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# Ineffective Assistance of Counsel and the U.S. Supreme Court: History and Development of a Constitutional Standard

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INEFFECTIVE ASSISTANCE OF COUNSEL AND THE  
U.S. SUPREME COURT:  
HISTORY AND DEVELOPMENT OF A CONSTITUTIONAL STANDARD

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## ABSTRACT

The purpose of this research project is to complete an exhaustive review of the U.S. Supreme Court cases in which the Court ruled on ineffective assistance of counsel (IAC) claims. The cases are examined to study how the Supreme Court has interpreted the constitutional right to effective counsel. Further, I examined how the standard for judging IAC claims has evolved since its first recognition by the Supreme Court. There are 46 decisions by the Court that address IAC claims.

In addition to reviewing the case law, relevant law reviews and social science academic journal articles are examined and incorporated in the research to assist in understanding and explaining the importance of IAC claims, critiquing the standards by the courts, and the consequences of not improving the issue. Further, a theoretical discussion borrowing from Black's (1976) notion that law is governmental social control is included as a means of contextualizing a discussion of the poor and indigent defense counsel. The research indicates that the Supreme Court has made progress in defining IAC claims, but has not yet created the concrete language needed to set a realistic bar from which to judge the standard set forth in the *Strickland* (1984) decision.

## TABLE OF CONTENTS

ABSTRACT.....	iii
LIST OF TABLES.....	iv
INTRODUCTION.....	1
PROJECT PURPOSE.....	5
METHODS.....	6
LITERATURE REVIEW.....	7
SUPREME COURT IAC CASES.....	12
A. Pre <i>Strickland</i> Cases: 1932-1984.....	12
B. <i>Strickland</i> (1984): The Landmark Case for IAC.....	17
C. Post <i>Strickland</i> Cases: 1984-2009.....	24
DISCUSSION.....	49
CONCLUSION.....	56
REFERENCES.....	58
CASES CITED.....	62

LIST OF TABLES

Table One

Significant IAC Supreme Court Cases ..... 45

Table Two

Supreme Court Cases: IAC Cases Not Primary Issue/Key Factor ..... 47

## INTRODUCTION

The right to counsel is a key constitutional protection for criminal defendants that is provided via the Sixth Amendment. The United States Supreme Court has determined that this fundamental right includes the right to *effective* assistance of counsel. More specifically, the Sixth Amendment affords the accused the right to counsel, while the Fourteenth Amendment ensures the right to due process, and the Supreme Court has determined that due process includes the right to effective counsel.

Ineffective assistance of counsel (IAC) claims have been reviewed by the Supreme Court in numerous cases since the court first held that the Sixth Amendment right to counsel applied to the states in *Powell v. Alabama* (1932). The high court has struggled to develop a clear explanation of what it means for counsel to be “effective” in their roles as legal advocates. The range of incompetency for defense counsel ranges from those whose failure to perform adequately results in harmless error to those whose incompetency demonstrates a blatant disregard of a defendant’s interests, and therefore affects the defendant’s ability to obtain a fair trial.

In this paper, I review Supreme Court cases on IAC and provide a summary and analysis of the law. It is important to add to the body of research on this topic for several reasons. Effective assistance of counsel has been held by the Supreme Court to be a constitutional right afforded to any individual who finds himself/herself in the criminal justice process. In order to maintain confidence and integrity in our criminal justice



system, claims of ineffective assistance of counsel must be investigated thoroughly to ensure that an individual's rights have been protected. Without these safeguards, we can never obtain a just and fair system.

Another important reason for adding to the research on IAC claims is that the subject has become a popular topic, as we hear of more wrongful conviction stories in the news than ever before. Therefore, is helpful to educate people on an issue when it is in the political and media "limelight".

The issue of ineffective assistance of counsel is of enough importance that it has been deemed as a major cause of wrongful convictions by the Innocence Project (The Innocence Project, 2009). The Innocence Project is a national organization that specializes in litigation and public policy that has done much to expose, and educate people about, the issue of wrongful convictions. The Innocence Project's website reports that there have been 242 exonerations in the United States, with others currently underway; some of them taking place just days before execution (The Innocence Project, 2009). In fact, a significant number of wrongfully convicted defendants are represented by capital cases. Gross (2008) reports that 22% of exonerations studied between 1979-2003 were capital murder cases (p. 6). Considering that death sentences, on average, consist of less than 1% of all prison sentences, those who have been wrongfully convicted are disproportionately represented by "more than 250 to 1" (Gross, 2008, p. 6).

The Supreme Court has ruled on several landmark cases that have set the standard for determining effective assistance of counsel. *Powell v. Alabama* (1932) is often referred to as the foundation for the right to effective assistance of counsel. In this case,

the Supreme Court held that it is not enough simply to provide an indigent capital defendant with an attorney at trial. Rather, for the right to counsel to be meaningful, that assistance must be effective, which means that the attorney must have an adequate opportunity to prepare a case for trial. The Court recognized that the mere appointment of counsel for a defendant was not sufficient to ensure a fair trial.

Another landmark case for IAC claims is *Strickland v. Washington* (1984). The Court in *Strickland* created a two-prong test for determining whether counsel is “ineffective” in violation of the Sixth Amendment. Both elements of the test must be met in order to find an attorney “ineffective.” First, the defendant must show that the defense counsel’s performance was “deficient” by pointing to specific acts. This is evaluated by a reasonableness standard, which takes into consideration all of the facts and circumstances of the case. Second, the defendant must be able to show that the defense counsel’s actions were prejudicial *and* if not for those actions, the outcome of the case would have been different. The burden of proof is that the prejudice is more than merely conceivable, but less than “more likely than not” (Levinson, 2001, p. 155).

In addition to the above-mentioned cases, there are numerous other landmark U.S. Supreme Court cases that have shaped the meaning and application of IAC claims. As evidenced by the ambiguous language used to explain the *Strickland* standards, words like *deficient*, *prejudicial*, and *reasonable* can be interpreted very differently, depending on who is reviewing the claim. As such, the courts are able to find almost any actions

taken (or not taken) to be “strategic” and within acceptable legal boundaries (Klaren & Rosenberg, 2004). This presents obvious cause for concern for courts setting a realistic bar by which IAC claims are judged.

## PROJECT PURPOSE

I examined all of the U.S. Supreme Court cases dealing with claims of ineffective assistance of counsel. The purpose of reviewing these cases was to study how the high court has interpreted the right to effective counsel and how the standard for judging IAC claims has evolved since its first recognition by the Supreme Court in 1932. There are 46 decisions by the Court that address IAC claims.

In addition to reviewing the case law, relevant law review and social science journal articles were examined and incorporated in the research to assist in understanding and explaining the importance of IAC claims, critiquing the standards set by the court, and the consequences of not improving the process for reviewing IAC claims. Further, a theoretical discussion borrowing from Black's (1976) notion that law is governmental social control is included for a discussion of the poor and indigent defense counsel. It is hypothesized that the research will show that the Supreme Court has made progress in defining IAC claims, but has not yet created the concrete language needed to set a realistic bar to judge the standard set forth in the *Strickland* (1984) decision.

## METHODS

This project is legal research, or doctrinal research. The data that was examined includes all of the United States Supreme Court decisions involving ineffective assistance of counsel claims, peer-reviewed social science journal articles on the issue, and relevant law reviews. The Supreme Court cases were chosen because the Supreme Court is the highest court with the power to provide the final ruling on an issue. This court sets precedent and is responsible for defining and interpreting ineffective assistance of counsel claims.

The comprehensive list of Supreme Court cases that addressed IAC claims came from an online Westlaw database search. The data was located by: (1) clicking on the *Legal* tab, (2) clicking on *Cases*, (3) check the box marked *Supreme Court cases*, and (4) entering the following phrase in the search box: (sy,di(ineffective +1 assistance +2 counsel)). After this list was compiled, each of the individual cases were located and collected from the online Lexis Nexis Academic database. This was done by: (1) clicking on the *Legal* tab, (2) clicking on *Federal and State cases*, and (3) entering in the case name. The social science peer-reviewed journal articles were collected from four major databases: *Criminal Justice Abstracts*, *Criminal Justice Periodicals*, *Academic Search Premiere*, and *JSTOR*.

## LITERATURE REVIEW

The U.S. court system was designed with the goals of justice and equality in mind. In order to achieve such a feat, the courts are supposed to be adversarial in nature, creating a balance between the charging agent (state or federal government) and the defendant. If a person finds himself or herself in criminal court, charged by the state/government, that person should be given the opportunity to defend him or herself. This means that a person who is not skilled in the art of law shall be given an attorney to defend their interests, even if the defendant is indigent and unable to secure legal assistance on their own. In order to achieve the goal of a fair and reliable result, a defendant's attorney must be able to provide a meaningful defense that will be effective. This right is fundamental and if enforced, should assure that individual rights are protected. Without the protection of effective assistance of counsel, our system risks its integrity by possibly handing down unjust and unreliable results and even convicting the innocent; an issue that threatens the core ideology of the criminal justice system (Dripps, 1998).

The ineffective assistance of counsel claim (IAC) is a constitutional "protection" that defendants can raise on appeal when they feel that they have not been given adequate representation. However, in reality, one must question if this is a viable protection. There are multiple reasons to be skeptical.

