

January 2010

## Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials

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### Recommended Citation

Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 Me. L. Rev. 97 (2010).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol62/iss1/5>

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# ESTABLISHING GUIDELINES FOR ATTORNEY REPRESENTATION OF CRIMINAL DEFENDANTS AT THE SENTENCING PHASE OF CAPITAL TRIALS

*Adam Lamparello*

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## ESTABLISHING GUIDELINES FOR ATTORNEY REPRESENTATION OF CRIMINAL DEFENDANTS AT THE SENTENCING PHASE OF CAPITAL TRIALS

*Adam Lamparello*\*

“People who are well represented at trial do not get the death penalty . . . I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the *defendant was well represented at trial*.”

—Justice Ginsburg<sup>1</sup>

“After 20 years on (the) high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country. Perhaps it’s time to look at *minimum standards* for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”

—Justice O’Connor<sup>2</sup>

### I. INTRODUCTION

In *Strickland v. Washington*,<sup>3</sup> the United States Supreme Court issued a seminal holding that single-handedly rendered it nearly impossible for a capital defendant to demonstrate that he was the victim of ineffective assistance of counsel at the underlying trial or at sentencing. Specifically, and as discussed in more detail below, the Court held that, in order to prove that counsel’s performance was ineffective, the defendant was required to demonstrate that counsel’s efforts fell below an objective standard of “reasonableness,” and that such performance was “prejudicial,” in that the alleged errors undermined confidence in the trial’s

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1. U.S. Supreme Court Justice Ruth Bader Ginsburg, (April 10, 2001), *available at* <http://www.deathpenaltyinfo.org/death-penalty-representation> (emphasis added).

2. U.S. Supreme Court Justice Sandra Day O’Connor, (April 10, 2001), *available at* <http://www.deathpenaltyinfo.org/death-penalty-representation> (emphasis added).

3. 466 U.S. 668 (1984). In *Strickland*, the defendant pleaded guilty to three murder charges and, during the plea colloquy, explained to the court that “although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family.” *Id.* at 668. In preparation for the sentencing hearing, defendant’s counsel did not present any mitigating evidence whatsoever regarding defendant’s background, character, or emotional state, and did not conduct any in-depth investigations into any of these areas. Instead, counsel simply relied upon the colloquy for evidence regarding these matters. The defendant ultimately was sentenced to death and thus sought collateral relief, alleging that counsel’s failure to investigate and present character witnesses on defendant’s behalf constituted ineffective assistance of counsel. *Id.*

outcome.<sup>4</sup> In rendering it exceedingly difficult for defendants to succeed on ineffective assistance claims, the Court repeatedly emphasized that “[j]udicial scrutiny of counsel’s performance must be highly deferential”<sup>5</sup> and that “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”<sup>6</sup> In this way, the Court strived to make it difficult for defendants to succeed on ineffective assistance of counsel claims, explaining to lower courts that they “should recognize that counsel is strongly presumed to have rendered adequate assistance”<sup>7</sup> and “strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable.”<sup>8</sup>

Indeed, due in substantial part to the fact that “*Strickland* was not intended to impose rigorous standards on criminal defense attorneys,”<sup>9</sup> the Court found ineffective assistance of counsel in only one case over the next sixteen years.<sup>10</sup> Critically, however, during this time, both state and federal courts bore witness to some of the most horrific examples of death penalty representation in the history of criminal jurisprudence. As set forth below, empirical data uncovered that many attorneys representing capital defendants were under the influence of alcohol,

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4. *Id.* at 687.

5. *Id.* at 689.

6. *Id.*

7. *Id.* at 690.

8. *Strickland*, 466 U.S. at 690.

9. Craig M. Cooley, *Mapping the Monster’s Mental Health and Social History: Why Capital Defense Attorneys and Public Defender Death Penalty Units Require the Services of Mitigation Specialists*, 30 OKLA. CITY U. L. REV. 23, 76 (2005) (quoting Welsh S. White, *Effective Assistance of Counsel in Capital Cases: the Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 333). See also Kelly Reissmann, Note, “Our System is Broken”: A Study of the Crisis Facing the Death-Eligible Defendant, 23 N. ILL. U. L. REV. 43, 47-48 (2002). In describing the difficulty of demonstrating that counsel’s performance at trial was ineffective, the Author writes:

The *Strickland* standard for ineffective counsel is almost impossible to meet. The burden rests with the defendant to satisfy both prongs of the test to prove that his or her counsel was ineffective. Showing that counsel’s performance was deficient . . . may not cause much difficulty. The prejudice requirement, however, poses great difficulty for defendants asserting a claim of ineffective assistance. The prejudice requirement mandates a showing that trial counsel’s errors were so serious as to deprive the defendant of a fair trial, and to undermine confidence in the result of the trial. Clearly, the prejudice prong is the most difficult element of the test to meet, especially in light of the extreme deference to counsel.

*Id.* at 47.

10. Cooley, *supra* note 9, at 79. See also John H. Blume & Stacy Neumann, “It’s Like Déjà Vu All Over Again”: *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard*, and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel, 34 AM. J. CRIM. L. 127, 134 (2007); Kenneth Williams, *Ensuring the Capital Defendant’s Right to Competent Counsel: It’s Time for Some Standards!* 51 WAYNE L. REV. 129, 139 (2005). Williams explains:

*Strickland* has proven to be inadequate in protecting a capital defendant’s Sixth Amendment right to effective assistance of counsel. . . . [I]t is almost as difficult to prove ineffectiveness now as it was prior to *Strickland*. Courts have been unwilling to find that an attorney’s performance was deficient even in the most egregious cases or they have often held that the defendant was not prejudiced by counsel’s representation.

*Id.*

drugs, or both during critical aspects of the trial.<sup>11</sup> In addition, many lawyers literally fell asleep during presentation of the prosecution's case-in-chief, while others suffered from mental illnesses that affected both their preparedness and competence.<sup>12</sup> Furthermore, "several recent studies of capital trials reveal that lawyers who represented death row inmates at trial were subsequently disbarred, suspended, or otherwise disciplined at a rate three to forty-six times the average for the relevant states."<sup>13</sup> Stated simply, "[T]he utter inadequacy of trial and appellate lawyers for capital defendants has been widely recognized as the single most spectacular failure in the administration of capital punishment."<sup>14</sup>

The reason for this failure is neither mysterious nor elusive. Quite frankly, "[T]he Court's terse and contradictory reasoning [in *Strickland*] has led to the miserable quality of capital defense advocacy."<sup>15</sup> As discussed above, the "*Strickland* standard proved virtually impossible to meet . . . [because] [a]lmost all representation was found to be within *Strickland*'s 'wide range of professionally competent assistance.'"<sup>16</sup> Moreover, even where a defendant could demonstrate that his attorney's performance fell below an objective standard of reasonableness, the appeal nonetheless nearly always failed because such defendant could not satisfy the prejudice prong, namely, showing that such representation affected the outcome of the trial.<sup>17</sup> More specifically, when discerning whether unreasonable attorney performance prejudiced a defendant, "courts often deferred to incomprehensible 'strategic' decisions provided by trial counsel rationalizing their

11. Galia Benson-Amram, *Protecting the Integrity of the Court: Trial Court Responsibility for Preventing Ineffective Assistance of Counsel in Criminal Cases*, 29 N.Y.U. REV. L. & SOC. CHANGE 425, 432 (2004).

12. *Id.* See also Matthew J. Fogelman, *Justice Asleep Is Justice Denied: Why Dozing Defense Attorneys Demean the Sixth Amendment and Should Be Deemed Per Se Prejudicial*, 26 J. LEGAL PROF. 67 (2002).

13. Benson-Amram, *supra* note 11, at 432.

14. See Cooley, *supra* note 9, at 65 (quoting Note, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923, 1923 (1994)).

15. *Id.* at 79. See also Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1477-78 (1999) (discussing glaring examples of incompetent representation that were deemed "effective" under *Strickland*). In criticizing the Court's decision in *Strickland*, Klein states:

In *Strickland*, the Supreme Court was confronted for the first time with the task of determining the standard to be used for assessing the effectiveness of counsel in a criminal case. The Court had the opportunity to render an opinion that could have benefitted untold numbers of indigents represented by court appointed private attorneys or public defenders. The competency of defense counsel had long been of concern and the Court's decision was eagerly awaited by those associations of attorneys most involved with providing and assessing defense services. . . . [Unfortunately, t]he *Strickland* Court's clear diminution of the import of effective counsel . . . has lead to a situation in the state and federal courts of this country wherein defense counsel are routinely denied the time and resources with which to challenge the prosecutor's case . . . The Court has reduced the Sixth Amendment to one of form over substance.

*Id.*

16. Blume & Neumann, *supra* note 10, at 142 (quoting *Strickland*, 466 U.S. at 690).

17. See *id.* at 142. See also George C. Thomas, III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 551 ("[T]o require prejudice in the right to counsel context is essentially to say to a defendant that the right to a competent lawyer exists only when the state's case is weak.").

slothful representation.”<sup>18</sup> Ultimately, the problem with *Strickland* is that the standard “is a very low one”<sup>19</sup> that has been “criticized for fostering tolerance of abysmal lawyering”<sup>20</sup> such that, in the sixteen years following its decision, “the Court found ineffectiveness in only one capital case.”<sup>21</sup> Critics have gone so far as to characterize *Strickland*’s two-pronged standard as “an essentially meaningless test.”<sup>22</sup> Perhaps the reason for this lies in the Court’s own words regarding the Sixth Amendment, namely, that it is “not to improve the quality of legal representation”<sup>23</sup> nor determine “what conduct is ‘prudent or appropriate, but only what is constitutionally compelled.’”<sup>24</sup>

Importantly, however, perhaps the most significant factor contributing to the incompetent state of representation in capital trials arises from the lack of any meaningful standards by which to govern the performance of attorneys in capital trials.<sup>25</sup> The absence of standards is deleterious particularly in capital cases because the “unique, bifurcated nature of capital trials and the special investigation into the defendant’s personal history and background . . . [along with] the complexity and fluidity of the law, and the high emotional stakes involved all make capital cases more costly and difficult to litigate than ordinary criminal trials.”<sup>26</sup> Due to the lack of standards governing either the appointment or performance of counsel, defendants have often been represented by “an appointed lawyer [who] was completely unqualified to handle a capital case,”<sup>27</sup> counsel who was “unaware of the governing death penalty statute,”<sup>28</sup> a lawyer who “was not even aware that a

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18. Blume & Neumann, *supra* note 10, at 142.

19. Cooley, *supra* note 9, at 76.

20. *Id.* at 77 (quoting William S. Geimer, *A Decade of Strickland’s Tin Horn: Doctrinal and Practical Understanding of the Right of Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995)).

21. *Id.* at 79.

22. Blume & Neumann, *supra* note 10, at 134. *See also* Donald J. Hall, *Effectiveness of Counsel in Death Penalty Cases*, 42 BRANDEIS L.J. 225, 225 (quoting a report by the Constitution Project, which stated that “[t]he current Supreme Court standard for effective assistance of counsel . . . permits ‘effective but fatal counsel’ and requires the defendant to show both that counsel’s performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence.”).

23. *Strickland*, 466 U.S. at 689.

24. Cooley, *supra* note 9, at 79 (quoting *Rompilla v. Horn*, 355 F.3d 233, 246 (3d Cir. 2004)).

25. *See id.* at 67-68. *See also* Kenneth Williams, *Why It Is So Difficult to Prove Innocence in Capital Cases*, 42 TULSA L. REV. 241, 245-46 (2006). Williams explains:

The only specific standard the Court has established is to require counsel to conduct an investigation if one is warranted under the circumstances. Other than that, the Court has refused to establish any new standards that counsel must meet, even in capital cases. Because the test the Court has adopted is so malleable, counsel’s performance is able to pass muster in most instances and most claims of ineffective assistance are not successful.

*Id.*

26. Cooley, *supra* note 9, at 67-68 (quoting *McFarland v. Scott*, 512 U.S. 1256, 1257 (1994) (Blackmun, J., dissenting on denial of writ of certiorari)). *See generally* Michael D. Moore, Note, *Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death-Eligible Defendants*, 37 WM. & MARY L. REV. 1617 (1996) (arguing that the system of representation for indigent capital defendants is deeply flawed and systemic reforms are necessary to provide competent counsel in the form of capital trial units who meet specific qualifications).

27. Benson-Amram, *supra* note 11, at 433.

28. *Id.*

separate sentencing proceeding would be held in a capital case,”<sup>29</sup> and lawyers who, quite simply, “[did] not know how to proceed.”<sup>30</sup> Consequently, the combination of *Strickland*’s deferential criteria and the lack of meaningful standards to guide attorney performance have been the driving forces underlying the “horrendous problems confronted by capital defendants in securing adequate representation.”<sup>31</sup>

Ultimately, therefore, “capital defendants are typically represented by the worst of the worst.”<sup>32</sup> Based upon empirical studies, “[a]pproximately ninety percent of capital defendants are indigent” and thus represented by court-appointed attorneys.<sup>33</sup> Moreover, in certain states, “three-quarters of those convicted of capital murder while represented by court-appointed lawyers have been sentenced to death.”<sup>34</sup> In Kentucky alone, nearly a quarter of death-row inmates were represented by attorneys who were later disbarred or had their licenses suspended.<sup>35</sup> In Alabama, court-appointed attorneys representing capital defendants were subject to disciplinary action, including disbarment, at a rate twenty times higher than that of the bar as a whole, and “[f]or those attorneys whose clients were executed, the rate of disciplinary sanctions was almost forty times that of the bar as a whole.”<sup>36</sup> The conclusion is ineluctable—the paradigm of capital representation is broken and requires systemic change. More specifically, the breakdown in the representation of capital defendants can be traced both to *Strickland*’s highly deferential standard and the fact that there are no specific standards that govern the performance of attorneys representing capital defendants.

Consequently, this Article will attempt to remedy the problem of ineffective assistance of counsel by proposing sweeping changes to: (1) the manner in which capital defendants are represented; and (2) the method by which their cases are reviewed on appeal. As an initial matter, this Article will focus exclusively on the sentencing phase of the capital trial because “many capital defendants get no meaningful support at the sentencing phase [and] . . . for this reason, claims of . . . ineffectiveness at the penalty phase are among the most common issues raised . . . by inmates on death row.”<sup>37</sup> As stated by one Commentator, “[C]ertain specific duties, such as the duty to investigate [for mitigating evidence] . . . [have] become

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29. *Id.*

30. *Id.* at 434.

31. Cooley, *supra* note 9, at 66 (quoting Norman Lefstein, *Reform of Defense Representation in Capital Cases: The Indiana Experience and its Implications for the Nation*, 29 IND. L. REV. 495, 497 (1996)). See also Geimer, *supra* note 20, at 96-97; Talia Nye-Keif, Comment, “Capital” Punishment or “Lack-of-Capital” Punishment? Indigent Death Penalty Defendants Are Penalized by a Procedurally Flawed Counsel Appointment Process, 10 SCHOLAR 211, 212 (2008) (“Far too often, indigent death-penalty defendants are appointed ineffective, inexperienced, or inexcusably incompetent counsel whose best efforts fail both their clients and the entire justice system.”).

32. Cooley, *supra* note 9, at 66.

33. Jeffrey Levinson, *Don’t Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 149 (2001).

34. Benson-Amram, *supra* note 11, at 431.

35. *Id.* at 432-33.

36. *Id.* at 433.

37. Cooley, *supra* note 9, at 24 (quoting Ira Mickenburg, *Ineffective Counsel*, NAT’L L.J., Aug. 4, 2003, at S9).

the most heavily scrutinized aspect of defense counsel's representation."<sup>38</sup> In so doing, this Article will posit that there should exist, in each state, a Death Penalty Representation Commission that promulgates detailed guidelines that require each attorney to undertake specific steps to uncover mitigating evidence from various aspects of a defendant's background that may be relevant to the issue of culpability. These will include, but are not limited to, medical, social, psychological, psychiatric, educational, familial, and criminal histories.

In addition, as detailed below, defense counsel will be required, outside the presence of the jury, to certify to the trial court that each of these steps have been taken and explain in depth how such evidence is likely to be presented to the jury at the penalty phase. Furthermore, if defense counsel believes that, as a strategic matter, the investigation into or use of certain mitigating evidence is neither advantageous nor beneficial, then counsel must certify in writing to the trial court his specific reasons for so deciding. The purpose of these specific guidelines and explanatory requirements is to ensure both that the quality of representation at the trial level is increased substantially and that the record is enhanced sufficiently to ensure meaningful and adequate appellate review in the event of an ineffective assistance claim.

The performance of these functions also contemplates a more active trial court in ensuring that counsel properly discharges his duty to engage in effective representation and meaningfully advocate on his client's behalf. Specifically, should the trial court find defense counsel's investigative efforts insufficient or non-exhaustive, it will have the authority to order further corrective efforts aimed at uncovering mitigating evidence that may bear directly upon the issue of the defendant's culpability. In addition, the trial court will also have oversight responsibilities relating to the manner in which defense counsel proffers mitigating evidence to the jury, for the purpose of ensuring that counsel's representation is consistent with prevailing professional norms. In this way, the problem of ineffective assistance of counsel can be addressed as it is happening, rather than after a defendant has been convicted and sentenced to death, where the record is often devoid of counsel's omissions and hindsight's benefits prove unavailing. Ultimately, at the conclusion of trial, should the court determine that counsel's performance is objectively reasonable under the circumstances, then it shall issue an opinion explaining such a decision with specificity, and with reference to the law and facts upon which it is based.

