinished. Lawrence Bobo calls the modern form of racism "a more covert, sophisticated, culture-centered and subtle racist ideology, qualitatively less extreme and more socially permeable form of racism than its predecessor Jim Crow racism" (Bobo, 2011). Modern racism will only be eradicated in the United States when an understanding exists throughout the country that race is entirely socially constructed and not a biological fact (Sharfstein, 2003).

Indigent Defense Post-Norris

The *Powell* (1932) and *Norris* (1935) decisions show that the 1930's Supreme Court was clearly moving in the direction of protecting minorities and poor defendants. In 1938, they expanded the types of cases in which counsel must be appointed to indigent defendants. In *Johnson v. Zerbst* (304 U.S. 458, 1938), the United States Supreme Court ruled that federal defendants have a right to be represented by an attorney unless they refuse this right and fully understand their decision. Justice Hugo Black, writing for the majority, held that, "since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty" (*Johnson v. Zerbst*, 1938). This ruling hinged upon the Supreme Court's interpretation of the deprivation of life and liberty. In Justice Black's view, a federal offense carried with it the possibility of a punishment that could rise to a level of deprivation of life and liberty. The Sixth Amendment's guarantee of assistance of counsel to all federal defendants further opened the door to indigent defendants who sought counsel in their cases. Though capital and federal cases mandated that counsel be provided to defendants who could not afford their own attorney, issues surrounding non-capital and state level cases would not be decided until the 1940's.

In 1942, the Supreme Court's decision in *Betts v. Brady* (316 U.S. 455, 1942) halted the progress made in the fight to provide legal representation to all defendants who were facing deprivation of life or liberty. *Betts* was charged with robbery and refused counsel by his trial judge. He was subsequently forced to represent himself at trial, where he was convicted. *Betts* filed writs of certiorari to circuit courts and courts of

appeals, but all were denied (*Betts v. Brady*, 1942). The United States Supreme Court granted certiorari and heard Betts's argument on the issue of why he should be granted counsel in a non-capital state-level case. The Court ruled 6-3 that Betts did not have a constitutional right to appointed counsel. Justice Owen Roberts wrote in his majority opinion that

"the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel." (*Betts v. Brady*, 1942)

Justice Roberts's opinion clearly states that he does not believe that self-representation is a major hurdle for indigent defendants to jump. He believed that due process and a fair trial could be achieved in some cases through a defendant's representation of himself or herself. Justice Hugo Black, on the other hand, held a different view. In his dissent, he wrote

"a practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented." (*Betts v. Brady*, 1942).

Justice Black believed that to deny someone the right to appointed counsel based on their financial status would be a violation of the Equal Protection Clause of the Fourteenth Amendment. Today, defendants who do not have the financial ability to hire their own counsel must be appointed an attorney by the State (National Conference of State Legislatures, 18 USC § 3006A).

The only substantial difference between the reasoning in *Johnson v. Zerbst* (1938) and the *Betts v. Brady* (1942) is that Johnson was a federal defendant. Justice Black did not believe that the detail of federal or state defendant was reason enough to make drastically different rulings that affect the life and liberty of an individual, or an entire economic group of people. The majority's decision did offer one positive change to the application of the Sixth Amendment's provision of counsel; the Court added to their decision that counsel must be appointed in cases where the defendant is illiterate, mentally incapable of representing himself or herself, or in unusually complicated cases (*Betts v. Brady*, 1942).

Justice Black's concerns regarding the applicability of the Sixth Amendment's assistance of counsel provision to the states were partially alleviated over two decades later in *Gideon v. Wainwright* (1963). Clarence Earl Gideon was convicted of petty larceny in 1961 in a case that was based on evidence that was entirely unreliable (Lewis, 1964). From the very beginning of his legal process, Gideon made it clear that he believed he was entitled to legal representation. Even after being told by his trial judge that he was not entitled to a public defender, Gideon stated that he believed that his Sixth Amendment right was being violated. This belief drove Gideon to challenge the Supreme

Court's previous holding in *Betts v. Brady* (1942) that only defendants in capital cases and federal defendants were guaranteed assistance of counsel.

Gideon argued that the Sixth Amendment's provision of assistance of counsel is applicable to states through the Fourteenth Amendment. On March 18, 1963, the Supreme Court of the United States announced that they unanimously agreed with Gideon that assistance of counsel is guaranteed to all defendants who are facing the deprivation of life or liberty, overturning their precedent set in *Betts v. Brady* (1942). Justice Clark's concurring opinion highlighted the fact that the Sixth Amendment does not make a distinction between capital crimes and non-capital crimes, so there can be no sound constitutional argument that rests on the basis that the Sixth Amendment is only applicable to those who face capital punishment (*Gideon v. Wainwright*, 1963).

The right to assistance of counsel was extended to juveniles in 1967 when the Supreme Court held in *In re Gault* (387 U.S. 1, 1967) that all due process rights of adults must also apply to juveniles. Prior to the *Gault* decision, juveniles were rarely afforded legal representation in juvenile courts because the stated purpose of juvenile courts was to rehabilitate, not to punish (Foxhoven, 2007; Madj & Puritz, 2009). The *In re Gault* (1967) decision was another step by the Court toward allowing all defendants who are facing the deprivation of life or liberty the right to counsel, regardless of age or income level.

The Supreme Court clarified the Sixth Amendment's guarantee of counsel for a defendant who is facing the deprivation of life or liberty in *Argersinger v. Hamlin* (407 U.S. 25, 1972). *Argersinger*, an indigent defendant, was convicted of carrying a concealed weapon and sentenced to 90 days in jail. During his trial, *Argersinger* was not

appointed representation because the Florida Supreme Court ruled in *Brinson v. State* (269 F.Supp. 747, 1967) that public defenders were only required in cases that were punishable by more than six months of imprisonment. The United States Supreme Court disagreed with the Florida Supreme Court in *Argersinger* (1972) and held that no defendant, absent willful and informed waiver, can be imprisoned without the representation of counsel. The Court's ruling forced courts to appoint counsel to all indigent defendants who were facing imprisonment. Chief Justice Burger stated that "this will mean not only that more defense counsel must be provided, but also additional prosecutors and better facilities for securing information about the accused as it bears on the probability of a decision to confine" (*Argersinger v. Hamlin*, 1972).