Ineffective assistance of counsel claims have been reviewed and ruled on by the Supreme Court in numerous cases since early discussions of the issue in *Powell v. Alabama* (1932) and its strong reiteration of the right in *McMann v. Richardson* (1970) (Gilles, 1983). However, courts have struggled to develop a clear understanding of what it means for counsel to be “effective” in their roles as legal advocates.

The right to effective assistance of counsel is inferred from the Sixth and Fourteenth Amendments to the Constitution. Due to Incorporation (the due process clause of the Fourteenth Amendment that has the effect of applying the provisions of the Bill of Rights to the states), the Supreme Court applied the Sixth Amendment into the Fourteenth Amendment via *Powell v. Alabama* (1932) (Cawley, 2007). Initially, the courts inferred the right to assistance of counsel from the Fourteenth Amendment, which guarantees that a defendant will have “due process and equal protection under the law”; a guarantee that is impossible to uphold if a defendant is appointed incompetent defense counsel (Williams, 2002, p. 249).

Then the Court shifted the focus of the right to counsel from the Fourteenth Amendment to the Sixth Amendment in *Gideon v. Wainwright* (1963) (Cawley, 2007). The Sixth Amendment provides more specific language for inferring *effective* counsel. Specifically, the Sixth Amendment affords the accused the right to counsel and the Supreme Court held this to include the added characteristic, *effective*. Chief Justice Rehnquist explained the central purpose of the Sixth Amendment, “to guarantee an effective advocate for each criminal defendant”; rather than the mere appointment of counsel (Robson, 2007, p. 3).

The problem of incompetent defense attorneys is largely a problem associated with the poor. This is because the indigent in this country are appointed counsel to defend them, who are largely overworked, underpaid, and devoid of resources; in contrast, the more affluent defendants are able to secure private counsel with the resources needed for their defense. The majority of criminal defendants in this country are indigent. Estimates are that 80% of criminal defendants require court-appointed counsel (Williams, 2002, p. 249). The Bureau of Justice Statistics (2001) reported similar statistics when looking at criminal defendants and the poor. In a study looking at indigent criminal defense programs in the largest 100 counties in the country, it was found that public defenders handled 82% of all criminal cases (Bureau of Justice Statistics, 2001, p.1). Perhaps more troubling is that these numbers increase for capital cases- approx. 90% of these defendants are indigent (Cawley, 2007, p. 1). These are startling statistics which suggest that the occurrences of the poor being convicted of crimes and ineffective indigent counsel should be studied as co-occurring phenomena.

The issue of poor defendants routinely receiving deficient counsel to represent them is rarely disputed in research on the subject (Bright, 1999; Dripps, 1998; Levinson, 2001; Reiman, 2007). The likelihood that a defendant will be assigned inadequate counsel largely depends on the level of training and resources provided to defense counsel by the state in which the attorney is employed. Levinson (2001) compares getting defense counsel for the poor from jurisdictions that do not provide the proper resources as being analogous to “getting brain surgery from a podiatrist” (p. 149).



This issue is a systematic problem in the criminal justice system that has only gotten worse. A study cited in the Harvard Law Review (2000) looked at 30,000 felony filings in Houston, Texas and found that 58% of defendants that were appointed counsel were given a jail or prison sentence compared with 29% of those who were able to hire private attorneys when looking at similar offenses (p. 2064). This and other studies suggest that indigent defense counsel do not always rise to the level of competency or have the resources that private attorneys are able to obtain for their clients (Harvard Law Review, 2000). Unfortunately, the reality is that a person who finds himself/herself in the criminal justice system is more likely to obtain qualified and competent defense counsel if they have higher financial status; if they can afford good counsel, their chances of keeping the system “honest” are increased (Reiman, 2007).

The consequences of ignoring the problem of incompetent defense counsel are wrongful convictions. The Innocence Project is a national organization that specializes in litigation and public policy that has done much to expose and educate people about the issue of wrongful convictions. The issue of ineffective assistance of counsel is of enough importance that it has been deemed as a major leading cause of wrongful convictions by the Innocence Project (The Innocence Project, 2009). To date, there have been 234 exonerations in the United States, with others currently underway (The Innocence Project, 2009). This is of great concern, as it is estimated that a significant number of falsely convicted defendants are capital cases (we know this because of DNA exonerations) and thus, can be subject to a death sentence (Gross, 2008).

Samuel Gross (2008) has studied wrongful convictions for much of his career and believes that false convictions occur at a rate of 2% to 5% in capital murder cases, and he estimates the same is true for rape cases ( p. 22). Although, we cannot know the exact number of instances in which IAC leads to wrongful convictions, this is a key issue that needs to be resolved if the hope is to have a balanced and fair system for seeking justice (Gross, 2008).

## SUPREME COURT IAC CASES

There are 46 Supreme Court cases that address ineffective assistance of counsel claims. Specifically, there are 19 cases that deal directly with these claims and are presented here.

### **A. Pre *Strickland* Cases: 1932-1984**

*Powell v. Alabama* (1932) was the first case in which the Supreme Court ruled on the issue of effective assistance of counsel and is considered the foundation for this right (Levinson, 2001). The case involved nine African-American male youths who were traveling on a freight train in Alabama. After fighting with a group of white male youths and allegedly throwing all but one of them off of the train, the nine defendants were accused of raping two white female passengers. The Sheriff at the closest train station was alerted and upon arrival, the defendants were greeted by an angry crowd. The youth were charged with rape after the trial court publicly declared them to be ignorant and illiterate. The defendants denied involvement in the alleged rape and claimed that they had never seen the girls on the train. The defendants were appointed counsel the morning of their trial, which took place with no investigation or opportunity for such. As a result, the defendants were found guilty by an all-White jury and seven of the nine defendants were sentenced to death (Uhrig, 2009).

On appeal, the Supreme Court found that the defendants were not granted the right to counsel “in any substantial sense” (Uhrig, 2009, p. 4). The convictions were overturned and the cases were remanded for new trials for each of the defendants. There were six important points which addressed the constitutional guarantee of counsel. First, the Supreme Court held that the right to counsel is a key element of due process and a defendant’s “right to be heard” via the Fourteenth Amendment (Blume & Seeds, 2005; Levinson, 2001, p. 151). Second, the constitutional right to counsel includes the ability of a defendant to choose his attorney. Third, the right to counsel is not limited to the trial stage, but includes assistance by counsel at all stages of trial preparation. Fourth, there must be enough time for a defendant and counsel to adequately prepare for a defense. Fifth, the court must assign defense counsel in capital cases if it is thought that a defendant is not able to argue in his own defense. Lastly, not only is a defendant guaranteed the right to counsel, but the counsel must provide *effective* aid to the defendant.

The Supreme Court added the verbiage “effective” in the final holding of *Powell* because it determined that it is not enough to merely appoint counsel, as the defendants did have attorneys appointed to them. However, the attorneys did not prepare, investigate, or consult with their clients and were only appointed the morning of the trial. The implications of the Supreme Court adding the appendage “effective” to the right of counsel were two-fold: (1) now the right to counsel was no longer “just a formal

guarantee” and (2) there were now minimum standards in place for defense counsel which must include at least enough of a guarantee to satisfy that due process has been met (Levinson, 2001, p. 152; Blume & Seeds, 2005).

The next case heard by the U.S. Supreme Court regarding effectiveness of counsel was *McMann v. Richardson* (1970), thirty-eight years after ruling in *Powell*. This case is the first time that the Supreme Court interpreted the constitutional right to counsel in the Sixth Amendment to include a right to effective assistance of counsel (Gilles, 1983). Further, *McMann* was the first attempt by the Supreme Court to establish working standards for defense attorneys (Levinson, 2001).

*McMann v. Richardson* (1970) involved a defendant who was charged with murder. Richardson and two other defendants asserted that their court appointed attorneys gave them poor legal advice to plead guilty. The defendants initially did not want to plead guilty and claimed that their confessions were coerced. Richardson claimed that his attorney advised him to plead guilty in order to avoid being sentenced to death, which according to his attorney would be the likely result if the confessions were heard at trial. Additionally, Richardson claimed that his attorney explained that he would be able to argue the issue of the coerced confession in subsequent proceedings.

All of the defendants attempted to get habeas relief by claiming that they were ill-advised by their attorneys to plead guilty under the circumstances of their alleged coerced confessions. The Supreme Court rejected the claims of ineffective assistance of counsel

and explained that the issue was not whether the attorney advice was right or wrong; rather, the issue was whether or not the attorney's advice fell within the acceptable range of competence for attorneys at that time (Gilles, 1983).

The Court did somewhat acknowledge the importance of effective assistance of counsel in this case, as it set the stage for creating standards that would assist in future determinations of IAC claims by holding:

The matter... should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys... (*McMann v. Richardson*, 1970, p. 771).

The only problem with this attempt to create standards is that the trial courts had no incentive to establish standards for defense attorneys without the pressure from higher courts and generally, require very little of defense attorneys (Levinson, 2001, p. 154). *McMann v. Richardson* (1970) left lingering questions about how the courts need to characterize defense attorney performance standards (Blume & Seeds, 2005).

*Cuyler v. Sullivan* (1980) involved three defendants charged with two counts of first-degree murder. The victims, a couple, were shot in an office building in Philadelphia by three assailants. A janitor claimed to have seen the three defendants enter the office building and after hearing gunshots, he was instructed by one of the defendants to leave the building. The bodies of the victims were found the next morning.