In addition, for purposes of appellate review, this Article proposes that the prejudice prong of *Strickland* be eliminated, in favor of a single inquiry into whether counsel's performance was objectively reasonable under the circumstances. This determination would involve a presumption and burden-shifting mechanism relating directly to the trial court's decision regarding the competence of counsel's performance (as well as counsel's actual performance) during the sentencing phase. Specifically, the appellate court shall be responsible for reviewing the trial court's holding that counsel's performance was in compliance with both the relevant guidelines and standards of professional competence. If, after reviewing the record of counsel's performance during the

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38. Blume & Neumann, *supra* note 10, at 132.

sentencing phase, the appellate court believes that the trial court's holding was consistent with the Sixth Amendment's guarantee of effective assistance of counsel, then this shall create a presumption that counsel's performance was objectively reasonable as a matter of law. The defendant would therefore be responsible for rebutting this presumption by adducing specific evidence demonstrating counsel's ineffectiveness.

Importantly, however, if the appellate court finds that the trial court's decision was erroneous, and that counsel's representation was constitutionally defective, then this shall create a presumption that, in fact, the defendant suffered a Sixth Amendment violation, and the state will then be required to proffer evidence supporting a determination that counsel's performance was objectively reasonable. In making these determinations, the appellate court shall state the reasons for its decisions with specificity for the purpose of guiding the decisions of future courts, the conduct of attorneys in future cases, and providing the respective state commissions with information upon which its guidelines can be revised.<sup>39</sup>

This Article next discusses the *Strickland* decision, particularly its rejection of specific standards to guide the performance of attorneys in capital cases. Next, it details the state of death penalty jurisprudence that resulted both from *Strickland*'s nearly impenetrable standard and the lack of any meaningful criteria to guide attorney performance in capital cases, particularly at the sentencing phase. Next, this Article proposes a new solution by which to enhance the quality of attorney performance in capital cases through the development of specific, meaningful, and relevant standards that would guide counsel's representation at the sentencing stage. Importantly, this Article focuses on the sentencing phase because so many ineffective assistance claims focus upon counsels' errors and omissions during sentencing.

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39. Importantly, at least some commentators have suggested that the Supreme Court's recent decisions in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Rompilla v. Beard*, 545 U.S. 374 (2005), signal a "jurisprudential shift" from the Court's nearly impenetrable *Strickland* standard. Indeed, this view is informed by the fact that, in these three cases, the Court relied upon the ABA guidelines for attorney representation in finding that the defendants' trial counsel had been ineffective. Critically, however, a closer analysis of these cases reveals that the Court not only re-affirmed *Strickland*, but also specifically rejected a guideline or checklist approach to assessing ineffective assistance claims, and continued to emphasize the need to afford substantial deference to trial counsel's strategic decisions. In addition, a review of state and federal decisions after *Williams*, *Wiggins*, and *Rompilla* reveals that courts continue to be hostile to ineffective assistance claims, and allow terribly incompetent representation, particularly when a defendant's life is at stake. Stated simply, *Williams*, *Wiggins*, and *Rompilla* did not import systemic change to the Court's Sixth Amendment jurisprudence, and are more notable for the facts upon which the Court granted relief rather than the law that it applied. However, systemic change is exactly what is needed in order to prevent the grave abuses that defendants are suffering at the hands of incompetent attorneys and trial courts that continue to deny ineffective assistance petitions that allege incompetence that is truly startling. Blume & Neumann, *supra* note 10, at 131-32. This Article proposes precisely that systemic change.

II. *STRICKLAND V. WASHINGTON* EXPRESSLY REJECTS THE CREATION OF STANDARDS TO GUIDE ATTORNEY PERFORMANCE IN CAPITAL CASES, AND INSTEAD RENDERS IT NEARLY IMPOSSIBLE FOR DEFENDANTS TO SUCCEED IN DEMONSTRATING INEFFECTIVE ASSISTANCE OF COUNSEL

A. *The Initial Move to a Guideline-Centered System of Representation*

This Article does not represent the first time that specific, categorical guidelines have been proposed to guide the performance of attorneys in capital cases. Nearly four decades ago, the American Bar Association (ABA) created the “Special Committee on Standards for the Administration of Criminal Justice,” which was designed to promulgate standards governing, *inter alia*, the performance of defense counsel.<sup>40</sup> In fact, one Commentator described this endeavor as follows:

These committees created a tentative draft in March of 1970 which included standards for defense counsel. Although these standards were arguably general and non-specific, when viewed in conjunction with the commentary, the standards acted as guides for defense attorneys, establishing some minimum requirements of competency. The new standards placed a heavy focus on certain specific duties, such as the duty to investigate, which . . . would become the most heavily scrutinized aspect of defense counsel’s representation.<sup>41</sup>

Critically, the new ABA Guidelines were responsive to the perception that “a rigorous legal standard was needed in order to increase the quality of criminal defense representation . . . particularly in cases involving court appointed counsel for indigent clients.”<sup>42</sup>

Additionally, the notion that specific guidelines should be developed to guide counsel’s performance was bolstered when Chief Judge David Bazelon of the United States Circuit Court of Appeals for the District of Columbia “announced a standard for evaluating counsel’s performance that offered real guidance to lawyers and judges.”<sup>43</sup> These criteria elaborated upon specific standards that were already developed in *Coles v. Peyton*, a Fourth Circuit decision, where that court similarly

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40. *Id.* at 132 (citing to ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND DEFENSE FUNCTION (Tentative Draft March 1970)).

41. *Id.* Importantly, Blume and Neumann describe the debate existing at that time regarding the appropriate criteria that should govern the performance of defense counsel:

The new ABA Guidelines fueled scholarly and judicial debate regarding the appropriate standard courts should use to resolve ineffective assistance of counsel claims. One camp believed the law should not simply be concerned with a particularly poorly represented defendant. Rather, a rigorous legal standard was needed in order to increase the quality of criminal defense representation across the board, particularly in cases involving court appointed counsel for indigent clients. Statistics of unmanageable caseloads combined with inadequate funds had surfaced, and many practitioners and scholars, including defense attorneys themselves, had visions of mandatory funding and maximum caseload limits that would surely follow a constitutional standard on effectiveness that had some teeth. Others, however, believed courts should only be concerned with the reliability of the verdict in the case under review.

*Id.* at 132-33.

42. *Id.* at 132.

43. *Id.* at 133.

endorsed the use of specific standards to guide attorney representation.<sup>44</sup> Specifically, Judge Bazelon “advocated a categorical or guideline approach that enumerated specific duties counsel must perform,”<sup>45</sup> which ultimately amounted to a “check-list”<sup>46</sup> of responsibilities that would ensure the effectiveness of counsel’s representation.<sup>47</sup> Indeed, Judge Bazelon’s guideline approach “is premised on the belief that certain fundamental and specific tasks and duties must be performed in all criminal cases.”<sup>48</sup> As a result, Judge Bazelon sought to effectuate accountability in defense representation through the creation of a “common set of standards that comprise these necessary functions and considers whether counsel substantially failed in any of the designated areas.”<sup>49</sup>

In further underscoring the accountability that these guidelines would produce, both Judge Bazelon and the Fourth Circuit “concluded that an attorney’s ‘omission or failure to abide by these [duties] constitutes a denial of effective [assistance] of counsel,’ and the burden shifts to the government to establish a lack of prejudice.”<sup>50</sup> As Judge Bazelon held, “If a defendant shows a substantial violation of any of these requirements he has been denied effective representation unless the government, ‘on which is cast the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby.’”<sup>51</sup> Importantly, Judge Bazelon’s burden-shifting provision was predicated upon the fact that “proof of

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44. 389 F.2d 224, 226 (4th Cir. 1968).

45. Blume & Neumann, *supra* note 10, at 133. See *United States v. DeCoster (DeCoster I)*, 487 F.2d 1197, 1203 (D.C. Cir. 1973), *rev’d on rehearing en banc*, 624 F.2d 196 (D.C. Cir. 1976). In discussing counsel’s performance with respect to ineffective assistance claims, Judge Bazelon enunciated the following specific standards:

Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.

*Id.* at 1203, n.22 (citing *Coles v. Peyton*, 389 F.2d at 226).

46. Blume & Neumann, *supra* note 10, at 133.

47. *Id.*

48. *Id.* at 135. See also Williams, *supra* note 10, at 147-54. Williams enumerates four specific standards governing qualification, compensations, conflicts of interest, and the duty to investigate, that should be required of every lawyer representing a capital defendant. With respect to the duty to investigate, Williams states:

The most basic duty that an attorney has in any case is to conduct an investigation. The Supreme Court has made it clear that counsel has a duty to investigate the defendant’s background for potential mitigating evidence. The court needs to make it equally clear that counsel has a duty to prepare for the guilt-innocence phase of the proceedings as well. . . . Since claims and defenses must be asserted during the initial stages of a capital case[s], the court should make it explicit that counsel has a duty to investigate any potential defenses available to the defendant before reaching a conclusion as to whether it should be asserted and that the failure to conduct a thorough pre-trial investigation constitutes ineffective assistance.

*Id.* at 153-54.

49. Blume & Neumann, *supra* note 10, at 135.

50. *Id.* at 138 (quoting *Coles*, 389 F.2d at 226).

51. *DeCoster I*, 487 F.2d at 1204.

prejudice may well be absent from the record precisely because counsel has been ineffective . . . [f]or example, when counsel fails to conduct an investigation, the record may not indicate which witnesses he could have called, or defenses he could have raised.”<sup>52</sup> In essence, the burden-shifting approach reflected the pragmatic concern that “[m]uch of the evidence of counsel’s ineffectiveness is frequently not reflected in the trial record.”<sup>53</sup>

Ultimately, Judge Bazelon’s “check-list” or “guideline” approach “attempted to define effective assistance of counsel in terms of services to defendants.”<sup>54</sup> For Bazelon, “the right to effective counsel . . . is not dependent upon the strength of the evidence of the defendant’s guilt”<sup>55</sup> because “minimum requirements of competent attorney performance . . . would give substance to the Sixth Amendment mandate.”<sup>56</sup> In Judge Bazelon’s view, every defendant was constitutionally entitled to an “active advocate,” and “[w]here such advocacy is absent, the accused has been denied effective assistance, regardless of his guilt or innocence.”<sup>57</sup>

*B. Strickland v. Washington Explicitly Rejects the Guideline Approach and Adopts a Standard That Renders It Nearly Impossible to Establish Ineffective Assistance*

*1. Rejection of the Guideline Approach*

*Strickland* dealt a devastating blow to those who supported the adoption of specific standards to guide the performance of counsel in criminal cases.<sup>58</sup> By way

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52. *Id.*

53. *Id.*

54. Blume & Neumann, *supra* note 10, at 138. As Blume and Neumann observe, perhaps the greatest “service” to a defendant is to engage in a “robust investigation” that uncovers all possible defenses and avenues for mitigating evidence:

A robust investigation was an essential demand of effective representation. . . . First, in order for the adversary system to function properly, both sides must prepare and organize their cases in advance of trial. . . . Second, proper investigation is critical to uncovering favorable facts and allows trial counsel to take full advantage of procedural safeguards for achieving a reliable verdict such as cross-examination and impeachment. . . . Third, investigation ensures that attorneys proffer all possible legal defenses and demand that the government prove the defendant’s guilty beyond a reasonable doubt. Finally, investigation is essential for procedural matters outside of trial, such as . . . urging for the reduction or dismissal of charges, and advocating for appropriate pleas and favorable sentences. Consequently, the attorney who is ineffective in the investigative phase might never be able to rectify her performance and provide her client with an adequate defense.

*Id.* at 139.

55. *Id.* at 138.

56. *Id.*

57. *Id.* at 138-39 (quoting *United States v. DeCoster (DeCoster III)*, 624 F.2d 196, 288 (D.C. Cir. 1976) (Bazelon, J., dissenting)).

58. 466 U.S. at 688-89. In *Strickland*, the defendant pled guilty to an indictment that included three capital murder charges. The defendant also represented to the Court that he had no significant prior criminal record and that he was under severe stress at the time the murders were committed. During the sentencing phase, defense counsel failed to conduct a thorough investigation into the defendant’s background, which included a failure to contact character witnesses or seek a psychiatric examination. Counsel believed that the inclusion of such evidence would only allow the prosecutor to come forth with more damaging evidence against the defendant and, on this basis he decided that such evidence should

of brief background, before Judge Bazelon's endorsement of the guideline approach, and prior to *Strickland*, "lower courts struggled to develop an appropriate standard by which to gauge the quality of counsel's representation."<sup>59</sup> In fact, to the extent that any review of counsel's performance existed, "the prevailing standard lower courts used to determine whether counsel's conduct satisfied the Sixth Amendment was the 'farce and mockery' test."<sup>60</sup> Pursuant to this test, the courts "asked only whether counsel's alleged ineffectiveness was so prevalent that it made the proceedings a 'farce and mockery of justice,' thereby depriving the defendant of the constitutional right to a fair trial under the Due Process Clause."<sup>61</sup> As one Commentator aptly noted, "[t]his test frequently left shockingly poor representation beyond the reach of courts to remedy."<sup>62</sup>

Importantly, in *McMann v. Richardson*,<sup>63</sup> the Court attempted to provide more guidance, albeit generally, governing the standards for attorney incompetence.<sup>64</sup> Unfortunately, because "trial courts had little incentive to create high standards for appointed counsel absent more specific higher court prompting . . . [l]ower courts often required the attorney to do little more than not make a 'farce or mockery' of justice, or not be grossly incompetent."<sup>65</sup> Significantly, however, with the advent of the Fourth Circuit's decision in *Coles*, coupled with Judge Bazelon's guideline approach to effective representation (as well as his burden-shifting paradigm), the courts began to develop a standard of representation which ensured that counsel's performance comported with the defendant's fundamental right to effective representation.

Unfortunately, however, *Strickland* permanently changed this landscape by expressly rejecting the guideline or check-list approach to attorney representation.<sup>66</sup>

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not be introduced. As a result, counsel instead decided to rely upon the plea colloquy as evidence of the defendant's remorse. Ultimately, the defendant was sentenced to death, and in his appeal, defendant alleged that he had been deprived of his Sixth Amendment right to the effective assistance of counsel. *Id.*

59. Blume & Neumann, *supra* note 10, at 131.

60. *Id.* In their Article, Blume and Neumann further note that the Supreme Court subsequently modified the "farce and mockery" test to suggest that "a defendant would prevail in proving he had ineffective assistance if counsel's conduct was not 'within the [wide] range of competence demanded of attorneys in criminal cases.'" The Authors are careful to note, however, that "[o]bservers largely criticized this vague test . . . on the basis that it was not significantly different from the 'farce and mockery' standard." *Id.* at 131-32.

61. *Id.* at 131.

62. *Id.*

63. 397 U.S. 759 (1970).

64. *Strickland*, 466 U.S. at 687. According to one Commentator, the Supreme Court arguably attempted to establish standards for attorney representation in *McMann*, in which the Court stated:

[T]he matter . . . should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts.

Levinson, *supra* note 33, at 153 (quoting *McMann*, 397 U.S. at 771).

65. *Id.* at 154.

66. Blume & Neumann, *supra* note 10, at 140 (explaining that Judge Bazelon's guideline approach was part of a larger debate among the judges on the D.C. Circuit in the *DeCoster* cases concerning the most appropriate method by which to assess ineffective assistance claims. In the end, "the categorical

In its seminal decision concerning the effective assistance of counsel, *Strickland* single-handedly defined the framework that would govern ineffective assistance claims for the next twenty-five years.<sup>67</sup> In its decision, while recognizing that the right to counsel implicates the right to “effective assistance of counsel,”<sup>68</sup> the Court steadfastly held that “specific guidelines are not appropriate.”<sup>69</sup> In so holding, the Court stated:

The Sixth Amendment refers simply to “counsel,” not specifying particular requirements of effective assistance . . . . In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in the American Bar Association Standards and the like . . . 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 best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions . . . . Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant’s cause. *Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but] simply to ensure that criminal defendants receive a fair trial.*<sup>70</sup>

Thus, the *Strickland* Court was unequivocal that counsel’s duties did not “form a checklist for judicial evaluation of attorney performance,”<sup>71</sup> and instead needed only to satisfy a “highly deferential”<sup>72</sup> review that merely looked to whether counsel’s representation “fell below an objective standard of reasonableness.”<sup>73</sup>

Ultimately, therefore, the guideline approach that was advocated by Judge Bazelon, the Fourth Circuit in *Coles*, and the ABA was rejected by the Supreme

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standard approach did not prove to be the prevailing standard. . . . [The] majority opinion rejected Judge Bazelon’s theory, preferring instead a case-by-case approach to ineffective assistance of counsel claims similar to the method subsequently embraced by the Supreme Court in *Strickland*.”).

67. By way of brief background, the constitutional right to counsel was first recognized in *Powell v. Alabama*, 287 U.S. 45 (1932), where the Supreme Court based the recognition of such right to defendants in capital cases upon the Fourteenth Amendment’s Due Process Clause. Subsequently, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court extended the right to counsel to all criminal defendants, not just those charged with capital crimes.

68. *Strickland*, 466 U.S. at 686. In *Strickland*, the Court began its analysis by explaining:

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of “actual ineffectiveness.” In giving meaning to this requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

*Id.*

69. *Id.* at 688.

70. *Id.* at 688-89 (emphasis added) (citations omitted).

71. *Id.* at 688.

72. *Id.* at 689.

73. *Id.* at 688.

Court, and in its place was instituted a two-pronged standard for reviewing ineffective assistance claims that has single-handedly lead to some of the worst lawyering for those defendants who have the most at stake during trial—their lives.<sup>74</sup>

*2. The Nearly Impenetrable Two-Pronged Standard for Ineffective Assistance:  
Unreasonableness and Prejudice*

In eschewing the guidelines approach, the *Strickland* Court held that “[a] convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components.”<sup>75</sup> According to the Court, “[f]irst, the defendant must show that counsel’s performance was deficient.”<sup>76</sup> Additionally, “the defendant must show that the deficient performance prejudiced the defense.”<sup>77</sup> As set forth below, this standard made it virtually impossible for a defendant to demonstrate ineffective assistance of counsel on appeal, while simultaneously tolerating incredibly incompetent representation of defendants charged with capital offenses.

