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Lawyering to the Lowest Common Denominator: "Strickland's" Potential for Incorporating Underfunded Norms into Legal Doctrine

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LAWYERING TO THE LOWEST COMMON DENOMINATOR: *STRICKLAND*'S POTENTIAL FOR INCORPORATING UNDERFUNDED NORMS INTO LEGAL DOCTRINE

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This symposium article explores how ineffective assistance of counsel doctrine, by its design, may incorporate and exacerbate the failings of an underfunded indigent defense system. Specifically, it highlights two aspects of the Strickland v. Washington standard for ineffective assistance of counsel: first, its inability to effectively address issues of underfunding through its two-prong test of deficient performance and prejudice; and, second, the way in which its eschewal of specific substantive guidelines for attorney performance in favor of reliance on "prevailing professional norms" may allow legal doctrine to be influenced by anemic, localized practice norms resulting from a lack of resources.

As part of its analysis, this piece surveys Alabama court decisions invoking the "prevailing professional norms" terminology under Strickland to determine the sources on which Alabama courts rely to assess the reasonableness of attorney conduct. This research reveals that the Alabama courts are unlikely to afford weight to systemic funding deficiencies. Moreover, in defining "professional norms," Alabama courts more likely to rely on previous instances of attorney conduct that have been deemed constitutionally sufficient or local practice norms than on external sources such as the ABA Guidelines. This trend is in line with the Supreme Court's latest word on the issue, which emphasizes that the ABA Guidelines are not definitive and that courts should have more freedom in determining what constitutes reasonable attorney performance. Unfortunately, it also increases the likelihood that "reasonableness," and thus the meaning of the Sixth Amendment's

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guarantee to the effective assistance of counsel, will be defined by lowered practice standards resulting from systemic underfunding.

In response to these findings, the article makes several recommendations as to how courts reviewing ineffective assistance of counsel claims might better respond to the potential impact of underfunding on the effectiveness of defense counsel. More generally, it suggests that courts should be mindful of how funding issues not only hinder the effective application of right to counsel doctrine, but also have the potential to degrade the law's ability to protect against future ineffective assistance.

INTRODUCTION

In recent years, there has been no shortage of examples of how the underfunding of indigent defense negatively impacts the legal representation that poor criminal defendants receive.[1] To provide just one example, a young attorney who until 2009 was employed as a public defender in Georgia, resigned from her position because she felt that she was not providing effective assistance under the office's budgetary constraints.[2] In a letter authored shortly after her resignation, she stated that severe underfunding in her office had resulted in unmanageable working conditions, such as: an annual caseload allowing, on average, a mere three hours to

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[1] *See, e.g.*, Vanita Gupta & Ezekiel Edwards, *Too Many Still Wait to Hear Gideon's Trumpet*, HUFFINGTON POST (Mar. 18, 2013), http://www.huffingtonpost.com/vanita-gupta/gideon-v-wainwright_b_2900837.html (citing the causes of the current indigent defense crisis as too little funding and too many cases); Lincoln Caplan, Editorial, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES (Mar. 9, 2013), http://www.nytimes.com/2013/03/10/opinion/sunday/the-right-to-counsel-badly-battered-at-50.html (suggesting that *Gideon*'s promise remains unfulfilled primarily because of a lack of funding, which manifests itself in ineffective assistance of counsel); JUSTICE POLICY INSTITUTE, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE (2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf (providing a detailed overview of indigent defense underfunding and how such underfunding manifests itself: understaffed public defender offices, lack of training, inability to prepare and investigate cases, and increased incarceration costs); *id.* at 9 ("Public defense has been historically underfunded and overburdened since *Gideon*; however, the recent economic downturn and fiscal/budget crises have made it worse.").

[2] Marie-Pierre Py, *Letter: Without Funds, PD System will deteriorate further*, FULTON COUNTY DAILY REPORT (Mar. 19, 2009), *available at* http://www.nlada.org/DMS/Documents/1237466797.97/GA_Without%20funds,%20PD%20system%20will%20deteriorate%20further.pdf.

work on each case;[3] a "cursory review" of each case to identify which cases would benefit from the office's limited resources;[4] pleas being entered without a thorough investigation of the case;[5] continued representation even in light of obvious conflicts;[6] very few requests for expert funding;[7] and limited training opportunities.[8]

The law's failure to effectively respond to this scenario is often viewed as a problem of application: an unfortunate disconnect between the ideals of legal doctrine and the realities of legal practice. In previous work, I have attributed this gap to the fact that Sixth Amendment doctrine is not well suited to account for funding concerns or simply operates ignorant of their existence.[9] Less attention has been paid, however, to the more pernicious possibility that, in turning a blind eye to issues of funding, courts actually allow the depressed practice norms of an anemic system to inform the legal standard used to assess the quality of indigent defense. In other words, conduct that once could have constituted a constitutional wrong has not only become the new normal, but also

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[3] "[I]n the 13 months I worked as a public defender, I closed approximately 900 cases. . . . Throughout this time, I had approximately 270 open cases at one time (not all of these were yet indicted or accused). In order to close this many cases in 13 months, an attorney working a 50-hour work week, taking no vacation time or sick leave would have only three hours to devote to an individual case (including court time and meeting with the client and not allowing for any administrative duties or continuing education)." *Id.*

[4] "The caseload pushed attorneys to approach each case with a cursory review aimed at identifying the few cases to which our meager resources would be directed." *Id.*

[5] "Time and time again, attorneys allowed clients who indicated an inclination to plead guilty to do so without an examination of the client's reasoning (which may well have been a fear of the criminal justice system rather than an indication of guilt) and without a thorough examination of the prosecution's case, let alone a full investigation of the case or an exploration of all possible defenses." *Id.*

[6] "[T]he budgetary constraints resulted in an appalling approach to cases of co-defendants who had conflicting interests. . . . With the exception of 'serious' felony cases, we were with regularity instructed not to withdraw from cases even where an obvious conflict existed." *Id.*

[7] "With regard to funding for experts, it was explained to us at the beginning of the fiscal year that the budget was so small that only in the exceptional case would expert funds be available to cases that did not involve rape, murder or aggravated child molestation. This initial warning, in addition to lack of training regarding the use of expert witnesses, resulted in a stifling of expert requests. Rarely, if at all, did my colleagues request expert funding." *Id.*

[8] "The lack of training and supervision of us novice public defenders resulted in a great disservice to our clients." *Id.*

[9] *See* Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1205–07 (2013).

the bar by which alleged ineffective assistance will be assessed in the future.

