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# THE POST-CONVICTION CLAIM THAT UNITES DEATH ROW

Emily Levy*

## INTRODUCTION

*". . . [D]eath-penalty cases are different from other criminal cases, due to the obvious finality of the punishment."*[1]

Thirty-one executions have taken place in Arkansas since 1990.[2] In February of 2017, Arkansas, uniquely, sought to execute *eight* inmates in eleven days—the so-called "Arkansas Eight."[3] All of those death row inmates shared a common post-conviction claim: *Strickland*. Prior to *Strickland v. Washington*, no Supreme Court jurisprudence made clear what constituted objectively sufficient defense representation pursuant to the Sixth Amendment. But that changed in 1984 when *Strickland* made clear that the Sixth Amendment included the right of effective assistance of counsel.[4]

Consider, for example, Ledell Lee, a member of the Arkansas Eight, who was executed in April of 2017.[5] His story presents an unremarkable set of attorney errors that ultimately

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1. Ward v. State, 347 Ark. 515, 517, 65 S.W.3d 451, 453 (2002) (emphasis added).

2. ARKANSAS DEPARTMENT OF CORRECTIONS, EXECUTIONS (2020), [https://perma.cc/4X83-VRT6].

3. *The "Arkansas Eight" Update: Three Stays Remain in Place, One Granted Clemency*, AM. BAR ASS'N (Dec. 1, 2017), [https://perma.cc/GDX9-A26T] [hereinafter *Arkansas Eight*].

4. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 686 (1984).

5. Ed Pilkington & Jacob Rosenberg, *Arkansas Executions: First Prisoner Killed After Legal Challenge Fails*, THE GUARDIAN (Apr. 21, 2017), [https://perma.cc/K5G3-MCRV].

*should* have resulted in the court finding that there was ineffective assistance of counsel.[6] His case was so glaring that his sister, Deborah Young, continued to declare Lee's innocence after his execution.[7] Young filed a complaint on January 23, 2020, "seeking an order of this Court directing the release of physical evidence in Defendants' custody for DNA testing and fingerprint analysis."[8] With the help of the American Civil Liberties Union and The Innocence Project, Lee's family hopes to exonerate Lee's legacy.[9]

The *Strickland* Court decided on a two-prong standard to test whether a criminal defendant receives constitutionally ineffective representation.[10] First, whether counsel's performance was "deficient," and second, whether the attorney's performance "prejudiced" the defendant.[11] "Deficient," said the Court, means that an attorney's "representation fell below an objective standard of reasonableness."[12] According to the Court, reasonableness is evaluated objectively in the context of professional norms, although a reviewing court should "indulge a strong presumption" that the attorney acted within the "wide range" of permissible trial strategy.[13] Collectively, the Court clarified, the standard was designed to promote a just outcome for criminal defendants.[14]

The second prong of the standard requires the defendant to prove that the deficient performance prejudiced the outcome of his case.[15] That is, the standard requires that "but for" the insufficient performance, the outcome would have been different.[16] The Supreme Court reasoned that "[a]n error by counsel, even if professionally unreasonable, does not warrant

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6. *See infra* Part I.D "Ledell Lee."

7. Complaint at 1, Young v. Jacksonville Police Dept., et al., No. 60CV-20-639 (Pulaski Cnty., Ark. Jan. 23, 2020); Dakin Andone, *Ledell Lee Was Executed in Arkansas in 2017. A New Lawsuit Says He Was Innocent*, CNN (last updated Jan. 24, 2020), [https://perma.cc/K3WZ-QEKY].

8. Complaint, *supra* note 7, at 1; Andone, *supra* note 7.

9. Andone, *supra* note 7.

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

11. *Id.*

12. *Id.* at 688.

13. *Id.* at 689.

14. *See id.*

15. *Strickland*, 466 U.S. at 687.

16. *Id.* at 694.

setting aside the judgment of a criminal proceeding if the error had no effect on the judgement."[17] The Court reasoned that an attorney's mistake is just as likely to be prejudicial as it is to be benign.[18] The second prong, therefore, prevents a defendant from succeeding on this claim, making the standard unattainable.

This Article argues that Arkansas should adopt a higher constitutional standard for what constitutes "**effective**" counsel for death penalty cases pursuant to Arkansas' Sixth Amendment.[19] In that narrow context, it should eliminate one part of the standard articulated by the Supreme Court of the United States in *Strickland v. Washington*. Part I tells the story of each member of the "Arkansas Eight." Part II, first, explores the standard set out in *Strickland v. Washington*.[20] Part II then demonstrates that—quite remarkably—all inmates currently on the Arkansas death row share a common claim: constitutionally *deficient* counsel. Part III contends that Arkansas should expect more from defense lawyers in death penalty cases. The stories of the representation provided to the death row defendants demand a change to the *Strickland* standard. Dropping the prejudice prong for death cases is an effective and proactive way to extend the right that is seemingly inherent to each and every person: adequate representation.

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17. *Id.* at 691.

18. *Id.* at 693.

19. The life of a criminal trial takes the following path: investigation, arrest, booking, post-arrest investigation, charging decision, complaint filed, judicial review, first appearance, preliminary hearing, arraignment, motions, discovery, plea negotiations, trial, sentencing, appeals, and collateral remedies. BRIAN R. GALLINI, INVESTIGATIVE CRIMINAL PROCEDURE: INSIDE THIS CENTURY'S MOST (IN)FAMOUS CASES 2-13 (2019). But after sentencing, a criminal defendant has the ability to challenge the decision, known as a Post-Conviction Proceeding and Relief. ARK. R. CRIM. P. 37.1. The challenge must be on one of the following grounds: (1) "that the sentence was imposed in violation of the Constitution and laws of the United States or this state; or" (2) "that the court imposing the sentence was without jurisdiction to do so; or" (3) "that the sentence was in excess of the maximum sentence authorized by law; or" (4) "that the sentence is otherwise subject to collateral attack[.]" *Id.* Post-Conviction claims are in large part the main place this article lives.

20. Strickland v. Washington, 466 U.S. 668 (1984); *See infra* Part IIA.

## I.

*"Carrying out four executions over the course of a week, as Arkansas did, stands alone in the modern history of capital punishment in this country."*[21]

*Strickland* has, to say the least, played a prominent role in some of the highest-profile capital litigation in the state of Arkansas. Consider: in 2017, there was a *rush order* on executions when the Governor of Arkansas, Asa Hutchinson, ordered that eight inmates be put to death during an eleven-day span.[22] "The Arkansas Eight," as they became known, included Bruce Ward, Don Davis, Stacey Johnson, Ledell Lee, Marcel Williams, Jack Jones, Jason McGehee, and Kenneth Williams.[23] Although the Arkansas Supreme Court stayed the executions of Bruce Ward, Don Davis, and Stacey Johnson, and Governor Hutchinson granted clemency to Jason McGehee, four inmates were executed within seven days from April 20 through April 27, 2017.[24] This condensed period of time caused a flurry of litigation that ultimately produced four stayed executions.[25] A common claim united the filings: *Strickland*. Part I discusses the part *Strickland* played in the rush order of executions in 2017 through profiles of each inmate.

### A. Bruce E. Ward

Nearly twenty-eight years earlier, in 1989, Bruce Ward killed Rebecca Doss at a Little Rock, Arkansas, gas station.[26] The Pulaski County jury convicted Ward and sentenced him to the death penalty.[27] During Ward's trial, the circuit judge refused the defense's side-bar objections, while allowing the prosecution's.[28] After his conviction and sentencing, Ward appealed to the

21. *Arkansas Eight*, *supra* note 3 (emphasis added).
22. *See id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. Ward v. Norris, 577 F.3d 925, 928 (8th Cir. 2009).
27. *Id.*; Ward v. State, 308 Ark. 415, 418, 827 S.W.2d 110, 111 (1992).
28. *Norris*, 577 F.3d at 928.

Arkansas Supreme Court.[29] Although the court affirmed Ward's conviction, it remanded for re-sentencing.[30] The jury, again, sentenced Ward to death.[31] But because the court reporter for Ward's proceeding did not accurately record the proceedings or include the number of bench conferences, a *third* sentencing followed.[32] Yet again, the jury sentenced Ward to death, and this time, the Arkansas Supreme Court affirmed.[33]

Ward sought post-conviction relief by arguing that his trial counsel was ineffective for failing to "challenge[] the judge's actions or move[] for the judge to recuse on the ground of bias" during trial.[34] During the post-conviction hearing, the court held that the circuit court judge's denial of side-bar objections only to the defense "did not reflect actual or presumed bias rising to the level of a constitutional violation or a structural error."[35] The court reasoned that "unfavorable" lower court rulings do not constitute a *Strickland* claim.[36] Ward, however, did not assert that the court's judgment formed the basis for his *Strickland* claim.[37] Rather, he focused on his attorney's failure to object to the judge's actions.[38] The reviewing court, nevertheless, denied post-conviction relief.[39]

### B. Don Davis

Don Davis's story began in 1990, a year after Ward killed Doss. When Richard Daniel returned home on October 12, 1990, he found his wife, Jane Daniel, lying in blood.[40] A Benton County jury convicted Davis of Daniel's murder, as well as burglary and theft.[41] After his conviction and death sentence, Davis argued that

29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. Ward v. Norris, 577 F.3d 925, 929 (8th Cir. 2009).
34. *Id.* at 936.
35. *Id.* at 937.
36. *Id.* at 937-38.
37. *See id.* at 936.
38. *See* Ward v. Norris, 577 F.3d 925, 937 (8th Cir. 2009).
39. *Id.* at 938.
40. Davis v. State, 314 Ark. 257, 261, 863 S.W.2d 259, 260-61 (1993).
41. *Davis*, 314 Ark. at 260, 863 S.W.2d at 260.

*Strickland* required a new trial because his attorney failed to cite a case indicating that a criminal defendant is "entitled to an independent psychiatric examination."[42] The court disagreed and held that even if Davis's trial counsel cited that particular case, there is no indication that it would have produced a different outcome.[43] Therefore, according to the court, Davis did not receive inadequate representation.[44]

### C. Stacey Johnson

In 1993, Stacey Johnson became the third man to join the Arkansas Eight. In April of that year, Carol Heath was killed while her two children, ages two and six, were home.[45] Heath's daughter, the six-year-old, described the person who was in the house as "'a [b]lack man.'"[46] After the incident, an officer showed the six-year-old daughter two sets of pictures of black males and she picked Stacey Johnson both times.[47] At trial, the daughter could not testify due to resulting trauma from the incident, but the trial court permitted the officer to testify as to what the six-year-old told him after the incident.[48] Johnson argued on appeal that *Strickland* required a new trial because his counsel failed to (1) present information regarding the six-year-old's competency and recollection of that night, and (2) request retesting of DNA evidence, among other *Strickland* claims.[49] The court held that counsel was not inadequate for failing to challenge the daughter's competency and for not attempting to retest the

42. Davis v. Norris, 423 F.3d 868, 877 (8th Cir. 2005) (citing Coulter v. State, 304 Ark. 527, 804 S.W.2d 348 (1991)).

43. Davis v. Norris, 423 F.3d 868, 877-78 (8th Cir. 2005).

44. *Id.* at 878. In 2017, the Arkansas Supreme Court stayed Davis's execution while waiting on a decision from the United States Supreme Court. Alan Blinder, *Court Decisions Force Arkansas to Halt Execution*, N.Y. TIMES, (Apr. 17, 2017), [https://perma.cc/5BX3-M8WQ].