*a. The Performance Prong*

With respect to the performance prong, the *Strickland* Court began by stating that “the proper standard for attorney performance is that of reasonably effective assistance.”<sup>78</sup> Accordingly, to demonstrate that an attorney’s representation was

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74. See *Strickland*, 466 U.S. at 706-09 (Marshall, J., dissenting). Importantly, Justice Marshall’s dissenting opinion in *Strickland* predicted precisely the type of substandard representation that would characterize attorney performance throughout the next twenty years. In his dissent, Justice Marshall stated:

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave “reasonable” and must act like “a reasonably competent attorney” . . . is to tell them almost nothing . . . the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

*Id.* at 707-08 (citation omitted). With respect to the issue of prejudice, Justice Marshall stated:

[I]t is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel . . . . The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. In view of all these impediments . . . it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

*Id.* at 710.

75. *Id.* at 687 (majority opinion).

76. *Id.*

77. *Id.*

78. *Id.* at 687-88. In rejecting the establishment of specific guidelines, the Court discussed the notion of “reasonableness” in the ineffective assistance context:

Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to

constitutionally deficient, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.”<sup>79</sup> In so holding, and as stated *supra*, the Court specifically rejected the use of guidelines in making this determination, and instead directed courts to focus upon “whether counsel’s assistance was reasonable considering all the circumstances.”<sup>80</sup>

Furthermore, in making the reasonableness determination, the Court stated that “[j]udicial scrutiny of counsel’s performance must be highly deferential.”<sup>81</sup> In so holding, the Court stated:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action “might be considered sound trial strategy.”<sup>82</sup>

In fact, in making the reasonableness determination, the *Strickland* Court stated that lower courts “should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”<sup>83</sup> The Court went so far as to state that “strategic choices made after thorough investigation of law and facts relevant to plausible options are *virtually unchallengeable*.”<sup>84</sup>

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avoid conflicts of interest. From counsel’s function as assistant to the defendant derive the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. . . . [However], [t]hese basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance.

*Id.* at 687-88 (citations omitted).

79. *Id.* at 688.

80. *Strickland*, 466 U.S. at 688.

81. *Id.* at 689. The Court also stated that “when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.” *Id.* at 691.

82. *Id.* at 689.

83. *Id.* at 690.

84. *Id.* (emphasis added). Importantly, the majority stressed the theme throughout *Strickland* was one of deference to trial counsel’s performance, even in the face of decisions that might otherwise seem questionable. The Court’s stated position that “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,” was predicated upon a desire to lower scrutiny of defense counsel’s performance on appellate review:

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel’s unsuccessful defense. Counsel’s performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could

Ultimately, what the *Strickland* Court was trying to accomplish—both in rejecting specific guidelines and implementing a “highly deferential”<sup>85</sup> reasonableness review—was both the reduction of ineffective assistance claims and the likelihood that such claims, if brought on appeal, would fail.<sup>86</sup> In fact, the *Strickland* Court did not shy away from this objective, stating that “[t]he availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges.”<sup>87</sup> Of course, while the reasonableness prong certainly made it difficult for defendants to demonstrate ineffective assistance, the prejudice prong rendered it nearly impossible.

*b. The Prejudice Prong*

In shifting to the prejudice aspect of its analysis, the Court emphasized that even if counsel’s performance was “professionally unreasonable,”<sup>88</sup> it would not support vacating the conviction if “the error had no effect on the judgment.”<sup>89</sup> In the Court’s view, because “the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding,”<sup>90</sup> any defects in counsel’s performance must “be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.”<sup>91</sup> Furthermore, the burden weighed on the defendant to “affirmatively prove prejudice”<sup>92</sup> because “[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.”<sup>93</sup> As a result, “[e]ven if a defendant shows that particular errors of counsel were unreasonable . . . the defendant must show that they actually had an adverse effect

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dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

*Id.*

85. *Id.* at 689.

86. *See Strickland*, 466 U.S. at 690.

87. *Id.*

88. *Id.* at 691.

89. *Id.* The Court’s prejudice requirement was premised upon its interpretation of the Sixth Amendment, which it claimed was to “ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding” and not simply to effectuate effective assistance per se. *Id.* at 691-92.

90. *Id.*

91. *Id.* at 692. The Court was careful to note, of course, that there were certain situations in which prejudice would be presumed. For example, the “[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.” *Id.* In addition, “so are various kinds of state interference with counsel’s assistance.” *Id.* *See also* *United States v. Cronin*, 466 U.S. 648, 659 (1984). Finally, the Court explained that prejudice would be presumed “when counsel is burdened by an actual conflict of interest.” *Strickland*, 466 U.S. at 692 (citing *Cuyler v. Sullivan*, 446 U.S. 341, 345-50 (1984)). With respect to conflict of interest issues, however, the Court cautioned that “the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above [actual or constructive denial of assistance of counsel or state interference with the right to counsel].” *Id.* Instead, the Court held that “[p]rejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests,’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *Id.* (quoting *Cuyler*, 446 U.S. at 350).

92. *Strickland*, 466 U.S. at 693.

93. *Id.*

on the outcome.”<sup>94</sup>

In making the requisite showing, however, the Court held that “[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding.”<sup>95</sup> Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”<sup>96</sup> The Court went on to define “reasonable probability” as “a probability sufficient to undermine confidence in the outcome.”<sup>97</sup> Thus, “[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.”<sup>98</sup>

Essentially, the Court’s “prejudice” prong required a post hoc review of the alleged errors, which was surprising given that the Court had emphasized earlier in its opinion the need to eliminate “the distorting effects of hindsight”<sup>99</sup> and avoid “reconstruct[ing] the circumstances of counsel’s challenged conduct.”<sup>100</sup> Ostensibly, although these principles were integral to the Court’s analysis when developing the “reasonableness” prong, they did not seem to carry any weight as the Court developed its nearly impenetrable “prejudice” standard.<sup>101</sup> The reason for this, according to the Court, was that, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal

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94. *Id.* The origin of the Court’s prejudice requirement can be traced to the following passage in *Strickland*:

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

*Id.*

95. *Id.*

96. *Id.* at 694.

97. *Id.* In establishing the parameters for ineffective assistance, the Court stated:

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

*Id.* at 694-95.

98. *Strickland*, 466 U.S. at 695.

99. *Id.* at 689.

100. *Id.*

101. *Id.* at 695.

representation,”<sup>102</sup> but to ensure simply “that criminal defendants receive a fair trial.”<sup>103</sup>

Not insignificantly, the Court was also aware that more accountability standards or detailed guidelines “would encourage the proliferation of ineffectiveness challenges,”<sup>104</sup> which the Court sought to avoid. Ultimately, therefore, what resulted was such a difficult standard that, for the next sixteen years, the Court found not *one single instance* of ineffective assistance of counsel.<sup>105</sup> Importantly, however, the *Strickland* decision is notable not simply for what it failed to do, but for the horrific state of representation that it produced, both in capital and non-capital cases.

### *c. Ineffective Assistance After Strickland*

As a practical matter, the two-pronged standard created by the Court in *Strickland* “proved virtually impossible for defendants to meet, and instead of raising the bar for effective counsel, the Court created a bar to nearly all assertions of attorney inadequacy.”<sup>106</sup> Indeed, during the sixteen years after *Strickland*, in which “the Supreme Court itself failed to find a single instance of constitutionally inadequate representation,”<sup>107</sup> nearly all representation was “found to be within

102. *Id.* at 689.

103. *Id.* When considering the Court’s notion that the Sixth Amendment was intended merely to ensure that a defendant receives a fair trial, an often overlooked passage in *Strickland* intimates that the success of an ineffectiveness claim is more likely to hinge upon the *strength of the prosecution’s case* rather than the quality of trial counsel’s performance:

In making this determination [concerning ineffectiveness] a court . . . must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated, trivial effect. *Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.* Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

*Id.* at 695-96 (emphasis added).

104. *Strickland*, 466 U.S. at 690.

105. Blume & Neumann, *supra* note 10, at 134.

106. *Id.*

107. *Id.* at 134. *See also* *Murray v. Giarratano*, 492 U.S. 1 (1989). Significantly, the Court’s decision in *Murray* also contributed to a defendant’s diminished chances of succeeding on ineffectiveness claims because it held that neither the Eighth Amendment nor the Due Process Clause requires the states to appoint counsel for indigent defendants seeking post-conviction relief. This is critical because post-conviction relief is precisely the path upon which most defendants seek to demonstrate that counsel’s performance at the underlying trial was ineffective. In rejecting the requirement that defendants be appointed counsel for post-conviction proceedings, the *Murray* majority reasoned:

In [*Pennsylvania v. Finley*, 481 U.S. 551 (1987)], we ruled that neither the Due Process Clause of the Fourteenth Amendment nor the equal protection guarantee of “meaningful access” required the State to appoint counsel for indigent prisoners seeking postconviction relief. The Sixth and Fourteenth Amendments to the Constitution assure the right of an indigent defendant to counsel at the trial stage of a criminal proceeding . . . [w]e [formerly] contrasted the trial stage of a criminal proceeding, where the State by

*Strickland*'s 'wide range of professionally competent assistance.'"<sup>108</sup> In fact, "[e]ven in capital cases, where life and death literally hung in the balance, courts often deferred to incomprehensible 'strategic' decisions provided by trial counsel rationalizing their slothful representation."<sup>109</sup> Unfortunately, in striving to reduce the volume and success of ineffective assistance claims, *Strickland* created a standard that "is a very low one"<sup>110</sup> that "was not intended to impose rigorous standards on criminal defense attorneys,"<sup>111</sup> and that promoted the "tolerance of abysmal lawyering."<sup>112</sup>

In fact, the type of representation that is tolerated under *Strickland*—particularly for capital defendants whose lives are at stake—continues to be horrific and is the antithesis of fairness and due process of law.<sup>113</sup> One Commentator explains the appalling instances of attorney incompetence:

Lawyers have been found to be drunk or drugged, mentally ill, or asleep while representing a defendant. In addition, several recent studies of capital trials reveal that lawyers who represented death row inmates at trial were subsequently disbarred, suspended, or otherwise disciplined at a rate three to forty-six times the average for the relevant states. . . . For those attorneys whose clients were

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presenting witnesses and arguing to a jury attempts to strip from the defendant the presumption of innocence and convict him of a crime, with the appellate stage of such a proceeding, where the defendant needs an attorney "not as a shield to protect him against being 'hauled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt."

*Murray*, 492 U.S. at 7 (quoting *Ross v. Moffit*, 417 U.S. 600, 610-11 (1974)).

108. Blume & Neumann, *supra* note 10, at 142 (quoting *Strickland*, 466 U.S. at 690).

109. *Id.* As Blume and Neumann explain, after *Strickland*, the Court decided two cases that demonstrated how deferential it would be towards glaring examples of attorney incompetence. In *Darden v. Wainwright*, the defendant's ineffective assistance claim was predicated upon the fact that his attorney failed to present any mitigating evidence whatsoever at his sentencing hearing. 477 U.S. 168 (1986). Ostensibly, trial counsel initially believed that his client did not qualify for any of the mitigating factors under the relevant Florida statute but then conceded that "I was completely unaware that any mitigating circumstance, if relevant, is admissible." Blume & Neumann, *supra* note 10, at 148 (citation omitted). The Court, however, ultimately denied defendant's claim because the trial court eventually informed counsel that it could present mitigating evidence concerning any fact that might have been pertinent. In this way, according to Blume and Neumann, "this choice to present no mitigating evidence in light of a stated and actual misunderstanding of the law was objectively reasonable; the Court gave short shrift to Darden's ineffective assistance of counsel claim." *Id.* Even worse, in *Burger v. Kemp*, the Court rejected defendant's ineffective assistance claim when defense counsel failed to present any mitigating evidence whatsoever at the sentencing phase. 483 U.S. 776 (1987). This time, however, there was evidence that Burger had an IQ that bordered on mental retardation and had an abusive family history that resulted in Burger suffering from various psychological problems. Counsel had ample opportunity to consult with defendant's family, all of whom were willing to testify concerning the abuse that Burger suffered. Ultimately, counsel halted his investigation and presented no mitigating evidence. His stated reason not to petition the court for a complete psychological examination of his client was based on his "experience with the mental hospital," which he thought was "biased against defendants generally." *Id.* In its decision, while the Court found that counsel's investigative efforts could have been more thorough, it concluded that counsel's efforts were objectively reasonable. *Id.*

110. Cooley, *supra* note 9, at 76.

111. *Id.* (quoting White, *supra* note 9, at 333).

112. *Id.* (quoting Giemer, *supra* note 20, at 94).

113. See generally 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 (1994) (describing the pervasive problem of deficient resources to ensure competent counsel for indigent defendants in capital cases).

executed, the rate of disciplinary sanctions was almost forty times that of the bar as a whole.<sup>114</sup>

Indeed, “[i]n many instances, appellate courts have found that an appointed lawyer was completely unqualified to handle a capital case.”<sup>115</sup> In such cases, for example, lawyers were “unaware of the governing death penalty statute,”<sup>116</sup> “not even aware that a separate sentencing proceeding would be held in a capital case,”<sup>117</sup> or “never tried a case to a jury before, and . . . failed to investigate physical evidence.”<sup>118</sup> Perhaps the most shocking aspect of these egregious examples of attorney incompetence is that, pursuant to *Strickland*, they were not deemed to constitute ineffective assistance of counsel.<sup>119</sup>

For example, in *Bellamy v. Cogdell*,<sup>120</sup> the defendant, who was charged with second-degree murder and criminal possession of a weapon,<sup>121</sup> sought post-conviction relief on the grounds that, pursuant to *Strickland*, he had been denied the Sixth Amendment right to counsel.<sup>122</sup> Specifically, in the months preceding trial, the defendant’s attorney “was the subject of disciplinary proceedings,”<sup>123</sup> which consisted of allegations that he “negligently handled a real estate transaction,”<sup>124</sup> and improperly “converted client funds.”<sup>125</sup> Perhaps more importantly, in the month prior to the trial’s commencement, the disciplinary proceeding was postponed because the defendant’s counsel was “not mentally capable of preparing for the hearing.”<sup>126</sup> Indeed, the defendant’s attorney was observed as having suffered from “a certain amount of disorientation,”<sup>127</sup> and was later diagnosed with “a variety of physiological ailments, including a . . . condition ‘characterized by

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114. Benson-Amram, *supra* note 11, at 431-33 (citing *Tippins v. Walker*, 77 F.3d 682 (2d Cir. 1996); *United States v. St. Germain*, 76 F.3d 376, 1996 WL 43578, at \*4-5 (4th Cir. Feb. 5, 1996) (per curiam); *Bellamy v. Cogdell*, 974 F.2d 302, 304 (2d Cir. 1992) (en banc)). See also Marcia Coyle, Fred Strasser & Marianne Lavelle, *Fatal Defense: Trial and Error in the Nation’s Death Belt*, NAT’L L.J., June 11, 1990, at 30, 44; Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 398 (1995).

115. Benson-Amram, *supra* note 11, at 433.

116. *Id.*

117. *Id.*

118. *Id.* at 434.

119. See, e.g., *Burdine v. Johnson*, 231 F.3d 950, 964 (5th Cir. 2000); *Tippins*, 77 F.3d at 687; *Fisher v. State*, 739 P.2d 523, 525 (Okla. Crim. App. 1987); *Commonwealth v. Vance*, 546 A.2d 632, 638 (Pa. Super. Ct. 1988).

120. 974 F.2d 302 (2d Cir. 1992) (en banc).

121. *Id.* at 303. By way of factual background, Bellamy was on trial for his alleged participation in the murder of State Parole Office Brian Rooney. Apparently, an individual named Lorenzo Nichols, who was incarcerated, ordered Rooney’s murder, and Bellamy lured Rooney to the location where he was ultimately murdered. After three weeks of trial and five days of jury deliberations, the jury convicted Bellamy of second-degree murder and criminal possession of a weapon.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Bellamy*, 974 F.2d at 303. In fact, a disciplinary hearing on these matters was scheduled for December 11, 1986, concerning these alleged improprieties; however, that hearing was postponed due to defense counsel’s various medical conditions, which rendered him incapable of adequately preparing.

126. *Id.* (citation omitted).

127. *Id.* (citation omitted).

peripheral motor weakness.”<sup>128</sup>

During this time, purportedly as a result of “physical and emotional stress,”<sup>129</sup> the defendant’s lawyer had been “virtually incapacitated”<sup>130</sup> and had “an inability to concentrate.”<sup>131</sup> Based upon his condition, the treatment of which would take between three to six months and would result in some incapacitation, the defendant’s lawyer represented to the bar that he would secure co-counsel to assist at the defendant’s trial.<sup>132</sup> Ultimately, the co-counsel had an unexpected scheduling conflict and the original attorney undertook representation alone.<sup>133</sup> The defendant was convicted, and approximately two months later, the defendant’s counsel was suspended from practicing law.<sup>134</sup> Based upon these and other grounds, the defendant claimed that he had been denied the effective assistance of counsel.

The Second Circuit, however, rejected this claim, asserting that counsel’s behavior did not “approach the type of fraudulent behavior” that the court had found previously to constitute ineffective assistance.<sup>135</sup> Moreover, in denying the

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128. *Id.* at 303 (citation omitted). More specifically, the court described trial counsel’s medical condition as follows:

According to Dr. Cohen [trial counsel’s physician], Guran [defense counsel] suffered from a variety of physiological ailments, including a recently diagnosed polyneuropathy, a condition “characterized by peripheral motor weakness [and] unsteadiness” on one’s feet. Dr. Cohen had been treating Guran for that condition for the preceding six weeks. During that time, as a result of the “physical and emotional stress” associated with Guran’s recently discovered illness and of certain medications, Guran had been “virtually incapacitated.” Dr. Cohen also noted that as a result of that condition, Guran “at times” had “an inability to concentrate.” The prognosis for Guran’s newly discovered condition was uncertain at that time, but Dr. Cohen “anticipated” that evaluation and treatment of the polyneuropathy would take three to six months, and that Guran would be “effectively incapacitated during that time.”