In *Strickland v. Washington*, the Supreme Court set forth the standard by which claims of ineffective assistance of counsel would be judged.[10] The Court's formulation of that standard was neither substantive nor wholly objective; rather, it relied on a relative assessment of defense counsel's conduct against "prevailing professional norms."[11] The nature of this standard means not only that it will change over time and is subject to external variables, but also that any change in the underlying norm used to assess attorney conduct will "implicitly change[]" the law itself.[12] Thus, the way in which courts determine the baseline norm against which all other attorney conduct will be judged has the potential to transform ineffective assistance doctrine. This article offers a limited empirical analysis of the Alabama state appellate courts' treatment of *Strickland*'s "professional norms" language in an attempt to determine whether the courts rely on external, objective standards to guide their discretion, or whether the sources on which they rely are localized,[13] and therefore more susceptible to being poisoned by the realities of underfunding.[14]

In Part I, the article describes the workings of the *Strickland* standard and the ways in which it fails to explicitly take issues of funding into account, as well as the ways in which it might covertly incorporate underfunded practice norms. In Part II, the article provides an analysis of the Alabama courts' application of *Strick-*

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

[11] *Id.* at 688. Although *Strickland* refers to an "objective standard of reasonableness" that should be applied in assessing counsel's performance, its use of "prevailing professional norms" to define the contours of such reasonableness inevitably opens the standard up to subjective determination (i.e., which professional norms will provide the basis for comparison), which is the subject of this piece. *Id.*

[12] Gary Feldon & Tara Beech, *Unpacking the First Prong of the Strickland Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases*, 23 U. FLA. J.L. & PUB. POL'Y 1, 16 (2012).

[13] In his dissenting opinion in *Strickland*, Justice Thurgood Marshall raised this very issue, suggesting that under the majority's reasoning, the standard of performance required by the Sixth Amendment may vary by locale. *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting).

[14] Even though the Supreme Court relied heavily on the American Bar Association (ABA) Guidelines in Wiggins v. Smith, 539 U.S. 510 (2003), it also acknowledged the relevance of local practice norms when it held that "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of the professional standards that prevailed in Maryland in 1989." *Id.* at 524.

land and, in particular, their interpretation of *Strickland*'s "professional norms" standard. The data resulting from this limited empirical analysis suggest that, for the most part, the Alabama courts' approach is relatively insular. More often than not, they reject the guidance of national standards and instead rely primarily on past precedent or their own judgment, based on the cases before them, to define the "professional norms" by which the reasonableness of an attorney's conduct shall be judged. The nature of the Alabama courts' analysis makes it more likely that the realities of underfunding will influence, and ultimately lower, the standard of attorney conduct that is deemed "reasonable." Thus, it serves as a demonstration of how *Strickland* not only fails to account for underfunding, but in doing so, also allows the lowest common denominator for attorney performance to define effective assistance of counsel under the Sixth Amendment. In light of these findings, Part III provides suggestions for how courts might better address funding issues under the *Strickland* analysis.

I. *STRICKLAND* AND THE PROBLEM OF UNDERFUNDING

To prevail on a *Strickland* claim, a criminal defendant alleging ineffective assistance must first prove that his counsel's conduct was deficient and then demonstrate that there is a reasonable probability that, but for such deficient performance, the outcome of the proceeding would have been different.[15] In defining "deficient performance," the *Strickland* Court declined to provide any substantive guidance, explaining that

> [t]he Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under *prevailing professional norms*.[16]

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[15] *Strickland*, 466 U.S. at 687, 694.

[16] *Id.* at 688 (citation omitted and emphasis added).

The standard articulated in *Strickland* begs the question: how do courts identify the "professional norms" on which they will rely? And what forces might bear on that determination? Many types of evidence could be marshaled to provide a basis for the "norms" referenced in *Strickland*. A court could rely on primary evidence, such as the testimony of expert witnesses and defense attorneys; decisions from legal malpractice cases or attorney disciplinary hearings; or professional ethics opinions from bar associations.[17] Alternatively—and likely more common—they might turn to secondary sources, such as the American Bar Association (ABA) Guidelines, the ABA Rules of Professional Conduct, guidelines from the National Legal Aid Defender Association (NLADA) and the U.S. Department of Justice, or law review articles.[18] Inadequate defense funding may also influence, albeit less directly, the definition of prevailing norms or "reasonable" attorney conduct.[19] This is particularly true in the case of primary evidence, which may be more susceptible to localization, and of state court decisions—inevitably influenced by the standard of practice to which judges have become accustomed—analyzing whether counsel's conduct in a previous case was reasonable.

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[17] Feldon & Beech, *supra* note 12, at 19.

[18] *Id.* at 19–20. Beech and Feldon provide specific factors that courts should consider in deciding which guidelines to use in determining prevailing norms:

> (1) the publication date of the standards and the date of the representation; (2) whether the standards are prescriptive or descriptive; (3) the type of case involved (e.g., capital or non-capital); (4) the nature of the organization announcing the purported norm; and (5) the method by which the organization developed the set of guidelines announcing the purported norm.

Id. at 20.

[19] *Strickland*, 466 U.S. at 708 (Marshall, J., dissenting). In *Strickland*, Justice Marshall criticized the majority opinion for its failure to acknowledge how the notion of "reasonableness" may be colored by the amount of resources available to the attorney:

> The debilitating ambiguity of an 'objective standard of reasonableness' in this context is illustrated by the majority's failure to address important issues concerning the quality of representation mandated by the Constitution. It is an unfortunate but undeniable fact that a person of means, by selecting a lawyer and paying him enough to ensure he prepares thoroughly, usually can obtain better representation than that available to an indigent defendant, who must rely on appointed counsel, who, in turn, has limited time and resources to devote to a given case. Is a "reasonably competent attorney" a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?

Id.

For example, a court could conclude that it was "reasonable" for an attorney not to seek funding for a particular expert given how rarely other attorneys utilize that type of expert, how infrequently funding is granted to secure such an expert, or the unlikelihood that any funds will be available for such an expense.[20] Perhaps it might also be "reasonable" for a lawyer not to request additional funding from a judge, knowing the county has limited funds and the attorney has other cases in the pipeline for which she plans to request funding—much in the way that the Georgia public defender office referenced in the introduction had to decide which cases would benefit from the office's limited funds. Moreover, given the tendency for courts to defer to counsel's strategic decisions about how to litigate a specific case (and the extent to which such deference is built into the *Strickland* framework itself), courts are unlikely to look behind or question the reasons for counsel's decisions.[21] Thus, underfunding of indigent defense may be influencing the court's analysis just by virtue of its pervasiveness.