45. Johnson v. State (*Johnson I*), 326 Ark. 430, 434, 934 S.W.2d 179, 180 (1996).

46. *Id.* at 435, 934 S.W.2d at 180.

47. *Id.* at 437, 934 S.W.2d at 182.

48. *Id.* at 442-44, 934 S.W.2d at 184-86 (while the court held that the statements regarding the photo lineup could not be classified as an excited utterance, the court did classify the six-year-old's statements as excited utterances, thus providing an exception to the hearsay rule).

49. Johnson v. State (*Johnson II*), 356 Ark. 534, 541-43, 552, 157 S.W.3d 151, 158-59, 165 (2004).

DNA evidence.[50] The court, however, did decide to retest the evidence on other grounds.[51]

### D. Ledell Lee

Like Stacey Johnson, Ledell Lee's story also began in 1993. A Pulaski County jury sentenced Ledell Lee to death for the murder of Debra Reese.[52] The jury rendered its verdict after listening to the prosecution's closing argument, wherein it stated that "Lee 'is a hunter. This is his habitat. And his prey were the people of Jacksonville from 1990 to 1993. And the people of Jacksonville didn't even know they were being hunted.'"[53] Lee's counsel responded in his closing: "who are we then to say that we are going to kill Ledell Lee?"[54] The prosecutor then rebutted with "I will tell you who we are. We are the hunted."[55] Lee's counsel did not object.[56] Although the circuit court scrutinized the prosecutor's statements as "improper," the judge ruled that the statements were not "so egregious and inflammatory that the defendant was denied a fair trial[,]"[57] and affirmed Lee's conviction, holding that Lee did not receive inadequate counsel.[58] The court reasoned that objecting during opening or closing arguments is highly debated and that the decision to do so is within the attorney's discretion via trial strategy.[59] At a hearing for a new sentencing trial, his former trial representation testified that he did not hear the prosecutor's closing statement and did not object because he "just missed it."[60] Despite the attorney's own

50. *Id.* at 551-52, 157 S.W.3d at 164-65.

51. In 2017, the Arkansas Supreme Court stayed Johnson's execution for post-conviction DNA testing. Johnson v. State, 2017 Ark. 138, at *1.

52. Lee v. State, 2009 Ark. 255, at 1, 308 S.W.3d 596, 599-600.

53. *Id.* at 19, 308 S.W.3d at 608.

54. *Id.*

55. *Id.*

56. *Id.*

57. Lee v. State, 2009 Ark. 255, at 19, 308 S.W.3d at 608.

58. *Id*. at 20, 308 S.W.3d at 608.

59. *Id.* at 19-20, 308 S.W.3d at 608; s*ee also* Buckley v. State, No. CR 06-172, 2007 WL 1509323, at *4 (Ark. May 24, 2007) (explaining "[e]xperienced advocates might differ about when, or if, objections are called for because, as a matter of trial strategy, further objections from counsel may succeed in making the comments seem more significant to the jury.").

60. *Lee*, 2009 Ark. 255, at 19, 308 S.W.3d at 608.

admission that he "just missed it," and the detrimental impact the statements had on the jury, the court held that the jury's sentence would not have been different, because of the testimony about Lee's various violent crimes.[61] Despite Lee's claims, he was executed on April 20, 2017.[62]

### E. Marcel Williams

Marcel Williams, the fifth of the Arkansas Eight, not surprisingly, also brought a *Strickland* claim.[63] Marcel Williams faced the death penalty for capital murder, kidnapping, rape, and aggravated robbery.[64] Ultimately, after hearing the evidence along with the attorney's arguments, the Pulaski County jury convicted Marcel Williams of all charges and sentenced him to death.[65] In November of 1994, Williams met Stacy Errickson at a Shellstop gas station.[66] Williams forced Errickson into the front passenger seat, drove her car away from the gas station, and made her withdraw money in eighteen different transactions from automated teller machines.[67] Later that night, Williams raped and killed Errickson.[68] The Circuit Court appointed two attorneys for Williams at trial, and an additional non-appointed attorney volunteered to assist.[69] Collectively, their strategy was to "admit[] guilt to the jury and seek[] mercy through a punishment of life without parole."[70] Despite the attorneys' strategy, Williams' team failed to present any mitigating evidence of their client's "troubled background."[71] Williams advised his team of attorneys about his lack of a good home life, previous time in the

61. *Id.* at 19-20, 308 S.W.3d at 608.

62. Pilkington & Rosenberg, *supra* note 5; s*ee also* Complaint, *supra* note 7; Andone, *supra* note 7.

63. Williams v. State (*Williams II*), 347 Ark. 371, 373, 64 S.W.3d 709, 711 (2002).

64. Williams v. State (*Williams I*), 338 Ark. 97, 105-06, 991 S.W.2d 565, 569 (1999).

65. *Id.* at 106, 991 S.W.2d at 569.

66. *Id.* at 105, 991 S.W.2d at 568.

67. *Id.*

68. *Id.* at 109, 991 S.W.2d at 571.

69. *Williams II*, 347 Ark. 371, 374, 64 S.W.3d 709, 712 (2002).

70. *Id.*

71. *Id.*

Department of Correction, and that he was allegedly raped while in prison when he was just sixteen.[72]

At a post-conviction hearing assessing Williams' insufficiency of counsel claim, trial counsel admitted that "they felt they should have done things differently, . . . at the time of trial, they did not know any other way to introduce the [mitigating] information."[73] Additionally, Williams' team testified that they should have, after researching more about the process of the mitigation phase, sought a psychologist to advise the jury of Williams' background.[74] One of the attorneys even admitted, "'[I]t wasn't that we didn't have mitigation, [it was] that we were ignorant of how to present it without exposing him.'"[75] Because the attorneys indicated that they defended Marcel Williams to the best of their ability "at the time with the knowledge [that] they had[,]" the court evaluated the representation's performance from their mindset and conduct at the time of trial.[76] Despite the attorney's unfamiliarity with the process of presenting mitigating evidence, the court held that it was a rational trial strategy that did not fall below an objective standard of reasonableness.[77] The court reasoned that a finding of inadequate representation is without merit unless the defendant provides actual evidence that might have "changed the mind of one of the jurors."[78] Marcel Williams was ultimately executed on April 24, 2017.[79]

### F. Jack Jones

Jack Jones' story began in 1995. A White County jury sentenced Jack Jones to death for the capital murder and rape of Mary Philips.[80] In June of 1995, Jones went to Phillips'

72. *Id.*
73. *Id.* at 378, 64 S.W.3d at 715.
74. *Marcel Williams II*, 347 Ark. at 378, 64 S.W.3d at 715.
75. *Id.*
76. *Id.*
77. *Id.* at 379, 64 S.W.3d at 715.
78. *Id.* at 380, 64 S.W.3d at 716.
79. Ed Pilkington et al., *Arkansas Carries Out First Double Execution in the US for 16 Years*, THE GUARDIAN (Apr. 25, 2017), [https://perma.cc/ADX7-MDRD].
80. Jones v. State *(Jones II),* 340 Ark. 1, 3-4, 8 S.W.3d 482, 483 (2000). Additionally, the White County Jury convicted Jones of the attempted capital murder of Lacy Phillips, the

workplace where she and her eleven-year-old daughter were waiting to attend a 3:00 p.m. dentist appointment.[81] However, this was not Jones' first visit to Phillips' place of work; he visited earlier that day to borrow a few books.[82] During his second visit, Jones robbed, raped, and killed Phillips, and seriously injured the eleven-year-old.[83] The police proceeded to Jones's house and arrested him as a result of the eleven-year-old's description of the attacker.[84] Ultimately, Jones admitted to the crimes. [85]

On appeal for the denial of post-conviction relief, Jones argued that his attorney's failure to object to the prosecutions' aggravating statements to the jury that the murder was "especially cruel or depraved[,]" and that Jones murdered Phillips to avoid or prevent his arrest, rendered him ineffective counsel.[86] Additionally, Jones argued that his counsel was ineffective for failing to object to the state's expert witness for a hair analysis found on Phillips.[87] Jones argued that absent the expert's testimony, he may not have received a death sentence.[88] Despite this, the court affirmed his conviction and held that Jones received adequate counsel.[89] The court reasoned that the standard is not "that his sentence *could* have been different" but rather "that [his] counsel's deficient performance prejudiced his defense."[90] Jack Jones was executed on April 24, 2017.[91]

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victim's eleven-year-old daughter. *Id*.; Jones v. State *(Jones I),* 329 Ark. 62, 64, 947 S.W.2d 339, 340 (1997).

81. *Jones I,* 329 Ark. at 64, 947 S.W.2d at 340.

82. *Id.*

83. *Id.* at 64-5, 947 S.W.2d at 340.

84. *Id.* Lacy, the eleven-year-old, described Jones as having "a teardrop tattoo on his face and more tattoos on his arm." *Id.* at 64, 947 S.W.2d at 340.

85. *Id.* at 65, 947 S.W.2d at 340. Jones indicated that he attacked Phillips and her daughter because "his wife had been raped, and that the police had done nothing about it." *Id.*

86. *Jones II*, 340 Ark. 1, 5, 8 S.W.3d 482, 484 (2000).

87. *Id.* at 10, 8 S.W.3d at 487.

88. *Id.* at 10, 8 S.W.3d at 488.

89. *Id.*

90. *Id.*

91. Ed Pilkington et al., *supra* note 79.

**G. Jason McGehee**

Jason McGehee joined the Arkansas Eight in 1996. McGehee inhabited a house with four other people, including fifteen-year-old John Melbourne, Jr.[92] The five used stolen checks and property to buy things for themselves.[93] Melbourne, upon order from McGehee, attempted to buy shoes with a stolen check, when he was apprehended by the police.[94] After Melbourne informed the police about the stolen items at the home, the police released him to his father.[95] McGehee and the other inhabitants hid in the house and watched while the police took possession of the stolen items.[96] That night, Melbourne was murdered.[97]

McGehee argued on appeal that *Strickland* required a new trial because his counsel failed to request a jury instruction indicating that McGehee had accomplices.[98] Although the court found that McGehee's counsel rendered deficient performance,[99] counsel's failure to seek a jury instruction for accomplices "did not make any difference in the result of the trial."[100] In August of 2017, Governor Hutchinson granted McGehee clemency, reducing his sentence to life without parole.[101]

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92. McGehee v. State, 348 Ark. 395, 399, 72 S.W.3d 867, 869 (2002).