*Id.* at 303-04.

129. *Id.* at 304 (citation omitted).

130. *Id.* (citation omitted).

131. *Bellamy*, 974 F.2d at 304 (citation omitted).

132. *Id.* Critically, after the postponement of the November 10 hearing, the disciplinary committee sought to have Guran suspended immediately and indefinitely from the practice of law. Guran responded that such suspension was not necessary because, among other things, he was now retired and working solely on Bellamy’s case. Furthermore, with respect to Bellamy’s representation, Guran certified:

I, of course, will not attempt to try this case by myself. I will have a competent attorney, but I must be present to assist him. Bellamy relies on, and strictly trusts only me and his mother has paid me. It would be a complete disservice to this defendant and jeopardize his right to a fair trial if I were not permitted to assist in his trial and defense.

*Id.* Ultimately, Guran did advise the trial court about his medical issues and pending disciplinary charges. *Id.* In addition, while Guran did retain co-counsel prior to trial, he ultimately represented Guran alone when co-counsel became involved with another case during the time of defendant’s trial. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 307. Note, however, that in *Bellamy*, the defendant argued that counsel’s errors constituted a *per se* violation of the Sixth Amendment, and thus did not require the Court to apply *Strickland*’s two-pronged standard. In rejecting defendant’s contention, the Second Circuit stated:

This court has found such *per se* violations in two limited circumstances: where, unknown to the defendant, his or her counsel was, at the time of trial (1) not duly licensed to practice law because of a failure ever to meet the substantive requirements

defendant's claim, the court placed emphasis on the fact that counsel never "intentionally misrepresented that he would secure co-counsel,"<sup>136</sup> and "informed the court of his pending disciplinary hearing,"<sup>137</sup> as well as "possible immediate suspension."<sup>138</sup> Based upon these facts, which did not relate whatsoever to counsel's actual performance at trial, the court found that "it cannot be said that [counsel's] conduct approached the egregious deceptive behavior of counsel"<sup>139</sup> that would, under *Strickland*, constitute a Sixth Amendment violation.

In addition, courts have rarely found alleged active drug use by defense attorneys as a basis for Sixth Amendment violations.<sup>140</sup> For example, in *Berry v. King*,<sup>141</sup> the defendant was charged and convicted of first-degree murder in connection with a bank robbery.<sup>142</sup> In asserting that he was denied effective assistance of counsel, the defendant claimed that his counsel's drug addiction resulted in a failure to "adequately investigate and prepare for the defense of his case."<sup>143</sup> Specifically, during the sentencing phase, counsel introduced not a single witness on the defendant's behalf, and offered no evidence whatsoever in mitigation of the defendant's culpability.<sup>144</sup> Despite these facts, the Fifth Circuit found that there was no violation of the Sixth Amendment right to counsel.<sup>145</sup> With respect to the issue of counsel's drug use, the court held that "under *Strickland* the fact that an attorney used drugs is not, *in and of itself*, relevant to an ineffective assistance claim."<sup>146</sup>

This approach was underscored in *State v. Coates*,<sup>147</sup> where the Supreme Court

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for the practice of law . . . or (2) implicated in the defendant's crimes. . . . Even on these occasions, we have applied the *per se* rule "without enthusiasm."

*Id.* at 306.

136. *Id.* at 307.

137. *Bellamy*, 974 F.2d at 307.

138. *Id.*

139. *Id.* at 308.

140. *See, e.g., Berry v. King*, 765 F.2d 451 (5th Cir. 1985); *State v. Coates*, 786 P.2d 1182 (Mont. 1982).

141. *Berry*, 765 F.2d at 451.

142. *Id.* at 452.

143. *Id.* at 454. The court summarized Berry's assertions:

Berry's contentions of ineffective assistance essentially fall into two closely related categories. First, Berry contends that as a result of his alleged drug addiction Blanche [defense counsel] failed to adequately investigate and prepare for the defense of his case. This lack of investigation and preparation allegedly caused Blanche to fail to locate witnesses who could have supplied exculpatory information in the guilt phase and mitigating testimony in the penalty phase. Second, Berry contends that Blanche's drug use, plus his failure to investigate, prevented him [from] making any sort of organized presentation during the guilt and sentencing phases of the trial. Berry contends that in the guilt phase this caused Blanche to stipulate to the "functional equivalent of a plea of guilty" without Berry's consent. He further contends that during the sentencing phase Blanche was unable to make more than a "tepid" plea for his client's life.

*Id.*

144. *Id.* at 452.

145. *Id.* at 454-55.

146. *Id.* at 454 (emphasis omitted).

147. 786 P.2d at 1185-86. In *Coates*, the defendant, who was convicted of felony theft, alleged that his counsel made the following errors: (1) failure to object to the use of statements made by the defendant prior to reading the defendant his *Miranda* warnings; (2) opening the door to testimony

of Montana held that trial counsel's "cocaine abuse, which [had] become public knowledge," did not constitute ineffective assistance of counsel.<sup>148</sup> In fact, the court held that, unless the defendant could expressly connect "specific errors or conduct"<sup>149</sup> to the admitted drug abuse, then "cocaine abuse is irrelevant to the issue of ineffective assistance of counsel."<sup>150</sup> Courts have also applied this exact logic to allegations of alcohol abuse. For example, in *People v. Garrison*,<sup>151</sup> the California Supreme Court held that, although trial counsel was "an alcoholic at the time of trial and that he has since died of the disease,"<sup>152</sup> there was no Sixth Amendment violation because, under *Strickland*, the defendant could not specifically demonstrate that counsel's performance was deficient.<sup>153</sup> Likewise, in *Burnett v. Collins*,<sup>154</sup> the Fifth Circuit held that despite the fact that the defendant "could smell alcohol on his attorney's breath; and after trial, his counsel entered a

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concerning prior convictions; (3) failure to suppress evidence seized from the back of the defendant's vehicle by challenging the probable cause of the search warrant; (4) failure to obtain witnesses that were necessary for his defense; (5) inadequate preparation for trial; (6) failure to properly question the witnesses; (7) failure to appeal several issues; and (8) defense counsel's drug abuse, which allegedly affected his ability to effectively represent the defendant. In denying defendant's ineffective assistance claim, the Court emphasized that it would not "second guess trial tactics [and strategy]." *Id.* at 1186.

148. *Id.* at 1186-87.

149. *Id.* at 1187.

150. *Id.*

151. *People v. Garrison*, 765 P.2d 419, 426, 439-43 (Cal. 1989). *See also* *Frye v. Lee*, 89 F. Supp. 2d 693, 708 (W.D. N.C. 2000) (holding that trial counsel's alcohol abuse in and of itself is insufficient to establish ineffective assistance of counsel). In *Garrison*, the defendant was found guilty of robbery, burglary, and two counts of first-degree murder, for which he was sentenced to death. On appeal, defendant asserted that he was denied the effective assistance of counsel because his counsel was an admitted alcoholic during the entire time that the trial was conducted. Defendant specifically contested that trial counsel's alcoholism constituted a per se violation of the Sixth Amendment. In rejecting this contention, the Supreme Court of California stated:

Although it is uncontested that Beardsley [defense counsel] was an alcoholic at the time of trial and that he has since died of the disease, defendant has failed to prove that Beardsley's performance was deficient. His reliance on a per se rule of deficiency for alcoholic attorneys is contrary to settled law. . . . It is undisputed that Beardsley was an alcoholic at the time of his representation and that he consumed large amounts of alcohol each day of the trial. The declarations in the petition and traverse indicate that Beardsley drank in the morning, during court recesses, and throughout the evening. Although these declarations confirm that Beardsley was an alcoholic, they do not address whether Beardsley's addiction adversely affected his courtroom performance to such an extent that defendant was denied effective assistance of counsel. Statements made by the bailiff . . . Hector Delgadillo, declares that he was in close contact with Beardsley throughout the trial [and] that Beardsley always smelled of alcohol. . . . [In addition], on the second day of jury selection, Beardsley was arrested for driving to the courthouse with a .27 blood-alcohol content. . . . The judge stated that Beardsley's courtroom behavior had not given him any reason to believe that Beardsley should not continue and told defendant, "*I personally can assure you that you probably have one of the finest defense counsel in this county.*" . . . " Our review of the facts indicate that Beardsley did a fine job in this case . . . there is no authority for the type of per se rule espoused by defendant.

*Garrison*, 765 P.2d at 440-41.

152. *Id.* at 440.

153. *Id.* at 440-41.

154. 982 F.2d 922 (5th Cir. 1993).

facility for treatment of alcohol abuse,” there was no violation of the right to counsel because the defendant could identify “no specific instances where counsel’s performance . . . was deficient because of alcohol abuse.”<sup>155</sup>

More startling, perhaps, is the fact that ineffective assistance claims have been rejected under *Strickland* where trial counsel has slept during portions of the trial.<sup>156</sup> For example, in *United States v. Muyet*,<sup>157</sup> while the court actually acknowledged that even if counsel was, in fact, sleeping in court, the trial court denied the defendant’s ineffective assistance claim because he was not “in a state of unconsciousness (actually snoring in the courtroom) throughout the trial.”<sup>158</sup> As a result, despite periods of falling asleep during trial, counsel’s conduct was deemed not to fall below “prevailing professional norms.”<sup>159</sup> Similarly, in *Tippins v. Walker*,<sup>160</sup> the Second Circuit held that “[p]rolonged inattention during stretches of a long trial (by sleep, preoccupation or otherwise) . . . may be quantitatively substantial but without consequence.”<sup>161</sup> Likewise, in *Burdine v. Johnson*,<sup>162</sup> the Fifth Circuit stated that “we decline to adopt a per se rule that any dozing by defense counsel during trial merits a presumption of prejudice [under *Strickland*].”<sup>163</sup>

Finally, the courts have been reticent to find ineffective assistance even where there exists evidence that the defendant’s counsel is suffering from a mental illness.<sup>164</sup> In *Smith v. YLST*,<sup>165</sup> the defendant alleged that his trial counsel’s erratic behavior during trial was due to an underlying mental illness that affected his performance.<sup>166</sup> Specifically, in declarations and supplemental material submitted by various individuals with knowledge of counsel’s behavior, including his associate and secretary, it was alleged that counsel was suffering from a “paranoid

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155. *Id.* at 930. In fact, in rejecting the defendant’s contention, the court revealed just how difficult it is for a defendant to succeed in demonstrating that trial counsel’s substance abuse was sufficiently prejudicial to warrant a finding of ineffective assistance:

The critical inquiry [under *Strickland*] is whether, for whatever reason, counsel’s performance was deficient and whether that deficiency prejudiced the defendant. . . . Burnett’s claim is nothing more than a bare assertion that since his counsel abused alcohol, his counsel was ineffective. . . . Burnett has failed to even show that counsel was impaired during trial due to alcohol abuse. . . . At the hearing, the investigator for the defense indicated that he did not observe defense counsel intoxicated during trial. Burnett’s defense counsel also testified that he was not intoxicated during the trial. Burnett has failed to show that his counsel was impaired at trial or that any impairment caused specific errors during trial. . . . [w]e must, therefore, reject his contention that his attorney’s alcohol use resulted in ineffective assistance of counsel.

*Id.* (citation omitted).

156. See, e.g., *Burdine*, 262 F.3d 336; *Tippins*, 77 F.3d 682.

157. 994 F. Supp. 550 (S.D.N.Y. 1998).

158. *Id.* at 560-61.

159. *Id.* at 561.

160. *Tippins*, 77 F.3d at 686.

161. *Id.*

162. *Burdine*, 262 F.3d 336.

163. *Id.* at 349.

164. See generally *Smith v. YLST*, 826 F.2d 872 (9th Cir. 1987).

165. *Id.*

166. *Id.* at 874.

psychotic reaction.”<sup>167</sup> The declarations stated that counsel feared for his own safety and “that of his client because he believed that his client was the target of a murder conspiracy involving the victim’s relatives and lover.”<sup>168</sup> It was also revealed that counsel “smoked marijuana one evening during the course of the trial”<sup>169</sup> and told his secretary that “he was crazy and wanted to go to an insane asylum.”<sup>170</sup> Counsel “also repeatedly expressed concern that people were going to try to kill him,” and the trial court observed that, at times, counsel’s behavior had been erratic.<sup>171</sup>

This was not sufficient under *Strickland*, however, to constitute ineffective assistance of counsel. The Ninth Circuit specifically found that “[a]lthough there is merit to the argument that a mentally unstable attorney may make errors of judgment,”<sup>172</sup> there could be no violation of the Sixth Amendment unless the defendant could “point to specific errors or omissions which prejudiced his defense.”<sup>173</sup> As a result, even if the defendant can demonstrate that trial counsel suffered from a “mental illness or defect”<sup>174</sup> that had “some impact on the attorney’s professional judgment,”<sup>175</sup> it would still not be enough to satisfy the *Strickland* standard unless it could also be proven that such illness was “manifested in his courtroom behavior and conduct of the trial.”<sup>176</sup>

These cases provide a demonstration of the type of representation that *Strickland* tolerates, even when a defendant’s life is at stake. If a defendant proves that his counsel was using drugs,<sup>177</sup> abusing alcohol,<sup>178</sup> sleeping during portions of the trial,<sup>179</sup> or suffering from mental illness,<sup>180</sup> this showing will not be even remotely close to the threshold necessary to demonstrate ineffective assistance. Furthermore, if a defendant can provide that any or all of these factors are present, and that they caused counsel’s performance to fall below an objective standard of reasonableness, then relief still will not be provided unless a showing of prejudice can be made. That is, a defendant can rarely, if ever, demonstrate conclusively, and through the “distorting effects of hindsight,”<sup>181</sup> that, but for counsel’s

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167. *Id.*

168. *Id.*

169. *Id.*

170. *Smith*, 826 F.2d at 874.

171. *Id.*

172. *Id.* at 876. In denying defendant’s claim for ineffective assistance, the court acknowledged, based upon evidence in the record, that “although Daul’s [defense counsel’s] behavior had at times been erratic, his conduct had no impact on the trial because the judge had not been influenced by Daul’s behavior.” *Id.* at 874. In addition, the Court relied upon the trial court’s finding in holding that “even if Daul was having some kind of breakdown, ‘the record and my recollection do not show any way in which the trial was distorted or the effectiveness of counsel was impaired by whatever conditions he had.’” *Id.*

173. *Id.* at 876.

174. *Id.*

175. *Id.*

176. *Smith*, 826 F.2d at 876.

177. *Berry*, 765 F.2d at 452.

178. *Burnett*, 982 F.2d at 930.

179. *Muyet*, 994 F. Supp. at 560.

180. *Smith*, 826 F.2d at 872.

181. *Strickland*, 466 U.S. at 689.

misfeasance, the outcome of the trial would have been different.<sup>182</sup> Put another way, those fairly rare cases “that navigated safely through the performance prong channel generally went aground on the rock of prejudice.”<sup>183</sup>

Stated simply, *Strickland* was, as a practical matter, impenetrable, and it was no accident that for sixteen years the Supreme Court found not a single case of ineffective assistance.<sup>184</sup> In fact, at the state level, during the period from 1994 through 2000, only thirty-four capital cases resulted in successful ineffective assistance claims.<sup>185</sup> At the federal level, for this same period, only thirty-two capital cases successfully navigated through the *Strickland* standard.<sup>186</sup> Quite simply, it should come as no surprise that, during this time, courts bore witness to particularly horrific examples of defense representation, made worse by the fact that, in many cases, a defendant’s life was at stake.

Recently, however, some Commentators have found evidence of a

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182. *Id.* at 694.

183. Blume & Neumann, *supra* note 10, at 142. See also Fogelman, *supra* note 12, at 78. With respect to *Strickland*’s second prong (the prejudice requirement), Fogelman states:

A central reason that *Strickland* has been so heavily criticized for creating an “almost insurmountable hurdle” for defendants claiming ineffective assistance is the extreme difficulty in establishing the second prong—that the defendant was treated with actual prejudice because of counsel’s deficient conduct. *Strickland* stated that a defendant must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The Court then defines a reasonable probability as “sufficient to undermine confidence in the outcome.” Requiring a defendant to bear the burden of demonstrating a “reasonable probability” that the result of the proceeding would have been different but for counsel’s ineffective assistance is merely a deceptive way of saying that the defendant must prove that he would have been acquitted. In other words, he must prove his innocence rather than forcing the state to prove his guilt. *Strickland* allows appellate courts to bypass the first prong of evaluating counsel’s performance and simply analyze the difficult-to-meet prejudice requirement, because if a defendant cannot effectively prove his innocence, his counsel’s performance is irrelevant.

*Id.* at 78 (citations omitted).

184. Blume & Neumann, *supra* note 10, at 134.

185. *Id.* at 156 tbl.1. See also Fogelman, *supra* note 12, at 79-80. Fogelman states:

[A]n appellate court can uphold a verdict particularly easily when the government has a strong case against the defendant, even though that is arguably when a defendant needs effective assistance of counsel the most. After *Strickland*, less than “mediocre assistance” is acceptable because *Strickland*’s broad deference to counsel’s performance allows appellate courts to merely view egregious errors as trial tactics. In applying *Strickland*, appellate courts tend to focus on errors of commission rather than omission because those courts are not easily able to “discern the prejudicial effects of errors of omission.” . . . As examples, the ineffectiveness of counsel in failing to interview a crucial defense or failing to object during direct examination could be the very reason that the record does not reflect any prejudice to a defendant for an appeals court to review. If defense counsel was sleeping, the record would be silent as to certain errors for exactly that reason—a dozing defense counsel is unable to speak or object, and the record, in turn, would reflect no error. . . . But *Strickland* has basically ensured that representation can be atrocious as long as defense counsel does not commit an egregious error on [the] record that cannot be explained away as strategy.

*Id.* at 79-80 (citations omitted).