At issue in *Cuyler* was a conflict of interest with the two attorneys who represented Sullivan and the co-defendants. The defendant, Sullivan, argued that because his attorneys were also representing the conflicting interests of his co-defendants, he was not provided with effective assistance of counsel (Sullivan used the co-defendants' attorneys because he was unable to afford his own attorney and was offered representation). Sullivan asserted that his attorneys failed to present evidence for his defense at trial. After exhausting state appeals, Sullivan sought federal habeas corpus relief by arguing that the trial court did not question the possibility of his attorneys having a conflict of interest by representing multiple defendants for the same case at the same time.

The Supreme Court's decision in *Cuyler* regarding ineffective assistance of counsel consisted of three parts. First, the trial court had no duty to inquire on the issue of conflict due to multiple representations in the *Cuyler* case because they had no knowledge of the conflict. Further, the Sixth Amendment only requires that the trial court investigate any such objections to conflict issues in a timely fashion and Sullivan did not raise any concerns for conflicts of interest during the trial. Second, A defendant must be able to show that there was not only a conflict of interest, but that the conflict "adversely affected" the quality of the defendant's representation (*Cuyler v. Sullivan*, 1980, p. 1). Third, the mere possibility of there being a conflict of interest is not sufficient to overturn a conviction. Again, the defendant must be able to show that the conflict affected the quality of representation.

The next case, *Duckworth v. Serrano* (1981), is similar to *Cuyler* because it also deals with attorney conflict and IAC claims. The defendant was convicted of murder and argued that he received inadequate representation when his attorney represented another defendant who was also a witness for the prosecution in his trial. The Court of Appeals reversed Serrano's conviction even though the argument had not been made before the state courts. The U.S. Supreme Court reversed the appellate court's decision and remanded the case.

### **B. *Strickland* (1984): The Landmark Case for IAC**

*Strickland v. Washington* (1984) is considered the landmark case for defense attorney standards of effectiveness, as this case prompted the Court to formulate a test used for determining defense attorney effectiveness. *Strickland* is the most commonly cited case for claims of ineffective assistance of counsel (Klaren & Rosenberg, 2004).

Washington was a defendant who pled guilty and was convicted for the kidnapping and brutal murders of three victims in Florida. After being sentenced to death for the crimes, Washington appealed his conviction and death sentence. According to Washington, his appointed defense counsel did very little to represent him with the exception of making a few phone calls to his family for some general information. Specifically, defense counsel did not cross examine the state's witnesses nor did he call any character witnesses to speak on the defendant's behalf. Even with the claims from the



defendant that he committed the crimes because he could not support his family, his attorney did not obtain a psychological evaluation for him (Klaren & Rosenberg, 2004).

After exhausting all of his state appeals and state petition for habeas corpus was denied, Washington appealed to the federal courts alleging that his Sixth Amendment constitutional right to effective assistance of counsel had been violated by his attorney's actions (or lack thereof) (Klaren & Rosenberg, 2004). The U.S. Court of Appeals reversed and remanded the lower court's decision to reject the IAC claim.

The Supreme Court agreed to hear the *Strickland* case to review the standards required by which a criminal conviction can be overturned as the result of ineffective assistance of counsel (Rigg, 2007). In an 8-1 decision, the Supreme Court reversed the decision of the lower court and found no merit to Washington's claim of IAC. However, the Court clarified the Sixth Amendment right to counsel by explaining that the right includes the expectation of effective counsel and that the foundation for judging IAC claims should be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" (*Strickland v. Washington*, 1984, p. 686). The most significant holding in *Strickland* was when the Court formulated the standards for judging IAC claims by developing a two-prong test which requires certain elements to be met in order for a court to find an attorney "ineffective." First, the Court held that a defendant must demonstrate that counsel's performance was deficient and as such, did not meet the expectation of functioning as "guaranteed by the Sixth Amendment" (*Strickland v. Washington*, 1984, p. 706). Second, the error(s) made by counsel must be shown as "so serious as to deprive

the defendant of a fair trial because of a reasonable probability that, but for counsel's unprofessional errors, the results would have been different" (*Strickland v. Washington*, 1984, p. 1). The Court clarified by explaining that if both elements of the test are not met, it cannot be said that a conviction or death sentence stems from an unreliable result.

The Court also addressed the standard for judging performance and prejudice. In doing so, the Court was cautious not to make specific guidelines or rules to follow. Instead, a general guide was provided for what may be considered when ensuring that defense has done its job to create a fair trial for the defendant; the Court felt that such judgment should be reviewed on a case by case basis (Blume & Neumann, 2007). For the performance prong, the Court held the standard as, "reasonable effective assistance, considering all the circumstances" and a defendant must be able to demonstrate that counsel's assistance "fell below an objective standard of reasonableness"; thus placing the burden of proof on the defendant (*Strickland v. Washington*, 1984, p. 688). For judicial scrutiny, the Court explained that "counsel's performance must be highly deferential" and must overcome a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (*Strickland v. Washington*, 1984, p. 689). For the prejudice prong, the standard requires the accused to show that if not for the counsel's errors, there is reasonable probability that the result of the proceeding would have had a different ending. Lastly, the Court found that any hearing for an IAC claim "must consider the totality of the evidence" (*Strickland v. Washington*, 1984, p. 695).

In Washington's case, the Supreme Court asserted that the defendant was unable to demonstrate either of the prongs needed to show ineffective assistance of counsel. The

Court held that the defense counsel's decision not to present mitigating evidence was a strategic decision. The holding contended that it would have been harmful to Washington if introduced because this would have allowed for introduction of other evidence by the state that would have been a detriment to his case (*Strickland v. Washington*, 1984).

In a dissenting opinion that would later be supported by many scholars and defense attorneys alike, Justice Marshall asserted that the standard for judging IAC claims is "so malleable that in practice it will either have no grip at all" or it will create much variation in how the Sixth Amendment is interpreted (*Strickland v. Washington*, 1984, p. 707).

There are many critics of the *Strickland* decision and its test for IAC. The first, and most commonly cited critique, is that the language written by the Supreme Court in *Strickland* is ambiguous and allows for too much discretion with attorneys regarding their "tactical or strategic" decisions; the language is thought to be so ambiguous that the courts are able to find almost any actions taken (or not taken) to be "strategic" and within acceptable legal boundaries (Klaren & Rosenberg, 2004).

The "tactical choice" portion is also problematic because it allows for the specific errors under scrutiny to be isolated and thus, not taken into account for an overall cumulative impact. Also, "tactical choice" allows for errors to be excused that were never part of a decision by the attorney to begin with (Levinson, 2001).

Other verbiage from *Strickland*, such as the finding of "reasonableness" also allows for a wide range of interpretation. Some experts believe that the ambiguity suggests that the real motivation behind the creation of the test is to create an exit path for

the innocent or those not deserving of a death sentence; rather than attempting to encourage better defense attorney standards or to ensure a fair trial (Klaren & Rosenberg, 2004).

Another critique of *Strickland* is that the ruling attracts a lot of litigation, even though the test has proven to be mostly useless or ineffective (Dripps, 1998). Some speculate that the Courts may easily reject IAC claims, in part, because of the frequency of it being raised. As Justice Jackson points out, “it must prejudice the occasional meritorious application to be buried in a flood of worthless ones” (Bibas, 2004, p. 3). Some scholars point out that while the *Strickland* test is not perfect, it is a “necessary evil in the name of judicial economy” (Levinson, 2001, p. 163). The low standards and vague nature of the requirements are somewhat adequate for *normal* trials because without them, defendants would be able to routinely re-litigate issues on appeal. However, under the presumption that “death is different,” some argue that *Strickland* should not be used when judging capital sentencing claims (Levinson, 2001, p. 163).

Yet another criticism of *Strickland* argues that the nature of the two-prong test violates typical constitutional law. This is because if a defendant is able to prove or meet the standard of the first prong (deficient counsel), then he/she has already proven a constitutional violation, as the Sixth Amendment has been interpreted to include the necessity of *effective* counsel. Some argue that this showing alone should be satisfactory to overturn a conviction or get a new trial for the defendant. Further, critics argue, that

the government should bear the burden of proving the prejudice requirement rather than the defendant who has already demonstrated a violation of the constitution (Levinson, 2001).

Dripps (1998) attempts to describe the feeling among defense attorneys regarding the minimal scrutiny for IAC claims, “the test of ineffective assistance of counsel is said to be whether counsel can fog a mirror”; in other words, if counsel can breathe, they are able to pass the test for effectiveness (Dripps, 1998, p. 249). This thought is supported by numerous stories of defense attorneys who have exceeded what most would consider *deficient* and worthy of *prejudice* as required by *Strickland* (Dripps, 1998). One tragic example is a case in Alabama that involved death penalty defendant, Horace Dunkins. Dunkins’ attorney failed to inform the jury that his client had an IQ like that of a six year-old child. This omission, along with other mitigating evidence that was not presented, resulted in the jury imposing a death sentence. After Dunkins was executed, members of the jury came forward and asserted that they would not have imposed the death penalty if they were provided with the information of his low IQ (Levinson, 2001).

Another example is a 1995 capital case of a defendant convicted of murder in Texas. This case involved an appointed defense attorney who slept through the majority of trial (frequently missing entire witness testimonies). Ultimately, the attorney was found to be *effective* by *Strickland’s* standards. When asked why he slept during court proceedings which determined the death penalty, the attorney explained that he was bored (Bright, 1999). The trial judge gave this explanation when denying that the

attorney's actions went against the Sixth Amendment's guarantee to effective assistance of counsel: "the Constitution doesn't say the lawyer has to be awake" (Bright, 1999, p. 26). The subsequent appeals by federal courts agreed with the trial judge that the *Strickland* requirements were not met for the defendant's IAC claim and therefore, the attorney was deemed *effective* (Bright, 1999).