93. *Id.* at 399-400, 72 S.W.3d at 869.

94. *Id.* at 400, 72 S.W.3d at 869-70.

95. *Id.* at 400, 72 S.W.3d at 870.

96. *Id.*

97. McGehee v. State, 348 Ark. 395, 400, 72 S.W.3d 867, 870 (2002). Melbourne underwent a horrific beating in two different locations involving numerous types of torture. *Id*. at 400-02, 72 S.W.3d at 870-71. Testimony at trial indicated that the group "agreed that Melbourne needed to be taught a lesson. They decided that upon Melbourne's return, they would beat him to teach him not to 'snitch.'" *Id.* at 400, 72 S.W.3d at 870.

98. *Id.* at 403-04, 72 S.W.3d at 872.

99. The court held that "[e]ven though we hold that the issue of accomplice liability should have been submitted to the jury, had counsel so requested, relief under Rule 37 is not required." *Id*. at 409, 72 S.W.3d at 875. Additionally, "even if Campbell and Diemert had been found to be accomplices, their testimony would have been corroborated by other evidence tending to connect McGehee with the commission of Melbourne's murder." *Id.* at 412, 72 S.W.3d at 878.

100. *Id.* at 413, 72 S.W.3d at 878.

101. Max Brantley, *Hutchinson Favors Clemency for Jason McGehee*, ARK. TIMES (Aug. 25, 2017), [https://perma.cc/NBP5-LU36]. McGehee was set for execution on April 27, 2017; however, the Arkansas Parole Board recommended clemency, which delayed his execution. *Id.*. Governor Asa Hutchinson stated "[m]y intent to grant clemency to Mr. McGehee is based partly on the recommendation of the Parole Board to commute his

**H. Kenneth Williams**

Kenneth Williams' Arkansas Eight story began in 1999. Upon his arrival at the Arkansas Department of Correction for a different set of crimes,[102] Williams escaped.[103] Williams ran across the highway and found Genie and Cecil Boren's home, where Cecil was alone.[104] Genie later found Cecil near the house, dead.[105] A neighbor, who Williams asked for directions, recognized the vehicle that Williams was driving as Cecil's.[106] The police pulled Williams over in Missouri, but Williams drove off and hit a water truck, subsequently killing the water truck driver.[107] Williams attempted to flee on foot but was captured by the police.[108] A Lincoln Circuit Court jury convicted Williams and sentenced him to death for the capital-murder conviction and forty years for the theft.[109] On appeal from post-conviction relief, Williams argued that *Strickland* requires a new trial because his counsel failed to remove a juror for cause, among other claims.[110] During voir dire, a juror, who was ultimately chosen, told the attorneys that "in certain situations death is the only appropriate punishment. She also said that she 'felt very strong about [the death penalty],' and that she '[felt] as though. . .the person that

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sentence from Death to Life Without Parole. . . . In making this decision I considered many factors including the entire trial transcript, meetings with members of the victim's family and the recommendation of the Parole Board. In addition, the disparity in sentence given to Mr. McGehee compared to the sentences of his co-defendants was a factor in my decision, as well." *Id.* Additionally, McGehee's attorney commented, "Jason's case offers a prime example of why clemency is a necessary part of capital sentencing." *Id.*

102. In September of 1999, Williams was sentenced to life without parole for "capital murder, attempted capital murder, kidnapping, aggravated robbery, theft, and arson[.]" Williams v. State (*Kenneth Williams I*), 347 Ark. 728, 737, 67 S.W.3d 548, 552-53 (2002).

103. *Id.* at 737-38, 67 S.W.3d at 553. Williams was released from his cell to make a "religious call" when he slipped into a "slop tank[]," which was used to transport items in and out of the prison. *Id.* at 738, 67 S.W.3d at 553. When outside of the prison, Williams jumped out of the tank and hid in a ditch, where he later ran across the highway and into a home. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 739, 67 S.W.3d at 554.

107. *Kenneth Williams I*, 347 Ark. 728, 739, 67 S.W.3d 548, 554 (2002).

108. *Id.*

109. Williams v. State (*Kenneth Williams II*), 369 Ark. 104, 107, 251 S.W.3d 290, 292 (2007).

110. *Id.* at 107-08, 111, 251 S.W.3d at 292-93, 295.

commit[ted] the crime should. . .pay the price for it.'"[111] Williams's counsel later admitted that he would have challenged this juror if he had any challenges left.[112] Despite this juror expressing that she "favor[ed] the death penalty," the court held that because there was not a reasonable probability of a different outcome, Williams was not prejudiced and therefore received sufficient counsel.[113]

*"Four men won court stays, three were executed."*[114]

## II.

Part II first explores *Strickland v. Washington*, the seminal Supreme Court case detailing the standard for ineffective assistance of counsel. It then explores how Arkansas courts utilize the *Strickland* standard by considering the stories of current Arkansas death row inmates.

### A. *Strickland* Story

The story begins with David Washington. In September of 1976, Washington committed numerous crimes over a twelve-day period, including murder, theft, and assault.[115] The trial court appointed William Tunkey—an "experienced criminal lawyer"—as Washington's defense counsel.[116] Despite Tunkey advising Washington to remain silent, Washington confessed and pleaded guilty to all charges.[117] The trial court sentenced Washington to three death sentences and multiple years of imprisonment.[118]

The "experienced" Tunkey did not agree with Washington's choice to confess and "experienced a sense of hopelessness."[119]

111. *Id.* at 111, 251 S.W.3d at 295.
112. *Id.*
113. *Id.* at 113, 251 S.W.3d at 296.
114. Melanie Eversley & John Bacon, *Arkansas Executes 4th Inmate in 8 Days*, USA TODAY (Apr. 28, 2017), [https://perma.cc/29NW-M4KV] (emphasis added).
115. Strickland v. Washington, 466 U.S. 668, 671-72 (1984).
116. *Id.* at 672; Brian R. Gallini, *The Historical Case for Abandoning Strickland*, 94 NEB. L. REV. 302, 304 (2015).
117. *Strickland*, 466 U.S. at 672.
118. *Id.* at 675.
119. *Id.* at 672.

This hopelessness led to a series of concerning behaviors perhaps best relayed by Richard Shapiro, Washington's appellate counsel.[120] On appeal to the Supreme Court of Florida, Shapiro argued that six specific illustrations of Tunkey's representation best exemplified his ineffectiveness:[121]

Tunkey *failed* to request a continuance following Washington's guilty plea to give himself a reasonable amount of time to prepare for the sentencing hearing.[122]

Tunkey *failed* to seek a psychiatric evaluation of his client.[123]

Tunkey "*failed* to investigate and present character witnesses."[124]

Tunkey *failed* to seek an investigation report prior to the sentencing.[125]

Tunkey *failed* to submit a "meaningful" argument during the sentencing phase of the trial to the court.[126]

Tunkey *failed* to obtain an "independent medical examination" and "*failed* to cross-examine the State's medical experts."[127]

The question before the Supreme Court, following a winding road of appellate history, was whether Tunkey provided "effective" assistance of counsel.[128] It preliminarily observed that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is *critical* to the ability of the adversarial system to produce just results."[129] It then settled on a two-prong standard to evaluate whether a criminal defendant received constitutionally adequate representation: first, whether "counsel's performance was

120. Gallini, *supra* note 116, at 319.

121. Gallini, *supra* note 116, at 317.

122. Washington v. State, 397 So. 2d 285, 286 (Fla. 1981); Gallini, *supra* note 116, at 317.

123. *Washington*, 397 So. 2d at 286; Gallini, *supra* note 116, at 317.

124. *Washington*, 397 So. 2d at 286 (emphasis added); Gallini, *supra* note 116, at 317 (emphasis added).

125. *Washington*, 397 So. 2d at 286; Gallini, *supra* note 116, at 317.

126. *Washington*, 397 So. 2d at 286; Gallini, *supra* note 116, at 317.

127. *Washington*, 397 So. 2d at 286 (emphasis added); Gallini, *supra* note 116, at 317 (emphasis added).

128. Strickland v. Washington, 466 U.S. 668, 684 (1984).

129. *Id.* at 685 (emphasis added).

deficient," and second, whether the attorney's performance "prejudiced" the defendant.[130]

Applying the new standard, the Court upheld Washington's convictions and sentence.[131] In construing Tunkey's performance as constitutionally reasonable, Justice O'Connor, writing for a majority of the Court, reasoned that Tunkey's failures were justifiably related to his "sense of hopelessness" about Washington's case following the latter's confession.[132] The Court further reasoned that although Tunkey was experienced in representing capital defendants, he *reasonably* viewed Washington's case as beyond repair and, therefore, did not fully participate in Washington's sentencing proceedings.[133] Even if Tunkey's representation was ineffective, the Court noted, Washington was not prejudiced by that performance given the overwhelming evidence against him.[134]

### B. Arkansas: Blurring the Line Between Harmful and Harmless Errors

*"When a defendant challenges a death sentence. . .the question is whether there is a reasonable probability that, absent the errors, the sentencer. . .would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."* [135]

The sheer volume of Arkansas *Strickland* cases brought by convicted defendants is overwhelming.[136] Although certain attorney errors may indeed "prejudice" a defendant's case, Arkansas courts usually classify these attorney "errors" as mere

130. *Id.* at 687.

131. *Id.* at 700.

132. *Id.* at 699.

133. *See* Strickland v. Washington, 466 U.S. 668, 699 (1984).

134. *Id.* at 698-700. The sentencing judge determined that the death penalty would be proper "even if respondent had no significant prior criminal history, [as] no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack." *Id.* at 677.

135. *Id.* at 695 (emphasis added).

136. The volume of cases involving *Strickland* claims includes both capital and non-capital cases; however, this Article focuses solely on death cases.

trial strategy.[137] Courts have characterized attorney errors as "[m]atters of trial strategy and tactics, even if arguably improvident, [they] fall within the realm of counsel's professional judgment and are not grounds for a finding of ineffective assistance of counsel."[138] With the application of a "strong presumption" that every defense attorney's conduct is within the vast scope of "reasonable professional judgement," a defendant, essentially, must show that his representation had virtually *no* strategy for trial.[139]

In Arkansas specifically, *Strickland*'s litigation presence transcends the "Arkansas Eight." Thirty inmates currently sit on death row in Arkansas and they are together connected by one thing: a *Strickland* claim.[140] Their claims, though varied, generally fall into one of three categories of attorney malfeasance: (1) failure to object, (2) failure to prepare for trial, and (3) failure to present mitigating evidence.

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137. *See generally* Buckley v. State, No. CR 06-172, 2007 WL 1509323, at *4 (Ark. May 24, 2007).

138. *Id.*

139. State v. Barrett, 371 Ark. 91, 96, 98, 263 S.W.3d 542, 546, 548 (2007) (holding that the defendant received insufficient representation when counsel failed to craft a trial strategy and had never tried a capital case).