Though the Supreme Court had previously ruled that a defendant's counsel must be effective in order for their Sixth Amendment right to counsel to be satisfied, effectiveness of counsel was not explained in detail until *Strickland v. Washington* (466 U.S. 668, 1984). The defendant, David Washington, pled guilty to three charges of capital murder. Upon entering his plea, Washington told the judge that he committed the murders while he was on a spree of burglaries that stemmed from his inability to provide for his family. The trial judge stated that he had respect for people like Washington who took responsibility for their actions (*Strickland v. Washington*, 1984). Washington's attorney believed that his plea colloquy was enough evidence to keep Washington from being sentenced to death. His attorney offered no additional evidence or witnesses to the character or mental health of the defendant. At the sentencing stage, the trial judge had no mitigating evidence to balance against the aggravating circumstances and he sentenced Washington to death for his crimes (*Strickland v. Washington*, 1984).

Upon direct appeal, the Florida Supreme Court affirmed the sentence of death. Washington later filed a writ of habeas corpus to the Federal District Court on the grounds of ineffectiveness of counsel. The District Court denied Washington relief for his claim that his counsel's inability to offer mitigating evidence caused prejudice against Washington that resulted in his death sentence. The United States Court of Appeals for the Eleventh Circuit overruled the District Court's decision, basing their ruling on the belief that a criminal defendant should have the right to reasonably effective assistance of counsel (*Strickland v. Washington*, 1984). The State of Florida then appealed to the United States Supreme Court.

The United States Supreme Court granted certiorari to *Strickland v. Washington* (466 U.S. 668, 1984) and ruled that there must be some standards for counsel's effectiveness. Justice O'Connor delivered the majority opinion which laid out a two-prong test in which both parts must be met for an ineffectiveness of counsel claim to be substantiated. First, the defendant must show that his/her attorney was deficient to a point that they do not qualify as "counsel" under the Sixth Amendment. Secondly, the defendant must show that his/her attorney's deficiency rose to a level that prevented the defendant from having a fair trial.

The first prong is met when the defendant shows that the performance of an attorney did not meet an "objective standard of reasonableness" by taking part in basic duties of attorneys, including making "reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary", fighting for their client, consulting with their client, and informing their client of the status of his/her case. The attorney must also have no conflict of interest with their client that would prevent them

from representing the client fairly (*Strickland v. Washington*, 1984). These basic duties of counsel constitute the bare minimum that attorneys must achieve when assisting their clients.

Although the abandonment of any of these duties constitutes a failure on the part of the attorney to adequately defend his/her client, the Court took it a step further with the second prong of *Strickland*. The defendant must be able to prove that their attorney's inadequacies directly led to their deprivation of a fair trial. This second prong is incredibly difficult for defendants to prove because judges are often unable or unwilling to imagine that a case could have turned out differently with effective assistance (Bibas, 2004). Judges may be able to see blatant forms of ineffectiveness of counsel that result from drinking, drug use, or sleeping on the job, but even this does not ensure that a judge would not be clouded by the thought of an inevitable outcome in his or her judgment of whether a trial was biased by ineffectiveness of counsel (Kirchmeier, 1996; Bibas, 2004).

Instead of fully protecting the rights of defendants by establishing rules and instructions for all attorneys to follow, the Court acknowledged the problem of ineffectiveness of counsel and made a broad test that makes it nearly impossible for defendants to prove deficiency on the part of their counsel and the resulting deprivation of a fair trial (Calhoun, 1988). Justice Thurgood Marshall's dissent in *Strickland* pointed out the absurdity of the two prong test. Justice Marshall wrote that the test will likely have no positive impact on the way that Sixth Amendment claims are adjudicated. One of his main points is that the term "reasonable" is ambiguous and undefined. Justice Marshall explains that the lack of clearly-defined standards regarding effectiveness of

counsel puts a burden on judges to rely on “their own intuitions regarding what constitutes ‘professional’ representation” and that the two-prong test limits lower courts’ ability to create standards and guidelines to curb ineffectiveness of counsel. (*Strickland v. Washington*, 1984). In addition to the effect that the majority opinion in *Strickland* has on courts, the vagueness of the term “reasonable” puts a heavy burden on the defendant to prove what cannot be defined (Calhoun, 1988).

Fortunately, the United States Supreme Court has made additional strides to define the term “effective” when dealing with assistance of counsel in death penalty cases. In *Wiggins v. Smith*, (359 U.S. 510, 2003), the Court adopted the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases Guideline 11.8.6 (1989) as the measuring stick for effectiveness in ineffectiveness of counsel claims. This guideline lays out the areas that an attorney must investigate in a capital case, including "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences" (*Wiggins v. Smith*, 2003).

Despite these very important strides in the right direction, much more work remains to be done by the Court. In 2000, for example, 55.5% of all jailed inmates awaiting trial for a capital offense had only the representation of a public defender (Harlow, 2001). Given these numbers, the Supreme Court should perhaps propose a stricter set of guidelines for indigent defense, including measures designed to address funding and caseload issues, while providing relief to overworked and underpaid public defender offices. The Court could also reconsider the second prong of *Strickland*. Specifically, the Court should reconsider the burden on defendants which requires them

to prove that their counsel's ineffectiveness led directly to a guilty verdict. Judges often have an inability to see the effect of ineffective counsel on a verdict. The Supreme Court could adopt a "reasonable jury member" standard for the second prong of the Strickland test. If a reasonable member of the jury could have had their opinion swayed by the ineffectiveness of a defendant's counsel, the defendant deserves a new trial.