Even more bizarre, is a case from Idaho, *Charboneau v. Klausner* (1997), involving a defendant who tried to argue that his attorney's bizarre behavior resulted in his receiving an unfair trial. Charboneau claimed that his counsel was ineffective primarily because his trial strategy was based on a séance that the attorney had with Charboneau's murdered ex-wife (The Federal Reporter, 1997). Amazingly, the court that heard this case did not find merit to the IAC claim by Charboneau.

In agreement with (and citing) Bright (1999), U.S. Supreme Court Justice Blackmun criticized *Strickland* in a compelling dissent (to deny certiorari for an IAC case):

My 24 years of overseeing the imposition of the death penalty from this Court have left me in grave doubt whether this reliance is justified and whether the constitutional requirement of competent legal counsel for capital defendants is being fulfilled. It is my hope and belief that this Nation soon will come to realize that capital punishment cannot morally or constitutionally be imposed). (Rigg, 2007, p. 4)

The problem of severely inept defense counsel is not new and has been challenged for years in court and in most cases, defendants have been unable to reach the

bar for the *Strickland* test (Bright, 1999). When reviewing defense attorney errors made in cases of the wrongfully convicted, the Innocence Project found the severe attorney errors, that did not meet Strickland, to include: sleeping in the courtroom, failure to investigate a defendant's alibi, failure to call forensic experts when necessary, and failure to be present at important court proceedings (Innocence Project, 2009).

### **C. Post *Strickland* Cases: 1984-2009**

The effects of the *Strickland* ruling were far-reaching and set firm precedent for the courts; it was the landmark case by which all subsequent IAC cases are judged. All cases heard by the U.S. Supreme Court after *Strickland* use its two-prong test as the standard for finding claims of ineffective assistance of counsel.

*U.S. v. Cronin* (1984), also a landmark case for the development IAC claims, was heard by the Supreme Court in the same year as *Strickland*. *Cronin* provides more specific language to the *Strickland* requirement that a defendant must show prejudice, by adding that the defendant must point to specific acts. At issue in *Cronin* was a defendant charged with mail fraud. More specifically, Cronin was alleged to have been engaged in a form of fraud called "check-kiting" (Dripps, 1998). Cronin was appointed defense counsel twenty-five days before the trial was to begin (even though the prosecution spent four and a half years investigating and preparing for its case against Cronin). The defendant's trial attorney was a real estate attorney who had never argued before a jury trial and not surprisingly, Cronin was found guilty and convicted at trial (Dripps, 1998).

Cronic appealed his conviction and claimed that his counsel was ineffective. Unlike *Washington*, Cronic did not point to specific errors made by the attorney; rather, the defendant claimed that the general circumstances of the case affected his ability to have a fair trial. Specifically, Cronic argued that the complexity of the case warranted more preparation time than the allotted twenty-five days and that his attorney was too inexperienced for such a complex case; he argued that these circumstances were grounds for asserting ineffective assistance of counsel (Dripps, 1998).

Although Cronic gained the support of the Tenth Circuit, the Supreme Court reversed the lower court's decision. The Supreme Court held that unless the circumstances are extreme, as in *Powell* when a defendant was appointed counsel on the same day as the trial, IAC claims must point "to specific errors" made by the trial counsel (Dripps, 1998, p. 277). However, the Court offered one exception, now referred to as the "Cronic exception." The "Cronic exception" allows for an IAC claim to meet the *Strickland* standards without pointing to specific acts or showing prejudice if a defendant receives "truly pervasive neglect by counsel" (Voigts, 1999, pp. 10-11). More specifically, the exception may be applied when there has been a severe deprivation of counsel during a key stage of the case, an attorney has been appointed to represent a defendant in "an unusually difficult situation," or if defense counsel "fails to subject the prosecution's case to a meaningful adversarial testing" (Bernhard, 2003, p. 38).

The next case to be heard by the U.S. Supreme Court for IAC claims, *Hill v. Lockhart* (1985), was the first case in which the Court applied the *Strickland* standards to the validity of guilty pleas. The defendant, William Hill, was charged with first degree



murder and theft. Hill pled guilty and was sentenced to 35 years in state prison. The defendant later claimed that his attorney was ineffective when he provided erroneous information regarding eligibility for parole. Hill claimed that his attorney did not tell him that to be eligible for parole, as a second-time offender, half of his sentence time must have been served before parole consideration. As such, the defendant filed for federal habeas relief based on ineffective assistance of counsel that resulted in an involuntary guilty plea (*State v. Patterson*, 2009).

The Supreme Court affirmed the lower court's decision and denied habeas relief for Hill. The Court held that since the defendant did not assert in his petition that if his counsel had provided the correct parole information, he would have pled not guilty and demanded a trial, there was no basis for arguing that he is entitled to a hearing on an IAC claim. Again, this is necessitated by the second requirement of the *Strickland* test which states, "the defendant must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different" (*Hill v. Lockhart*, 1985, p. 57). The Supreme Court also addressed the application of *Strickland* standards when counsel fails to investigate exculpatory evidence where the defendant pled guilty as recommended by counsel. The Court held that in cases where a defendant claims ineffective assistance of counsel because the attorney did not investigate exculpatory evidence, the "determination whether the error prejudiced the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea" (*State v. Patterson*, 2009, p. 17).

Additionally, there must be the likelihood that an investigation/discovery of such evidence would have impacted the trial outcome.

At issue in *Darden v. Wainwright* (1986) was a defendant convicted of murder, robbery, and assault with intent to kill. The defendant was accused of entering a Florida couple's furniture store and robbing and killing one of the owners. After pretending to be interested in purchasing some furniture, the defendant allegedly held a gun to the female owner's back and took the money from the register. Next, the defendant was attempting to sexually assault the woman when her husband came to her aid and then was shot in the head and killed. A teenage neighbor came to check on the owners and was shot three times by the assailant, but survived. After fleeing the furniture store, the assailant got into a car accident and ran. Darden was found the next day at his girlfriend's home and was identified by both of the surviving victims.

At trial, Darden was found guilty and sentenced to death in Florida. Darden challenged both his conviction and death sentence by arguing, among other claims, that during the sentencing phase of his trial, he received ineffective assistance from his attorney. Specifically, the defendant claimed that his attorney failed to present any mitigating evidence at sentencing and spent an inadequate amount of time preparing for this. Darden's attorney claimed that his client did not meet any of the factors for mitigating evidence under Florida statutes. Additionally, the attorney stated that he did not know that mitigating factors were admissible if not statutory (Blume & Neumann, 2007).

The Supreme Court found that the trial court had informed Darden's attorney that it was permissible to present mitigating evidence at sentencing and the attorney failed to do so. Even so, the Supreme Court held that the defendant did not meet the requirements of the *Strickland* test, which requires a defendant to prove that his attorney's actions "fell below an objective standard of reasonableness" (*Darden v. Wainwright*, 1986, p. 4). The Court explained that it is reasonable to conclude that the attorney's reasons for not presenting mitigating evidence may have been a strategic decision of which, the defendant failed to prove otherwise. The Court further commented that, contrary to the defendant's claims, the record revealed that the attorney did spend a sufficient amount of time preparing the defendant's defense and sentencing. The Supreme Court affirmed.

At issue in *Kimmelman v. Morrison* (1986) is how courts should treat IAC claims when the primary assertion of ineffective counsel is related to counsel's failure to properly litigate a Fourth Amendment claim. This case is significant because it is the first case that the Supreme Court ruled in favor of the defendant's claim of ineffective assistance of counsel.

Morrison was charged with the rape of a teenage girl in New Jersey who was his employee at the time. The defendant's attorney attempted to suppress a key piece of evidence that was introduced at trial. The evidence, a bed sheet with semen on it, was collected by the police without a search warrant. The trial judge denied the motion on the grounds that the attorney's timing was outside of the 30 day procedural deadline for filing the motion, as required by New Jersey law. Morrison's attorney argued that the

prosecution had an obligation to disclose the evidence that they intended to use for their case regardless of whether it was requested by the defense. The trial judge held the decision to deny the suppression motion and the defendant was convicted of rape.

Following his conviction, Morrison dismissed his trial attorney and hired a new one on appeal. The new counsel argued that: (1) he received ineffective assistance of counsel at trial and as such, he was convicted and (2) the trial court erred when it refused to suppress the motion. The U.S. Supreme Court agreed to hear Morrison's case, specifically to address the issue of whether or not restrictions that have been placed on habeas review, of certain Fourth Amendment claims, should be applied to IAC claims when the primary assertion of the attorney's ineffective assistance is the result of failing to file a motion to suppress illegally obtained evidence in a timely manner- a violation of the Fourth Amendment.

The Supreme Court affirmed the Court of Appeals decision which held that "restrictions on federal habeas review of Fourth Amendment claims should not have been extended to bar federal habeas consideration of Sixth Amendment claims based on counsel's alleged failure competently to litigate Fourth Amendment claims" (*Kimmelman v. Morrison*, 1986, p.1). The Supreme Court ruled that federal courts can grant habeas relief when appropriate, "regardless of the nature of the underlying attorney error" (*Kimmelman v Morrison*, 1986, p. 16). The Court explained that the attorney's assistance was "constitutionally deficient" because he did not file a timely motion to suppress the evidence; a circumstance that could not be viewed as a strategic

decision (*Kimmelman v. Morrison*, 1986, p. 1). As such, the Supreme Court found the defendant's IAC to have merit and affirmed the lower court's decision.