140. *Death Row*, ARK. DEP'T OF CORRS. (Aug. 23, 2018), [https://perma.cc/NLH5-WVR2]. Currently, there are thirty inmates on death row; however, three of the thirty inmates—Brad Smith, Eric Reid, and Scotty Gardner—were recently sentenced and have yet to file for post-conviction relief. Motion for Continuance, Smith v. State, No. CR20-86 (Ark. Feb. 10, 2020); Reid v. State, No. CR-18-517 (Ark. June 15, 2018); Gardner v. State, No. CR-19-257 (Ark. Nov. 1, 2019). It is highly likely that these three death row inmates will file for post-conviction relief. Additionally, inmate Billy Thessing's record is sealed; however, through the unsealed records, it is clear that the inmate sought post-conviction relief for ineffective assistance of counsel. Thessing v. State, No. CR-05-420 (Ark. Apr. 13, 2005). Finally, inmate Mauricio Torres was retried in February of 2020; however, another mistrial ensued, and he will be re-tried again. Tracy Neal, *Judge Sets Retrial Date for Northwest Arkansas Man Accused of Killing Son*, ARK. DEMOCRAT GAZETTE (Oct. 8, 2019), [https://perma.cc/V3C7-4DQG]; *Courthouse Scuffle Leads to Mistrial in Mauricio Torres' Case,* 5 NEWS (Mar. 5, 2020), [https://perma.cc/6Z3X-UJTW].

### *1. Failure to Object* [141]

*"The defense should at least indicate its concern . . ."*[142]

First, failing to object is prejudicial to a defendant's case and detrimental to a jury or judge's view of the faith the attorney has in his or her client. "'Objections can be made to questions, answers, exhibits, and virtually anything else that occurs during a trial.'"[143] Without an objection, a jury must interpret the prosecutor's arguments as true and within the rules of evidence.[144] Many death row attorneys indicate that they will not object because they do not want to "highlight[] the comment and ma[ke] the jury, which might not have understood the significance of the remark [initially] [and] pay attention to it [instead]."[145] Although courts have held that a lack of objection during closing arguments is a reasonable trial strategy,[146] many statements that go without objection reflect poorly on the defendant. Most notably, the closing argument allows each side to refine the evidence and issue to the jury.[147] Because the closing argument is crucial for a side to achieve success, a criminal prosecutor must remember his or her influential role for the public at large. The Supreme Court has even articulated that prosecutors shall "prosecute with earnestness and vigor. . . . But, while he may strike hard blows, he is not at liberty to strike foul ones."[148] Stated differently,

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141. While this article profiles only two death row inmates under the failure to object category, the other current death row inmates who share this claim include Randy Gay and Jerry D. Lard. Brief of Appellant, Gay v. State, No. CR-19-762 (Ark. Feb. 7, 2020); Petition for Post-Conviction Relief, Lard v. State, No. CR-2012-173 (Ark. Cir. Ct. Greene Cnty. Jan. 29, 2015).

142. WAYNE R. LAFAVE, ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION 600 (2d ed. 2009) (emphasis added).

143. Craig Lee Montz, *Trial Objections from Beginning to End: The Handbook for Civil and Criminal Trials*, 29 PEPP. L. REV. 243, 246 (2002) (quoting MAUET, TRIAL TECHNIQUES 262 (2000)).

144. *See generally* LAFAVE ET AL., *supra* note 142 (explaining that objections to improper statements made by opposing counsel during closing arguments should be made).

145. Sasser v. State, 338 Ark. 375, 391, 993 S.W.2d 901, 910 (1999).

146. LAFAVE, ET AL., *supra* note 142, at 600. "In some localities, immediate objections to improper closing arguments are expected, while others consider it a matter of common curtesy, verging on obligation, for opposing counsel not to interrupt one another's closing arguments by objections." *Id.*

147. *Id.* at 595.

148. *Id.* at 596-97 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

without objection, the defense substantially decreases its chance to zealously argue on behalf of an inmate.[149]

Failure to object is best illustrated by Jack Greene's story. Current death row inmate Jack Greene faces the death penalty for a capital murder charge.[150] The Johnson County jury sentenced Greene to death; however, his sentence was reversed, and his case was remanded for re-sentencing.[151] During re-sentencing, the jury, again, sentenced Greene to death after the prosecutor, in his final closing argument, declared:

If someone comes into our community from off somewhere and does this to one of our citizens, I think we should tell them, 'You get the maximum penalty here.' Giving the maximum penalty discourages and deters other people from doing things like this to sixty nine year old retired ministers in Johnson County.[152]

Greene's attorney did not object.[153] Greene argued that the prosecution's arguments painted him as "'an outsider'" and unconstitutionally compared him to an "illegal alien."[154] However, the reviewing court reasoned that although "racially biased prosecutorial arguments" are unconstitutional, the sole notion that Greene is an outsider did not stem from the defendant's race or his ethnicity, thus eliminating the constitutional argument.[155] Ultimately, due to the facts of the crime, the court held that the attorney's failure to object did not influence the jury to the point of harming Greene.[156] If the attorney would have objected, the court noted, that objection

149. *See generally id.* at 600.

150. Greene v. State, 356 Ark. 59, 63, 146 S.W.3d 871, 875 (2004).

151. *Id.* The Supreme Court of North Carolina reversed Greene's prior murder charge and conviction, which the jury in his Arkansas case "had considered as an aggravating circumstance." *Id.*

152. *Id.* at 68, 146 S.W.3d at 878-79.

153. *Id.* at 68, 146 S.W.3d at 879.

154. *Greene*, 356 Ark. at 69, 146 S.W.3d at 879 (citing United States v. Cruz-Padilla, 227 F.3d 1064 (8th Cir. 2000)).

155. *Id.*

156. *Id.* at 70, 146 S.W.3d at 879-80. In Greene's first case, the court held that "[t]he evidence of a premeditated and deliberated murder is overwhelming, and, under such circumstances, the trial error was harmless." *Id.*, 146 S.W.3d at 879.

would have been "meritless" and, in any event, did not merit finding Greene's representation constitutionally inadequate.[157]

Moreover, in 1994, Andrew Sasser's story *also* presents an attorney's failure to object during the prosecutor's closing argument.[158] Sasser faced the death penalty for the felony murder of Jo Ann Kennedy.[159] The prosecution, during closing argument, harped on Sasser's "lack of remorse" for his actions.[160] The prosecutor's statements posed rhetorical questions to the jury about whether they felt he was remorseful for the death of Kennedy.[161] For instance, the prosecutor argued "that there is no role for mercy in the criminal justice system."[162] The court attempted to justify the prosecutor's statements, commenting that "[s]everal [of the prosecutor's] remarks look worse on paper than they did in the courtroom. . . . [The statements] were more a way of speaking than a flat statement and were understood as the prosecutor's opinion about the evidence that was presented. . . ."[163] The reviewing court reasoned that although some of the prosecutor's comments were "'technically objectionable,'" the court did not believe that the statements were prejudicial to the jury because of the "*overwhelming*" evidence presented against Sasser.[164] During a post-conviction hearing, defense counsel testified that he *rarely* objects during the prosecution's closing argument.[165] Counsel did, however, testify

157. *Id.* at 70, 146 S.W.3d at 880 (citing Jackson v. State, 352 Ark. 359, 105 S.W.3d 352 (2003)). Greene brought other claims for ineffective assistance of counsel including his attorney's failure to seek live testimony during the penalty phase, failure "to make a proper objection to an improper interpretation of an Arkansas law," failure to challenge testimony made by the medical examiner, and failure to raise a constitutional argument regarding the introduction of "a T-shirt inscribed 'If you love someone, set them free. If they don't come back, hunt them down and shoot them.'" *Id.* at 63, 146 S.W.3d at 875.

158. Sasser v. State, 338 Ark. 375, 388, 993 S.W.2d 901, 909 (1999). Andrew Sasser also brought ineffective counsel claims for failure to object to the omission of an element from a jury instruction, failure to object to the testimony from a prior victim, failure to seek a limiting instruction, and the lack of representation by two attorneys. *Id.* at 382-95, 993 S.W.2d at 905-12.

159. *Id.* at 379, 993 S.W.2d at 903.

160. *Id.* at 389, 993 S.W.2d at 909.

161. *Id*.

162. *Sasser*, 338 Ark. at 389, 993 S.W.2d at 909.

163. *Id.*

164. *Id.* at 390, 993 S.W.2d at 910 (emphasis added).

165. *Id.*

that he would have objected if the prosecution's statements were "'absolutely outrageous.'"[166]

### *2. Failure to Prepare for Trial* [167]

*"Remember, as a lawyer in the case, you should know much more about your case than the Court."*[168]

Preparation is defined as "the act or process of getting ready. . . . The type of preparation needed for a particular work *varies*."[169] Preparation is key to trial success[170] and adequate representation. "Trial lawyers have a singular goal: to persuade juries."[171] Without adequate preparation and investigation into the case, this goal is essentially unachievable.[172] Mitigation is central to any capital case, requiring more preparation and investigation into what a lawyer can argue during the penalty phase of the trial.[173] The type of preparation for the guilt and penalty phases are vastly different.[174] For the guilt phase, the attorney focuses on the evidence and the law, while in the penalty phase, an attorney must present the defendant's medical and social history.[175] The art of preparation for a capital case requires unique skills that non-capital attorneys may not possess.[176]

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166. *Id.* at 390-91, 993 S.W.2d at 910.

167. While this Article profiles only two death row inmates under the failure to prepare for trial category, the other current death row inmates who share this claim include Ray Dansby and Latavious D. Johnson. Dansby v. State, 350 Ark. 60, 84 S.W.3d 857 (2002); Johnson v. State, 2020 Ark. 168, 598 S.W.3d 515.

168. Fred Daugherty, *The Importance of Pre-Trial Preparation*, STUDENT L. J., Feb. 1961, at 13, 14 (emphasis added).

169. *Preparation Law and Legal Definition*, USLEGAL, [https://perma.cc/VC5L-EU94] (last visited Jan. 20, 2020) (emphasis added).

170. THOMAS A. MAUET, TRIAL TECHNIQUES 499 (5th ed. 2000).

171. David Berg, *The Trial Lawyer*, 31 LITIGATION 8, 8 (2005).

172. *See id.*

173. Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 41 (2013). "[F]amiliarity with the mitigating force of social history may serve as a powerful basis for empathy and amelioration. . . ." *Id.* at 42.

174. LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 266 (4th ed. 2018).

175. *Id.*

176. *Id.*

In Arkansas, failures to prepare for capital proceedings are abundant in scope.[177] Failure to prepare for trial is illustrated through Zachariah Marcyniuk's story. In 2008, a Washington County jury convicted Marcyniuk of Katie Wood's murder.[178] Marcyniuk went to Wood's home, grabbed her, and stabbed her with a knife.[179] For trial, Marcyniuk hired private representation.[180] Marcyniuk's counsel's strategy was to assert the "mental disease or defect defense" during both his opening and closing statements at trial.[181] However, Marcyniuk's counsel asked the jury to return a verdict for second-degree murder, essentially voiding his own defense strategy.[182]

At a post-conviction relief hearing, Marcyniuk's counsel testified that his strategy was to use the mental disease or defect defense as mitigating evidence, not as a full defense.[183] However, during the penalty phase of the trial, Marcyniuk's attorney did not investigate or call the mitigating witnesses which Marcyniuk provided.[184] Marcyniuk argued that the addition of the testimony would have prompted at least one juror to choose life in prison over the death penalty.[185] His representation failed to investigate what the witnesses would have testified to and decided that "'there is a problem with putting your friends on in mitigation, as they would essentially testify that they did not recognize that you were especially anxiety ridden or depressed[.]'"[186] The court affirmed the conviction and held that he received adequate representation.[187] The court reasoned that "[e]ven though the jury

177. *See, e.g.*, Dansby v. State, 350 Ark. 60, 84 S.W.3d 857 (2002); Johnson v. State, 2020 Ark. 168, 598 S.W.3d 515; Marcyniuk v. State, 2014 Ark. 268, 436 S.W.3d 122; Kemp v. Kelley (*Kemp II),* 924 F.3d 489 (8th Cir. 2019).

178. *Marcyniuk*, 2014 Ark. 268, at 1, 436 S.W.3d at 125.

179. *Id.* at 2, 436 S.W.3d at 125.

180. *Id.* at 3, 436 S.W.3d at 126.

181. *See id.* at 4, 436 S.W.3d at 126.

182. *See id.* at 6, 436 S.W.3d at 127; *Court Upholds Man's Conviction, Death Sentence in Slaying of UA Student*, ARK. NEWS (June 5, 2014), [https://perma.cc/38DD-4563].

183. Marcyniuk v. State, 2014 Ark. 268, at 8-10, 436 S.W.3d 122, 129-30; *Court Upholds Man's Conviction, Death Sentence in Slaying of UA Student*, *supra* note 182.

184. *Marcyniuk*, 2014 Ark. 268, at 19, 436 S.W.3d at 135.

185. *Id.*

186. *Id.* at 19-20, 436 S.W.3d at 135.

187. *Id.* at 20, 436 S.W.3d at 135-36.

was not persuaded by [counsel's] trial tactics" Marcyniuk's attorney's strategy and decisions were "reasonable."[188]

Similarly, in 1993, failure to prepare for trial is evident in Timothy Kemp's case. A Pulaski County jury sentenced Kemp to death for the murders of David Wayne Helton, Robert Phegley, Cheryl Phegley, and Richard Falls.[189] Kemp argued that *Strickland* required a new trial because his attorney failed to adequately investigate his "childhood abuse, fetal-alcohol exposure, and post-traumatic stress disorder."[190] Although his trial attorney presented mitigating witnesses and evidence during the penalty phase who discussed Kemp's history with alcohol and abuse, the jury chose death over life.[191] Later, in Kemp's hearing in federal court for habeas corpus review, the Federal District Court judge recalled that "Kemp presented compelling evidence not introduced at trial: a deep family history of poverty and mental illness; a routine of trauma during childhood; and Kemp's mother [] drank alcohol heavily when she was pregnant with him."[192] Despite this, the Eighth Circuit Court of Appeals agreed with the state courts and affirmed Kemp's sentence, holding that Kemp's trial counsel took reasonable measures to satisfy his duty to investigate under *Strickland.*[193]

188. *Id.* at 20, 436 S.W.3d at 136.

189. Kemp v. State (*Kemp I*), 324 Ark. 178, 186, 919 S.W.2d 943, 946 (1996).

190. *Kemp II*, 924 F.3d 489, 497 (8th Cir. 2019); Max Brantley, *Appeals Courts Sustain Two Capital Murder Cases in Arkansas*, ARK. TIMES (May 16, 2019), [https://perma.cc/6L8B-2Y49].

191. *Kemp I*, 324 Ark. 178, 186, 919 S.W.2d 943, 946 (1996).

192. *Kemp II*, 924 F.3d 489, 497-98 (8th Cir. 2019) (internal quotations omitted).

193. *Id.* at 503.

### *3. Failure to Present Mitigating Evidence* [194]

*"Mitigation evidence enables the sentencer to consider the life and circumstances of the particular defendant in deciding whether death or life is the appropriate sentence."*[195]

Finally, mitigation is a central part of an attorney's job when representing a defendant facing the death penalty. Mitigation is "[a] reduction in how harmful, unpleasant, or seriously bad a situation is; a lessening in severity or intensity."[196] The public empowers each juror to decide which pieces of evidence mitigate the maximum sentence before awarding an appropriate punishment.[197] No textbook can teach an attorney how to convince a juror to recommend a life sentence over the death penalty,[198] but it is defense counsel's job to try.[199]

Mitigation took center stage in Terrick Nooner's story. A Pulaski County jury sentenced Terrick Nooner to death for capital murder.[200] Nooner met a college student, Scott Stobaugh, at a laundromat in March of 1993.[201] Later that day, a surveillance camera recorded Nooner shoot Stobaugh.[202] During the penalty phase of the trial, the prosecutor presented evidence of Nooner's prior robbery charge, intending it to be an aggravating circumstance.[203] Although Nooner informed his counsel that the

194. While this article profiles only three death row inmates under the failure to present mitigating evidence category, the other current death row inmates who share this claim include: Karl D. Roberts (Roberts v. State, 2020 Ark. 45, 592 S.W.3d 675), Alvin Jackson (Jackson v. State, 352 Ark. 359, 105 S.W.3d 352 (2003)), Roderick Rankin (Rankin v. State, 365 Ark. 225, 227 S.W.3d 924 (2006)), Kenneth Isom (Isom v. State, 2010 Ark. 495, 370 S.W.3d 491), Thomas Springs (Springs v. State, 2012 Ark 87, 387 S.W.3d 143), Gregory Decay (Decay v. State, 2014 Ark. 387, 441 S.W.3d 899), Brandon Lacy (State v. Lacy, 2016 Ark. 38, 480 S.W.3d 856), Zachary Holly (Petition for Relief Under Ark. R. Crim. P. 37, State v. Holly, No. 04CR-13-1 (May 18, 2018)), Mickey Thomas (Thomas v. State, 2014 Ark. 123, 431 S.W.3d 923), and Derek Sales (Sales v. State, 2013 Ark. 218, 2013 WL 2295436).

195. CARTER, *supra* note 174, at 181 (emphasis added).

196. *Mitigation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

197. CARTER, *supra* note 174, at 266.

198. *See generally id.* at 266.

199. *Id.* at 266.

200. Nooner v. State, 339 Ark. 253, 255, 4 S.W.3d 497, 498 (1999).

201. *Id.*

202. *Id*.

203. *Id.* at 258-59, 4 S.W.3d at 500.

prior robbery charge was reduced to a lesser offense due to his protection of a victim during the robbery, counsel did not present that mitigating evidence to the jury during the penalty phase.[204] At the post-conviction hearing for relief, Nooner's trial representation had no recollection of the reduced robbery.[205] In denying Nooner's request for post-conviction relief, the court held that even if Nooner's representation knew, there was no reasonable probability that the jury's decision would have changed if they knew about the changes to Nooner's prior robbery charge.[206]

Perhaps the most glaring example of an attorney's failure to present mitigating evidence occurred when the Arkansas Supreme Court reversed the death sentence for Kenneth Reams. In 1993, a Jefferson County jury sentenced Reams to death following his involvement in the death of Gary Turner.[207] Reams' co-defendant, Alford Goodwin, was convicted and sentenced to life in prison for Turner's shooting before Reams went to trial.[208] Essentially, counsel for Reams sought to blame Goodwin during Reams' trial, although counsel later "testified that '[he didn't] know when [Goodwin] pled in relation to [Reams'] trial.'"[209] Moreover, counsel declined to have Goodwin testify during the penalty phase.[210] The court held that this constituted inadequate assistance of counsel.[211]

Most recently, in 2019, the Eight Circuit Court of Appeals declined to reverse a death penalty sentence for Justin Anderson on *Strickland* grounds.[212] Although the jury heard forty-two potential mitigating factors at the penalty phase, the jury did not consider any viable.[213] The defense provided a multitude of mitigating factors to the jury; however, many were "duplicative,"

204. *Id*.
205. Nooner v. State, 339 Ark. 253, 258-59, 4 S.W.3d 497, 500 (1999).
206. *Id.*
207. Reams v. State, 2018 Ark. 324, at 1-2, 560 S.W.3d 441, 445.
208. *Id*. at 2, 560 S.W.3d at 445.
209. Max Brantley, *Death Penalty Reversed in Pine Bluff Killing for Ineffective Defense*, ARK. TIMES (Nov. 8, 2018), [https://perma.cc/T8YS-Q6EA].
210. *Id.*
211. *Id.*
212. Anderson v. Kelley, 938 F.3d 949, 954-55 (8th Cir. 2019).
213. *Id.* at 953.

including Anderson's lack of a stable home life, and the fact that he lived in nine different places before he was sixteen.[214] While his defense provided numerous duplicative mitigating factors, Anderson's counsel failed to present evidence of Anderson's fetal alcohol spectrum disorder.[215] Anderson argues that the addition of this mitigating circumstance could have pushed the jury to choose life.[216] However, the court held that Anderson did not provide to the court "a reasonable probability that the jury 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'"[217]

However, one judge, concurring in part and dissenting in part, pointed out that the defense counsel's presentation of forty-two repetitive mitigating factors was not helpful.[218] Additionally, he added that "[i]t's not just the quantity, but the quality of mitigating evidence that can make the difference between life and death."[219] Ultimately, counsel did not conduct a thorough investigation to reveal all the possible mitigating factors because they failed to present that "Anderson's childhood was soaked in alcohol[.]"[220] Anderson, indeed, had fetal alcohol spectrum disorder due to the excessive amount of alcohol his mother consumed while she was pregnant which continued during the early years of Anderson's life.[221] In fact, the capital defense bar community and its leaders encourage attorneys to use fetal alcohol spectrum disorder as a mitigating circumstance.[222] Although counsel knew that Anderson's mother drank alcohol, they failed to further inquire about or investigate additional

214. *See id.* at 958, 964-65.

215. Anderson v. Kelley, 938 F.3d 949, 964-65 (8th Cir. 2019) (Kobes, J., concurring in part and dissenting in part).

216. *Id.* at 954.

217. *Id.* at 958.

218. *Id*. at 953, 964-65 (Kobes, J., concurring in part and dissenting in part).

219. *Id.* at 965 (Kobes, J., concurring in part and dissenting in part).