186. Blume & Neumann, *supra* note 10, at 156 tbl.1.

“jurisprudential shift”<sup>187</sup> in the Supreme Court’s analysis of ineffective assistance claims.<sup>188</sup> Specifically, in the past eight years, the Court has found Sixth Amendment violations in three cases, and in each case the Court relied upon the respective trial counsel’s failure to follow the ABA Guidelines, which were in their third edition since the original version of 1970, as evidence of objectively unreasonable and prejudicial performance.<sup>189</sup> As a result, Professor Neumann has declared that these decisions evince a “chink in *Strickland*’s armor” and a “shift towards . . . the standard . . . once hailed by Judge Bazelon.”<sup>190</sup> In fact, Professor Neumann has gone so far as to state:

[T]his shift [to a guideline approach] was intentional . . . [and] the reality was that in the hands of most state courts and many federal courts of appeal, the *Strickland* performance prong was license to do nothing. In essence, the Supreme Court realized that *Strickland* was part of the problem, not a solution to poor representation in capital cases. Capital defendants were frequently being represented by ineffective counsel, and the high threshold of the *Strickland* standard tied the hands of appellate courts from doing much about the problem.<sup>191</sup>

In fact, Professor Neumann has declared that “faced with the reality of the representation and the ineffectiveness of the review process, the Court has adopted the general approach Judge Bazelon articulated thirty years prior.”<sup>192</sup>

Importantly, however, although the Court’s decisions in *Williams v. Taylor*,<sup>193</sup> *Wiggins v. Smith*,<sup>194</sup> and *Rompilla v. Beard*<sup>195</sup> certainly demonstrate that the Court is reviewing trial counsel’s performance under a higher level of scrutiny, they presage neither the overruling of *Strickland* nor the adoption of specific guidelines by which counsel’s performance will be measured in future cases. While *Williams*, *Wiggins*, and *Rompilla* provide reason for optimism that the standards governing ineffective assistance claims are indeed beginning to evolve, they do not in and of themselves signify a substantial and sustained departure from the jurisprudence that continues to tolerate extraordinary examples of incompetent representation in capital cases. In other words, defendants charged with some of the worst crimes are still the victims of terribly poor representation, and despite the Supreme Court’s recent rulings, the courts continue to be hostile to their ineffective assistance claims.<sup>196</sup> This fact alone demonstrates that *Williams*, *Wiggins*, and *Rompilla* represent the beginning, not the end, of the solution to nearly thirty years of injustice. An examination of these cases both reveals reason for hope but the continued necessity for sweeping change.<sup>197</sup>

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187. *Id.* at 147.

188. *See* cases cited *infra* notes 193-95.

189. Blume & Neumann, *supra* note 10, at 142-47.

190. *Id.* at 142, 152.

191. *Id.* at 153.

192. *Id.* at 154.

193. 529 U.S. 362.

194. 539 U.S. 510.

195. 545 U.S. 374.

196. Blume & Neumann, *supra* note 10, at 142-47.

197. *Id.* at 160-61.

III. THE UNITED STATES SUPREME COURT FINDS INEFFECTIVE ASSISTANCE IN  
*WILLIAMS V. TAYLOR*, *WIGGINS V. SMITH*, AND *ROMPILLA V. BEARD*, WHILE RELYING  
UPON THE AMERICAN BAR ASSOCIATION'S GUIDELINES IN ASSESSING TRIAL  
COUNSEL'S PERFORMANCE

As set forth above in *Williams*, *Wiggins*, and *Rompilla*, although the Supreme Court found that trial counsels' performance constituted ineffective assistance of counsel, these decisions did not effectuate the sweeping change that is necessary to prevent the "abysmal lawyering"<sup>198</sup> that continues to exist without remedy at both the state and federal levels. Although some Commentators believe that these decisions signified a return to a "guidelines" or "checklist" approach to ineffective assistance claims,<sup>199</sup> such assertions, when analyzing each opinion, are overstated. A close analysis of each opinion reveals that *Strickland* continues to remain good law when ineffective assistance claims are raised.

In addition, the ABA standards, although helpful, continue to serve merely as guides, which is precisely how the Court described them in *Strickland*, and do not operate as mandatory rules or benchmarks. Finally, at least one study conducted after these decisions were rendered reveals that there has been only a modest increase in the success of ineffective assistance claims, as courts continue to tolerate incompetent representation on behalf of capital defendants.<sup>200</sup> As a result, the necessity for sweeping change could not be more evident.

A. *Williams v. Taylor*

In *Williams*, the defendant was convicted of robbery and capital murder.<sup>201</sup> During his sentencing hearing, the prosecution introduced evidence of Williams's prior convictions, which included armed robbery, burglary, and grand larceny.<sup>202</sup> The prosecution also introduced evidence relating to other violent felonies that Williams had committed after the murder, some of which were the subject of his

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198. Cooley, *supra* note 9, at 77 (quoting Giemer, *supra* note 20, at 94).

199. Blume & Neumann, *supra* note 10, at 152-53. Indeed, when discussing *Williams*, *Wiggins*, and *Rompilla*, Blume and Neumann state:

[T]he most significant doctrinal development was the Court's reliance on the ABA's Guidelines. The ABA Guidelines and Standards regarding the obligation to thoroughly investigate permeate *Williams*, *Wiggins*, and *Rompilla*. Much like Judge Bazelon's original checklist approach, the Court basically adopted the ABA's Guideline requirements for investigation as establishing the prevailing norms for defense counsel. In effect, when considering the adequacy of trial counsel's investigation, courts must now look to ABA standards, as well as local practice, in order to determine whether the Sixth Amendment has been satisfied. . . . In essence, these three decisions mark a shift towards the effective assistance of counsel standard once hailed by Judge Bazelon.

*Id.* at 152-53.

200. *Id.* at 156-57.

201. *Williams*, 529 U.S. at 368. By way of factual background, on November 3, 1985, the victim, Harris Stone, was found dead in Danville, Virginia. State officials initially determined the cause of death to be blood alcohol poisoning. However, approximately six months after Stone's death, defendant Williams drafted a letter to the police in which he admitted to murdering Stone, and on this basis, he was charged and convicted of the crime. *Id.* at 367.

202. *Id.* at 368.

confession.<sup>203</sup> After presenting this evidence, the prosecution presented two expert witnesses who testified that “there was a ‘high probability’ that Williams would pose a serious continuing threat to society.”<sup>204</sup>

Thereafter, Williams’s defense counsel offered the testimony of his mother, two neighbors, and a taped excerpt by a psychiatrist, who stated that Williams had removed bullets from his gun during a robbery to prevent injury to the victims.<sup>205</sup> Williams’s defense counsel offered no other mitigating evidence. In addition, during defense counsel’s closing, counsel admitted that it was “difficult to find a reason why the jury should spare Williams’s life”.<sup>206</sup>

I will admit too that it is very difficult to ask you to show mercy to a man who maybe has not shown much mercy himself. . . . I doubt very seriously that he had mercy very highly on his mind when he was walking along West Green and the incident with Alberta Stroud. I doubt very seriously that he had mercy on his mind when he took two cars that didn’t belong to him. Admittedly it is very difficult to get us and ask that you give this man mercy when he has shown so little of it himself.<sup>207</sup>

Not surprisingly, the jury sentenced Williams to death.<sup>208</sup> The trial court subsequently determined that the death penalty was a “proper” and “just” sentence.<sup>209</sup> Thereafter, Williams filed for state collateral relief, alleging that he was the victim of ineffective assistance of counsel.<sup>210</sup> Specifically, Williams claimed that his trial counsel failed to investigate and present substantially

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203. *Id.* Specifically, the evidence introduced against Williams included:

[T]he prosecution proved that Williams had been convicted of armed robbery in 1976 and burglary and grand larceny in 1982. The prosecution also introduced the written confessions that Williams had made [regarding the murder] . . . . The prosecution described two auto thefts and two separate violent assaults on elderly victims perpetrated after the Stone murder. On December 4, 1985, Williams had started a fire outside one victim’s residence before attacking and robbing him. On March 5, 1986, Williams had brutally assaulted an elderly woman on West Green Street—an incident he had mentioned in his letter to the police. That confession was particularly damaging because other evidence established that the woman was in a “vegetative state” and not expected to recover. Williams had also been convicted of arson for setting a fire in the jail while awaiting trial in this case.

*Id.* at 368-69 (citations omitted).

204. *Id.* at 368-69.

205. *Id.* at 369. Additionally, Williams’s counsel’s performance during cross-examination of the prosecution’s witnesses included:

Williams’ counsel repeatedly emphasized the fact that Williams had initiated the contact with the police that enabled them to solve the murder and to identify him as the perpetrator of the recent assaults, as well as the car thefts. In closing argument, Williams’ counsel characterized Williams’ confessional statements as “dumb,” but asked the jury to give weight to the fact that he had “turned himself in, not on one crime but on four . . . that the [police otherwise] would not have solved.”

*Id.*

206. *Id.*

207. *Williams*, 529 U.S. at 369 n.2.

208. *Id.* at 370.

209. *Id.*

210. *Id.*

mitigating evidence at the sentencing phase.<sup>211</sup> This evidence included documents detailing Williams's commitment when he was eleven years old "that dramatically described mistreatment, abuse, and neglect during his early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin."<sup>212</sup> In addition, the same experts that testified on the prosecution's behalf stated that Williams would not pose a danger to society if kept in a structured environment.<sup>213</sup>

Based upon this evidence, the same judge who had sentenced Williams to death also found that Williams had been denied the effective assistance of counsel and ordered a new sentencing hearing.<sup>214</sup> The Virginia Supreme Court, however, reversed the trial court, and Williams then sought relief in federal court, which reversed the Virginia Supreme Court and granted Williams's petition.<sup>215</sup> However, the Fourth Circuit later overruled the district court, and the U.S. Supreme Court granted certiorari.<sup>216</sup>

The Supreme Court reversed the Fourth Circuit and, for the first time in sixteen years, found that a defendant had been denied the right to effective assistance of counsel.<sup>217</sup> In so holding, the Court began by explaining that "the merits of [the defendant's] claim are squarely governed by our holding in *Strickland v. Washington*."<sup>218</sup> Accordingly, in stating that *Strickland* constituted "clearly established Federal law,"<sup>219</sup> the Court held that Williams must first demonstrate that his counsel's performance fell below an objective standard of reasonableness and that such performance prejudiced the defense.<sup>220</sup>

In finding that trial counsel's performance was constitutionally ineffective, the Court relied almost exclusively on *Strickland*, and predicated its holding upon counsel's failure to introduce critical mitigating evidence that would likely have influenced the jury's decision at the penalty phase.<sup>221</sup> The Court held:

The record establishes that counsel did not begin to prepare for [the sentencing]

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211. *Id.*

212. *Id.*

213. *Williams*, 529 U.S. at 371.

214. *Id.* at 370-71.

215. *Id.* at 372.

216. *Id.* at 374.

217. *Id.* at 398-99.

218. *Id.* at 390.

219. *Williams*, 529 U.S. at 391.

220. *Id.* at 390-91.

221. *Id.* at 395-99. The Court further stated:

Of course, not all of the additional [mitigating] evidence was favorable to Williams. The juvenile records revealed that he had been thrice committed to the juvenile system—for aiding and abetting larceny when he was 11 years old, for pulling a false alarm when he was 12, and for breaking and entering when he was 15. But as the Federal District Court correctly observed, the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession. Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background.

*Id.* at 396 (citations omitted).

phase of the proceeding until a week before the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams's nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams's parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.<sup>222</sup>

The Court was also critical of Williams's counsel because he "failed to introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond the sixth grade in school."<sup>223</sup> In addition, the Court criticized counsel for failing to introduce evidence detailing "Williams's commendations for helping crack a prison drug ring"<sup>224</sup> or concerning "the testimony of prison officials who described Williams as among the inmates 'least likely to act in a violent, dangerous or provocative way.'"<sup>225</sup> As a result, relying in part upon ABA Standard 4-4.1, the Court concluded that Williams's counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background."<sup>226</sup> Based upon these and other omissions, the Court held that Williams had been denied the effective assistance of counsel in violation of the Sixth Amendment.<sup>227</sup>

Critically, however, nothing in *Williams* indicated that the Court was reluctant to apply *Strickland* or willing to modify its Sixth Amendment jurisprudence. In fact, the opposite is true, as the Court explained that its decision was "squarely governed"<sup>228</sup> by *Strickland*, which it characterized as "clearly established Federal law."<sup>229</sup> Furthermore, although the Court did cite to the ABA Guidelines in parts of its holding, not one sentence in its decision even suggested that the Guidelines were to play a role any more significant than *Strickland* originally contemplated—as

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222. *Id.* at 395 (citations omitted).

223. *Id.* at 396 (citations omitted).

224. *Id.*

225. *Williams*, 529 U.S. at 396 (citations omitted).

226. *Id.* at 396.

227. *Id.* at 399. Specifically, the Court held that Williams was prejudiced by the failure of his attorneys to investigate and present the powerful mitigating evidence concerning his character and background:

We are also persuaded, unlike the Virginia Supreme Court, that counsel's unprofessional service prejudiced Williams within the meaning of *Strickland*. After hearing the additional evidence developed in the postconviction proceedings, the very judge who presided at Williams' trial, and who once determined that the death penalty was "just" and "appropriate," concluded that there existed a "reasonable probability that the result of the sentencing phase would have been different" if the jury had heard that evidence. . . . Judge Ingram did stress the importance of mitigation evidence in making his "outcome determination," but it is clear that his predictive judgment rested on his assessment of the totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing.

*Id.* at 396-97.

228. *Id.* at 390.

229. *Id.* at 391.

guides rather than benchmarks.<sup>230</sup> The core of the *Williams* holding was based not upon the enunciation or implementation of a new standard, but upon the recognition that Williams's lawyer had failed in nearly every respect to present mitigating evidence that likely would have spared his client the penalty of death.

### B. *Wiggins v. Smith*

In *Wiggins*, the defendant was convicted of capital murder by a Maryland judge and sentenced to death by a jury.<sup>231</sup> The defendant's trial counsel moved to bifurcate the sentencing hearing, in which they would first argue that Wiggins was not principally responsible for the victim's death and, if necessary, present a mitigation case.<sup>232</sup> The court subsequently denied this motion, and at the sentencing phase Wiggins's attorneys re-asserted his innocence yet offered no mitigating evidence whatsoever.<sup>233</sup> Indeed, while counsel told the jury in her opening statements that it would hear evidence concerning "Wiggins's difficult life,"<sup>234</sup> such evidence was never introduced. The jury ultimately sentenced Wiggins to death.<sup>235</sup>

Thereafter, Wiggins sought post-conviction relief, arguing that "his trial counsel had rendered ineffective assistance by failing to investigate and present mitigating evidence of his dysfunctional background."<sup>236</sup> Specifically, Wiggins presented evidence by a forensic social worker concerning "the severe physical and sexual abuse he had suffered at the hands of his mother and while under the care of a series of foster parents."<sup>237</sup> Both the trial court and state court of appeals denied Wiggins's motion, but the federal district court granted Wiggins's habeas petition.<sup>238</sup> The Fourth Circuit reversed, finding "trial counsel's strategic decision to focus on Wiggins's direct responsibility to be reasonable."<sup>239</sup>

The Supreme Court reversed the Fourth Circuit and held that Wiggins's

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230. *Strickland*, 466 U.S. at 688.

231. *Wiggins*, 539 U.S. at 515-16.

232. *Id.* at 515.

233. *Id.* at 515-16.

234. *Id.* at 515. Specifically, the record reveals the following regarding trial counsel's conduct at sentencing:

On October 12, the court denied the bifurcation motion, and sentencing proceedings commenced immediately thereafter. In her opening statement, Nethercott [defense counsel] told the jurors they would hear evidence suggesting that someone other than Wiggins actually killed [the victim]. Counsel then explained that the judge would instruct them to weigh Wiggins' clean record as a factor against a death sentence. She concluded: "You're going to hear that Kevin Wiggins has had a difficult life. It has not been easy for him. But he's worked. He's tried to be a productive citizen, and he's reached the age of 27 with no conviction for prior crimes of violence and no convictions, period. . . . I think that's an important thing for you to consider." During the proceedings themselves, however, counsel introduced no evidence of Wiggins' life history.

*Id.* (citations omitted).

235. *Id.* at 516.

236. *Id.*

237. *Wiggins*, 539 U.S. at 516.

238. *Id.* at 517-18.

239. *Id.* at 519.

counsel had been constitutionally ineffective.<sup>240</sup> In so holding, the Court again began its analysis by setting forth the “established . . . legal principles that govern claims of ineffective assistance of counsel,” namely, the two-pronged *Strickland* test.<sup>241</sup> Furthermore, at the outset the Court specifically stated that “[w]e have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that ‘[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’”<sup>242</sup>

The Court’s finding of ineffectiveness was based primarily upon the fact that counsel failed to present critical mitigating evidence that would likely have affected the outcome of the sentencing phase.<sup>243</sup> Put differently, trial counsel’s decision to limit their investigation into various potential sources of mitigating evidence was not objectively reasonable and ultimately prejudiced the defendant.<sup>244</sup> For example, the record demonstrated that counsel’s investigation produced information from three sources.<sup>245</sup> First, a psychologist conducted certain tests on the defendant, Wiggins, which revealed that he had an IQ of seventy-nine and “exhibited features of a personality disorder.”<sup>246</sup> In addition, the pre-sentence investigation report contained Wiggins’s own description of his youth as “disgusting,” while noting that he spent most of his life in foster care.<sup>247</sup> Counsel’s final source of information was certain records kept by the Baltimore City Department of Social Services, which documented Wiggins’s placement in various foster homes throughout his childhood.<sup>248</sup> Ultimately, counsel decided not to expand their investigation beyond this information and focused their efforts during the sentencing phase to re-arguing the issue of Wiggins’s responsibility for the murder.<sup>249</sup>

It was counsel’s failure to probe further into Wiggins’s background that

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240. *Id.* at 534-38.

241. *Id.* at 521.