*Burger v. Kemp* (1987) was the next case heard by the Supreme Court for an IAC claim. The defendant, Burger, was accused of kidnapping, sodomizing, and drowning a cab driver to death in Georgia at the age of seventeen with a companion (who was represented by the partner of Burger's attorney). The defendant was convicted and sentenced to death (Blume & Neumann, 2007).

Burger argued that he received an unfair trial because his attorney did not present any mitigating evidence on his behalf during trial. There were several key issues that could have been investigated more thoroughly by the defense counsel. It was found that Burger had an IQ that was almost low enough to constitute mental retardation. The defendant's attorney failed to raise this issue and did not have a psychological evaluation completed for his client. Further, the attorney was aware that Burger was involved in a program during his youth that documented the physical and emotional abuse he had endured in his childhood; however, the attorney did not call anyone involved in the program or any family members to give character statements on his client's behalf (Blume & Neumann, 2007).

The defendant won an appeal in the state Supreme Court that overturned his death sentence and called for a new hearing. However, the defendant's new hearing resulted in the death penalty again was subsequently upheld by the state Supreme Court on appeal. In federal court, the defendant raised an IAC claim on the grounds that: (1) there was a conflict of interest due to his attorney's partner representing his co-

defendant (there was testimony that was used in the other defendant's trial that was damaging to Burger's case) and (2) counsel did not present mitigating evidence on his behalf (Blume & Neumann, 2007).

The U.S. Supreme Court heard the case and in a 5-4 decision, the Court affirmed the lower court's decision. The Court held that Burger was unable to show that the performance of his attorney was deficient (Blume & Neumann, 2007). Specifically, the Court addressed the issue of counsel's conflicting interests by finding that the conflict did not rise to the level of violating the Sixth Amendment. Further, the failure of the attorney to present and investigate mitigating evidence on the defendant's behalf, it was held, was "based on reasonable professional judgment" and also did not violate the defendant's Sixth Amendment right to effective assistance of counsel (*Burger v. Kemp*, 1987, p. 789).

The four dissenting Justices addressed both of Burger's claims regarding IAC and agreed that each met the requirements set forth by *Strickland*. The Justices explained that the prejudice prong should have been met automatically for Burger's claim regarding attorney conflict, because such conflict is enough to deny a defendant the fundamental right to effective assistance of counsel. Additionally, the Justices explained that the IAC claim by Burger that his attorney failed to present mitigating evidence had merit, as evidenced by the trial record; therefore, it is reasonable to think that the sentencing outcome may have been different if that evidence were presented to the jury (*Burger v. Kemp*, 1987).

The next case to be heard by the U.S. Supreme Court regarding ineffective assistance of counsel, *Lockhart v. Fretwell* (1993) impacted the *Strickland* standard significantly. The Court's decision added to the prejudice requirement of the two-prong test, the "overall fairness" phrase. (Levinson, 2001). Also, *Lockhart* tested the requirement of a "just and reliable result" (Klaren & Rosenberg, 2004, p. 345).

The defendant, Bobby Ray Fretwell, was tried and convicted of capital murder during a robbery and sentenced to death in Arkansas. The defendant's charge also included an aggravating factor that the murder was the result of a robbery and thus, committed with the defendant standing to receive monetary gain as a result.

On direct appeal, Fretwell argued that his sentence was unconstitutional due to a ruling by the Eighth Circuit (although later overturned) which held that an aggravating factor cannot duplicate the "element of the offense" that the defendant was convicted of (*Lockhart v. Fretwell*, 1993, p. 1). In Fretwell's case, he was already charged with the felony of murder during a robbery and therefore, the inclusion of the aggravated factor (receiving monetary gain for the crime) duplicated an element of the original felony charge. On appeal to the Arkansas Supreme Court, the defendant again argued the rule of duplicating offenses and added an IAC claim. The defendant argued that he received ineffective assistance of counsel due to the failure by counsel to object to a recent precedent set by the Eight Circuit regarding the duplication of offenses; if the objection was made, Fretwell could not have been sentenced to death. The Arkansas Supreme Court refused to consider the first claim asserting that the failure of the defendant to raise the issue at sentencing barred the Court from hearing the claim on appeal. The

IAC claim was also rejected by the Court. However, a later appeal found the defendant's IAC claim to meet both the performance and prejudice requirements of the *Strickland* test, and the defendant's sentence was conditionally vacated (*Lockhart v. Fretwell*, 1993).

The Supreme Court, in a 7-2 ruling, reversed the decision by the lower court. The Court held that the failure of the defendant's counsel to object to the precedent set by the Eighth Circuit (that disallowed the duplication of an element of an underlying charge) did not rise to the level of finding prejudice, as required by the *Strickland* test. The Court explained that in order to meet the *Strickland* prejudice requirement, the defendant must show that the attorney's errors were severe enough to "deprive him of a trial whose result is unfair or unreliable", not just that the outcome would have been different (*Lockhart v. Fretwell*, p. 368). The Court explained that the defendant can not demonstrate unfair or reliable counsel error unless the error "deprives the defendant of a substantive or procedural right to which the law entitles him" (*Lockhart v. Fretwell*, 1993, p. 372) In *Fretwell's* case, the Court asserted, no such right was deprived because the precedent by which the defendant was arguing (the Eighth Circuit ruling) was overturned on appeal and thus, not able to meet the prejudice requirement (*Lockhart v. Fretwell*, 1993). However, Chief Justice Rehnquist found the circumstances in this case a "windfall" for *Fretwell* and therefore, added the "overall fairness" element to the *Strickland* test to urge courts to not focus solely on the "outcome determination" (Levinson, 2001, p. 156). Justice Stevens concluded, in a dissenting opinion, that the evidence was there to support the IAC claim, and the two-prongs of the test were met.



He held that the defendant would not have been sentenced to death if his attorney had objected (under the existing law at the time) (Klaren & Rosenberg, 2004).

The Supreme Court added to the *Strickland* test in *Fretwell* by holding that future considerations of IAC claims must utilize an “overall fairness” approach to analyzing prejudicial error (Levinson, 2001). The judgment for the prejudice prong of the *Strickland* test must not rely solely on “outcome determination”; rather, courts should take into consideration “overall fairness” (Levinson, 2001, p. 156).

*Roe v. Flores-Ortega* (2000) is a case by which the primary issue was an IAC claim. The defendant pled guilty to second-degree murder in California. During the sentencing phase, the judge gave the defendant notice of the time period that an appeal could be filed if desired. The defendant’s attorney failed to file an appeal for the defendant even though notes were made on the attorney’s file (written by the attorney) to bring the appeal papers to the defendant. Later, the defendant attempted to file an appeal outside of the allowed time period and as such, the appeal was rejected. After exhausting state remedies, the defendant appealed to the federal courts by habeas corpus petition asserting that he had received ineffective assistance of counsel. The basis for the claim was that the attorney promised to file the appeal and failed to do so. The U.S. District Court rejected the petition and denied relief. The U.S. Court of Appeals reversed the lower court’s decision and agreed that the defendant should be granted relief; this decision was based on the Court of Appeals precedent which allowed automatic relief for a defendant if counsel failed to file a notice for appeal without the consent of the defendant.

The U.S. Supreme Court vacated and remanded. The Court concluded that the *Strickland* standard was the appropriate framework by which the case should be judged. The Court held that the Court of Appeals erred when it granted relief because it did not use the *Strickland* standard to evaluate the claim and it did not have a record that could conclude that counsel was ineffective based on the prejudice requirement.

*Williams v. Taylor* (2000) was also heard in 2000, a year in which the U.S. Supreme Court heard a total of five cases involving IAC claims (a significant number, considering the total number of cases heard by the Court on this issue). Williams, the defendant, was convicted of robbery and murder. Williams confessed by writing a letter to police in Virginia claiming that he robbed (for three dollars) and killed an elderly person who's death had already been ruled an accident by alcohol poisoning. Following conviction, Williams was given the death penalty (Rigg, 2007, p. 5).

During sentencing, the state presented aggravating factors such as the defendant's long criminal record and expert witnesses to support its notion that Williams would continue to harm society. The defendant's attorney failed to present mitigating factors, aside from three character witnesses, that would have been helpful for death penalty considerations. For instance, the defendant's attorney failed to investigate or present evidence that would have shown that Williams' mental capacity was "borderline mentally retarded" (Rigg, 2007, p. 5). Further, the defendant's parents were imprisoned for neglecting and physically abusing him and his siblings when they were young children (the abuse continued in foster care as well). Finally, there were prison officials that would have testified on Williams' behalf concerning his ability to

thrive in institutional settings; he was never engaged in violent behavior and even sought to further his education while in imprisoned in the past. These and other mitigating circumstances, if presented, may have contradicted the state's assertions that the defendant would continue to threaten society and therefore, should receive the death penalty. In addition poor investigative skills, defense counsel shocked the Court during closing arguments by telling the jury that it would be difficult to convince them not to sentence Williams to death (Rigg, 2007).