The *Strickland* test and the American Bar Association guidelines that were referenced in *Wiggins v. Smith* (2003) represent the current state of law regarding ineffectiveness of counsel in the United States. These rulings, however, have not sufficiently addressed the problems of ineffectiveness of counsel that plague indigent defenders. Though the United States Supreme Court has made progress toward ensuring that defendants, especially capital defendants, receive effective counsel regardless of their race or economic class, the progress is slow-moving. The problems arising from high caseloads, inadequate training, and low pay for defenders are pervasive and they affect both juvenile and adult defendants (Madj & Puritz, 2009). Some parts of the United States have made more progress than others in the area of public defense, with states like Connecticut completely overhauling their indigent defense system to make the system fairer by providing more money to indigent defense statewide, more attorneys to share the caseload, and better training for indigent defenders (*Rivera v. Rowland*, 1999).

Indigent Defense in the South

Some states have remained behind the rest of the nation when it comes to indigent defense. States in the South have oftentimes faced harsh criticism for their ineffective and seemingly discriminatory indigent defense systems (Bright, 1997). The Spangenberg Project at the Center for Justice, Law, and Society at George Mason University, for

example, conducted a study of each of the fifty states' indigent defense programs. The structure and makeup of each state's indigent defense system varies greatly from state to state. This is particularly true about indigent defense systems in the South. Not only do public defense laws differ from state to state, they also vary within some states (Stevens et al., 2010). Alabama allows the district judges and municipal governments of each district in the state to choose between an appointed counsel system and a contract system (Ala. Code § 15-12-2). Both systems have advantages and disadvantages. Although a contract defense system may save states money by awarding indigent defense cases to the lowest bidder, there is no guarantee of effective counsel when dealing with contract defenders. Stephen Bright (1997) shows the inadequacies of the contract defense system in his story of Georgia contract defender Bill Wheeler. In 1993, Wheeler's bid of \$25,000 per year for indigent defense services saved the state of Georgia \$21,000 per year from the \$46,000 that the state spent in compensating public defenders the previous year. This monetary savings translated to a terribly ineffective indigent defense system, with Wheeler entering guilty pleas for 313 defendants and taking only three cases to court over the first four years of his contract. In the same four year time period, Wheeler filed only three motions (Bright, 1997). Though the contract defense system is defective, the appointed counsel system is also not without its flaws. Appointed defenders are chosen by judges from a list of attorneys who sign up to represent indigent defendants at a fixed hourly rate. Judges often choose the attorneys that they know will try their case quickly so that the judge can clear their dockets sooner than they would if an enthusiastic attorney were to fight for his/her client (Bright, 1997).

The ineffectiveness of indigent defense programs in the South has not gone entirely unnoticed by southern states. Alabama, Georgia, Mississippi and South Carolina have all made significant changes to their indigent defense systems in the last decade in an effort to fix some of their public defense problems. In 2011, Mississippi lawmakers established the Office of State Public Defender which consists of three divisions: Capital Defense, Indigent Appeals, and Public Defenders Training. The Office of State Public Defender is primarily funded by appropriations from the state legislature which are derived from criminal case assessments collected from any individual that pays a fine or other penalty to the State for violations, misdemeanors, or felonies (Miss. Code § 99-19-73; Miss. Code § 99-18-17). Mississippi's Office of Capital Post-Conviction Counsel, established in 2000, is separate from the Office of the State Public Defender and provides post-conviction representation for indigent defendants who have received a death sentence. The Office of Capital Post-Conviction Counsel is also funded by special fund appropriations derived from criminal case assessments (Miss. Joint Legis. Budget Cmte., 2013; Miss. Code § 99-19-73). For the Fiscal Year 2014, Mississippi lawmakers appropriated \$3,663,051 for the Office of the State Public Defender, a 4.31% increase in funding from the \$3,511,641 appropriated in Fiscal Year 2013. The Office of Capital Post-Conviction Counsel received a 5.25% increase in funding between Fiscal Year 2013 and Fiscal Year 2014, from \$1,084,516 to \$1,141,491 (Miss. Joint Legis. Budget Cmte., 2013). While this increase in funding from 2013 to 2014 is a step in the right direction, there is no reason to believe that a marginal increase in funding will protect indigent defendants from the inefficiencies of a system that is grossly underfunded (Bibas, 2004; American Bar Association, 2006).

The creation of a statewide indigent defense system does not necessarily reflect a state's willingness to increase funding and limit ineffectiveness associated with indigent defenders. Alabama's Office of Indigent Defense Services was established in 2011 as an attempt to save the state money on public defense. Alabama's Act 2011-678 details the standards which govern the provision of indigent defense services through the Office of Indigent Defense Services. The first standard set forth by Alabama's legislature in the act is not to provide counsel for indigent defendants; the main goal of the Office of Indigent Defense Services is "[p]roviding fiscal responsibility and accountability in indigent defense preparation" (Ala. Act 2011-678, 2011). Also included in Alabama's Act 2011-678 is the legislature's call for the Office of Indigent Defense Services to provide appointed counsel, contract counsel, and public defenders with "minimum experience, training, and other qualifications" to represent their clients (Alabama Act 2011-678, 2011). The goals of Alabama's lawmakers in their creation of the Office of Indigent Defense Services highlight the problem of inadequate funding for indigent defense in the South. Indigent defense proponents believe that states are not spending enough money to provide indigent defenders with the resources that are necessary for an effective defense while lawmakers continue to take measures to cut back on the amount of funding available for public defense (Bibas, 2004).