Contributing to this problem is the fact that *Strickland*'s two-prong test for deficient performance and prejudice does not provide an effective vehicle to explicitly address the possibility that counsel was inadequately funded or otherwise under resourced. This is due in large part to *Strickland*'s focus on actual attorney performance (to the exclusion of the reasons for or influences on the attorney's conduct).[22] *Strickland* deems the amount of resources made available to counsel irrelevant unless it manifests in some way that impacts the ultimate outcome of the case. The late William Stuntz observed:

> [N]othing in the law of criminal procedure regulates how much states must spend on lawyers for defendants. This too is a consequence of ineffective assistance doctrine. . . . Th[e *Strickland*] test rules out

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[20] *See infra* Part II.C (case examples).

[21] *Strickland*, 466 U.S. at 690–91. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

[22] For further discussion of this point, see Lucas, *supra* note 9, at 1205–07.

> claims based on inadequate resources. If defense counsel did indeed fail to provide constitutionally adequate assistance, the state's pay scale is irrelevant—the defendant wins no matter how well or poorly counsel was paid. If, on the other hand, defense counsel met the constitutional performance standard, the state's pay scale is again irrelevant—the defendant loses regardless of attorney pay because he got what the Sixth Amendment guarantees him: constitutionally adequate representation.[23]

This observation is borne out in Alabama by the number of cases in which claims of undercompensation or underfunding are defeated by a defense attorney's testimony that the level of compensation provided did not impact his work on the case.[24] The defense attorneys providing such testimony may have any number of reasons to testify to that effect, including pride or, more pragmatically, the desire to receive additional case assignments from a cash-strapped court. Yet even those attorneys who demonstrate exceptional talent or creativity in working with limited resources reveal the bizarre calculus at work under the *Strickland* analysis: the more able an attorney to work around underfunding and provide good representation in the absence of necessary resources, the less likely a court will be to see the resource issues underlying her work.

In the instance of the hardest case or the most egregious crime—where resources are often needed most—the question of resources will likely be least relevant. Regardless of what counsel might have done, a court could conclude that nothing would have swayed the jury in light of the overwhelming evidence against the defendant or the depraved nature of the crime. The defendant would therefore be unable to prove prejudice. The question of prejudice also presents another circular problem: a lack of resources may make it more difficult, not only to provide adequate representation at trial, but also to create a record of the ways in

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[23] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 21 (1997) (citations omitted).

[24] *See, e.g.*, Taylor v. State, 10 So. 3d 1037, 1051–52 (Ala. Crim. App. 2004), *rev'd in part on other grounds*, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005); Slaton v. State, 902 So. 2d 102, 114–15 (Ala. Crim. App. 2003); Pierce v. State, 851 So. 2d 558, 589 (Ala. Crim. App. 1999), *rev'd on other grounds*, Ex parte Pierce, 851 So. 2d 606 (Ala. 2000); Payne v. State, 791 So. 2d 383, 401 (Ala. Crim. App. 1999).

which constitutionally sufficient representation would have affected the outcome of the case, providing post-conviction counsel with the basis for a successful ineffective assistance claim on appeal.[25]

In the rare event that a court does deem counsel ineffective, the remedy provided—a new trial—does nothing to address the underlying resource issue. If a criminal defendant is in fact fortunate enough to be granted relief, he is sent back into the same underfunded system in which he previously received inadequate assistance.

II. ANALYSIS: DEFINING "PROFESSIONAL NORMS" IN THE ALABAMA APPELLATE COURTS

For the reasons described above and elaborated upon in my prior work, *Strickland* does not offer an effective means for vindicating funding-related concerns. Perhaps just as troubling, however, is the further possibility that it may actually internalize the problems created by a lack of funding within the standard by which it judges other ineffective assistance claims. As stated above, *Strickland*'s mandate to lower courts in assessing the adequacy of counsel's conduct is simply to ensure such conduct is "reasonable[] under prevailing professional norms."[26] The *Strickland* Court went on to explain that

> [p]revailing norms of practice reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant. Any such set of rules would interfere with the constitutionally

[25] *Cf. Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) ("[E]vidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1467 (1999) (explaining that the "record may not reveal weaknesses in the prosecutor's case *because* of counsel's incompetence").

[26] *Strickland*, 466 U.S. at 688.

> protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.[27]

If the ABA Guidelines and other national standards or recommendations for attorney conduct are "only guides" and "[m]ore specific guidelines are not appropriate,"[28] then what drives the definition of "professional norms" for lower courts analyzing the vast majority of *Strickland* claims?

A. *Methodology*

To answer this question, this article provides a survey of Alabama state appellate cases citing *Strickland*'s "professional norms" language. A search for all cases in the database of Alabama state cases (AL-CS) using the terms "Strickland v. Washington" and "professional norms" yielded 86 total cases. Of those cases, 81 were decided by the Alabama Court of Criminal Appeals, and just five were decided by the Alabama Supreme Court.[29]

Each case was read and charted with regard to various factors, including, but not limited to: whether counsel was retained or appointed; whether the court found deficient performance and/or prejudice; whether relief was ultimately granted as to the ineffective assistance of counsel claim; whether the court relied on state, federal or Supreme Court authority in assessing counsel's performance under "professional norms" (i.e., in defining "professional norms," did the court cite to *Strickland* alone, other Supreme Court cases, Alabama federal cases, Alabama state cases, or cases from other state or federal jurisdictions); whether other sources, either

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[27] *Id.* at 688–89.

[28] *Id.* at 688.

[29] With one exception, the resulting Alabama Supreme Court cases were not duplicative of other results coming from the Court of Criminal Appeals—i.e., they were not opinions reversing or affirming a lower court opinion that had also been generated by the search. In the case of Miller v. State, 99 So. 3d 349 (2011), both the Court of Criminal Appeals opinion and the Alabama Supreme Court opinion appeared in the search results. Because both opinions offered independent analyses of the ineffective assistance claim, they were both considered as part of the analysis. The rationale that I have applied is that, to the extent the goal is to probe the factors considered by any given court in determining the meaning of "professional norms," the reasoning of each court is just as relevant. However, where statements herein have been made about the total number of cases to reach a certain result—i.e., to grant or deny relief—only the result of the Alabama Supreme Court has been deemed relevant.

primary (e.g., expert testimony) or secondary (e.g., ABA Guidelines) were relied upon in assessing counsel's performance; whether the Court explicitly applied a presumption of effectiveness to counsel's conduct; and whether the defendant made a claim of effective assistance of counsel based on a lack of resources or other related external constraints.