220. Anderson v. Kelley, 938 F.3d 949, 963 (8th Cir. 2019) (Kobes, J., concurring in part and dissenting in part).

221. *Id.* (Kobes, J., concurring in part and dissenting in part).

222. *Id*. at 964. (Kobes, J., concurring in part and dissenting in part). Arkansas has used FASD as a defense beginning around 1995 with *Miller v. State*. *Id.* (citing Miller v. State, 328 Ark. 121, 942 S.W.2d 825, 828 (1997)) (Kobes, J., concurring in part and dissenting in part).

mitigating circumstances.[223] Anderson's representation even acknowledged, "evidence of FASD would have fit perfectly with the theme of the mitigation defense. . . not just that Anderson had a horrible childhood, but that it changed him physically."[224] The dissent concluded that the attorney's behavior violated the Sixth Amendment.[225]

Mitigation is arguably the most important evidence an attorney can present for a death defendant. Mitigation also comes in many forms.[226] Mitigation essentially demonstrates a "meaningful way to reject the death penalty[.]"[227] Stated more plainly, mitigation is the attorney's chance to persuade the jury to choose life for the defendant instead of the death penalty. Unfortunately, mistakes made by attorneys in the penalty phase are numerous and warrant reform.

## III.

*"Supposed to be reserved for the 'worst of the worst' defendants, the death penalty is handed down more often for those with the worst lawyers—not the worst crimes."*[228]

Criticism has followed *Strickland* in the decades since its issuance, particularly in the context of death litigation. And perhaps rightly so. After all, an attorney representing a criminal defendant facing the death penalty bears a tremendous

223. *Id*. at 962-63 (Kobes, J., concurring in part and dissenting in part). Judge Kobes pointed out that the American Bar Association Guidelines state that, "[m]itigation cases depend on 'extensive and generally unparalleled investigation into personal and family history' that 'begins with the moment of conception.'" *Id.* at 964 (citing ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (AM. BAR ASSOC. 2003), *reprinted in* 31 HOFSTRA L. REV. 913 (2003)) (Kobes, J., concurring in part and dissenting in part).

224. *Id.* at 965 (Kobes, J., concurring in part and dissenting in part).

225. *Id*. (Kobes, J., concurring in part and dissenting in part) "When counsel fail to ask important questions [to their clients] and turn up crucial facts, that failure cannot be shifted to experts." *Id*. at 964 (Kobes, J., concurring in part and dissenting in part).

226. LINDA E. CARTER ET AL., UNDERSTANDING CAPITAL PUNISHMENT LAW 181 (4th ed. 2018).

227. *Id.*

228. CASSANDRA STUBBS, AM. CIV. LIBERTIES UNION, THE DEATH PENALTY IN 2019: A YEAR OF INCREDIBLE PROGRESS MARRED BY UNCONSCIONABLE EXECUTIONS (2019), [https://perma.cc/HFP9-V5GE] (emphasis added).

responsibility.[229] And in death penalty cases, competent counsel is essential. This Article is about constitutionally guaranteed process—not innocence or guilt. This Article does not purport that the Arkansas defendants are innocent; rather, even if guilt is present, each criminal defendant is constitutionally guaranteed competent counsel.

While commentators have proposed a number of potential solutions, this Article argues that the most favorable is a straightforward approach: drop the second prong of the *Strickland* standard in death cases. Section A discusses why funding is not a permanent fix to extend death defendants "more" adequate counsel. Section B, then, illustrates how the American Bar Association's requirements for competent counsel directly point to dropping the second prong of *Strickland*. Finally, Section C illustrates how the lack of a prejudice prong would alter the outcome in the Arkansas Eight cases.

229. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995). *See also* Am. Bar Ass'n, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* , 31 HOFSTRA L. REV. 913, 967-68 (2003) ("[O]ne study found that over the entire course of a case, defense attorneys in federal capital cases bill for over twelve times as many hours as in noncapital homicide cases. In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation.")

### A. Funding: The *Cronic* Problem

*"[H]elping criminal defendants is not a high priority for the public."*[230]

Civil suits and more money will not fix the problem. Public defenders represent the bulk of criminal defendants.[231] Because of this, there is a "nationwide problem consist[ing] of 'too little money, too few attorneys, and too many defendants.'"[232] In 2019 alone, there were 79,723 "active" criminal cases in Arkansas.[233] 40,634 of the 2019 cases involve "distinct individuals across the state."[234] Of those distinct individuals, 26,499 were represented by public defenders.[235]

In Arkansas, at any given time, many public defenders carry between ninety and one-hundred-twenty cases, each, all at once .[236] Generally, that caseload collectively comprises about eighty-five to ninety percent of the entire criminal docket.[237] No public

230. Bryan Altman, *Improving the Indigent Defense Crisis Through Decriminalization*, 70 ARK. L. REV. 769, 782 (2017) (emphasis added). Altman also points to a hearing from the Annual Conference of the National Legal Aid and Defender Association. *Id.* at 782 n. 89. The transcript illustrates that no answer will be publicly favored. *Id.*; AM. BAR ASS'N, GIDEON UNDONE: THE CRISIS IN INDIGENT DEFENSE FUNDING 10 (John Thomas Moran ed.,1982). At the hearing, a private practitioner commented: "What I'm asking you all here today as members of the bar is to realize this is a very very unpopular subject. There is no public support whatsoever. If we had to put it on a referendum, how much money are the people of Massachusetts willing to pay for people accused of crime, what would we get? $100? $200? Do you think we'd hit four figures? I doubt it. . . . If we are not willing to stand up for our indigent clients, then we have to stand up for the Constitutional guarantees of the right to counsel and equal protection of the law." *Id*. at 11.

231. Carrie Dvorak Brennan, *The Public Defender System: A Comparative Assessment*, 25 IND. INT'L & COMP. L. REV. 237, 238 (2015).

232. *Id.*

233. E-mail from Joe Beard, Research Analyst & Tableau Server Adm'n for the Arkansas Admin. Office of the Courts (Mar. 23, 2020, 08:20 CST) (on file with author). Active is defined as cases that do not have a filed disposition. E-mail from Joe Beard, Research Analyst & Tableau Server Adm'n for the Arkansas Admin. Office of the Courts (Apr. 23, 2020, 1:07 CST) (on file with author).

234. E-mail from Joe Beard, Research Analyst & Tableau Server Adm'n for the Arkansas Admin. Office of the Courts (Mar. 23, 2020, 08:20 CST) (on file with author).

235. *Id*.

236. David Koon, *Arkansas Public Defenders Stretched Thin*, ARK. TIMES (Jan. 29, 2015), [https://perma.cc/9L2W-9YNR].

237. *Id*. Each client also has multiple cases. *Id.* An Arkansas Budget committee member "gave the scenario of a policeman who pulls over a car for no tags and eventually

defender in those or similar circumstances could adequately prepare his or her entire case-load for trial.[238] The National Advisory Commission on Criminal Justice Standards and Goals (NAC) recommends that one attorney should not manage more than 150 felony cases per year.[239] But, in Arkansas and elsewhere, many public defenders surpass this.[240]

One managing public defender in Arkansas stated that public defense "a lot of times, it's just the assembly-line practice of law."[241] This is not a new or surprising comment; there are frequent calls for more resources and funding.[242] Indeed, public defenders nationwide face similar financial challenges and feel that "It's impossible for [them] to do a good job representing [their] clients" because of budget cuts, staff reductions, and access even to basic resources.[243]

But requests for increases to public defender funding raise a separate concern about where the money to support those increases will come from. But as many cases indicate, more money is not the sole issue. Consider *United States v. Cronic*,[244]

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arrests the person inside for DUI, possession of a handgun by a felon, possession of a stolen handgun and possession of a controlled substance." *Id.* While the number of cases does not reflect only capital cases, the number reflects the multitude of directions that a public defender is pulled in on a daily basis. *See generally id.*

238. *Id.* At the base-line level, to prepare for a jury trial, an attorney must meet with his or her client, talk to all witnesses, send subpoenas to all witnesses that will give testimony, hire expert witnesses if needed, prepare an opening statement, and prepare questions for direct and cross examination. *See generally id.* "Because public defenders have so many cases per year, they can spend only minutes on each individual case, compromising the level of defense provided." THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CTR. FOR JUST., GIDEON AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 4 (2013), [https://perma.cc/PW57-C8TW].

239. NORMAN LEFSTEIN, AM. BAR ASS'N, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE, 43 (2011). The NAC, which is funded by the federal government, has a considerable impact on public defenders. *Id.* There is a lack of caseload recommendations in the practice of law and NAC fills this gap. *Id.*

240. *See generally* Tina Peng*, I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing my Clients.*, WASH. POST (Sept. 3, 2015), [https://perma.cc/UW9P-CYXQ].

241. Koon, *supra* note 236.

242. *See id.*

243. Peng*, supra* note 240. *See also* GIOVANNI & PATEL, *supra* note 238, at 4 ("In New Orleans, defenders handled on average 19,000 cases in 2009, which translated into seven minutes per case. Minnesota defenders reported devoting an average of 12 minutes per case, not including court time, in 2010."); Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES (Nov. 8, 2008), [https://perma.cc/7AZD-F6KE].

244. United States v. Cronic, 466 U.S. 648 (1984).

a case the United States Supreme Court decided on the same day as *Strickland*.[245] Just days before trial, Harrison Cronic's counsel withdrew, and the court appointed new counsel for Cronic.[246] In doing so, the court set trial for twenty-five days later, even though the government had "four and one-half years to investigate [this] case and. . .review[] thousands of documents during that investigation."[247] The Supreme Court was tested with examining whether Cronic's newly-appointed representation adequately prepared for trial.[248] Although the Court held that twenty-five days to prepare for trial provided sufficient time, it also recognized that preparing a sufficient defense requires timely appointment of knowledgeable counsel coupled with adequate preparation time and resources prior to trial.[249]

That recognition mirrors the Court's precedent established in *Powell v. Alabama*,[250] *Wiggins v. Smith*,[251] *Williams v.*

245. Samantha Jaffe, "*It's Not You, It's Your Caseload": Using Cronic to Solve Indigent Defense Underfunding*, 116 MICH. L. REV. 1465, 1474 (2018).

246. *Cronic*, 466 U.S. at 649. In addition to the twenty-five-day disadvantage, the "court appointed a young lawyer with a real estate practice" and no prior experience litigating a jury trial. *Id.* at 649, 665. The court held that these mere factors regarding the attorney's qualifications did "not undermine[]" the conclusion. *Id.* at 665. The court went on to reason that "[e]very experienced criminal defense attorney once tried his first criminal case. Moreover, a lawyer's experience with real estate transactions might be more useful in preparing to try a criminal case involving financial transactions than would prior experience in handling, for example, armed robbery prosecutions." *Id.*

247. *Id.* at 649. Cronic argued that twenty-five days is an inadequate amount of time to prepare for trial, as litigated in *Powell v. Alabama*. Jaffe, *supra* note 245, at 1474 (citing Powell v. Alabama, 287 U.S. 45, 57 (1932)).