South Carolina's indigent defense system consists of sixteen Circuit Public Defenders who are appointed by the South Carolina Commission on Indigent Defense. Each Circuit Public Defender oversees the public defense services for their judicial circuit, but each of the state's counties have offices that mostly operate independently of other counties in the judicial district (South Carolina Commission on Indigent Defense,

2013). In some instances, counties join with other counties in their region to consolidate their indigent defense systems. South Carolina's indigent defense system is funded by the state through the South Carolina Office of Indigent Defense, which derives its funding from criminal case assessments (S.C. Code § 14-1-206).

In 2003, the Georgia General Assembly enacted a sweeping overhaul of the state's indigent defense programs, moving from a county-based system to a state-funded system that is comprised of offices in each of the state's judicial circuits (Stevens et al., 2010). The new indigent defense system operates under the guidance of the Georgia Public Defender Standards Council, which consists of eleven members. Ten of the council's members are appointed by the Governor, the Lieutenant Governor, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court of Georgia, and the Chief Judge of the Georgia Court of Appeals. The eleventh member of the council is a circuit public defender who is elected by a majority vote of all of the state's circuit public defenders (Ga. HB 770, 2003). Each of the eleven members of the Georgia Public Defender Standards Council is required to possess "significant experience working in the criminal justice system" or "have demonstrated a strong commitment to the provision of adequate and effective representation of indigent defendants" (Ga. HB 770, 2003). The Georgia Public Defender Standards Council develops and enforces standards for the state's public defense system and oversees the education, training, and support services of each of Georgia's 49 circuit public defenders (Stevens, 2010). Funding for Georgia's circuit-based system comes from appropriations from the state's general fund (Ga. Act No. 309, 2013).

Arbitrariness of Death Sentences

Deficiencies in indigent defense are manifested most in our nation's capital defense system. When examining death penalty cases, legal commentators and the Supreme Court of the United States have pointed out that there is a problem with the arbitrariness with which capital sentences are given to death-eligible defendants (*Furman v. Georgia*, 408 U.S. 238, 1972; Steiker & Steiker, 2005). In his concurring opinion of *Furman v. Georgia* (1972), Justice Douglas explained that

“[i]n a Nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.” (*Furman v. Georgia*, 1972)

The Court's proposed solution to the arbitrary nature in which death sentences were being handed down to death-eligible defendants was to put in place a moratorium on the death penalty that would allow states the opportunity to enact laws and guidelines that limit capriciousness and discrimination in death penalty sentencing.

In the four years following the *Furman* (1972) ruling, states threw together sets of rules and guidelines that were intended to satisfy the Supreme Court's requirements for a constitutional death penalty system. In 1976, the Court reexamined the death penalty systems of Georgia, Florida, Texas, North Carolina, and Louisiana to determine whether

their proposed guidelines for capital sentencing effectively reduced arbitrariness and capriciousness in capital cases (*Gregg v. Georgia*, 428 U.S. 153, 1976). The Supreme Court ruled in *Gregg v. Georgia* (1972) that the new sentencing guidelines that were proposed by Georgia, Florida, and Texas effectively limited the unpredictable nature of death sentencing (*Gregg v. Georgia*, 1972; *Proffitt v. Florida*, 428 U.S. 242, 1976; *Jurek v. Texas*, 428 U.S. 262, 1976). These states each had rules in place that required the presence of one or more aggravating factors in order to sentence a defendant to death. Georgia, Florida, and Texas also included in their capital sentencing guidelines the necessity for the sentencing judge or jury to hear mitigating evidence that speaks to the character or history of a defendant. The Supreme Court held that the death penalty can be constitutionally allowed as long as a state had guidelines that require 1) that one or more objective standards be met in order to show that the offense contained aggravating circumstances and, 2) that the sentencing judge or jury take into account the record and character of the defendant before their sentencing (*Gregg v. Georgia*, 1976). North Carolina and Louisiana had objective criteria for aggravating circumstances in place that were similar to those of Georgia, Florida, and Texas, but their inclusion of mandatory death sentences for certain offenses caused the Court to rule that their systems were unconstitutional (*Gregg v. Georgia*, 1976). The Supreme Court held that some degree of discretion must be allowed on the part of the sentencing judge or jury in order for a death sentence to be considered constitutional.

Although the safeguards required by the *Gregg* ruling were supposed to be put into place to limit arbitrariness in capital cases, the unpredictability of death sentences in death-eligible cases continues to be a prevalent issue after *Gregg v. Georgia* (Arkin,

1980). There is often no way to distinguish between the characteristics of a case that results in a death sentence and one that results in life in prison (Phillips, 2009). The main factor that researchers have been able to identify as a predictor of capital punishment is whether a defendant's counsel is court-appointed or hired (Beck & Shumsky, 1997).

Both social scientists and legal scholars have sought to identify the problems that exist within indigent defense systems. Most researchers have found that for the majority of case types there is no difference in the quality of representation of hired counsel, assigned counsel and contract defenders (Cohen, 2012; Houlden & Balkin, 1985). However, in capital cases, defendants with hired counsel are less likely to receive a death sentence than defendants with appointed counsel (Beck & Shumsky, 1997). Social scientists have also noted that state-run public defense programs are more likely to operate free of local political and economic pressure than local and county-based indigent defense programs (Worden & Worden, 1989).

One of the significant factors that comes into play when examining the differences between public defenders and hired counsel is race. Researchers have found that while there is little difference between the quality of representation for white defendants with hired counsel and white defendants with public defenders, black defendants with hired counsel are twice as likely as black defendants with public defenders to have their primary charge reduced (Hartley, Miller & Spohn, 2010). Among public defenders, attorneys with more experience in public defense receive more positive outcomes for their clients than public defenders who are new to their jobs. A public defender with ten years of experience reduces the average sentence length by 17 percent

when compared to a defender in his/her first year of public defense (Abrams & Yoon, 2007).