B. Findings

For those cases in which it was apparent from the appellate court opinion whether counsel was retained or appointed, the vast majority (87%) involved appointed counsel, suggesting that the defendant was likely indigent. Of the 86 cases reviewed, the court found deficient performance in nine cases and granted relief in just seven. Given the infrequency of successful *Strickland* claims,[30] this fact is not surprising. More relevant to the topic at hand, however, is the courts' treatment and interpretation of "professional norms" in determining whether counsel's performance was in fact deficient.

In determining the specific meaning of "professional norms," 24 of the cases reviewed cited to Supreme Court cases other than *Strickland*, 36 cited to Alabama state cases, and 21 cited to other state and federal cases. Citation to past precedent in this context—and particularly state cases, in which most courts inevitably have denied relief—has the potential to trigger a downward spiral in professional norms. A finding by one court that subpar attorney conduct is constitutionally sufficient equates to judicial ratification of such conduct, which can then be relied upon by other courts in assessing future attorney conduct. And because courts analyzing *Strickland* claims almost always fail to explicitly address resource issues, or render them irrelevant, we have no way of knowing whether the conduct undertaken in the initial case was

[30] DAVID COLE, NO EQUAL JUSTICE 78–79 (1999) ("The *Strickland* standard has proven virtually impossible to meet. Courts have declined to find ineffective assistance where defense counsel slept during portions of the trial, where counsel used heroin and cocaine throughout the trial, where counsel allowed his client to wear the same sweatshirt and shoes in court that the perpetrator was alleged to have worn on the day of the crime, where counsel stated prior to trial that he was not prepared on the law or the facts of the case, and where counsel appointed in a death penalty case could not name a single Supreme Court decision on the death penalty."); Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L.J. 1835, 1841 n.45, 1843 (1994) (providing numerous examples of ineffective assistance of counsel and egregious attorney conduct not found to violate the Sixth Amendment).

influenced by a lack of resources. One illustrative example is *Flowers v. State*, in which the Court of Criminal Appeals relied on a prior decision holding that counsel was not ineffective for failing to file a motion for funds to hire an expert, without any discussion of why counsel may not have sought such funds.[31] The *Flowers* court relied on its prior decision to hold more generally: "We have . . . held that counsel is not ineffective for failing to obtain the assistance of experts."[32] Thus, there is potential for individual cases affected by funding issues to be extrapolated into more general legal conclusions, sending a message that the norm for attorneys practicing criminal law, particularly for indigent clients, is set low.

On which sources do the Alabama courts rely, other than past precedent, in determining the meaning of "professional norms" under *Strickland*? Twelve cases—approximately 14% of those reviewed—cited to the ABA Guidelines, as did the Supreme Court in cases like *Wiggins v. Smith*.[33] In only four of those cases, however, did the court rely on the Guidelines as a benchmark for reasonable performance.[34] In the other eight cases, the court cited the Guidelines only to reject their applicability, echoing *Strickland*'s caveat that such sources are merely guides.[35] Notably, not one of those eight cases rejecting the applicability of the Guidelines granted relief, whereas two of the four positively citing the Guidelines did. Nine of the 86 cases surveyed relied on other secondary sources, such as the Alabama Rules of Professional Re-

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[31] 799 So. 2d 966, 993 (Ala. Crim. App. 1999), on return to remand (Oct. 27, 2000) (citing Ward v. State, 814 So. 2d 899, 921–22 (Ala. Crim. App. 2000)).

[32] *Flowers*, 799 So. 2d at 993. *See also, e.g.*, Boyd v. State, 913 So. 2d 1113, 1139 (Ala. Crim. App. 2003), *reh'g denied* (Dec. 2, 2003), *cert. denied* (May 27, 2005). In *Boyd*, the Court rejected the defendant's claim that counsel's failure to interview and present potential mitigation witnesses rendered counsel's representation ineffective because such testimony would have been cumulative of other evidence presented at trial. *Id.* In doing so, the Court relied on several previous cases. *See* Pierce v. State, 851 So. 2d 558, 582 (Ala. Crim. App. 1999), rev'd on other grounds, 851 So. 2d 618 (Ala. 2002) (failure to present mitigation witnesses), Williams v. State, 783 So. 2d 108, 117 (Ala. Crim. App. 2000) (failure to present mitigation witnesses), Fortenberry v. State, 659 So. 2d 194, 199 (Ala. Crim. App. 1994) (failure to present psychiatric or psychological expert witness), State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993) (failure to present defendant's family and friend witnesses); *see also* Jackson v. State, No. CR-06-1026, 2009 WL 3805808 (Ala. Crim. App. Nov. 13, 2009) (citing *Williams*, 783 So. 2d at 108, *Tarver*, 629 So. 2d at 14, and other similar cases for this proposition).

[33] 539 U.S. 510, 524–25 (2003).

[34] *See, e.g.*, State v. Gamble, 63 So. 3d 707, 717–18 (Ala. Crim. App. 2010).

[35] *See, e.g.*, Jones v. State, 43 So. 3d 1258, 1276–77 (Ala. Crim. App. 2007).

sponsibility and Rules of Professional Conduct, law review articles, the American Law Reports, and American Jurisprudence.[36] Only three cases cited to primary sources (i.e., evidence offered at trial) to determine the appropriate standard for attorney conduct.[37] Of the nine cases relying on other secondary sources, two involved a grant of relief;[38] in the three cases citing to primary sources, the court granted relief in one, and that case involved specific commentary on counsel's actions by the presiding trial judge.[39] Perhaps most notable is that of the seven cases in which relief was granted, four involved reliance on the ABA Guidelines or other secondary evidence of appropriate attorney conduct.[40]

Unsurprisingly, in many cases, the court relied on "strategy" to justify decisions by trial counsel not to present certain evidence or to conduct further investigation.[41] *Strickland*'s emphasis

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[36] *See* Ex parte Duren, 590 So. 2d 369, 372 (Ala. 1991) (Code of Professional Responsibility of the Alabama State Bar); Ex parte Womack, 541 So. 2d 47, 68 (Ala. 1988) (Code of Professional Responsibility of the Alabama State Bar); Johnson v. State, No. CR-05-1805, 2013 WL 2906383, at *19 (Ala. Crim. App. Jun. 14, 2013) (American Jurisprudence); Washington v. State, 95 So. 3d 26, 54 (Ala. Crim. App. 2012) (American Law Reports); Miller v. State, 99 So. 3d 349, 395 (Ala. Crim. App. 2011) (law review articles); McCombs v. State, 3 So. 3d 950, 953 (Ala. Crim. App. 2008) (Alabama Rules of Professional Conduct); Jenkins v. State, 972 So. 2d 111, 146 (Ala. Crim. App. 2004) (law review articles); Thompson v. State, 581 So. 2d 1216, 1226 (Ala. Crim. App. 1991) (law review article); Richardson v. State, 456 So. 2d 1152, 1156 (Ala. Crim. App. 1984) (American Law Reports).