Williams exhausted his state appeals and continued on to federal court arguing ineffective assistance of counsel on the basis that his attorney failed to present meaningful mitigating evidence on his behalf during sentencing. The Supreme Court agreed to hear the case specifically to address the IAC claim by deciding whether Williams' attorney acted unreasonable with regards to the extent of investigating the defendant's background. The Court applied the *Strickland* test and held that Williams' IAC claim met both the "deficient performance and prejudice" requirements (Cawley, 2007, p. 6). The Court held that if the attorney was competent and conducted a better background on Williams, he may not have been sentenced to death. The Court reversed the lower court's decision and overturned the death sentence (Cawley, 2007).

*Bell v. Cone* (2002) involves a defendant, Cone, charged and convicted with murdering an elderly couple in Tennessee. The defendant's counsel tried to use insanity as a defense, but the jury did not agree and returned a death sentence. At sentencing, Cone's attorney did not present mitigating evidence on his behalf and waived the closing argument. Therefore, the jury heard only the aggravating factors presented by

the state along with the state's closing argument when making the decision to punish Cone by death.

On appeal in federal court, Cone raised an IAC claim on the basis that his attorney failed to present mitigating evidence and erred with the decision to waive the closing argument at sentencing. The U.S. Court of Appeals held that the defendant's IAC claim had merit and that the *Strickland* requirements were met. The Court held that the defendant's attorneys' inactions caused a breakdown in the case by not subjecting the state's request for the death penalty to "meaningful adversarial testing" (*Bell v. Cone*, 2002, p. 716). The Court reversed and remanded.

The Supreme Court agreed to hear the case and reversed the decision by the Court of Appeals. The Court held that the decision by the defense attorney to omit mitigating evidence was tactical and reasonable, and failure to present a closing argument was a strategic decision because it prevented the state from making a rebuttal argument. The Court did not believe that the death penalty could have been avoided because the state had plenty of evidence pointing to the cruelty of the crimes; therefore, neither of the *Strickland* requirements could be met.

*Massaro v. U.S.* (2003) was a federal case heard by the Supreme Court, which primarily addressed the issue of procedurally barring IAC claims from subsequent appeals if not raised on direct appeal first. The defendant, Massaro, was charged with federal racketeering and murder. At trial, the defendant's attorney learned from the prosecutor that there was evidence, a bullet, found near the victim's body, which was not revealed before trial. Despite the court's offer of a continuance, which would allow

time to have the bullet examined, the defendant's attorney declined and the evidence was admitted. Massaro was found guilty and sentenced to life in prison (*Massaro v. U.S.*, 2003).

On direct appeal, Massaro's new attorney argued that the trial court erred when it allowed the evidence to be submitted, but failed to raise the issue of ineffective assistance of counsel. Massaro then appealed to the Court of Appeals, this time claiming ineffective assistance of counsel. The Court ruled that if the defendant is represented by a new attorney on appeal and the IAC issue was directly related to issues at trial, then the IAC claim must have been raised at direct appeal; thus, Massaro's claim was procedurally barred on the basis that the IAC claim could have been raised on direct appeal. The Court of Appeals affirmed.

The Supreme Court agreed to hear the case and reversed the lower court's decision. The Court held that the failure by the defendant to raise the IAC claim on direct appeal did not constitute barring the claim from being heard in later proceedings. It is important to note that this ruling was specifically aimed at defendant's convicted in federal courts. The Court remanded the case for further proceedings.

The next case, *Wiggins v. Smith* (2003), was heard by the Supreme Court three years after *Williams v. Taylor* (2000) and has some similarities in the way that the IAC claims were judged in light of investigative failure by counsel. In both cases, the Supreme Court language asserted the necessity of defense counsel to investigate mitigating evidence on behalf of their clients during the penalty phase (Bernhard, 2003).

Wiggins was charged with murder, robbery, and theft of an elderly woman. The crime was particularly heinous, as the victim was drowned in her own bathtub half-clothed and covered in roach and ant killer. The defendant waived the jury trial and chose a trial by judge, by which he was convicted of all charges. At sentencing, the defendant chose a jury to decide the punishment. In the opening statement, Wiggins's counsel told the jury that they would be hearing evidence of Wiggins's tragic life and past, along with other mitigating circumstances. However, the attorney did not deliver on that promise; there was no history of the defendant investigated by defense counsel even though there were significant mitigating factors that, if presented, may have been useful at sentencing (Klaren & Rosenberg, 2004). More specifically, Wiggins was abused (both physically and sexually) and neglected by his mother when he was a child; the abuse continued into foster care and subsequently, with his life on the streets. The jury, unaware of these circumstances, sentenced Wiggins to death (Rigg, 2007).

On appeal in federal court, the defendant raised an IAC claim. The U.S. Supreme Court agreed to hear the case to decide whether or not the counsel's failure to present or investigate mitigating evidence was reasonable and strategic. The Court found the defense attorneys' inactions to be deficient and not strategically motivated. Further, the Court ruled that it is reasonable to think that the sentencing outcome may have been different if the mitigating evidence was presented to the jury; thus finding the IAC claim to meet the *Strickland* standards. The Supreme Court overturned the death sentence (Klaren & Rosenberg, 2004).

*Florida v. Nixon* (2004) is another case that the Supreme Court heard with the primary issue being IAC. The defendant, Nixon, was accused of a kidnapping and brutal murder in the state of Florida. At arrest, the defendant gave a detailed account to police about how he committed the crimes. Initially, the defendant pled not guilty. After reviewing Nixon's case, however, his defense counsel determined that the evidence against him was strong and allowed for little chance of the defendant getting off. Therefore, Nixon's attorney attempted to plea bargain with the prosecution to no avail. The prosecution asserted its desire to seek the death penalty. With this information, his defense counsel decided that the best strategy for Nixon would be to admit guilt at trial in hopes of gaining respect from the jury and reducing his chances of receiving the death penalty. When counsel repeatedly approached the defendant with this strategy, the defendant, who had been disruptive at most of the legal proceedings thus far, was unresponsive and refused to offer any guidance or preparation for his case. The attorney then made the decision to proceed as planned without approval or disapproval from his client. The jury returned a guilty verdict at trial. At sentencing, Nixon's attorney provided extensive mitigating evidence on his behalf which included expert testimony revealing his low IQ, traumatic childhood, possible brain damage, emotional issues, and anti-social personality, as deemed by a psychiatrist. After hearing the evidence, the jury still imposed the death penalty.

On appeal to the Florida Supreme Court, Nixon claimed that his attorney was ineffective on the basis that he conceded guilt without Nixon's consent, which he argued should automatically meet the prejudicial requirement of the *Strickland* test. The

Florida Supreme Court agreed that Nixon was disruptive, unhelpful, and further, that his attorney was probably working for the defendant's best interests; however, the Court reversed and remanded in favor of the defendant. The Court held that the act of the attorney revealing the defendant's guilt, without consent, must be considered ineffective assistance of counsel.

Florida appealed to the U.S. Supreme Court. The Court reversed and remanded. In a unanimous decision, the Court held that the attorney's strategy to concede his defendant's guilt without consent could not automatically satisfy the prejudice requirement. First, the Court explained that when a defense attorney is working on a capital case, both the guilt and sentencing phases must be taken into consideration when determining strategy. Further, when the defendant refused to respond to counsel's efforts to discuss strategy, the attorney's efforts to move forward were not restricted by any rule that required "explicit consent" (*Florida v. Nixon*, 2004, p. 566).

*Rompilla v. Beard* (2005) is similar to the cases of *Williams* and *Wiggins* with regards to the Court expressing the requirement of counsel to investigate properly, but *Rompilla* added to the extra requirement for counsel to "rebut the prosecution's case for death" (Blume & Neumann, 2007, p. 146).

Rompilla was charged and convicted of murder among other related charges. At sentencing, defense counsel presented little mitigating evidence which consisted only of testimony from several of the defendant's relatives begging for mercy. The prosecution presented evidence of numerous aggravating factors which included the fact that the murder occurred during the commission of a felony, the victim was tortured, and



Rompilla's felony criminal record marked by violence (unknown by the defense). The jury returned the punishment of death.

On appeal in federal court, Rompilla alleged ineffective assistance by counsel and the U.S. Court of Appeals denied a hearing. On certiorari, the U.S. Supreme Court agreed to hear the case for the IAC claim. The Court held that the failure of the defendant's attorney to investigate mitigating evidence and especially, failure to obtain and review the conviction record of the accused, fell below a reasonable standard. The Court added to this by explaining the standard for defense counsel's obligation to investigate the information that the state has against the defendant, "investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities" (*Rompilla v. Beard*, 2005, p. 363). The Court reversed the decision of the lower court.

The Court's acknowledgement and inclusion of the need for defense counsel to investigate evidence that the state has against the defendant, in addition to the normal investigative requirements, made enormous progress for the development of attorney standards and IAC claims. The result of Rompilla is that now the *Strickland* standard has a little more guidance and "teeth" for judging IAC claims (Blume & Neumann, 2007).

The capital cases of *Williams*, *Wiggins*, and *Rompilla* mark a turning point for IAC claims because the Supreme Court, in all three cases, found IAC claims to meet the ever-rigorous standards of *Strickland*; thus, the death penalties were overturned (Rigg, 2007). Although the attorneys found to be *ineffective* in the cases of *Williams*, *Wiggins*, and *Rompilla* did meet *Strickland's* low bar, they were by no means examples of severely

incompetent defense attorneys. As previously mentioned, there were several cases before the Supreme Court with more severe circumstances regarding attorney failure to investigate that did not meet the *Strickland* bar. In fact, the Court ruled in the holdings of the other cases that the attorneys were only required to perform at a minimum when investigating defendants' backgrounds (Blume & Neumann, 2007).