Missing from social science literature is the study of the racial component to ineffectiveness of counsel claims for death-sentenced inmates in the South. The purpose of this study is to examine whether the race of a defendant influences their likelihood of receiving a positive outcome in these Strickland claims. Among other things, the research will reexamine Kenneth Williams's study which compares the cases of Strickland claims that were decided in the five years before *Wiggins v. Smith* (2003) to the cases that were decided in the five years after *Wiggins*. Focusing on the South, I will determine whether the race of a defendant impacts his/her likelihood to receive a successful outcome in a Strickland claim.

Chapter 3: Data and Methods

The data used in this study comes from United States Court of Appeals opinions. Specifically, the data for this research was extracted from cases contained in the Lexis-Nexis database. Because of the study's focus on the indigent defense systems of Alabama, Georgia, Mississippi, and South Carolina, the only cases analyzed are out of the Fourth, Fifth, and Eleventh Circuits. The range of years for the cases in this study, between 1998 and 2008, was chosen because it represents the five years before and five years after the Supreme Court's decision in *Wiggins v. Smith* (539 U.S. 510, 2003). This study is a reexamination of Kenneth Williams's 2009 study, "Does Strickland Prejudice Defendants on Death Row?" An examination of this ten-year period will reveal the effect that the *Wiggins* decision had on Strickland claims. This research aims to identify the legal and extralegal factors that lead to successful Strickland claims in the South.

The cases in this study are broken down by circuit so that the characteristics of the cases within each circuit can be compared to the case characteristics of other circuits. This information will be useful in determining whether there are particular case characteristics that influence judges to vote for a positive outcome in one circuit more often than judges in other circuits. The circuits examined in this study are the Fourth, Fifth, and Eleventh Circuits. The Fourth Circuit consists of North Carolina, South Carolina, Virginia, and West Virginia. The Fifth Circuit contains Louisiana, Mississippi, and Texas. The Eleventh Circuit is comprised of Alabama, Florida, and Georgia.

Although the focal points of this study are Alabama, Georgia, Mississippi, and South Carolina because of the problems with their indigent defense systems, other states in the Fourth, Fifth, and Eleventh Circuits are included for analysis. There were a total of 256 cases involving Strickland claims in the Fourth, Fifth, and Eleventh Circuits between the years of 1998 and 2008. Of these 256 cases, 77 of these cases come from the Fourth Circuit, with 40 cases occurring before the *Wiggins* (2003) decision and 37 cases occurring after the *Wiggins* decision. In the Fifth Circuit, there are a total of 122 Strickland claim cases with 41 cases coming before *Wiggins* and 81 cases coming after *Wiggins*. There are 57 total cases with Strickland claims from 1998 to 2008 in the Eleventh Circuit, with 35 coming before the *Wiggins* decision and 22 coming after the *Wiggins* decision.

By examining the differences in outcomes between the three circuits, this research will endeavor to uncover whether the circuit in which a defendant is tried can affect the likelihood that the defendant will be granted relief through a Strickland claim.

Dependent Variable

The dependent variable for the current study is whether the Strickland claim was granted relief. The case outcomes are coded dichotomously such that “1” represents cases in which the defendant was granted relief and “0” represents cases where the defendant was denied relief.

Independent Variables

The independent variables in this study include a variety of legal and extralegal factors that may affect the likelihood that a defendant is granted relief in a Strickland

claim. One of the most important independent variables in the study is the type of violation that the defendant has alleged regarding the ineffectiveness of counsel. The type of violation alleged by the defendants included in this study are the failure of the defendant's attorney to present mitigating factors of the defendant's background (1=yes, 0=no) and the inability of counsel to provide a reasonable defense strategy (1=yes, 0=no). These alleged violations are the two most common Strickland violations in this study. Although there are only a small number of cases that get overturned due to Strickland claims, research shows that Strickland violations are commonly alleged and likely occur more often than the number of granted Strickland claims show (Murphy, 2000; Gabriel, 1986). The aggravating factors of the crime the defendant was convicted of are also included as an independent variable. The two most common aggravating factors in the study are robbery (1=yes, 0=no) and brutality (1=yes, 0=no). The Supreme Court's decision in *Gregg v. Georgia* (1976) required that states have objective criteria that must be met in order to sentence a defendant to death, which led many states to compile a list of aggravating factors that must be present in a case for the prosecutor to pursue the death penalty (Iyengar, 2011). Aggravating factors are used at the sentencing phase of a death penalty trial to convince jurors to lean towards sentencing the defendant to death by highlighting the dangerousness of the defendant. Jurors who are unsure of whether to vote to sentence a defendant to death are often swayed by the inclusion of aggravating factors (Hoffman, 1994). Whether a gun was used (1=yes, 0=no) and whether or not there was an expert witness at the trial (1=yes, 0=no) are also included as dichotomous independent variables.

A number of extralegal factors were examined in order to uncover whether there are additional case attributes that could impact the outcome. The judge's race (1=African American, 0=other) and the party affiliation of the president that appointed the judge to his/her seat (1=Democrat, 0=Republican) were examined. Given the literature, it could be surmised that a defendant will not receive a positive outcome in a Strickland claim when the authoring judge was appointed by a conservative president because conservative judges are less likely than liberal judges to grant positive outcomes for defendants in appeals cases (Nagel, 1961; Yarnold, 1990).

Research on the impact that a judge's race has on his/her decision-making is conflicting, though most researchers have found that a judge's race is often a significant factor in predicting their judicial decisions (Bonneau & Rice, 2009; Schanzenbach, 2005; Spohn, 1990; Steffensmeier & Britt, 2001; Welch, Combs, & Gruhl, 1988). This study seeks to determine whether a judge's race has an impact on cases involving Strickland claims in the South. As you may recall, this study's focus on the South, and in particular Mississippi, Alabama, Georgia, South Carolina, comes from the numerous problems that surround indigent defense and the death penalty in these states. A focus on these states will allow researchers to reassess these states' indigent defense and death penalty systems in light of this study's findings. Because the authoring judge is important in this study, per curiam decisions and other decisions without a clear authoring judge were excluded from data analysis. This brought the number of cases to be tested down from 256 to 207 (n=207).