[37] *See* Grace v. State, 683 So. 2d 17, 20 (Ala. Crim. App. 1996); Thompson v. State, 581 So. 2d 1216, 1234–35 (Ala. Crim. App. 1991); Baldwin v. State, 539 So. 2d 1103, 1107–08 (Ala. Crim. App. 1988).

[38] *See Womack*, 541 So. 2d at 67–68 (finding that defense counsel's decision to testify against his client and contrary to his principle line of defense constituted ineffective assistance of counsel); *McCombs*, 3 So. 3d at 954 (holding that defense counsel provided ineffective assistance by advising defendant to testify falsely at trial).

[39] *Grace*, 683 So. 2d at 20–21 (granting relief because the trial judge stated that if counsel had filed a written discovery motion, he would have granted it, and would subsequently have excluded the defendant's incriminating statement from evidence if not made available to the defense by the prosecution). The other two cases citing primary evidence, in which relief was denied, involved expert testimony by other criminal defense attorneys. *Thompson*, 581 So. 2d at 1234–35; *Baldwin*, 539 So. 2d at 1107–08.

[40] *See Womack*, 541 So. 2d at 68 (Code of Professional Responsibility of the Alabama State Bar); *Gamble*, 63 So. 3d at 717–18 (ABA Guidelines); *McCombs*, 3 So. 3d at 953 (Alabama Rules of Professional Conduct); Harris v. State, 947 So. 2d 1079, 1127 (Ala. Crim. App. 2004) (ABA Guidelines).

[41] *See, e.g.*, Jones v. State, 753 So. 2d 1174, 1184 (Ala. Crim. App. 1999) ("[I]n light of the evidence presented at trial, Jones's trial counsel may have made a strategic decision to not focus on the issue whether the victims were dead prior to Jones's participation."); Hamm v. State, 913 So. 2d 460, 487 (Ala. Crim. App. 2002) ("We agree with the circuit court's finding that defense counsel were not ineffective for failing to introduce at trial

on presuming counsel to be competent[42] similarly carried substantial weight with the courts: in 75 (or 87.2%) of the 86 cases reviewed, the court relied on a presumption of counsel's effectiveness or competence in assessing the attorney's performance.[43]

In twelve of the 86 cases, defendants raised claims of ineffective assistance based specifically on the lack of funding provided for defense counsel. All twelve claims were rejected for various reasons, including insufficient evidence, procedural bars, failure to sufficiently plead the claim, and because the claim had previously been rejected in other cases.[44] Only one case acknowledged, in some way, that a lack of time or resources might affect counsel's performance; yet, even that observation was made with some cynicism.[45] In *Boyd v. State*, the Court of Criminal Appeals ultimately

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[records of defendant's criminal, medical, and educational history]. . . . This type of strategy is virtually unassailable."); *Miller*, 99 So. 3d at 407 ("'Simply because Miller alleges that more mitigating evidence could have been presented does not demonstrate that his trial counsel was ineffective. Trial counsel's decision was reasonable and strategic, and this Court will not 'second-guess' it.'" (quoting the circuit court's decision below)).

[42] *Strickland*, 466 U.S. at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance.").

[43] *See, e.g.*, Whitson v. State, 109 So. 3d 665, 674 (Ala. Crim. App. 2012) ("We must presume that [trial counsel's] decision was sound trial strategy and was the result of reasonable professional judgment."); Martin v. State, 62 So. 3d 1050, 1068 (Ala. Crim. App. 2010) ("[A]n ambiguous or silent record will not overcome the strong and continuing presumption that counsel's conduct was appropriate and reasonable."); Simmons v. State, 797 So. 2d 1134, 1180 (Ala. Crim. App. 1999) ("When reviewing a claim of ineffective assistance of counsel, we indulge a strong presumption that counsel's conduct was appropriate and reasonable." (citation omitted)); Thompson v. State, 581 So. 2d 1216, 1226 (Ala. Crim. App. 1991) ("[C]ounsel is strongly presumed to have rendered adequate assistance . . . "); Baldwin v. State, 539 So. 2d 1103, 1107 (Ala. Crim. App. 1988) ("Baldwin failed to overcome the strong presumption that [his attorney]'s representation was within reasonable professional norms.").

[44] *See, e.g.*, Hyde v. State, 950 So. 2d 344, 361 (Ala. Crim. App. 2006) (finding claim insufficiently pleaded); Burgess v. State, 962 So. 2d 272, 280 (Ala. Crim. App. 2005) (finding defendant's challenge to Alabama's statutory scheme for compensating attorneys appointed to represent indigent defendants procedurally barred and noting that "these same arguments have been rejected previously by the appellate courts of this state") ; Slaton v. State, 902 So. 2d 102, 126 (Ala. Crim. App. 2003) (rejecting defendant's claim because he "alleged no facts in his petition and presented no evidence at the evidentiary hearing to support his allegation . . . "); McGahee v. State, 885 So. 2d 191, 207 (Ala. Crim. App. 2003) (holding claim procedurally barred where defendant failed to raise claim on direct appeal); McNair v. State, 706 So. 2d 828, 840 (Ala. Crim. App. 1997) ("Our courts have consistently upheld the constitutionality of [the Alabama statute for compensating appointed counsel] when attacked on the same grounds.").

[45] Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003), *reh'g denied* (Dec. 2, 2003), *cert. denied* (May 27, 2005).

denied relief,[46] but in discussing new evidence offered in mitigation by post-conviction counsel, recognized that "with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings."[47]

C. Conclusions

What can be gleaned from this limited survey of Alabama court decisions? In applying the "prevailing professional norms" language to assess the reasonableness of counsel's conduct, Alabama courts have been reluctant to afford external sources, such as the ABA Guidelines, any significant weight in the assessment of attorney performance. Alabama courts are more likely to emphasize that courts need not adhere to such guidelines in determining whether counsel's conduct was unreasonable.[48] They are also more likely to determine reasonableness in the present case by relying on previous cases that have found counsel's conduct constitutionally sufficient. In doing so, they more often cite Alabama state cases than Supreme Court precedent or cases from other jurisdictions, which may result in a more localized understanding of professional norms. Finally, the Alabama courts tend to treat a defendant's claims that his legal representation was negatively affected by on a lack of funding with either ambivalence or hostility. To the extent that an indigent defense system is underfunded—and, subsequently, less is expected from defense counsel—it is therefore easy to see how courts might characterize a lower level of competence as reasonable. And as each case builds upon that initial assessment, lower standards for professional conduct become enshrined in the very law that was intended to protect against such aberrations.