One example that critics struggle to understand, the case of *Burger v. Kemp* (1987), presented with many of the same issues as *Wiggins*. Both cases involved defendants with defense attorneys who failed to conduct background investigations for their defendants, the defendant's had low IQ's and traumatic childhoods, and the defendants both killed their victims by drowning after robbing them; yet, the Supreme Court found the IAC claim in one case to have merit and not the other (Klaren & Rosenberg, 2004). It remains a mystery why the Supreme Court began to impose stricter standards for attorneys to investigate beginning with *Williams*, but nevertheless, progress with the *Strickland* standard has been made (Blume & Neumann, 2007).

*Knowles v. Mirzayance* (2009) is the most recent U.S. Supreme Court decision to deal with IAC. Mirzayance was charged with first-degree murder in California. The victim, Mirzayance's 19 year old cousin, was brutally stabbed with a hunting knife and then shot several times. Mirzayance confessed to the murder and entered two pleas: *not guilty* and *not guilty by reason of insanity*.

In California, when two pleas are entered, the court is required to have a trial with two phases and the same jury- one to determine guilt and the other to determine the validity of the insanity claim. In the guilt determining phase, the defendant's attorney

tried to avoid a first-degree murder conviction; rather, the attorney tried to get a second-degree murder conviction by including medical testimony to show that Mirzayance was insane at the time of the murder and could not have premeditated the crime. This effort was not successful and the jury returned a first-degree murder guilty verdict. The second phase of the trial was set for the following day, but Mirzayance's attorney advised him not to proceed with the insanity phase because he would have to show the same evidence that got him convicted to the same jury. The only additional evidence that could be used was mitigating evidence by the testimonies of Mirzayance's family, who changed their minds about testifying anyway. Mirzayance agreed to his attorney's advice and abandoned his not guilty by reason of insanity plea.

Mirzayance appealed his conviction in state post-conviction proceedings, claiming that he received ineffective assistance of counsel when his attorney advised him to withdraw his insanity plea. His petition was denied, as was his appeal in the state Court of Appeals. Mirzayance went on to appeal this decision in federal court and the District Court denied the petition for habeas relief. The U.S. Court of Appeals overturned the District Court's decision and granted habeas relief. The Court of Appeals explained that although the defendant's attorney had good reason to believe that the second phase of the trial would not have made a difference for the fate of his client, his performance was still deficient because the attorney had nothing to lose by moving forward.

The U.S. Supreme Court heard the case and reversed the decision by the Court of Appeals. The Court explained that the defense attorney's decision to not move forward with the insanity phase of the trial may not have been the best course of action, but it

could not be considered "unreasonable" as required by *Strickland*. Further, the Court added that the defendant's claim would probably not have had success for the second phase, as cited by the trial court (*Knowles v. Mirzayance*, 2009).

The above-mentioned 19 cases that dealt primarily with the issue of ineffective assistance of counsel are listed below in Table One.

Table One

*Significant IAC Supreme Court Cases*

CASE	KEY ISSUE/OUTCOME
<i>Powell v. Alabama</i> , 287 U.S. 45 (1932)	First time the Supreme Court rules that counsel must provide effective assistance
<i>McMann v. Richardson</i> , 397 U.S. 759 (1970)	The Supreme Court ruled that the Sixth Amendment included the right to <i>effective</i> counsel
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980)	Whether attorney conflict is grounds for IAC claim- Court ruled that defendant must show that conflict must affect quality of representation in order to find IAC
<i>Duckworth v. Serrano</i> , 454 U.S. 102 (1981)	Attorney conflict and IAC
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	Landmark case for IAC claims- Supreme Court created two-prong test for finding ineffective assistance of counsel
<i>U.S. v. Cronin</i> , 466 U.S. 648 (1984)	Added the to the <i>Strickland</i> test by requiring defendants to point to specific errors made by counsel
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	Validity of IAC claims and attorney advising defendant to enter guilty plea- Court ruled that defendant must meet <i>Strickland</i> standards

Table One continues

Table One (continued)

CASE	KEY ISSUE/OUTCOME
<i>Darden v. Wainwright</i> , 477 U.S. 168 (1986)	Failure by attorney to provide mitigating evidence at trial and IAC- Court ruled that defendant must meet <i>Strickland</i> standards
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986)	First case that Supreme Court found IAC claim to have merit and meet the <i>Strickland</i> test requirements- case involved improper litigation of Fourth Amendment claim
<i>Burger v. Kemp</i> , 483 U.S. 776 (1987)	Failure by attorney to provide mitigating evidence at trial and IAC- Court ruled that defendant must meet <i>Strickland</i> standards
<i>Lockhart v. Fretwell</i> , 506 U.S. 364 (1993)	Added "overall fairness" verbiage for analyzing the prejudice requirement of the <i>Strickland</i> test
<i>Bell v. Cone</i> , 535 U.S. 685 (2002)	Failure by attorney to provide mitigating evidence at trial and IAC- Court ruled that defendant must meet <i>Strickland</i> standards
<i>Massaro v. U.S.</i> , 538 U.S. 500 (2003)	Whether IAC claims should be barred from being raised in future appeals if not raised on direct appeal- Court ruled no
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	Failure by attorney to investigate defendant's background or provide mitigating evidence at trial and IAC- Court ruled that defendant must meet <i>Strickland</i> standards- death sentence overturned
<i>Florida v. Nixon</i> , 543 U.S. 175 (2004)	Attorney conceded defendant's guilt without consent- Court ruled claim must meet <i>Strickland</i> standards
<i>Rompilla v. Beard</i> , 545 U.S. 374 (2005)	Court increased strength of <i>Strickland</i> by ruling that defense attorneys must investigate defendant's background, gather information from prosecution, and provide mitigating evidence- death sentence overturned
<i>Knowles v. Mirzayance</i> , 129 S. Ct. 1411 (2009)	Attorney advised defendant to withdraw insanity plea- Court ruled that defendant must meet <i>Strickland</i> standards

In addition to the 19 cases discussed in detail above, the Supreme Court heard 27 other cases that included claims by petitioners alleging ineffective assistance of counsel; however, these IAC claims were not the primary issue addressed (and in some cases, not addressed) by the Supreme Court and did not contribute to the development of the constitutional standard. The cases are listed below in Table Two.

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Table Two

*Supreme Court Cases: IAC Cases Not Primary Issue/Key Factor*

CASES
Arave v. Hoffman, 128, S. Ct. 743 (2008)
Bradshaw v. Richey, 546 U.S. 602 (2005)
Castro v. U.S., 540 U.S. 375 (2003)
Coleman, v. Thompson, 501 U.S. 722 (1991)
Custis, v. U.S., 511 U.S. 485 (1994)
Daniels, v. U.S., 532 U.S. 374 (2001)
Dobbs v. Zant, 506 U.S. 357 (1993)
Dretke v. Haley, 541 U.S. 386 (2004)
Edwards v. Carpenter, 529 U.S. 446 (2000)
Glover v. U.S., 531 U.S. 198 (2001)
Halbert v. Michigan, 545 U.S. 605 (2005)
Harris v. Reed, 489 U.S. 255 (1989)
Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394 (2001)
Lozada v. Deeds, 498 U.S. 430 (1991)
Murray v. Carrier, 477 U.S. 478 (1986)

Table Two continues

Table Two (continued)

Sawyer v. Whitley, 505 U.S. 333 (1992)
Schlup v. Delo, 513 U.S. 298 (1995)
Schriro v. Landrigan, 550 U.S. 465 (2007)
Schriro v. Smith, 546 U.S. 126 (2005)
Smith v. Murray, 477 U.S. 527 (1986)
Smith v. Robbins, 528 U.S. 259 (2000)
Stewart v. Smith, 534 U.S. 157 (2001)
Stewart v. Smith, 536 U.S. 856 (2002)
Strickler v. Greene, 527 U.S. 263 (1999)
Terrell v. Morris, 493 U.S. 1 (1989)
U.S. v. MacCollom, 426 U.S. 317 (1976)
Wright v. Van Patten, 128 S. Ct. 743 (2008)

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## DISCUSSION

This paper examined all of the U.S. Supreme Court cases that ruled on claims of ineffective assistance of counsel. In reviewing these cases, it was discovered how the high court has interpreted the right to effective counsel and arrived at the current standard, by which IAC claims are now judged. It was hypothesized that while the Supreme Court has made progress in refining the standards for judging IAC claims, the standard still lacks the ability to set a realistic bar, by which to judge IAC claims.

The first IAC cases, *Powell v. Alabama* (1932) and *McMann v. Richardson* (1970), heard by the Supreme Court provided a path for future claims of IAC. These cases established the right to not only counsel, but *effective* counsel, as being a constitutional right via the Sixth Amendment.

The 1984 ruling in *Strickland v. Washington* is undoubtedly the most influential ruling by the Court because for the first time, a standard was developed for the courts to judge IAC claims, by the two-prong test. First, the defendant must demonstrate that counsel's performance was deficient (performance prong). Second, the error(s) made by counsel must be so serious that the defendant did not receive a fair trial and but for those errors, there is reason to believe that different results may have been found (prejudice prong). Further, the Court ruled that both prongs of the test must be met to find an attorney *ineffective*.