The background of each defendant is also examined. The race and gender of each defendant was recorded in order to determine the impact that these factors have on a

judge's likelihood to grant relief to a defendant in a Strickland claim. Research has shown that black defendants are more likely to receive the death penalty than white defendants (Wolfgang & Riedel, 1973; Eberhardt et al., 2006; Ziesel, 1981). Because of this fact, the race of the defendant will be important to analyze in relation to case outcomes in Strickland claims. The four categories of race in this study include Caucasian, African-American, other, and 'unknown'. Given the literature, it is likely that black defendants are less likely to receive positive outcomes than white defendants (Steffensmeier & Demuth, 2000; Miethe & Moore, 1986).

The gender of each defendant is also important to examine when looking at case outcomes in Strickland claims because research has indicated that women receive, on average, lesser sentences than men for similar crimes (DeSantts & Kayson, 1997; Starr & Rehavi, 2012). However, the effect of the defendant's gender on a positive case outcome could not be examined with these data because there were only two cases of females with Strickland claims out of the 207 claims studied and no female defendants received a positive case outcome.

Each of the defendants in this study had an attorney, so there were no pro se cases to examine. Although it would be beneficial to examine which defendants were represented by public defenders and those who employed hired counsel, this data was not available for the majority of cases examined in this study. Nevertheless, the lack of data for type of counsel should not be too much of a concern due to the fact that the overwhelming majority of capital defendants are indigents who are represented by public defenders (Liebman, Fagan, West & Lloyd, 1999).

Finally, a series of dummy variables were created for “failure to present mitigating evidence” with “0” representing no allegation of failure to present mitigating evidence and “1” representing failure to present mitigating evidence of a defendant’s background at the guilt phase or sentencing phase of the trial. A second dummy variable was created for “failure to present an adequate defense strategy at any phase of the trial” with “0” representing no allegation of an inadequate strategy and “1” representing an ‘allegation of an inadequate strategy at any phase of the trial.’ Failure to present an adequate defense and failure to present mitigating evidence are two of the most common violations of the Sixth Amendment that are brought up in Strickland claims (Gabriel, 1986). All other allegations were grouped together as a catchall, “other Strickland violation,” and then “dummied.”

Analytic Plan

Binary logistic regression was determined to be the best method of analysis for the data set of this study because the dependent variable, the case outcome, is dichotomous. Binary logistic regression will be used in order to connect the predicting factors of each case to the case outcome (Harrell, 2001). Binary logistic regression examines all of the independent variables together to determine the effect that the independent variables have on the dichotomous dependent variable. Logistic regression assumes that the independent variables are metric or binary, and the coding of the independent variables in this study from nominal variables to metric and binary dummy variables satisfies this assumption of logistic regression (Harrell, 2001).

Of the 207 Strickland claims studied across the Fourth, Fifth, and Eleventh Circuits, there were only eight positive outcomes for defendants. All eight of the

defendants that were granted positive case outcomes in this study came from the Fifth and Eleventh Circuits, meaning that no defendants in the Fourth Circuit received a positive Strickland claim outcome. Because there were no positive outcome Strickland claims in the Fourth Circuit, the Fourth Circuit data had to be removed from the data set in order to run binary logistic regression analyses. There was no variation in the dependent variable, positive outcome Strickland claim, so there was a clear problem with collinearity. The removal of the Fourth Circuit data brought the number of cases in the regression analyses to 141, with 93 cases coming out of the Fifth Circuit and 48 cases coming out of the Eleventh Circuit. After removing the Fourth Circuit data, collinearity diagnostics were run on the variables that were being tested in this study and all of the variables fell well within acceptable VIF (variance inflation factor) values, as they were all below a VIF of 2.0 (Friendly & Kwan, 2009; O'Brien, 2007).

Binary logistic regression was used to test the legal/quasi-legal and extralegal variables in two separate models. The first model (seen in Table 2) consisted entirely of legal and quasi-legal variables, which included whether an expert witness testified, whether the defendant's allegation was a failure to present mitigating evidence, and whether the defendant's allegation was a failure to present a reasonable defense strategy at trial.

The second model (seen in Table 3) included all of the legal variables from Model 1 and seven extralegal variables: circuit, race of judge, race of defendant, whether a gun was used in the crime, whether brutality was an aggravator, whether robbery was an aggravator, and whether the judge was appointed by a Democrat.

Chapter 4: Results

Descriptive statistics for each of the independent and dependent variables in this study are found in Table 1. These descriptive statistics were run to show the incidence of each variable in the study. The Fourth Circuit made up 31.9% (66 Strickland claims) of the cases in this study, while the Fifth Circuit was responsible for 44.9% (93 Strickland claims) and the Eleventh Circuit made up 23.2% (48 Strickland claims). The racial makeup of the judges in this study is predominantly Caucasian, with 84.1% of the cases involved Caucasian authoring judges. African-American judges authored 8.2% of the decisions and Hispanic judges authored 7.7% of the decisions. The most common alleged Strickland violation was the failure to present mitigating circumstances of the defendant's background (43.5% of claims). The failure to present an adequate defense at any stage of the trial made up 24.2% of the Strickland claims in this study, while all other alleged violations made up 32.4% of the claims. The dependent variable, the favorability of the circuit outcome, consisted of 96.1% of the Strickland claimants receiving a negative case outcome while only 3.9% of the claimants received a positive circuit outcome.