The contrast between recent Supreme Court cases and the vast majority of the Alabama cases reviewed reveals a link be-

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[46] *Id.* at 1149.

[47] *Id.* at 1138 (citing Chandler v. U.S., 218 F.3d 1305, 1316 n. 20 (citing Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc))).

[48] *See, e.g., id.* at 1135 ("Boyd spends very little space in his petition setting forth the relevant case law governing ineffective assistance of counsel claims, instead relying on the non-binding [American Bar Association] guidelines. Although these guidelines are persuasive authority, and on a few occasions offer a baseline for examining counsel's performance, the guidelines do not accurately reflect the legal and factual realities of Sixth Amendment ineffective assistance of counsel jurisprudence.").

tween a court's tendency to rely on external sources and its willingness to expect more from counsel's conduct or to impose substantive responsibilities on counsel.[49] In *Padilla v. Kentucky*, for example, the Court concluded that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[50] In reaching this conclusion, the Court relied on a large number of outside sources aimed toward the profession as a whole, including the ABA Standards for Criminal Justice, standards issued by the Department of Justice, and briefs filed by professors of criminal law and procedure.[51]

Through the lens of *Padilla*, Stephanos Bibas has optimistically interpreted *Strickland*'s "prevailing professional norms" mandate, which he describes as "dynamic and bottom-up" and designed to allow the law to "respond[] and evolve[e] in light of the bar's expectations and accumulated wisdom over time."[52] Acknowledging that the assessment of an attorney's performance is "necessarily linked to the practice and expectations of the legal community,"[53] the *Padilla* Court "looked to bar publications, criminal defense organizations, treatises, and scholars to confirm that its rule reflected prevailing norms."[54] Bibas may be correct that *Strickland*'s emphasis on prevailing norms is preferable to a simple rule regarding misadvice because it "accommodates the important roles of resource allocation and discretion."[55] However, the above-

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[49] I acknowledge that there may not necessarily be a causal effect between citing external sources and finding deficient performance—i.e., those courts more likely to find deficient performance may subsequently be more willing to cite such sources supporting their decision. Yet, logically, it would seem that when externally imposed standards require more than what occurs in day-to-day attorney practice, an adherence to such standards will be more likely to lead to a finding of deficient performance.

[50] Padilla v. Kentucky, 559 U.S. 356, 367 (2010); *see also* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L REV. 1117, 1120 (2011) ("With *Padilla*, the Court has now begun to interpret due process and the Sixth Amendment right to counsel to impose meaningful safeguards on the plea process.").

[51] *See Padilla*, 559 U.S. at 367. Contrast, for example, the Court's per curiam opinion in *Bobby v. Van Hook*, 558 U.S. 4 (2009), which emphasized that the Guidelines are "'only guides' as to what reasonableness means, not its definition." *Id.* at 8 (quoting *Strickland*, 466 U.S. at 688); *see also id.* at 13–14 (Alito, J., concurring) (contesting the notion that the Guidelines have "special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment").

[52] Bibas, *supra* note 50, at 1144.

[53] *Padilla*, 559 U.S. at 366.

[54] Bibas, *supra* note 50, at 1144.

[55] *Id.*

referenced exploration into how Alabama courts have interpreted *Strickland*'s meaning does not bear out such a positive interpretation.[56] Bibas's logic assumes that courts will rely on objective, and perhaps even aspirational, recommendations for the behavior that lawyers should exhibit in specific situations. In reality, however, the above analysis demonstrates that some lower courts are unwilling to assign meaningful weight to such sources. The more cynical view is that the fungibility of a "prevailing norms" standard facilitates not an improvement of lawyering from the "bottom-up," but instead a diminished standard for attorney conduct adjusted to the lowest common denominator—subpar conduct that has been condoned by past judicial opinions or understood by the court to be par for the course.[57]

If this view is right, the Supreme Court's per curiam opinion and Justice Alito's concurrence in *Bobby v. Van Hook*[58] provide reason for concern. Currently the Court's last word on the issue, *Van Hook* declined to make the ABA Guidelines the definitive measure of prevailing norms, instead emphasizing that they are "only guides" as to what reasonableness means.[59] In his concurrence, Justice Alito went even further, suggesting that the Guidelines should have no "special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment"[60] and that "[i]t is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution."[61] The more the courts move away from external, objective sources like the ABA Guidelines in assessing counsel's conduct, the more susceptible they become to the influence of underfunding on practice norms.

Individual case examples lend insight into how, under the present scheme, local practice standards may influence a court's

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[56] *See supra* Part II.B.

[57] One step toward avoiding this effect might be to follow the process described by Feldon and Beech for identifying controlling precedent. For example, they suggest that precedent should only be controlling to the degree that it addresses the same professional norm, applies at least as rigorous a standard of representation as that currently applied, and involves the same operative facts. Feldon & Beech, *supra* note 12, at 16–18.

[58] Bobby v. Van Hook, 558 U.S. 4 (2009).

[59] *Id.* at 8.

[60] *Id.* at 13–14.

[61] *Id.* at 14.

understanding of what constitutes effective assistance. In *Ray v. State*, the Court of Criminal Appeals relied explicitly on local custom in determining the reasonableness of the defense attorney's decision not to request funds for a jury consultant:

> [Defense counsel] testified that at the time of Ray's trial he was not aware of any case in Dallas County where funds had been granted to hire a jury consultant in a capital-murder case. (R. 425.) Certainly, under these circumstances, a reasonably prudent attorney would not be ineffective for failing to move for funds for a jury consultant.[62]

Another clear example of such reliance appears in *Davis v. State*:

> Davis argues that counsel was ineffective for failing to hire an expert—a social worker—to conduct an extensive background investigation on him. The circuit court found that at the time of Davis's trial in 1993, social workers were not routinely retained to assist in capital cases; thus, counsel was not ineffective for failing to request the assistance of a social worker.[63]

Even though the initial holding in both cases was based on local practice norms and not reasoned professional judgment, these cases may later be cited as precedent to support a finding that the failure to hire a jury consultant or social worker does not constitute ineffective assistance.