While the Court was careful to avoid listing specific guidelines, due to the individual nature of such cases, it did elaborate on judicial scrutiny for considering the performance prong. Specifically, the Court held that the performance prong should consider that "counsel's performance must be highly deferential" and should overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (*Strickland v. Washington*, 1984, p. 688).

The *Strickland* decision has been highly criticized for the ambiguity in its language that allows most actions taken (or not taken) to fall within acceptable legal boundaries for defense attorneys. The courts have wide discretion when deciding if attorney decisions are "tactical" or "strategic" in nature. Klaren and Rosenberg (2004) point out that there is a problem with this type of scrutiny because the Courts tend to isolate the issue(s) of concern for examination and thus, ignore the cumulative impact of errors.

Other criticisms include the argument that *Strickland's* ambiguity has led to much litigation and that it violates constitutional law. *Strickland's* phrases are so ambiguous that almost anyone can use an IAC claim as an opportunity to challenge a conviction and many do. Further, the Sixth Amendment right to *effective* counsel, a constitutional protection, has opened litigation in federal courts for those who otherwise would not have had access; thus, *Strickland* serves as a vehicle for such claims. Additionally, some critics explain that if the defendant is able to prove the first prong of the *Strickland* test (that

their attorney's performance was constitutionally deficient), than he/she has already proven a constitutional violation and thus, should be satisfactory to overturn a conviction (Levinson, 2001).

While the *Strickland* decision was a much needed attempt to clarify and set standards for defense attorneys, it has proven to "have no teeth" in application (Rigg, 2007). If it were effective, surely the courts would not find drunken attorneys, sleeping attorneys, and other examples of ineffective counsel, to be *effective* according to the requirements set forth in *Strickland* (Dripps, 1998; Levinson, 2001; Bright, 1999).

Nonetheless, the *Strickland* ruling set precedent and still remains the landmark case, by which all other IAC claims are judged. However, the Supreme Court has acknowledged some of its weaknesses and has made a few improvements, as evidenced by reviewing post-*Strickland* cases.

*U.S. v. Cronin* (1984) contributed to the development of defense attorney standards by adding to *Strickland*. Two additions were made. First, the Supreme Court added that defendants must point to specific acts or attorney errors for an IAC claim. Second, the Court recognized that in some cases, defendant's may receive "truly pervasive neglect by counsel" and as such, an exception should be made that will allow the courts to find counsel *ineffective* without forcing defendant's to meet the *Strickland* requirements; thus, "the Cronin exception" emerged (Voights, 1999, pp. 10-11). While the exception appears to recognize that some defense attorneys are so blatantly ineffective that they cannot possibly provide defendants with a fair trial, the exception has yet to be granted in Supreme Court decisions (despite some shocking failures by

defense attorneys brought before the Court). Again, this exception appears to be another claim that appears to be an improvement, but lacks any practical application thus far.

It is apparent that the Supreme Court began to recognize that the prejudice prong of *Strickland* was too narrowly focused on "outcome determination". The Court softened this requirement by adding, in *Lockhart v. Fretwell* (1993), that judges must also consider "the overall fairness" of the case.

The last addition to the development of defense attorney standards, took form in the three death penalty cases of *Williams*, *Wiggins*, and *Rompilla*. While the Supreme Court did not formally add more language to the *Strickland* test/standard, it revealed that failure to investigate or present mitigating evidence can meet the rigorous threshold for ineffective counsel. This is a significant advancement for IAC claims because the recognition by the Court in these cases, in effect, creates some sort of standards for attorneys, although not formally. This is important, considering that many cases before this have asserted similar claims that were found to have no merit by the Court (i.e. *Burger v. Kemp* (1987), etc.). The Court overturned the death sentences in all three of these cases, which by no means represents the most profoundly incompetent IAC claims brought before the Court. The same issues that served to overturn the sentences for these cases had been presented to the Supreme Court before, but did not result in reversals (i.e. *Burger v. Kemp* (1987)), which demonstrates a positive evolution in the development and results of IAC claims (Klaren & Rosenberg, 2004).

While the Court has made progress in creating standards for defense attorneys, as evident by the improvements of the *Strickland* standard, the root of the problem remains-

ineffective counsel is largely a problem of the poor. Donald Black's (1976) book, *Behavior of Law*, offers a valuable theory as to the way societies create law, which can be applied to the issue of ineffective assistance of counsel and the poor.

Black (1976) explains social control as being a normal part of social life. Society needs social control, in some form, to manage deviant behavior. As such, law, as social control, is a powerful aspect of life between private citizens and the government. There are fewer protections and more hurdles for the defendant than the state; this is especially true for the defendants who are indigent (Black, 1976). The criminal justice system has a constitutional obligation to provide equal justice for all who come in contact with it, rich or poor. As such, the government is duty-bound to provide resources and protections to both the state and the accused equally; however, we know this is not the case (Reiman, 2007)

Black (1976) explains that there are various aspects of social life and the behavior of law varies based on these aspects: stratification, morphology, culture, organization, and social control. While Black's (1976) book does not specifically address IAC, the social aspect of *stratification* can be used as a theoretical basis to understand the inherent flaws in our criminal justice system when looking at ineffective assistance of counsel claims and the poor.

Black (1976) describes stratification as being a vertical social aspect that is responsible for the unequal distribution of material conditions, largely wealth. One variable aspect of this is the amount of difference in wealth between the top of the economic strata and the bottom (vertical distance). Also, there is the amount of wealth

that is distributed to each layer in the vertical hierarchy. Black (1976) posits that “law varies directly with stratification” and therefore, the higher amount of stratification found in society, the higher quantity of law (p. 13). The wealthy or those “on top” must also ensure that they stay in their position and fight to do so. A quote in Black’s (1976) book describes the nature of this aspect:

The universal spirit of laws, in all countries, is to favor the strong in opposition to the weak, and to assist those who have possessions against those who have none. This inconveniency is inevitable, and without exception. (p. 12)

Stratification relates to the overall inequality of the criminal justice system, especially when looking at indigent defendants challenging the state with the state funded defense counsel. The state has more power and resources for the prosecution than indigent defense attorneys have for their defendants; an obvious impairment when seeking justice. As Black (1976) explains, the creation by the government for more laws or protections for the state, without providing the same for the defendant, who is up against the state, is an example of stratification and the government trying to keep the power on its side; this is a fundamental flaw in the criminal justice system. Bright (1999) adds to the argument that the charging agent of the government (prosecution) has more power than the indigent defendant, by explaining that the state has little incentive to improve indigent defense. This is because in assigning incompetent counsel, the state increases the likelihood of a conviction and "reduces the scope of appellate and post-conviction review" (p. 27). One can expect that the more power that is given to the

government (i.e. the prosecutors, police, etc.), the higher the rate of wrongful convictions (Leo, 2005).

This is an immensely important issue considering that ineffective counsel is a known leading cause of wrongful convictions. The Innocence Project's work with exonerations supports Black's (1976) notion that incompetent defense for the indigent is not merely a rare occurrence in an otherwise just system, but part of the system. This is especially troubling when considering the disproportionate number of indigent defendants affected by wrongful convictions. The Innocence Project (2009) reports that the majority of the exoneration cases to date had incompetent, indigent defense counsel as a major contributing factor leading to wrongful conviction; thus, the consequence of ignoring the problem of IAC is grave and well established.

## CONCLUSION

The issue of incompetent defense counsel is a serious concern in our criminal justice system that has far-reaching effects. Particularly troublesome is the disproportionate effect of incompetent defense on the poor. It seems that because this issue is largely a problem of the poor, there will always be lack of resources and general concern for significant change- the "out of sight, out of mind" mentality (Bright, 1999, p. 27).

It has been demonstrated that wrongful conviction and its causes, namely ineffective assistance of counsel, is a real and prevalent concern for the criminal justice system. The Innocence Project's work with exonerations and extensive research has shown us that ignoring the issue of ineffective counsel can and will lead to wrongful convictions, which can have deadly consequences for some capital defendants. Groups like the Innocence Project realize the importance and magnitude of wrongful convictions; but many other stakeholders in the criminal justice system need to be educated.

Early debates on wrongful convictions used to consist of whether or not the phenomenon even occurred. Now, the debate has shifted to a matter of frequency. It is estimated that the frequency of wrongful convictions ranges anywhere between .5% to 20%; we may never know the exact number (as we only can study those we know of) (Ramsey & Frank, 2007, p. 440). The range of the estimates often correlates with the mission of those reporting them. The Bureau of Justice Statistics (2004) reports that there

are over 2,000,000 people that are incarcerated in this country. Based on the above-mentioned estimates, there could be between 10,000 and 400,000 people incarcerated who are innocent of the crimes of which they have been convicted; these statistics are alarming and support the serious nature of wrongful convictions (Ramsey & Frank, 2007, p. 440).

The Supreme Court has taken steps to improve defense attorney standards by improving the *Strickland* test for IAC claims, as evidenced by the decisions reviewed in this paper; however, the Court has yet to create a standard with enough "grip" to effectively root out the problem. Future Supreme Court considerations for IAC should be focused on clarifying the *Strickland* standards further. Specifically, a better set of guidelines that provide concrete language will help strengthen the protection afforded by, and application of, *Strickland*. Additionally, the American Bar Association should work with indigent defense attorneys to develop better guidelines and resources to secure better attorney assistance for the poor (Bright, 1999).

In order to minimize the damage done by ineffective defense counsel, there must be an emphasis on continued education and outreach efforts. These are multifaceted and complex issues that require a multi-disciplinary approach for research, education, and reform in our criminal justice system.



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