Table 4.1

Independent Variables and Dependent Variables

Frequencies		Frequency	Percent			Frequency	Percent
Independent Variables					Dependent Variable		
Circuit					Favorable Circuit Outcome		
	5th Circuit	93	66.0		No	133	94.3
	11th Circuit	48	34.0		Yes	8	5.7
Race of Judge							
	African-American	15	89.4				
	Other	126	10.6				
Race of Defendant							
	African-American	59	41.8				
	Other	82	58.2				
Appointed by Democrat							
	No	88	62.4				
	Yes	53	37.6				
Gun Used							
	No	54	38.3				
	Yes	87	61.7				
Expert Witness Testified							
	No	117	83.0				
	Yes	24	17.0				
Robbery Aggravator							
	No	82	58.2				
	Yes	59	41.8				
Brutality Aggravator							
	No	129	91.5				
	Yes	12	8.5				
Strickland- Failure to Present Mitigating Factors							
	No	82	58.2				
	Yes	59	41.8				
Strickland- Failure to Present Adequate Case							
	No	107	75.9				
	Yes	34	24.1				

In the first logistic regression model (Table 2), the legal or quasi-legal factors alone were tested for significance. The legal and quasi-legal factors include the type of Strickland violation alleged by the defendant and whether an expert witness testified for the defense. The two types of Strickland violations included in the logistic regression model are ‘failure to present an adequate case at the guilt or sentencing phase’ and ‘failure to present mitigating factors at the guilt or sentencing phase’. These two types of Strickland allegations were chosen for analysis because they are the most common

allegations in this study. Neither ‘failure to present an adequate case at the guilt or sentencing phase’ nor ‘failure to present mitigating factors at the guilt or sentencing phase’ were statistically significant in predicting a positive outcome for a Strickland claim. Whether an expert witness testified was also included as a quasi-legal factor, and it was found to not be a significant predictor of a positive outcome for a Strickland claim.

Table 4.2

Legal/Quasi-legal Variables

Predictor*	B	S.E.	Sig.	Exp(B)
Strickland- Failure To Present Mitigating	1.246	1.136	0.273	3.475
Strickland- Failure To Present Adequate Case	1.528	1.178	0.195	4.608
Expert Witness Testified	-0.441	1.099	0.688	0.643
Constant	-3.796	1.017	0	0.022
*Dependent Variable- Positive Outcome Strickland Claim				

A second regression model was run to test the significance of extralegal variables along with legal and quasi-legal variables. No variables achieved significance ($P < .05$) in this model. The type of Strickland claim was not a significant factor in the circuit court’s decisions. The type of aggravating factors also did not impact the circuit court’s decisions. Additionally, the political affiliation of the president that appointed the authoring judge was not a significant factor. The race of the defendant ($P = .174$) came closer to approaching a .05 significance level than any other variable in Table 3, but it was also not a significant predictor in favorable outcome Strickland claims.

Table 4.3

Legal/Quasi-Legal and Extralegal Variables

Predictor*	B	S.E.	Sig.	Exp(B)
Strickland Failure To Present Mitigating	0.804	1.185	0.497	2.234
Strickland Failure To Present Adequate Case	1.047	1.264	0.407	2.850
Expert Witness Testified	0.120	1.227	0.922	1.128
Brutality Aggravator	1.202	1.415	0.396	3.326
Robbery Aggravator	0.737	0.945	0.435	2.091
Gun Used	1.158	1.201	0.335	3.182
Circuit	-0.692	0.809	0.392	0.501
Race of Judge	0.049	1.333	0.971	1.050
Appointed By Democrat	-0.126	0.908	0.890	0.882
Race of Defendant	1.213	0.892	0.174	3.365
Constant	-5.163	1.618	0.001	0.006
*Dependent Variable- Positive Outcome Strickland Claim				

Chapter 5: Discussion

There has been no prior research that studies the factors that lead to positive outcomes for Strickland claims in death penalty cases and only one study that examines how often positive outcome Strickland claims occur in select circuits in the United States (Williams, 2009). This study is the first of its kind to dissect the cases that lead to Strickland claims for death row inmates. Prior literature has indicated that black defendants are more likely to receive the death penalty than white defendants (Eberhardt et al., 2006; Ziesel, 1981; McAdams, 1998; Iyengar, 2011), but this study did not find that a defendant's race is a significant factor in determining the likelihood of a positive outcome Strickland claim in Southern circuits. In fact, there were no significant predictors of positive Strickland case outcomes found in this study.

The explanation for these findings may lie in the fact that a circuit court of appeals is comprised entirely of judges, while most death penalty cases are decided by juries; juries are more likely than judges to sentence a defendant to death (Towne, 1982; Iyengar, 2011). Judges may be less likely to feel, or at least act on, racial bias because they have to deal with people from different backgrounds on a daily basis. Jurors are pulled out of communities that vary in diversity and racial tolerance, so exposure to different races is not guaranteed with jurors in the way that it is guaranteed with judges (Sommers & Ellsworth, 2001). Exposure to a variety of people may not be the only reason why judges are less likely than jurors to sentence a defendant to death. Their

commitment to constitutionally-ensured equality may also be a factor (Choi & Gulati, 2008). Most jurors do not have the knowledge and understanding of the Constitution as a judge does, so they may not have the same respect for equal protection. Even if a judge has racial biases, he/she may be more likely than a juror to attempt to put such biases aside in the name of equal protection. Judges take an oath to protect all citizens equally and uphold the integrity of the Constitution, so their duties may override their biases.

Although the race of the defendant was not a significant factor in this study, it does not mean that race may exert its influence through more subtle means. More research should be conducted to include a wider range of years in order to determine if the insignificance of race in Strickland appeals is a new phenomenon or whether race has been insignificant in predicting positive Strickland case outcomes since *Strickland v. Washington* (1984) was decided. Further research on Strickland claims should be expanded to include not only a wider range of years, and additional circuits in order to determine if there are significant legal or extralegal factors that impact a defendant's likelihood of receiving a positive outcome.