Another less direct example is the Court of Criminal Appeals's opinion in *Floyd v. State* and its reliance upon that precedent in later opinions.[64] In *Floyd*, the court held that counsel conducted an adequate investigation of his client's mental state by reviewing the client's prison records himself and conducting his own physical examination of the client to search for evidence of

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[62] Ray v. State, 80 So. 3d 965, 987 (Ala. Crim. App. 2011).
[63] Davis v. State, 9 So. 3d 539, 566 (Ala. Crim. App. 2008).
[64] Floyd v. State, 571 So. 2d 1221 (Ala. Crim. App. 1989), *rev'd on other grounds sub nom, Ex parte Floyd*, 571 So. 2d 1234 (Ala. 1990).

drug abuse.[65] Ten years later, in *Lawhorn v. State*, the court cited *Floyd* to support its holding that trial counsel was not ineffective for failing to seek expert psychiatric assistance.[66] Without wading too deeply into the specifics of these two cases, they demonstrate that a fairly low standard for what might constitute a sufficient investigation in one case—here, counsel's cursory self-assessment in *Floyd* that his client was "street smart" and "the smartest sixty IQ person I think I have ever run into"—may provide justification in a later case for the conclusion that counsel's investigation was reasonable.[67]

Other aspects of Alabama's indigent defense scheme shed light on how underfunding may indirectly influence later cases. For example, until 1999, Alabama's statutory scheme for compensating attorneys representing indigent defendants in capital cases limited compensation for out-of-court work to $1,000.[68] This is in spite of the fact that, even in the early 1990s, experts estimated that a capital trial required 400 to 1,000 hours of investigation and research.[69] Some of the defendants subjected to this scheme chal-

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[65] *Id.* at 1229.

[66] Lawhorn v. State, 756 So. 2d 971, 988 (Ala. Crim. App. 1999) (citing *Floyd* for its "holding that trial counsel's decision not to pursue a defense, which upon investigation appears fruitless, was reasonable and did not render his performance deficient").

[67] *Floyd*, 571 So. 2d at 1229. Contrast the 1989 ABA Guidelines, which provided that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Am. Bar Ass'n, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), 13 (1989), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/Standards/National/1989Guidelines.authcheckdam.pdf.).

[68] ALA. CODE § 15-12-21(d) (amended to delete the $1,000 limit, effective June 10, 1999). Until 1984, the same statute limited fees for expert witnesses to $500. *Id.* (prior to revision by Act No. 84-793, 1984 Ala. Acts 1st Ex. Sess., p. 198, effective June 13, 1984).

[69] Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1928 (1994) ("Experts estimate that a capital trial requires 400 to 1,000 hours of investigation and research, and the actual trial time takes about 850 to 1,000 lawyer hours. Yet many death belt states pay 'virtually nothing' for capital defense, investigation, and experts." (citing Stephanie Saul, *When Death Is the Penalty: Attorneys for Poor Defendants Often Lack Experience and Skill*, N.Y. NEWSDAY, Nov. 25, 1991, at 8 (interviewing experts and reviewing individual capital cases)); *see also* Albert L. Vreeland, II, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626, 645–46 (1991) ("The investigation underpinning a capital defense is estimated to be three to five times longer than that of a noncapital trial, sometimes spanning

lenged the statutory limit, claiming that it deprived their attorneys of sufficient funds to mount an adequate defense and would inevitably result in ineffective representation.[70] In one of those cases—*Ex parte Grayson*—the Alabama Supreme Court refuted the notion that lawyers would not provide effective assistance if not compensated adequately, stating, "[a] lawyer needs no motivation beyond his sense of duty and pride."[71] In *Bui v. State*, the Court of Criminal Appeals rejected a similar claim, holding that the statutory scheme did not "in and of itself, den[y] a defendant effective representation" and that without any further evidence, counsel's conduct would not be deemed to fall "outside the wide range of professionally competent assistance."[72]

Case after case in Alabama has found claims of inadequate compensation either barred because counsel failed to make the argument at trial or without merit because a bare assertion of undercompensation (without specific instances of deficient performance linked to inadequate compensation) was deemed insufficient.[73] Yet, the standard of conduct generated by a regime that

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two years. The attorney must fully investigate the circumstances of the crime and conduct a complete investigation of the defendant's entire life." (citations omitted)).

[70] Bui v. State, 717 So. 2d 6, 15 (Ala. Crim. App. 1998) (noting that the statute had been upheld repeatedly against constitutional challenges).

[71] Ex parte Grayson, 479 So. 2d 76, 80 (Ala. 1985).

[72] *Bui*, 717 So. 2d at 15.

[73] *See, e.g.*, Jackson v. State, No. CR-06-1026, 2009 WL 3805808, at *20 (Ala. Crim. App. Nov. 13, 2009) (claim of ineffective assistance based on inadequate compensation rejected because defendant cited "no specific instance" where counsel's performance was ineffective due to the statutory cap); Smith v. State, 71 So. 3d 12, 22–23 (Ala. Crim. App. 2008) (same); Hinton v. State, No. CR-04-0940, 2006 WL 1125605, at *26 (Ala. Crim. App. Apr. 28, 2006) ("Lack of compensation, per se, is not proof of ineffective assistance of counsel."), rev'd on other grounds, Ex parte Hinton, No. 1051390, 2008 WL 4603723 (Ala. Oct. 17, 2008); Hyde v. State, 950 So. 2d 344, 361 (Ala. Crim. App. 2006) (claim insufficiently pleaded and statute does not itself equate to ineffective assistance); Taylor v. State, 10 So. 3d 1037, 1051–52 (Ala. Crim. App. 2004) (statutory limit on attorney fees in capital cases did not result in ineffective assistance where attorney testified that the cap did not affect his work on the case), *rev'd in part on other grounds*, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005); McGahee v. State, 885 So. 2d 191, 207 (Ala. Crim. App. 2003) (claim procedurally barred where defendant failed to raise claim on direct appeal); Brown v. State, 807 So. 2d 1, 13–14 (Ala. Crim. App. 1999) (rejecting claim that statutory fee cap led to ineffective assistance of defense counsel).