242. *Id.* (quoting *Strickland*, 466 U.S. at 688).

243. *Wiggins*, 539 U.S. at 534-35.

244. *Id.*

245. *Id.* at 523.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Wiggins*, 539 U.S. at 526. Specifically, the Court found that counsel’s decision to limit their investigation to the pre-sentencing report and records kept by the Department of Social Services was constitutionally defective:

[S]tandard practice in Maryland in capital cases at the time of Wiggins’ trial included the preparation of a social history report. Despite the fact that the Public Defender’s office made funds available for the retention of a forensic social worker, counsel chose not to commission such a report. Counsel’s conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we have long referred as “guides to determining what is reasonable.” The ABA Guidelines provide 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.” Despite these well-defined norms, however, counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources.

*Id.* at 524 (citations omitted).

formed the basis for the Court's finding of ineffective assistance.<sup>250</sup> First, the Court noted that the information that counsel initially discovered in the social service records should have prompted further inquiries rather than halt the investigation altogether.<sup>251</sup> Indeed, the social service records revealed that Wiggins's mother was a chronic alcoholic; that he was transferred to various foster homes throughout his childhood, often experiencing emotional difficulties; that he had frequent absences from school; and that "his mother [often] left him and his siblings alone for days without food."<sup>252</sup>

The Court explained that if counsel had conducted a proper investigation, they would have uncovered the following facts:

Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, abusive mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. [According to the Court] [t]he time Wiggins spent homeless, along with his diminished mental capacities . . . further augment his mitigation case.<sup>253</sup>

Furthermore, the Court noted that it was particularly egregious for trial counsel to instruct the jury during the sentencing phase that it would hear evidence concerning Wiggins's "difficult life,"<sup>254</sup> yet never ultimately present any evidence of this "difficult life."<sup>255</sup>

Importantly, in *Wiggins*, as in *Williams*, the Court made no suggestion, implicitly or explicitly, that it was modifying or otherwise reassessing the viability of *Strickland*. In fact, the opposite is true. Yet again, the Court specifically "declined to articulate specific guidelines for appropriate attorney conduct,"<sup>256</sup> and while it did rely upon the ABA Standards in its opinion, it specifically referred to

250. *Id.* at 524-25.

251. *Id.* at 525.

252. *Id.*

253. *Id.* at 535.

254. *Id.* at 526.

255. *Wiggins*, 539 U.S. at 526. In fact, with respect to this issue, the Court stated:

The record of the actual sentencing proceedings underscores the unreasonableness of counsel's conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment . . . during the sentencing proceeding itself, counsel did not focus exclusively on Wiggins' direct responsibility for the murder. After introducing that issue in her opening statement, Nethercott entreated the jury to consider not just what Wiggins "is found to have done," but also "who [he] is." Though she told the jury it would "hear that Kevin Wiggins has had a difficult life," counsel never followed up on that suggestion with details of Wiggins' history. At the same time, counsel called a criminologist to testify that inmates serving life sentences tend to adjust well and refrain from further violence in prison—testimony with no bearing on whether petitioner committed the murder by his own hand. Far from focusing exclusively on petitioner's direct responsibility, then, counsel put on a half-hearted mitigation case, taking precisely the type of "shotgun" approach the Maryland Court of Appeals concluded counsel sought to avoid. When viewed in this light, the "strategic decision" the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more [of] a *post hoc* rationalization of counsel's conduct rather than an accurate description of their deliberations prior to sentencing.

*Id.* at 526-27 (citations omitted).

256. *Id.* at 521.

them, in the context of *Strickland*, as “standards to which we long have referred as ‘guides to determining what is reasonable.’”<sup>257</sup> The Court was not breaking new ground in *Wiggins*. It was simply recognizing and condemning one egregious case of attorney incompetence.

### C. *Rompilla v. Beard*

In *Rompilla*, the defendant was convicted of murder.<sup>258</sup> During the penalty phase, the prosecutor sought to prove several aggravating factors to justify a death sentence, one of which was that “Rompilla had a significant history of felony convictions indicating the use or threat of violence.”<sup>259</sup> The prosecutor presented evidence on all three of these factors and the jury found all of them proven.<sup>260</sup> In response, Rompilla’s counsel presented a mitigation case that consisted of five family members that argued for “residual doubt”<sup>261</sup> (which appeals to lingering doubts about the defendant’s guilt) and asked the jury for mercy, “saying [that] they believed Rompilla was innocent and a good man.”<sup>262</sup> Ultimately, the jury sentenced Rompilla to death.<sup>263</sup>

Subsequently, Rompilla sought post-conviction relief in which he alleged that his counsel’s performance was ineffective “in failing to present significant mitigating evidence about Rompilla’s childhood, mental capacities and health, and alcoholism.”<sup>264</sup> The state court, as well as the Supreme Court of Pennsylvania, denied Rompilla’s request.<sup>265</sup> However, the federal district court granted Rompilla’s claim, holding that his counsel had been ineffective in failing to investigate “‘pretty obvious signs’ that Rompilla had a troubled childhood and suffered from mental illness and alcoholism.”<sup>266</sup> On appeal, the Third Circuit reversed, finding that counsel’s investigation into mitigating evidence, which consisted of interviewing Rompilla and certain family members, as well as consultations with three mental health experts, was constitutionally sufficient.<sup>267</sup>

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257. *Id.* at 524.

258. *Rompilla*, 545 U.S. at 377-78.

259. *Id.* at 378. The other two aggravating factors were that: (1) the murder was committed in the course of another felony; and (2) the murder was committed by torture. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* Specifically, “Rompilla’s 14-year-old son testified that he loved his father and would visit him in prison.” *Id.* While the jury found “in mitigation, that Rompilla’s son had testified on his behalf and that rehabilitation was possible,” they “assigned the greater weight to the aggravating factors” and thus sentenced Rompilla to death. *Id.*

263. *Id.*

264. *Rompilla*, 545 U.S. at 378.

265. *Id.*

266. *Id.* at 379.

267. *Id.* The Supreme Court summarized the Third Circuit’s reasoning:

The majority found nothing unreasonable in the state court’s application of *Strickland*, given defense counsel’s efforts to uncover mitigation material, which included interviewing Rompilla and certain family members, as well as consultation with three mental health experts. Although the majority noted that the lawyers did not unearth the “useful information” to be found in Rompilla’s “school, medical, police and prison records,” it thought the lawyers were justified in failing to hunt through these records when their other efforts gave [them] no reason to believe the search would yield

The Supreme Court reversed, holding that Rompilla was denied the effective assistance of counsel.<sup>268</sup> The Court commenced its analysis by re-asserting *Strickland*'s governing legal principles, and noting that "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving a 'heavy measure of deference to counsel's judgments.'"<sup>269</sup> The Court first observed that trial counsel's only sources of mitigation were Rompilla himself, five members of his family, and three mental health witnesses who examined Rompilla prior to the sentencing phase.<sup>270</sup> Thereafter, the Court delineated several additional avenues that Rompilla's counsel could have pursued to "cast light" on his mental condition or otherwise discover additional mitigating evidence.<sup>271</sup> For example, the Court noted that counsel could have searched school records and information regarding juvenile and adult incarcerations.<sup>272</sup> Importantly, however, the Court followed *Strickland*'s mandate that the failure to pursue these lines of inquiry was not tantamount to ineffective assistance because trial counsel was not required to "scour the globe on the off chance something will turn up."<sup>273</sup>

Critically, however, the Court found that counsel's performance was constitutionally infirm because Rompilla's lawyers failed to examine the file containing the prior convictions upon which the prosecution relied in proving one of its aggravating factors.<sup>274</sup> The Court cited various reasons in support of its finding, first that "[c]ounsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law."<sup>275</sup> Counsel also knew that the prosecution would specify his "prior conviction for rape and assault, and would emphasize his violent character by introducing a transcript of the rape victim's testimony given in [his] earlier trial."<sup>276</sup> The Court, therefore, found it unreasonable for counsel to not even examine the information that the prosecution planned to present in support of its argument in favor of the death

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anything helpful. The panel thus distinguished Rompilla's case from *Wiggins v. Smith*. Whereas Wiggins's counsel failed to investigate adequately, to the point even of ignoring the leads their limited enquiry yielded, the Court of Appeals saw the Rompilla investigation as going far enough to leave counsel with reason for thinking further efforts would not be a wise use of the limited resources they had.

*Id.* (citations omitted).

268. *Id.* at 380.

269. *Id.* at 381 (citations omitted).

270. *Rompilla*, 545 U.S. at 381-82.

271. *Id.* at 382.

272. *Id.* The Court also stated:

And while counsel knew from police reports provided in pretrial discovery that Rompilla had been drinking heavily at the time of his offense . . . and although one of the mental health experts reported that Rompilla's troubles with alcohol merited further investigation, counsel did not look for evidence of a history of dependence on alcohol that might have extenuating significance.

*Id.*

273. *Id.* at 383. With respect to these issues, the Court explained that "reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Id.*

274. *Id.*

275. *Id.*

276. *Rompilla*, 545 U.S. at 383.

penalty.<sup>277</sup> As the Court stated:

[I]t is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. The prosecution was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay, and to anticipate the details of the aggravating evidence the Commonwealth would emphasize. Without making reasonable efforts to review the file, defense counsel could have had no hope of knowing whether the prosecution was quoting selectively from the transcript, or whether there were circumstances extenuating the behavior described by the victim.<sup>278</sup>

Moreover, as the Court recognized, "[t]he obligation to get the file was particularly pressing here owing to the similarity of the violent prior offense to the crime charged and Rompilla's sentencing strategy stressing residual doubt."<sup>279</sup> Indeed, "[w]ithout making efforts to learn the details and rebut the relevance of the earlier crime, a convincing argument for residual doubt was certainly beyond any hope."<sup>280</sup>

In addition, the Court found trial counsel's performance to be prejudicial because, had the prior conviction file been consulted, then valuable mitigation evidence could have been uncovered that could have been presented at the penalty phase.<sup>281</sup> As the Court stated, "[I]f the defense lawyers had looked in the file on Rompilla's prior conviction, it is uncontested they would have found a range of mitigation leads that no other source had opened up."<sup>282</sup> For example, the files contained records of "Rompilla's prior imprisonment," and "pictured Rompilla's childhood and mental health very differently from anything defense counsel had seen or heard."<sup>283</sup> A file also contained an evaluation by a corrections officer that

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277. *Id.* at 385-86.

278. *Id.*

279. *Id.* at 386.

280. *Id.* The Court also stated:

Nor is there any merit to the United States' contention that further enquiry into the prior conviction file would have been fruitless because the sole reason the transcript was being introduced was to establish the aggravator that Rompilla had committed prior violent felonies. The Government maintains that because the transcript would incontrovertibly establish the fact that Rompilla had committed a violent felony, the defense could not have expected to rebut that aggravator through further investigation of the file. That analysis ignores the fact that the sentencing jury was required to weigh aggravating factors against mitigating factors. We may reasonably assume that the jury could give more relative weight to a prior violent felony aggravator where defense counsel missed an opportunity to argue that [the] circumstances of the prior conviction were less damning than the prosecution's characterization of the conviction would suggest.

*Id.* at 386 n.4 (citations omitted).

281. *Id.*

282. *Rompilla*, 545 U.S. at 390.

283. *Id.*

Rompilla was “reared in the slum environment of Allentown, Pa. . . . quit school at 16,” and had a series of incarcerations “related to over-indulgence in alcoholic beverages.”<sup>284</sup> In addition, the prior conviction file revealed “test results that the defense’s mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling.”<sup>285</sup>

Indeed, “[t]he accumulated entries [in the prior conviction file] would have destroyed the benign conception of Rompilla’s upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members.”<sup>286</sup> The entries likely would have led to further investigative efforts, which would have uncovered that Rompilla’s “parents were both severe alcoholics who drank constantly.”<sup>287</sup> Furthermore, Rompilla “was abused by his father, who beat him when he was young with his hands, fists, leather straps, belts and sticks.”<sup>288</sup> Rompilla also suffered from “organic brain damage, an extreme mental disturbance significantly impairing several of his cognitive functions.”<sup>289</sup> Ultimately, therefore, had counsel conducted his investigative efforts in an objectively reasonable manner, the evidence would have amounted to “a mitigation case that bears no relation to the few naked pleas for mercy actually put before the jury . . . .”<sup>290</sup> Based upon the totality of all these factors, the Court held that Rompilla had been denied the right to effective assistance of counsel.<sup>291</sup>

Consequently, *Williams*, *Wiggins*, and *Rompilla* are less about the Court

284. *Id.* at 390-91.

285. *Id.* at 391.

286. *Id.* The Court further explained:

With this information, counsel would have become skeptical of the impression given by the five family members and would unquestionably have gone further to build a mitigation case. Further effort would presumably have unearthed much of the material postconviction counsel found, including testimony from several members of Rompilla’s family.

*Id.*

In addition, as specifically summarized, by a dissenting judge on the Third Circuit:

Rompilla’s parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla’s mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

*Id.* at 391-92 (quoting *Rompilla v. Horn*, 355 F.3d 233, 279 (Sloviter, C. J., dissenting) (citation omitted)).

287. *Id.* at 391.

288. *Rompilla*, 545 U.S. at 392 (quoting *Rompilla*, 355 F.3d at 279).

289. *Id.*

290. *Id.* at 393.

291. *Id.*

doctrinally altering its approach and more about its recognition of instances of truly substandard representation where the defendant's life was at stake. Nowhere in these opinions did the Court intimate that *Strickland* was no longer the governing law with respect to its analysis concerning ineffective assistance claims. In fact, in each of these cases, the Court began its opinion by re-stating the two-pronged test that defendants must satisfy in order to succeed in demonstrating a Sixth Amendment violation. Furthermore, although the Court did rely to varying degrees upon the ABA's Guidelines, it was careful to note that these were only *guides* to its analysis, not mandatory rules or benchmarks against which counsel's performance would be scrutinized. In fact, in *Wiggins*, the Court specifically rejected the use of specific guidelines, holding that "[w]e have declined to articulate specific guidelines for appropriate attorney conduct and instead have emphasized that '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'"<sup>292</sup>

Thus, the Court's decisions in *Williams*, *Wiggins*, and *Rompilla* do not reflect a fundamental "jurisprudential shift"<sup>293</sup> in the Court's ineffective assistance analysis, but instead represent a reaction to truly sub-standard lawyering that prejudiced the defendants in each case. Put another way, these cases are notable more for the facts upon which they are based rather than any fundamental change in the governing legal principles that are applied. *Strickland* remains good law, and defendants continue to face an uphill battle in proving that trial counsel's performance constituted ineffective assistance of counsel.

In fact, recent statistics underscore that *Williams*, *Wiggins*, and *Rompilla* have had, if anything, only a modest impact upon the success of ineffective assistance claims brought in state and federal courts.<sup>294</sup> For example, as stated above, from 1994 through 2000, only thirty-four ineffective assistance claims brought by capital defendants at the state level were successful.<sup>295</sup> In the six years following *Williams*, and during the period in which *Wiggins* and *Rompilla* were decided, this number increased to only forty-seven, as capital defendants continued to face courts that were hostile to their ineffective assistance claims.<sup>296</sup> Furthermore, at the federal level, from 1994 through 2000, only thirty-two ineffective assistance claims brought by capital defendants were successful.<sup>297</sup> During the six years following *Williams*, and during the time that *Wiggins* and *Rompilla* were decided, courts remained reluctant to grant relief to defendants claiming ineffective assistance, as only forty-seven claims navigated safely through *Strickland*'s two-pronged standard.<sup>298</sup> This can no more be characterized as a "jurisprudential shift"<sup>299</sup> than can the Court's decisions be summarized as a shift toward the guidelines approach

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292. *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688).

293. *But see* Blume & Neumann, *supra* note 10, at 147 ("The jurisprudential shift is now evident and established.").

294. *Id.* at 156-57.

295. *Id.* at 156.

296. *Id.*

297. *Id.*

298. *Id.* at 156-57.

299. Blume & Neumann, *supra* note 10, at 147.

“once hailed by Judge Bazelon.”<sup>300</sup>

The truth is that such claims of a perceived shift are overstated. In fact, Professor Neumann acknowledges that “a number of courts still remain hostile to ineffective assistance of counsel claims and are still willing to put a stamp of approval on appallingly inadequate representation.”<sup>301</sup> For example, as Professor Neumann notes, since *Williams*, the Texas Court of Criminal Appeals has found ineffective assistance in only one case.<sup>302</sup> As Professor Neumann notes, “Some of the cases affirmed by that court involved truly abysmal representation.”<sup>303</sup> Indeed, the Court denied an ineffective assistance claim where defense counsel failed to present evidence “that the defendant . . . had ingested large amounts of a strong psychoactive drug known to increase aggressive tendencies . . . along with other narcotics and alcohol . . . at the time of the offense.”<sup>304</sup> In addition, defense counsel failed to present mitigation evidence “regarding the severe physical, emotional, and sexual abuse the defendant endured as a child . . . at the hands of his grandparents . . . and the sexual abuse his mother inflicted upon him.”<sup>305</sup> Despite this evidence, the Texas Court of Criminal Appeals, after *Williams*, *Wiggins*, and *Rompilla* had been decided, denied this defendant’s ineffective assistance claim.<sup>306</sup>

Professor Neumann also recognizes that the Fifth Circuit continues to routinely reject claims of ineffective assistance “in spite of strong evidence of attorney incompetence.”<sup>307</sup> For example, Professor Neumann cites one case where a defendant’s trial counsel failed to present any mitigating evidence whatsoever, despite evidence that the defendant “suffered from a chronic brain injury stemming from an accident during his childhood”<sup>308</sup> and “subsequent impaired intellectual functioning.”<sup>309</sup> In addition, counsel failed to present “testimony from his mother, half-sister, aunt, and cousin regarding their love for defendant,”<sup>310</sup> and the fact that “he was young and intoxicated when he committed the murder and was extremely remorseful.”<sup>311</sup> Despite counsel’s failure to present any mitigating evidence, the court denied the defendant’s ineffective assistance claim, holding that such tactics constituted reasonable “strategic” decisions under *Strickland*.<sup>312</sup>

Professor Neumann contends, however, “[t]he worst offender . . . is the Fourth Circuit.”<sup>313</sup> Specifically, “[i]t has repudiated every single ineffective assistance of counsel claim raised by a death-sentenced inmate after *Williams*.”<sup>314</sup> Amazingly, in one case the court denied an ineffective assistance claim “despite the court’s

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300. *Id.* at 152.