248. *See generally Cronic*, 466 U.S. at 650, 662.

249. *See* United States v. Cronic, 466 U.S. 648, 662-63, 665 (1984).

250. Powell v. Alabama, 287 U.S. 45, 57 (1932).

251. Wiggins v. Smith, 539 U.S. 510, 521 (2003). Seventeen years after *Strickland*, *Wiggins v. Smith* seemed to gently challenge the *Strickland* decision. Gallini, *supra* note 116, at 351-52. Surprisingly, Justice O'Connor, who authored the majority opinions in both *Strickland* and *Wiggins*, refined her own opinion about *Stickland* prejudice. *Id.* at 319, 351-52. *Wiggins* was convicted of capital murder, among other crimes, and was sentenced to death. *Wiggins*, 539 U.S. at 515-16. Ultimately, *Wiggins* tasked the United States Supreme Court with deciding whether his counsel provided adequate representation during trial. *Id*. at 518-20. During that trial, counsel did not introduce any evidence of the defendant's "life history," nor did he seek professional assistance to prepare a report of Wiggins' background. Gallini, *supra* note 116, at 352 (citing Wiggins v. Smith, 539 U.S. 510, 515 (2003)). Instead, during counsel's opening, he merely told the jury: "'You're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. . . . I think that's an important thing for you to consider.'" *Wiggins*, 539 U.S. at 515. That's it. No details followed to describe his "difficult life." Gallini, *supra* note 116, at 352. Surprisingly, Justice O'Connor, unlike in *Strickland*, concluded that the lack of investigation into a client's life to gain mitigating

*Taylor*,[252] and *Rompilla v. Beard*,[253] wherein it recognized that failure to prepare, failure to present mitigating evidence, and failure to gather mitigating evidence constitutes ineffective assistance of counsel.[254] However, more money would not have granted Cronic's attorney more days to prepare. *Cronic* prompted a series of litigation regarding the lack of funding;[255] even so, many public defenders still work hundreds of cases a year, utilize minimal resources, and conduct nominal preparation.

### B. ABA Standards Call to Eliminate *Strickland* Prejudice

The great weight of death penalty defense representation has spurred the development of various and unique strategies for effective defense representation in death litigation.[256] Consider,

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evidence "did not reflect reasonable professional judgement," and, perhaps more importantly, if counsel had presented the evidence of Wiggins' background, "there is a reasonable probability that [the jury] would have returned with a different sentence." *Id*. (citing Wiggins v. Smith, 539 U.S. 510, 534, 536 (2003)). Her opinion reasoned that the jury *only* heard a small slice of mitigating evidence; however, "[h]ad the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least *one* juror would have struck a different balance." *Id*. (citing Wiggins v. Smith, 539 U.S. 510, 537 (2003)) (emphasis added).

252. *See generally* Williams v. Taylor, 529 U.S. 362 (2000). In *Williams*, the defendants counsel failed to research his client's behavior, which later was found to possibly have a mitigating effect. Jaffe, *supra* note 245, at 1475.

253. *See generally* Rompilla v. Beard, 545 U.S. 374 (2005). Just two years after *Wiggins*, the Court again appeared to retreat from *Strickland*. *See* Gallini, *supra* note 116, at 353. In *Rompilla*, a jury convicted Ronald Rompilla on all charges, including capital murder. *Rompilla*, 545 U.S. at 378. However, the jury rendered its verdict after counsel's failure to present significant mitigating evidence during the penalty phase. *Id.* at 381. Defense counsel presented Rompilla's five family members' testimony as mitigating evidence, but nothing else. *Id.* at 378. The Court held this rendered ineffective assistance of counsel. *Id*. at 393. Justice O'Connor wrote a concurring opinion focused on the significance of looking into a defendant's history. Gallini, *supra* note 116, at 353 (citing Rompilla v. Beard, 545 U.S. 374, 394-96 (2005)) (O'Connor, J, concurring). Specifically, for Rompilla, Justice O'Connor reasoned that defense counsel's failure "'was the result of inattention, not reasoned strategic judgement.'" Gallini, *supra* note 116, at 353 (citing Rompilla v. Beard, 545 U.S. 374, 395-96 (2005) (O'Connor, J., concurring)).

254. *See* Jaffe, *supra* note 245, at 1475.

255. *See e.g*., Kuren v. Luzerne Cnty., 146 A.3d 715 (Pa. 2016); Hurrell-Harring et al. v. State,
930 N.E.2d 217 (N.Y. 2010); Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

256. *See generally* Strickland v. Washington, 466 U.S. 668 (1984); Am. Bar Ass'n, *supra* note 229, at 923 (quoting Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995)).

for instance, the guidance provided by the American Bar Association:

> [D]efending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[257]

Wholly apart from ABA guidance, capital defense attorneys, typically, must first satisfy rigorous state-level qualifications in order to handle capital cases.[258] Despite quality assurance efforts, no one remains happy with *Strickland*. Questions about defense attorney competency therefore persists—and especially so in Arkansas.

At the core of criminal representation is professional competence. The commonality of death defendants manifests itself through representation that falls below the standards expected by the American Bar Association. Under the Model Rules of Professional Conduct, the American Bar Association categorizes lawyer competency into four classifications: (1) "Legal Knowledge and Skill," (2) "Thoroughness and Preparation," (3) "Retaining or Contracting With Other Lawyers," and (4) "Maintaining Competence."[259] By eliminating *Strickland* prejudice, death defendants will receive constitutionally competent representation as outlined by the American Bar Association's professional conduct requirements.

Objecting, preparing for trial, and presenting mitigating evidence all fit squarely within the categories of lawyer

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257. Am. Bar Ass'n, *supra* note 229, at 923 (quoting Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995)).

258. ARK. R. CRIM. P. 37.5. In Arkansas, the requirement to qualify to be the lead death penalty attorney is three years of experience practicing law, prior experience as lead counsel in at least five jury trials regarding "complex cases," and experience with at least one case where the death penalty was sought. *Id*. These are the main qualifications to serve as the lead attorney; however, there are a separate set of qualifications to serve on the defense team. *Id.*

259. MODEL RULES OF PRO. CONDUCT r 1.1 (AM. BAR. ASS'N 2018) (emphasis omitted).

Additionally, the rule itself expressly states, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.* (emphasis omitted).

competency requirements. The American Bar Association's second category, "Thoroughness and Preparation," expressly "includes adequate preparation."[260] Further, the thoroughness and preparation requirements recognize the need to alter "[t]he required attention and preparation are determined in part by what is at stake. . . ."[261] The rules also indicate that even if an attorney is lacking in prior experience, the "lawyer can provide adequate representation in a wholly novel field through necessary study."[262] Compliance with professional conduct and ethics are at the center of the legal profession.[263] These rules ensure that clients receive adequate and competent counsel.

Despite the Supreme Court's attempt to provide a standard for ineffective counsel in *Strickland*, the Court's test continually precludes meaningful appellate review of whether trial counsel was, in fact, *effective*.[264] Arkansas juries decided *all* of the Arkansas Eight inmates' cases discussed in this article, as well as the remaining thirty Arkansas death row inmates.[265] Juries are unpredictable and, in any given case, may choose life over death, or death over life, perhaps only on the basis of just one statement from either side.[266] In a capital case, the second prong, the requirement to prove prejudice, is often an unattainable burden which a post-conviction attorney must attempt to prove.

Without the need for an appellant litigant to prove the second prong of *Strickland*, the stories of each Arkansas Eight defendant, as well as other death row inmates, might have turned out differently. In reliance on the second prong of the *Strickland* standard, Arkansas courts uniformly concluded that all of the Arkansas Eight received constitutionally accepted

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260. *Id.* (emphasis omitted).

261. *Id.*

262. *Id.*

263. *See generally* Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33 (2012). "Lawyers must be able to represent and competently advocate for their clients without succumbing to behavior that is not commensurate with the esteemed position of the legal profession." *Id.* at 43.

264. *See infra* Part I & Part II.

265. *See infra* Part I & Part II.

266. *See generally* Brian H. Bornstein & Edie Greene, *Jury Decision Making: Implications for and from Psychology*, 20 ASS'N FOR PSYCHOL. SCI. 63 (2011).

representation.[267] From attorney errors regarding failure to object, to failure to present mitigating evidence, to failure to challenge a six-year-old's testimony, the unavoidable question arises: would the result have been different *but for* the prejudice prong?[268]

## C. Imagine the Executed Arkansas Eight Without *Strickland* Prejudice

Consider how appellate review might proceed without *Strickland* prejudice. Ledell Lee, Marcel Williams, Jack Jones, and Kenneth Williams, were executed in April of 2017 without *Strickland* prejudice.[269] Recall the facts. Ledell Lee's counsel failed to object to the prosecution's egregious statements to the jury, which painted Lee as a "hunter," because counsel admitted that he "just missed it."[270] Nevertheless, the reviewing court held no prejudice existed, and Lee was executed.[271] Without the requirement to address the prejudice prong, the reviewing court would have focused solely on whether counsel provided professionally reasonable representation. In Lee's case, recall the court's conclusion that counsel's lack of objection "was clearly not part of his strategy because he testified at the August 2007 hearing that he 'just missed it.'"[272] Lee would, therefore, still be alive and likely be awarded a new trial with different counsel. More importantly, such a holding signals that the court demands more from defense attorneys.

Next, recall that Marcel Williams' counsel failed to present mitigating evidence to the jury.[273] Counsel testified during a post-conviction review hearing that "[i]t wasn't that [they] didn't have mitigation, [it was] that [they] were ignorant of how to present it

267. *See Infra* Part I for Arkansas Eight profiles.

268. *See Infra* Part I for Arkansas Eight profiles.

269. Jamiles Lartey, *Arkansas Executions: Profiles of the Eight Death Row Prisoners*, THE GUARDIAN (Apr. 15, 2017), [https://perma.cc/7UWE-QW8F]. *See* Strickland v. Washington, 466 U.S. 668 (1984).

270. Lee v. State, 2009 Ark. 255, at 19, 308 S.W.3d 596, 608.

271. Pilkington & Rosenberg, *supra* note 5.

272. *Lee*, 2009 Ark. 255, at 19-20, 308 S.W.3d at 608.