The United States Supreme Court recently reversed the Alabama Court of Criminal Appeals's decision in *Hinton v. State*, cited above, holding that Hinton's counsel was ineffective for his mistaken belief that he could pay no more than $1,000 for a firearms and toolmark identification expert. Hinton v. Alabama, 134 S.Ct. 1081, 1083–84 (2014) (per curiam). News coverage of the Supreme Court's decision noted that the lawyer himself was paid a total of $1,600 for defending Mr. Hinton against capital murder

limits out-of-court compensation in a capital case to $1,000 will inevitably inform what is expected of counsel in terms of investigation or other preparation.[74] In turn, it will also influence what is perceived as "reasonable" attorney conduct under *Strickland*—particularly if, in deciding what is "reasonable," courts rely primarily on other cases within the same jurisdiction.[75]

III. RECOMMENDATIONS

The above findings indicate that the majority of courts, at least in Alabama, are blind to the impact of underfunding on the quality of legal representation. If courts continue to ignore the influence of funding on attorney performance, they will be laboring under a myth of impartiality. As demonstrated above, the failure to provide such recognition not only leaves defendants without

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charges—the equivalent of what today's top corporate lawyers would charge for about 75 minutes of work. Jesse Wegman, *The One-Eyed Witness*, N.Y. TIMES, Feb. 24, 2014, at http://takingnote.blogs.nytimes.com/2014/02/24/the-one-eyed-witness; *see id.* (quoting Mr. Hinton's defense attorney since 1999, Bryan Stevenson of the Equal Justice Initiative: "[N]o one can credibly assert that a capital defendant can get the assistance he needs for $1000.").

[74] *See* Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1322 (1997) ("In some states, abysmally low fees [referencing Alabama's $1,000 statutory fee cap] have made capital representation a financial misadventure that only a handful of economically rational lawyers would willingly repeat—in the main, lawyers who are not skilled or established enough to have more profitable options, along with a small cadre of dedicated opponents of the death penalty."); Vreeland, *supra* note 63, at 643–44 ("Undercompensation discourages seasoned attorneys from accepting appointments and leaves the lion's share of appointed cases to be divided among either young attorneys eager to gain trial experience or incompetent attorneys aptly characterized as 'walking violations of the sixth amendment.' . . . The second category of appointed counsel, often referred to as the 'regulars,' maintain their practice on a high volume of appointed cases. Their financial success depends on disposing of cases with a minimal investment of time and effort." (footnotes and citations omitted)).

[75] Compare, for example, national standards in place at the time that some of the Alabama cases referenced above were decided, which specifically require that lawyers receive reasonable compensation. ABA Criminal Justice Section Standards, *Providing Defense Services*, Standard 5-2.4 (Am. Bar Ass'n 3d ed. 1992), *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html ("Assigned counsel should be compensated for all hours necessary to provide quality legal representation."); National Study Comm'n on Defense Servs., Nat'l Legal Aid & Defender Ass'n, *Guidelines for Legal Defense Systems in the United States*, Guideline III-3.1 (1976) (requiring compensation at a rate that reflects customary compensation in the jurisdiction for similar services, the time and labor required by the attorney, and the degree of professional skill and experience of the attorney).

judicial recourse, but also creates a danger that the realities of underfunded lawyering will become incorporated into the legal standard for assessing attorney conduct. If the prevailing professional norm is dictated by budgetary constraints, so will the nature of what qualifies as ineffective assistance under the Sixth Amendment. Moreover, there is a further risk that setting norms low will create a self-fulfilling prophecy, contributing to continued underfunding: if the minimal amount of funding provided facilitates legally tolerable levels of attorney performance, there may be little perceived need for additional funding.

To combat the negative effects of underfunding, courts should affirmatively address funding concerns when reviewing ineffective assistance claims.[76] For example, courts might set aside the presumption of attorney competence or place less emphasis on "strategy" upon a threshold showing by the defendant (or defendant's post-conviction counsel) that trial counsel or the indigent defense system as a whole suffers from a lack of resources.[77]

In *Strickland*, the Court held that the "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."[78] Under conditions like those described above by the young Georgia public defender, a more extreme interpretation of this language might be that government-imposed budgetary constraints themselves violate the Sixth Amendment. Similarly, placing such extreme fiscal limits on the

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[76] There are a number of solutions that could be undertaken by trial courts and by other actors in the judicial system to address underfunding. *See, e.g.*, Lucas, *supra* note 9 (suggesting that courts reincorporate principles of equality into the access to justice context); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005) (reviewing state court decisions addressing the impact of underfunding on indigent defense and suggesting a more meaningful role for courts in enforcing the Sixth Amendment). Given the nature of this short piece, however, I have limited this discussion to appellate courts in the position of reviewing ineffective assistance claims under *Strickland*.

[77] Compare, for example, the case of *State v. Peart*, 621 So. 2d 780 (La. 1993), in which the trial court found that indigent defendants in New Orleans were not receiving effective assistance of counsel as a result of inadequate funding. On appeal, the Louisiana Supreme Court mandated lower courts hearing similar pre-trial claims to apply "a rebuttable presumption that defendants were not receiving constitutionally mandated effective assistance of counsel; if the State was unable to overcome that presumption, the trial judge was instructed not to permit the case to proceed to trial." Note, *supra* note 76, at 1736–38. (discussing the history of the *Peart* case).

[78] *Strickland*, 466 U.S. at 686.

practice of indigent defense might be deemed to create a conflict of interest worthy of judicial intervention.[79]

Alternatively, courts could deem funding irrelevant in a more positive sense. Rather than measuring attorney performance against the lowest common denominator of legal representation, courts could set the bar high by using professional standards promulgated by the ABA and other national organizations as a benchmark for appropriate attorney conduct. Some critics might respond that the requirements of representation contemplated by such standards are not financially feasible, given the realities of state and local budgets; however, those arguments should not bear on the courts' determination of what is constitutionally required.

The findings discussed herein should also encourage higher courts to develop more specific baselines for attorney conduct, as did the Court in *Padilla*.[80] With one exception, every Alabama appellate case citing to the ABA Guidelines was decided after the Supreme Court's decision in *Wiggins*, which relied prominently on the ABA Guidelines in deeming counsel's performance deficient.[81] This may suggest that lower courts are responsive to guidance from the upper echelons of the judicial hierarchy, albeit to a limited degree, with regard to the factors that should be considered in assessing the reasonableness of counsel's performance.

CONCLUSION

The survey presented in this piece provides only a small window into how courts assess the adequacy of attorney conduct and the sources brought to bear on that determination. I hope it encourages others to be thoughtful about the ways in which the underfunding of indigent defense not only hinders effective application of the law, but may also influence the development of the law itself. It should give some pause to those who assume that the fiscal shortages negatively impacting indigent defense will one day pass, leaving the system to operate as intended. Instead, the funding crisis may have left an indelible mark that will hinder the reach of Sixth Amendment doctrine for years to come.

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[79] *Id.* at 683 (citing Cuyler v. Sullivan, 446 U.S. 335 (1980)).
[80] *See supra* Part II.C.
[81] *See supra* notes 14 and 33.