The race of the judge was not a significant factor in this study, which is contrary to much of the literature on the effect of a judge's race on his/her judicial decision-making (Bonneau & Rice, 2009; Steffensmeier & Britt, 2001; Welch, Combs, & Gruhl, 1988). This could be due to the fact that many studies on the impact that a judge's race has on his/her judicial decision-making focus on trial or state level judges rather than circuit level appellate judges (Schanzenbach, 2004; Spohn, 1990; Steffensmeier & Britt, 2001; Welch, Combs, & Gruhl, 1988). Appellate judges at the circuit level, who are appointed by the president of the United States, have a track record that is likely

scrutinized more publicly than trial and state level judges. Such public scrutiny could lead presidents to try to appoint judges that will not stain their presidential legacy with obvious racial biases. Research shows that federal judges appointed by Democratic presidents tend to vote more liberally than judges appointed by Republican presidents (Stidham, Carp & Songer, 1996). Regardless, the political party of the presidents that appointed each circuit judge is insignificant in predicting positive outcome Strickland claims.

In this study, the circuit in which a Strickland claim arose was not significant. Prior research on the differences in judicial decision-making across each of the twelve United States Circuits of Appeals indicates that the circuit matters (Davis & Songer, 1988; Kautt, 2002; Williams, 2009). The literature on the topic of ideological variations between circuits indicates that circuits comprised of traditionally conservative states are more likely to issue conservative opinions, while circuits comprised of traditionally liberal states are more likely to issue liberal opinions (Sunstein, Schkade, & Ellman, 2004).

Although there were no significant predictors of positive outcome Strickland claims found in this study, there was an interesting finding regarding the Fourth Circuit. The Fourth Circuit originally made up 31.9% (n=66) of the 207 cases in this study. Of these 66 cases, there was not a single positive outcome Strickland claim issued by the Fourth Circuit judges. This finding is not difficult to explain, as the Fourth Circuit is considered to be one of the most conservative circuits in the country (Broscheid, 2011). Judges in the Fourth Circuit are historically conservative, and conservatives are more likely than liberals to support the death penalty (Radelet & Borg, 2000). It may be the

case that judges in the Fourth Circuit are less willing than judges from other circuits to believe that a death-sentenced defendant is being wronged by an inadequate defense. More research needs to be conducted to include a wider range of years in order to determine whether the Fourth Circuit has a history of issuing opinions that are unfavorable to Strickland claimants.

The lack of positive outcomes in the Fourth, Fifth, and Eleventh Circuits over the ten year period in this study proved to be a stumbling block for establishing which factors lead to positive outcomes in Strickland claims. The South's history of conservatism could be a factor in explaining why positive outcomes are rare for defendants who allege Strickland violations (Sunstein, Schkade, & Ellman, 2004; Spohn, 1995). The inclusion of other circuits would reveal whether the Southern circuits in this study are similar to other circuits in regards to positive outcome Strickland claims. If circuits that are historically more liberal than the Fourth, Fifth, and Eleventh circuits have the same low numbers of positive outcome Strickland claims, then there is a problem with ineffectiveness of counsel cases across the country that needs to be addressed through revisions to the two-prong test of Strickland and more resources dedicated to indigent defense systems. Scholars have shown that there are very clear problems with indigent defense and the death penalty, so there are likely to be more instances of ineffective counsel than are being brought to court and overturned on appeal (Bright 1990; Bright, 1994; Beck & Shumsky, 1997).

Another possible factor in the explanation of so few positive outcomes in the South is the quality of representation by appellate attorneys. The overwhelming majority of death row inmates are indigents who rely on public defenders to handle their appeals

(Bright, 1994; Bright, 1997). Although this study could not distinguish between cases in which a public defender was used or a hired attorney was used because the data was not available, future research could use what we know about the percentage of defendants who use public defenders as a proxy. Research should be conducted to examine the case outcome differences between cases handled by hired counsel and cases handled by public defenders. Prior literature has shown that public defense systems in the South are plagued by high caseloads, a lack of education, and inadequate resources (Bright, 1997; Fisher, 2004). An increase in funding and education for public defense in the South could result in better representation of Strickland claimants, leading to more positive outcome Strickland claims. (Bibas, 2004; American Bar Association, 2006).

In the thirty years since *Strickland v. Washington* (1984) was decided, there has only been one study that has examined the likelihood of a death row defendant to receive a positive outcome Strickland claim, and it focused solely on the impact of the circuit (Williams, 2009). More research needs to be conducted to include larger sample sizes of Strickland claims in order to find which factors are significant in the determination of a positive Strickland claim. One way to expand the sample size of Strickland claims would be to include more years of Strickland claims in the South. Another way to examine more Strickland claims is to include other circuits in the study, although this would not particularly help researchers to find which factors lead to positive case outcomes for Strickland claims in the South.

Overall, this study was successful in highlighting the sheer unlikeliness of a defendant in the South to receive a positive outcome in their Strickland claim. Judges in the South are seemingly unwilling to rule in favor of defendants in Strickland claims,

regardless of the factors surrounding the case. The current two-prong test from *Strickland v. Washington* (1984) and the American Bar Association guidelines for effective counsel adopted by the Supreme Court in *Wiggins v. Smith* (2003) do not go far enough to protect defendants from ineffective assistance of counsel. The second prong of the Strickland two-prong test needs to be reworked in order to make it more difficult for judges to dismiss a Strickland claim simply because they do not believe that the attorney's ineffectiveness is the reason why the defendant lost his/her case. Additionally, indigent defense systems across the South need more resources and better oversight in order to protect indigent defendants from the perils of high caseloads and inadequate funding.

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