273. Williams v. State, 347 Ark. 371, 373, 64 S.W.3d 709, 711 (2002).

without exposing him."[274] Despite that testimony, the court held that counsel was nonetheless effective even though counsel also testified that "they should have done things differently, they admitted that, at the time of trial, they did not know any other way to introduce the information about Williams's troubled youth."[275] However, the reviewing court did not address the prejudice prong because Williams made a conclusory argument for post-conviction relief, which ultimately did not provide enough specific information for the court's liking.[276] Without the prejudice prong, a court may have put more weight on Williams' counsel's ignorance and awarded him a new trial. Marcel Williams, however, was executed on April 24, 2017.[277]

Recall Jack Jones. Jones' counsel failed to object to the state's expert witness as well as the flagrant statements by the prosecution about the murder itself.[278] Jones argued that without the expert's testimony and the statements, the outcome "*could* have been different."[279] However, the reviewing court strictly construed *Strickland*, commenting that the standard requires proof that "the decision reached *would* have been different."[280] Stated differently, the court decided not to address prejudice because Jones' argument included *could* instead of *would*.[281] Without the prejudice prong, the outcome may have been different and Jack Jones may still be alive. However, Jack Jones was executed on April 24, 2017.[282]

Lastly, Kenneth Williams' counsel failed to remove a biased juror who stated that she "felt very strong about the [death penalty.]"[283] Williams' counsel did testify that he would have excused this juror provided he had challenges left.[284] The court decided that this did not carry a reasonable probability that the

274. *Id.* at 378, 64 S.W.3d at 715.
275. *Id.*
276. *Id.* at 380, 54 S.W.3d at 716.
277. Pilkington & Rosenberg, *supra* note 79.
278. *Jones II*, 340 Ark. 1, 5, 8 S.W.3d 482, 484 (2000).
279. *Id.* at 10, 8 S.W.3d at 488 (emphasis added).
280. *Id.*
281. *See id.* (emphasis added).
282. Pilkington et al., *supra* note 79.
283. Williams v. State, 369 Ark. 104, 111, 251 S.W.3d 290, 295 (2007).
284. *Id.*

outcome would have been different.[285] It then follows that without the prejudice prong, the court may have found deficient performance sufficient for a new trial. However, Kenneth Williams was executed on April 27, 2017.[286] These four executed inmates may still be alive *but for* the prejudice prong of the *Strickland* standard.

## CONCLUSION

Physical presence of counsel is not equivalent to competent representation. *Strickland*, although important, has created an unreachable burden for criminal defendants to meet when claiming ineffective counsel. Dropping the second prong for death penalty cases focuses the reviewing court's attention where it should be—attorney competence. If any defendant deserves a more focused appellate standard, it is death penalty defendants. Once the lethal injection is dispensed, there are no reversals, relief, or judicial assistance. If any defendants deserve a heightened standard of representation, it is death penalty defendants.

285. *Id.* at 113, 251 S.W.3d at 296.

286. Ed Pilkington and Jacob Rosenberg, *Fourth and Final Arkansas Inmate Kenneth Williams Executed*, THE GUARDIAN (Apr. 28, 2017), [https://perma.cc/SN6Y-7EVP].

## Appendix A

## Arkansas Eight Inmates

| Inmate* | Date of Sentence | County of Trial Court | Category | Other |
|---|---|---|---|---|
| **Marcel Williams**[287] | 1/14/97 | Pulaski County | Failure to Present Mitigating Evidence | Executed |
| **Jack Jones**[288] | 4/17/96 | White County | Failure to Present Mitigating Evidence | Executed |
| **Ledell Lee**[289] | 10/12/95 | Pulaski County | Failure to Object | Executed |
| **Kenneth D. Williams**[290] | 8/30/00 | Lincoln County | Failure to Prepare | Executed |
| **Don W. Davis**[291] | 3/6/92 | Benton County | Failure to Prepare | |
| **Stacey E. Johnson**[292] | 9/23/94 | Siever County | Failure to Prepare | |
| **Bruce E. Ward**[293] | 10/18/90 | Pulaski County | Failure to Object | |
| **Jason McGehee**[294] | 1/8/97 | Boone County | Failure to Prepare | Clemency |

*Footnotes attached to inmate's name indicate the *Strickland* claim case information.

287. *Williams I*, 338 Ark. 97, 991 S.W.2d 565, (1999).
288. *Jones I*, 329 Ark. 62, 947 S.W.2d 339 (1997).
289. Lee v. State, 2009 Ark. 255, 308 S.W.3d 596.
290. Williams v. State, 347 Ark. 728, 67 S.W.3d 548 (2002).
291. Davis v. State, 314 Ark. 257, 863 S.W.2d 259 (1993).
292. Johnson v. State, 326 Ark. 430, 934 S.W.2d 179 (1996).
293. Ward v. Norris, 577 F.3d 925 (8th Cir. 2009).
294. McGehee v. State, 348 Ark. 395, 72 S.W.3d 867 (2002).

## Appendix B

## Current Death Row Inmates in Arkansas

| Inmate* | Date of Sentence | County of Trial Court | Category | Other |
|---|---|---|---|---|
| **Jack G. Greene**[295] | 7/1/99 | Johnson County | Failure to Object | |
| **Andrew Sasser**[296] | 3/3/94 | Miller County | Failure to Object | |
| **Jerry D. Lard**[297] | 7/28/12 | Greene County | Failure to Object | |
| **Randy W. Gay**[298] | 3/19/15 | Garland County | Failure to Object | |
| **Ray Dansby**[299] | 6/11/93 | Union County | Failure to Prepare | |
| **Zachariah Marcyniuk**[300] | 12/12/08 | Washington County | Failure to Prepare | |
| **Timothy W. Kemp**[301] | 12/2/94 | Pulaski County | Failure to Prepare | |
| **Latavious Johnson**[302] | 11/4/14 | Lee County | Failure to Prepare | Attorney Conduct Issues[303] |

*Footnotes attached to inmate's name indicate the *Strickland* claim case information.

295. Greene v. State, 356 Ark. 59, 146 S.W.3d 871 (2004).

296. Sasser v. State, 338 Ark. 375, 993 S.W.2d 901 (1999).

297. Petition for Post-Conviction Relief, State v. Lard, 2014 Ark. 1 (No. CR 2012-173).

298. Brief for Appellant, Gay v. State, No. CR-19-762 (Ark. Feb. 07, 2020).

299. Dansby v. State, 350 Ark. 60, 84 S.W.3d 857 (2002).

300. Marcyniuk v. State, 2014 Ark. 268, 436 S.W.3d 122.

301. Kemp v. State, 324 Ark. 178, 919 S.W.2d 943 (1996).

302. Brief for Appellant, Johnson v. State, 2020 Ark. 168 (No. CR 19-847).

303. Johnson v. State, 2015 Ark. 414.

| Inmate* | Date of Sentence | County of Trial Court | Category | Other |
|---|---|---|---|---|
| **Alvin Jackson**[304] | 6/20/96 | Jefferson County | Failure to Present Mitigating Evidence | |
| **Karl D. Roberts**[305] | 5/24/00 | Polk County | Failure to Present Mitigating Evidence | |
| **Kenneth Isom**[306] | 12/20/01 | Drew County | Failure to Present Mitigating Evidence | |
| **Zachary D. Holly**[307] | 5/27/15 | Benton County | Failure to Present Mitigating Evidence | |
| **Thomas Springs**[308] | 11/24/05 | Sebastian County | Failure to Present Mitigating Evidence | |
| **Brandon E. Lacy**[309] | 5/13/09 | Benton County | Failure to Present Mitigating Evidence | |
| **Roderick L. Rankin**[310] | 2/13/96 | Jefferson County | Failure to Present Mitigating Evidence | |
| **Terrick T. Nooner**[311] | 9/28/93 | Pulaski County | Failure to Present Mitigating Evidence | |

304. Jackson v. State, 352 Ark. 359, 105 S.W.3d 352 (2003).
305. Roberts v. State, 2020 Ark. 45, 592 S.W.3d 675.
*Footnotes attached to inmate's name indicate the *Strickland* claim case information.
306. Isom v. State, 2010 Ark. 495, 370 S.W.3d 491.
307. Petition for Relief, State v. Holly, No. 04CR-13-1 (Ark. Cir. Ct. May 18, 2018).
308. Springs v. State, 2012 Ark 87, 387 S.W.3d 143.
309. State v. Lacy, 2016 Ark. 38, 480 S.W.3d 856.
310. Rankin v. State, 365 Ark. 255, 227 S.W.3d 924 (2006).
311. Nooner v. State, 339 Ark. 253, 4 S.W.3d 497 (1999).

| Inmate* | Date of Sentence | County of Trial Court | Category | Other |
|---|---|---|---|---|
| **Justin Anderson**[312] | 1/31/02 | Lafayette County | Failure to Present Mitigating Evidence | Off death row |
| **Gregory Decay**[313] | 4/24/08 | Washington County | Failure to Present Mitigating Evidence | |
| **Kenneth Reams**[314] | 12/16/93 | Jefferson County | Failure to Present Mitigating Evidence | Off death row |
| **Mickey D. Thomas**[315] | 9/28/05 | Pike County | Failure to Present Mitigating Evidence | |
| **Derek Sales**[316] | 5/17/07 | Ashley County | Failure to Present Mitigating Evidence | Attorney Conduct Issues[317] |
| **Mauricio A. Torres**[318] | 11/15/16 | Benton County | Retrial Granted | |
| **Brad H. Smith**[319] | 7/28/17 | Cleveland County | Sentenced Recently | |
| **Eric A. Reid**[320] | 3/12/18 | Garland County | Sentenced Recently | |

312. Anderson v. Kelley, 938 F.3d 949 (8th Cir. 2019).

313. Decay v. State, 2014 Ark. 387, 441 S.W.3d 899.

*Footnotes attached to inmate's name indicate the *Strickland* claim case information.

314. Reams v. State, 2018 Ark. 324, 560 S.W.3d 441; Brantley, *supra* note 209.

315. Thomas v. State, 2014 Ark. 123, 431 S.W.3d 923.

316. Sales v. State, 2013 Ark. 218.

317. Sales v. State, 2010 Ark. 320.

318. Tracy Neal, *Judge Sets Retrial Date for Northwest Arkansas Man Accused of Killing Son*, ARK. DEMOCRATIC GAZETTE (Oct. 8, 2019), [https://perma.cc/BU6L-CLJV]; *Courthouse Scuffle Leads to Mistrial in Mauricio Torres' Case*, 5 NEWS (Mar. 5, 2020), [https://perma.cc/868Y-YLF6].

319. Brief for Appellant, Smith v. State, No. CR-20-86 (Ark. Apr. 13, 2020).

320. Reid v. State, No. CR-18-517 (Ark. June 15, 2018).

| Inmate* | Date of Sentence | County of Trial Court | Category | Other |
|---|---|---|---|---|
| **Scotty R. Gardner**[321] | 8/22/18 | Faulkner County | Sentenced Recently | |
| **Billy Thessing**[322] | 9/10/04 | Pulaski County | Sealed Record | |
| **Robert Holland**[323] | 7/10/14 | Lincoln County | Sentenced Recently | |

321. Brief for Appellant, Gardner v. State, 2020 Ark. 147 (No. CR-19-257).

322. Thessing v. State, No. CR-05-420 (Ark. Apr. 13, 2005).

*Footnotes attached to inmate's name indicate the *Strickland* claim case information.

323. Holland v. State, 2015 Ark. 318, 468 S.W.3d 782.