301. *Id.* at 160.

302. *Id.*

303. *Id.*

304. *Id.*

305. Blume & Neumann, *supra* note 10, at 160.

306. *See id.* (citing *Ex parte Martinez*, 195 S.W.3d 713 (Tex. Crim. App. 2006)).

307. *Id.* at 161.

308. *Id.*

309. *Id.*

310. *Id.*

311. Blume & Neumann, *supra* note 10, at 161.

312. *Id.* at 161-62.

313. *Id.* at 162.

314. *Id.*

acknowledgement that the bulk of counsel's work in preparation for mitigation occurred during the week that he was also participating in the guilt phase of the trial and handling his partnership's IRS difficulties, and that counsel's 'efforts were certainly less than optimal.'"<sup>315</sup> In fact, counsel had "attempted to withdraw . . . 'when it became clear that his partnership's financial difficulties would unacceptably interfere with his representation, but the state court denied his motion.'"<sup>316</sup>

In further underscoring the limits of *Williams*, *Wiggins*, and *Rompilla*, Professor Neumann acknowledges that the Supreme Court's nod to the ABA Standards "is only relevant to the performance component of ineffective assistance of counsel claims."<sup>317</sup> As Professor Neumann observes, "*Strickland*'s prejudice prong, which requires the defendant to prove by a preponderance of the evidence that there is a reasonable probability that the outcome would have been different, is also badly in need of modification."<sup>318</sup> Indeed, as Professor Neumann notes, until further reforms are implemented, "ineffective assistance of counsel claims will still be difficult to win."<sup>319</sup>

Consequently, courts at both the state and federal level continue to allow an appallingly substandard level of representation to persist without remedy. Although *Williams*, *Wiggins*, and *Rompilla* are commendable for addressing situations of blatantly incompetent representation, they do not represent a jurisprudential shift in the Court's approach to ineffective assistance adjudication. Instead, much of what has happened post-*Rompilla* resembles what has happened post-*Strickland*: Trial counsel are failing to present substantial and credible mitigating evidence, often pertaining to social histories revealing a defendant's severe physical, emotional, and sexual abuse, as well as legitimate medical histories detailing organic brain damage, psychiatric illnesses, and personality disorders. Despite these glaring failures, state and federal courts continue to reject defendants' claims of ineffective assistance, labeling such calculations as permissible strategic decisions, or, even if objectively unreasonable, insufficient to affect the outcome under *Strickland*'s prejudice prong. The effect of these rulings is a capital sentencing system that continues to tolerate incompetent performance by counsel. *Williams*, *Wiggins*, and *Rompilla* did not effectuate systemic change. They merely signaled that the Court was not going to tolerate obvious examples where attorneys had failed their clients in life-and-death situations.

Systemic change, however, is exactly what is needed if the concept of "effective" assistance is to become a reality for all criminal defendants, particularly those against whom the death penalty is sought. As set forth below, this Article proposes systemic change on the following four fronts, aimed directly at improving the quality of legal representation: (1) the establishment of a Death Penalty Representation Commission in each state, responsible for the promulgation of specific and detailed guidelines that will direct trial counsel's performance at the sentencing phase of a capital case; (2) the contemplation of a more active trial

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315. *Id.* (quoting *Buckner v. Polk*, 453 F.3d 195, 202 (4th Cir. 2006)).

316. *Id.* (quoting *Buckner*, 453 F.3d at 202 n.5).

317. Blume & Neumann, *supra* note 10, at 164.

318. *Id.*

319. *Id.*

court, which will be responsible, in various ways and through several means, for ensuring adherence to the guidelines and representation that complies with reasonable standards of professional competence; (3) substantive and meaningful appellate review; and (4) elimination of *Strickland*'s prejudice requirement, while retaining the "objectively reasonable" prong, with burden-shifting provisions implemented depending upon defense counsel's compliance with the relevant guidelines.

This will ensure that the "objectively reasonable" analysis is applied in an equitable manner, to reflect counsel's actual performance at trial, demonstrated by his compliance with specific guidelines that enumerate particular duties pertaining to the investigation and presentation of mitigating evidence. Critically, the following section will focus solely on the sentencing phase because, as discussed above, counsel's failure to investigate and present mitigating evidence is the most common ground upon which ineffective assistance of counsel claims are based.

#### IV. SYSTEMIC CHANGE TO ADJUDICATING INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS: A NEW "GUIDELINE" APPROACH THAT IS CONNECTED TO A PRESUMPTION-BASED "REASONABLENESS" ANALYSIS

This Article focuses upon the sentencing phase of capital trials because "many capital defendants get no meaningful support at the sentencing phase. . . . [F]or this reason, claims of ineffectiveness at the penalty phase are among the most common issues raised in habeas corpus petitions by inmates on death row."<sup>320</sup>

As a threshold matter, the systemic change proposed here involves the following: (1) the formation of a Death Penalty Representation Commission in each state that is responsible for researching, drafting, and developing specific guidelines pertaining to the representation of defendants at the sentencing phase of capital trials; (2) the compilation of detailed guidelines concerning trial counsel's performance at the sentencing phase, particularly as it relates to the investigation and presentation of mitigating evidence; (3) the emphasis upon an active trial court, which is responsible both for ensuring compliance with the guidelines and ordering corrective measures where potential instances of incompetent representation are identified; and (4) an elimination of *Strickland*'s prejudice requirement on appellate review, in favor of a burden-shifting "reasonableness" analysis that is based upon counsel's compliance with these standards and overall performance at the underlying trial.

The necessity for such guidelines is motivated by three primary factors. First, at the sentencing phase in a capital trial, the defendant's life is at stake, and thus the necessity to present skillfully all relevant evidence relating to the defendant's background and character could not be more pressing. Indeed, "[a]t the penalty phase of a capital case, the central issue . . . is the highly-charged moral and emotional issue of whether the defendant . . . is a person who should continue to live."<sup>321</sup> Thus, at this stage, "it is imperative that all relevant mitigating information

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320. Cooley, *supra* note 9, at 24 (quoting Mickenberg, *supra* note 37, at 59).

321. *Id.* at 42 (quoting Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 334-35 (1983)).

be unearthed for consideration at the capital sentencing phase.”<sup>322</sup> “Relevant mitigating information” is that which “casts [defendants] in a more sympathetic light.”<sup>323</sup>

Second, as a practical matter, although many commentators have advocated for modifications to the manner in which attorneys are appointed to represent capital defendants, the truth remains that “approximately ninety percent of capital defendants are indigent”<sup>324</sup> and thus receive the services of each state’s public defender system. Of course, while “some indigent defendants are appointed quite competent counsel,”<sup>325</sup> in states “that do not adequately fund or train public defenders, [t]oo often, assistance of counsel for the poor can be like getting brain surgery from a podiatrist.”<sup>326</sup> As a result, “[w]ithout proper representation, the current standards adopted by the Supreme Court [in *Strickland*] allow indigent defendants . . . to be killed by the state with minimal protection.”<sup>327</sup> For this reason, the establishment of guidelines can, at the very least, contribute to improving the quality of legal representation for those defendants who rely upon attorneys provided by the states.

Finally, and perhaps most importantly, the presentation of mitigating evidence at the penalty phase is a highly complex endeavor that requires the skill and participation of professionals from a variety of fields and with varying expertise.<sup>328</sup> Indeed, because a jury is constitutionally permitted to consider “all relevant mitigating evidence”<sup>329</sup> when rendering a life decision, mitigating factors include matters such as “family history; youthfulness; underdeveloped intellect and maturity; favorable prospects for rehabilitation; poverty; military service; cooperation with authorities; character; prior criminal history; mental capacity; [and] age.”<sup>330</sup> In this way, “[t]he Court’s limitless rule with respect to mitigation

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322. *Id.* at 24 (quoting *Wallace v. Stewart*, 184 F.3d 1112, 1117 (9th Cir. 1999) (citation omitted)). Cooley explains the reason for this:

All capital defendants face an uphill battle as they enter the guilt-innocence phase. The American public has been continually inundated with deceptive stereotypes and incomplete facts which purposely misrepresent the painful truths that afflict the lives of capital defendants. The hill becomes even steeper once capital defendants are found guilty of a monstrous crime. Once branded as a capital murderer, our capital sentencing system leads us to perceive “capital defendants as genetic misfits, as unfeeling psychopaths who kill for the sheer pleasure of it, or as dark, anonymous figures who are something less than human.” Ultimately, media misperceptions and political falsehoods regarding the character and propensity of violent criminals guarantee that most prospective jurors will have no realistic or legitimate notions of mitigation. To counteract these biases and partial truths, defense counsel needs to exploit the most significant aspect of the Supreme Court’s mitigation jurisprudence.

*Id.* at 49.

323. *Id.* at 23 (quoting Charles Lane, *Death Penalty of Md. Man Is Overturned*, WASH. POST, June 27, 2003, at A01).

324. Levinson, *supra* note 33, at 149.

325. *Id.*

326. *Id.* (quoting DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 76-77 (1999)).

327. *Id.* at 150.

328. Cooley, *supra* note 9, at 60-62.

329. *Blystone v. Pennsylvania*, 494 U.S. 299, 305 (1990).

330. Cooley, *supra* note 9, at 48 (citations omitted).

evidence enables defense counsel to construct a comprehensive, illustrative, and life-saving social history of capital defendants.”<sup>331</sup> This social history “cannot be stressed enough”<sup>332</sup> because “[w]hen determining whether to sentence an individual to death, jurors often yearn for meaningful explanations of why the capital violence resulted in the first place.”<sup>333</sup>

Critically, however, while “[t]he importance of social histories is obvious,”<sup>334</sup> identifying the “most relevant aspects of the defendant’s life and the onset age of such an investigation are not as evident.”<sup>335</sup> Indeed, after a discussion of the “necessary elements that counsel must consider when developing a mitigation strategy . . . defense counsel, psychologists, and psychiatrists . . . realize the enormity of mitigation investigations.”<sup>336</sup> Thus, for these three reasons—the stakes, likely inexperience of defense counsel, and complexity of mitigation evidence—the development of specific guidelines during the penalty phase could not be more vital.

#### *A. The Establishment of a Death Penalty Representation Commission*

At the outset, the success of any guidelines-driven system depends upon the quality of its drafters. As a result, this Article proposes that each state should develop a Death Penalty Representation Commission (“Commission”), comprised of attorneys, judges, scholars, and commentators with intimate familiarity of the processes relating to death penalty representation in the state within which such guidelines will be promulgated. Importantly, before enunciating specific guidelines, the Commission should conduct in-depth research with the purpose of identifying each capital case, over the previous ten-year period, that was prosecuted in that particular state. In so doing, the Commission should analyze in detail the specific arguments made by both the prosecution and the defense during the penalty phase, with particular emphasis upon the evidence that the defense adduced to mitigate the defendant’s culpability. The Commission should study both the type of evidence that was produced, along with the manner in which it was introduced. In addition, the Commission should identify the frequency with which experts were used, including psychologists, social workers, and psychiatrists, along with other evidence that tended to be offered in an attempt to spare the defendant’s life.

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331. *Id.* at 49-50.

332. *Id.* at 50.

333. *Id.* Cooley further explains:

First, because capital trials are structured to dehumanize capital defendants, evidence must be gathered that depicts the defendant as a human being with civilizing attributes. Second, evidence needs to be offered that makes the capital violence as humanly understandable as possible. Third, evidence tending to illustrate the high likelihood that the defendant will be productive within a correctional setting is critical. Fourth, evidence that can successfully refute the State’s aggravating evidence must also be presented. Fifth, any evidence of mitigating circumstances surrounding the capital crime itself needs to be incorporated into the penalty phase.

*Id.* at 52.

334. *Id.* at 51.

335. *Id.*

336. Cooley, *supra* note 9, at 51.

The Commission should also assess the frequency with which family histories, medical histories, educational histories, and other relevant data were used, and detail the emphasis that defense attorneys customarily place upon each piece of mitigating evidence. The Commission should also study the many cases in which defense counsel elected not to pursue a mitigation strategy and examine the reasons underlying such decisions as set forth in the record. From this data, the Commission should look at each jury's verdict in every case, and, using this information, the Commission should seek to discern a pattern or patterns that indicate the types and kind of mitigation evidence that was most effective and influential. From this research the Commission will be able to develop two sets of information. First, it will be able to "rank" or identify for attorneys litigating capital cases the specific mitigating evidence most commonly used by defense attorneys at the sentencing phase. Second, the Commission will be able to set forth in the same manner the type of evidence that has been found to be most influential or favorable to the defendant. While this will serve as a preliminary guide for trial counsel, the most important role of this research is that it will allow the Commission to promulgate informed, detailed, and purpose-driven guidelines.

### *1. The Commission's Specific Guidelines*

The Commission's guidelines should be specific and endeavor to assist counsel in both investigating and preparing the most effective mitigation defense possible. In other words, the guidelines should serve to assist counsel in identifying the sources of potentially mitigating evidence, the specific experts—social workers and psychologists—who can assist counsel in organizing, presenting, and testifying concerning such evidence, and the best methods by which to present such evidence to a jury. The guidelines should therefore operate to assist the attorney in putting forth the most persuasive mitigation defense possible, consistent with trial counsel's role to present his client in the most sympathetic—and truthful—light possible to the sentencing jury.

Having said that, the guidelines should be drafted in a check-list format that specifically identifies each aspect of the defendant's background that the attorney is required to investigate and, correspondingly, all experts with whom the attorney is required to consult. Against this conceptual backdrop, each Death Penalty Representation Commission will be responsible for drafting detailed guidelines that focus upon counsel's duty to investigate and present a compelling social history in mitigation of their client's culpability. The following represents a substantial portion of the specific points that the guidelines should encompass in their initial renditions.

#### *a. Medical History*

Counsel for every capital defendant should be required to investigate his client's medical history. Indeed, "[t]he defendant's medical history is crucial because most jurors find medical reasons for capital violence easier to accept and understand than many other forms of mitigating evidence."<sup>337</sup> As one Commentator

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337. *Id.* at 53.

notes:

Counsel should determine whether the defendant suffers from any neurological defects or whether the defendant experienced birth complications. Then, counsel should determine whether the defendant has ever been exposed to toxins or whether the defendant suffers from chronic illnesses. Finally, counsel should determine whether the defendant was genetically endowed with a violent-prone personality, whether the defendant has been diagnosed with brain impairments, whether the defendant suffered from fetal alcohol syndrome, or whether the defendant is mentally retarded. Due to the Supreme Court's recent holdings in *Atkins v. Virginia* and *Roper v. Simmons*, mental retardation and youthfulness (offenders under the age of eighteen) are categorical bars to the death penalty.<sup>338</sup>

As a result, an investigation in the defendant's medical history will be an important aspect of any guideline system, due to its potential to produce highly relevant mitigating evidence.

#### *b. Psychiatric Disabilities*

Critically, given "the high population of mentally impaired individuals on death row, it is imperative that defense counsel explore whether defendants have psychiatric disabilities."<sup>339</sup> As one Commentator notes, to "competently investigate, accumulate, and present psychiatric evidence, defense counsel must (1) appreciate the myriad of mental health issues relevant to criminal cases, (2) be familiar with the various symptoms that defendants may exhibit, and (3) be aware of the different diagnostic processes of psychologists and psychiatrists."<sup>340</sup> Likewise, "[s]pecialized attention must be channeled to ascertain whether the defendant suffers from severe depression, postpartum depression, sleep disorders, or a chemical dependency."<sup>341</sup>

Additionally, trial counsel should "determine whether the defendant's intellectual functioning is impaired, whether the defendant suffers from epilepsy, and whether the defendant was physically or sexually abused as a child."<sup>342</sup> With respect to the issue of abuse, whether physical or sexual, "the jury must be provided with concrete illustrations of the abuse so that it may understand its general and long-term effects."<sup>343</sup> Lastly, efforts should be made to "determine whether the defendant has ever attempted suicide, or . . . exhibit[ed] psychopathic or anti-social personality traits."<sup>344</sup>

Importantly, to obtain this information, defense counsel must investigate a variety of sources. Such sources include the "defendant's family members; the defendant's former schools (i.e., elementary, middle, high school, trade schools, and colleges); the defendant's military institution(s), juvenile court and prison

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338. *Id.* at 53-54.

339. *Id.* at 54.

340. *Id.*

341. *Id.*

342. Cooley, *supra* note 9, at 54-55.

343. *Id.* at 55-56.

344. *Id.* at 55.

records; and the defendant's medical and psychiatric records."<sup>345</sup>

*c. Drug and Alcohol Addiction*

Not surprisingly, "the defendant's drug and alcohol history must be thoroughly assessed."<sup>346</sup> Trial counsel must also investigate whether the defendant was under the influence of alcohol or drugs at the time of the offense.<sup>347</sup> In doing so, trial counsel should: (1) consult with individuals who were with the defendant on the day that the alleged crime occurred; (2) analyze the crime scene evidence; (3) "review the post-arrest medical records; and (4) 'talk to as many eyewitnesses as possible.'"<sup>348</sup> If evidence of an addiction is discovered, "defense counsel must then consult with medical [and] psychiatric experts to determine how the addiction [or] intoxication may have affected the defendant's behavior on the day the capital violence was perpetrated."<sup>349</sup>

*d. Comprehensive Family Investigation*

Importantly, a "comprehensive family investigation must be conducted to garner a more holistic understanding of how the defendant's family dynamics may have contributed to the capital violence."<sup>350</sup> Specifically, defense counsel should investigate "whether there was material discord between the defendant's parents; whether the parents were substance abusers; 'the relationship of the parents to the defendant and other siblings'; whether any family members have a criminal history; and whether there has been a history of mental illness in the family."<sup>351</sup> In addition—and closely related to family history—counsel should investigate the

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345. *Id.*

346. *Id.* at 56.

347. *Id.*

348. Cooley, *supra* note 9, at 56.

349. *Id.*

350. *Id.* As Cooley explains:

Embarking on a family investigation is similar to "constructing a series of concentric circles." The innermost circle starts with the defendant and expands to his or her immediate family. Cessie Alfonso, an experienced mitigation specialist, has argued that to fully appreciate the complexities of this inner most circle, a "generational analysis" must be performed. To carry out a generational analysis, it is essential "to gain the family's trust." Doing so will likely require defense counsel to meet with the defendant and his or her family members on several occasions. Thus, developing this rapport and trust takes a considerable amount of time and energy. Moreover, family members may oppose any attempts to uncover certain family secrets even if the information may prove beneficial to the defendant's mitigation case. After methodically investigating the defendant's immediate family, defense counsel must then interview "the spreading circles of people and institutions that the defendant had contact with during the course of his life." As a result, interviews with "friends, neighbors, schoolteachers, clergy, coaches, employers, co-workers, physicians or therapists" are essential. These individuals can offer personal details that immediate relatives may not be willing to disclose. Furthermore, this "investigation must include acquaintances who do not have such a stake in the trial so as to get accurate information untainted by the desire of the family and others to hide their dirty laundry."

*Id.* at 57-59 (citations omitted).

351. *Id.* at 57 (citations omitted).

defendant's educational history, including schools attended, grades achieved, attendance records, specific instructors, the occurrence of any psychological evaluations, and scholastic awards.<sup>352</sup> Finally, in compiling the defendant's social history, "defense counsel must then interview 'the spreading circles of people and institutions that the defendant had contact with during the course of his life.'"<sup>353</sup> This will normally include "friends, neighbors, schoolteachers, clergy, coaches, employers, co-workers, physicians or therapists."<sup>354</sup>

Thus, as the above information demonstrates, the areas of investigation and discovery of potentially mitigating evidence are substantial. Perhaps most critically, however, "[b]ecause capital sentencing requires an all-encompassing inquiry into the defendant's mental health and social life, counsel must ultimately turn to the mental health and social work professions for assistance."<sup>355</sup> In fact, "[t]hese professions have the necessary experts who can guide attorneys in researching and developing relevant mitigating evidence."<sup>356</sup> Commonly referred to as "mitigation specialists," mental health and social work experts are indispensable in compiling a persuasive social history for the defendant, and thus should be an integral part of every state's guideline paradigm.

## 2. Mitigation Specialists

Significantly, while trial counsel may be able to identify all of the necessary areas within which mitigating information may be located, counsel often lacks the knowledge or resources to locate such substantial amounts of information. As a result, "[m]itigation specialists . . . possess the training, experience, and wherewithal to bring together the massive amounts of information needed to develop a life-saving mitigation strategy."<sup>357</sup>

By definition, mitigation specialists are those "qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority . . . that a death sentence is an inappropriate punishment."<sup>358</sup> Mitigation specialists often have degrees in social work, which enables them "to not only hunt down the necessary documentation, but also to offer holistic perspectives that can effectively and sympathetically explain why the capital violence occurred in the first place."<sup>359</sup> Ultimately, the role of the mitigation

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352. *Id.*

353. *Id.* at 58 (citations omitted).

354. Cooley, *supra* note 9, at 58.

355. *Id.* at 59.

356. *Id.*

357. *Id.*

358. *Id.* (quoting Jonathan P. Tomes, *Damned If You Do, Damned If You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 367-68 (1997)).

359. *Id.* at 61. Importantly, Cooley explains why psychologists and psychiatrists are not well-suited to conduct mitigation investigations:

Psychologists and psychiatrists are highly educated professionals. Nevertheless, their training and education, though impressive, does not enable them to perform the mitigation specialist's "intimidating and time consuming task[s]." When psychiatrists or psychologists conduct capital evaluations, success often depends on the amount of freedom afforded to them to carry out their detailed and time-consuming diagnostic

specialist is as follows:

[T]o provide the attorney with an all inclusive social history of the client, which includes identifying significant, positive and negative, traumatic life events . . . includ[ing] information on the parental figures in the client's life . . . [and] the social factors that made the client different from siblings and other[s] who may have been subjected to the same environment. . . . Another essential role of the mitigation specialist is to assist attorneys in communicating more efficiently with the defendant, his or her family members, and other significant mitigation witnesses. Similarly, if not more importantly, mitigation specialists are responsible for acting as liaisons between other mental health experts (i.e. psychologists [and] psychiatrists) and defense counsel.<sup>360</sup>

In this way, “[w]hen [properly] utilized, mitigation experts can aid both counsel and other mental health experts.”<sup>361</sup>

Perhaps most importantly, however, is the assistance that mitigation specialists provide to defense counsel in the investigatory or fact-finding process. Without mitigation specialists, defense counsel simply could not—and would not—be able to compile the type of social history that would adequately capture the relevant aspects of the defendant's character, background, and personality.<sup>362</sup> For example, in compiling a life-saving social history, mitigation specialists routinely investigate the following avenues:

- Maternity and birth records (seeking information relating to fetal alcohol syndrome, head trauma at birth, or prenatal drug addiction);
- School records (seeking early psychological or psychiatric evaluations);
- Other agency records (i.e., foster care systems or public health agencies);
- Military records (revealing information such as education, psychological evaluations, disciplinary actions, work assignments and addiction problems);
- Family medical records (revealing medical and psychiatric disorders and possibly physical or sexual abuse);
- Criminal and prison records (a clean criminal record may be a mitigating factor, while post-incarceration behavior is admissible at sentencing, and thus must be known to defense counsel);
- Employment history (revealing work-related injuries, work assignments, duties, awards, and any disciplinary actions);

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assessments. Therefore, one major distinction would be having to travel to distant and far-off localities to gather documentation and to interview innumerable witnesses. Moreover, assembling the necessary documents requires expertise in locating and acquiring social service, mental health, education, employment, military, and medical documents. Psychiatrists and psychologists, for the most part, are not familiar with the various means by which these documents can be legally acquired from governmental agencies or private corporations. Furthermore, many psychiatrists and psychologists have pre-existing time constraints arising from non-death penalty related commitments . . . . This is not to say, however, that psychologists and psychiatrists should not be utilized in capital defense litigation . . . . Their employment, nonetheless, should focus on interpretational (e.g., whether the defendant's psychological testing indicates a particular mental abnormality) rather than retrieval or investigative assignments.

*Id.* at 62-63.

<sup>360.</sup> Cooley, *supra* note 9, at 61.

<sup>361.</sup> *Id.*

<sup>362.</sup> *Id.* at 63-65.

- Psychological testing (revealing abnormally low IQ so that death cannot even be a consideration); and
- Evidence of drug and alcohol abuse (revealing a possible diminished capacity defense or mitigating premeditation).<sup>363</sup>

Stated simply, “[t]he amount of information that is uncovered during mitigation investigations is literally beyond measure.”<sup>364</sup> Ultimately, “[a]ttorneys . . . simply lack the investigative tenacity to perform this potentially limitless investigation [and] . . . [m]itigation specialists . . . can utilize their specialized training . . . to construct humanizing and sympathetic portrayals of the defendant.”<sup>365</sup> When defense counsel “employ mitigation specialists they are reinforcing the cardinal rule in capital defense work—to save the defendant’s life, it takes a team effort.”<sup>366</sup> Thus, because “[a]n increasing number of state and federal appellate courts have held defense counsel ineffective because they failed to meticulously investigate their client’s background to uncover mitigating evidence,”<sup>367</sup> the use of mitigation specialists will be an important part of any guideline system.

*B. An Active Trial Court That Is Designed to Ensure Compliance with the Guidelines and Empowered to Issue Corrective Measures*

Importantly, an active trial court is essential to the proper administration of this proposal. The trial court shall serve three primary functions: (1) to ensure compliance with the Commission’s guidelines with respect to the search for potentially mitigating evidence (the “investigatory” phase); (2) to ensure that counsel’s presentation of relevant mitigating evidence to the sentencing jury comports with reasonable levels of professional competence (the “performance” phase); and (3) to issue corrective measures where instances of potential incompetence or substandard performance are identified, at either the investigative or performance phases.

*1. The Investigative Phase*

The trial court’s first obligation will be to ensure compliance with the Commission’s relevant guidelines regarding the search for mitigating evidence. As an initial matter, the guidelines should require that each attorney’s initial investigative efforts consist of a search into four categories pertaining to the defendant’s social profile: (1) medical history; (2) psychiatric disabilities or psychological conditions; (3) history of drug or alcohol abuse; and (4) family history. The Commission shall also set a specific timetable that these investigative efforts be completed at least *thirty days* prior to the commencement of the penalty phase, to ensure that, if the court deems such efforts insufficient or incomplete, corrective measures can be undertaken without prejudice to the defendant.

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363. *Id.*

364. *Id.* at 65.

365. *Id.*

366. Cooley, *supra* note 9, at 65.

367. *Id.*

Importantly, after defense counsel completes each set of the investigative process within the four categories, he must certify to the court, upon completion of each category, that a full and thorough search for all relevant mitigating evidence has been completed. In rendering such certification, defense counsel must state the specific types of documents and records that were searched under each category in an attempt to uncover mitigating evidence. Furthermore, in completing this more specific aspect of the certification, the court will require defense counsel to furnish information concerning the mitigation specialists who were enlisted to assist in compiling the necessary records under the specified category.

Critically, due to the substantial amount of information that is likely to be uncovered, and the variety of sources from which it may be derived, the investigative efforts by defense counsel alone will not be deemed sufficient, and should be automatic grounds for an order directing counsel to re-commence investigative efforts for that category. Put another way, the court should expect, and counsel should anticipate, that the search for mitigation evidence will entail the retention of outside experts with specific expertise in certain areas relevant to particular aspects of the defendant's social history.

The guideline or checklist approach will allow counsel to waive or forego an investigation into one or more of the categories if such investigation, in counsel's judgment, is deemed futile or tactically unnecessary. If counsel makes this determination, he will have to certify to the court, in writing and with a detailed explanation, precisely why any investigation into the specified category would be futile, stating the reason with specificity. In addition, if such investigation is justified with reference to "tactics" or "strategy," an explanation justifying such decision will likewise be required.

Ultimately, defense counsel's compliance with the investigative phase will be based upon a certification to the court first identifying the investigative efforts for a particular category, for example, medical history, which will be followed by a more detailed explanation of the sources that were searched, and evidence that was obtained in the course of counsel's investigation, which shall be conducted in conjunction with the efforts of a mitigation specialist that is enlisted to aid in such efforts. As stated above, if counsel decides to waive or forego investigation into a particular category or source, it shall furnish an explanation accompanying the certification explaining the reasons for such a decision.

The court shall then examine the quality and thoroughness of the investigation for each category, to ensure that its breadth and scope is sufficiently likely to identify mitigating evidence relevant to the issue of the defendant's culpability. The court will also be responsible for reviewing the substantive explanations for any waivers that counsel asserts on the defendant's behalf, and assessing whether the reasons for such a decision is based upon a prudent assessment of the law and facts. Ultimately, if the trial court is not satisfied with the scope or direction of defense counsel's investigation, it shall have the power to issue an order directing that counsel's investigation into particular categories or sources resume, and the court shall also have the power to order counsel to obtain supplemental professional assistance to aid counsel where it deems necessary and just. The purpose of creating a more active trial court is both to ensure defense counsel's accountability and to also prevent Sixth Amendment violations *before* they might otherwise occur.

## 2. *The Performance Phase*

Significantly, the search for and retention of powerful mitigating evidence will serve little purpose unless it is presented to the sentencing jury in a compelling manner that portrays the defendant's background, character, and personal history in the most sympathetic light possible. For this reason, in addition to having oversight concerning the investigatory aspect of the penalty phase, the trial court shall also have an active role with respect to trial counsel's preparation of and presentation to the jury of the various mitigating evidence that has been compiled.

In this way, the trial court will be responsible for actively overseeing the manner and method by which defense counsel proffers mitigating evidence before the sentencing jury to ensure that, at the very least, counsel is doing so in a manner that is consistent with reasonable standards of professional competence. Of course, the trial court shall be admonished never to engage in subjective judgments or intrusive comments regarding trial counsel's strategy or tactics. Instead, the trial court will have the power to identify potential situations of incompetent representation as it arises, so that corrective measures can be undertaken.

At the conclusion of trial, if the court is satisfied with the investigatory and performance aspects of counsel's representation, then the court shall certify in writing that, in its view, the defendant's Sixth Amendment rights have been preserved. Importantly, however, in certifying that counsel's performance is consonant both with Sixth Amendment strictures and prevailing professional norms, the court shall explain in detail precisely why it arrived at this conclusion, with reference to both the particular facts of each case and the law upon which its decision is predicated. In doing so, the trial court will create a more specific record upon which the appellate court can conduct a meaningful and substantive review.

This system is designed to promote several objectives. First, it is intended to improve the quality of representation of capital defendants during that phase of the trial when their lives are at stake. Second, it is designed to hold defense counsel responsible and accountable for incompetent representation. Third, it prevents trial courts from sitting idly by when counsel completely fails to responsibly exercise their duty to advocate on behalf of their clients, a duty that is no more important than when a jury is deciding between life and death. Finally, it simply seeks to promote a more just and fair society. The representation of capital defendants that the post-*Strickland* world has allowed has been truly offensive. The time for change is now.

### *C. The Appellate Review Process: Elimination of Strickland's Prejudice Prong in Favor of a Presumption-Based Reasonableness Analysis*

This Article proposes that *Strickland's* prejudice prong be eliminated<sup>368</sup> in

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368. At the outset, this Article posits that the actual compliance with, adherence to and enforcement of specific guidelines by the trial court will obviate the need for any "prejudice" analysis because the trial court, in its more active function of ferreting out incompetent representation *as it occurs*, will be able to rectify potential ineffective assistance before the penalty phase commences. In this way, the guidelines, as a functional matter, operate in a preventative manner by contemplating active trial court intervention through scrutiny of counsel's certification regarding the area and scope of mitigation efforts.

favor of a presumption-based “reasonableness” analysis that is predicated upon: (1) the correctness of the trial court’s certification regarding counsel’s investigation and performance at the penalty phase; (2) counsel’s compliance with the relevant guidelines governing both investigation and performance; and (3) counsel’s actual performance at the penalty phase.<sup>369</sup> The occurrence of these steps will fundamentally alter the framework for appeals alleging ineffective assistance of counsel.

As a threshold matter, it is important to note the precise appellate court, state or federal, that will be involved at each stage of the appeals process, because this will determine whether the provisions of the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) are implicated. After a conviction, a defendant will normally move for a new trial on several grounds, including ineffective assistance, before the same judge that presided over the initial trial. Based upon the proposal set forth above, it is virtually guaranteed that the trial court will re-affirm the same certification that was made previously approving trial counsel’s performance. The defendant, therefore, will almost certainly lose at this phase.

Subsequently, the defendant will initiate post-conviction proceedings in the state courts, which will involve the appellate courts of the state in which the defendant was convicted. It is in these proceedings where this Article’s proposed appellate review framework (elimination of the “prejudice” requirement in favor a presumption-based reasonableness analysis) commences.

In the event that a defendant claims, in a state post-conviction relief petition, that trial counsel was ineffective at the underlying trial, the state appellate review process shall occur in the following manner. First, the state appellate court will have at its disposal a detailed and comprehensive record by which to assess both the decisions of the trial court and the actions of counsel. Against this backdrop, the appellate court’s initial task will be to assess the propriety of the trial court’s decision certifying that counsel’s representation was consistent with prevailing

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369. Before turning to this framework, it is critical to note that federal habeas petitions in capital cases are now governed by the AEDPA. *See Williams, supra* note 10, at 134-35. The AEDPA provides tremendous deference both to a state court’s findings of fact and legal conclusions. *Id.* at 135, 143. Specifically, as Professor Williams notes, “[I]n order to grant a capital defendant’s request for habeas relief, a federal court must find that the state court’s adjudication ‘resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States.’” *Id.* at 143 (quoting 28 U.S.C. § 2254(d)(1) (2002)). Based upon Supreme Court precedent, a state court adjudication is contrary to federal law if “the state court applies a rule that contradicts that governing law set forth in our cases” or if “the state court decides a case differently that [the Supreme Court] has on a set of materially indistinguishable facts.” *See id.* at 143-44 (quoting *Williams*, 529 U.S. at 405). Thus, a “state court unreasonably applies federal law if it ‘identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the particular facts of the particular state prisoner’s case.’” *Id.* at 144 (quoting *Williams*, 529 U.S. at 407). As a practical matter, federal courts typically evaluate state court decisions under the unreasonableness prong of the AEDPA, because they almost always identify *Strickland* as the governing legal standard. *Id.* Importantly, however, under the “unreasonableness” prong, it is not sufficient to “convince a federal habeas court that the state court was incorrect in its application of *Strickland* . . . . [Instead] a capital defendant must demonstrate that the state court applied *Strickland* in an objectively unreasonable manner.” *Id.* As a result, “the state court’s determination will be sustained if it is ‘at least minimally consistent with the facts and circumstances of the case.’” *Id.* (quoting *Conner v. McBride*, 375 F.3d 643, 664 (7th Cir. 2004)).

professional norms. In making this determination, the appellate court shall first review the text of the trial court's decision regarding certification which, as stated above, will explain in depth both the factual and legal underpinnings of its decision. The appellate court will then be in a position to assess, whether the court's decision was predicated upon sound factual and legal bases.

In addition to reviewing the trial court's decision, the appellate court shall review in-depth the certification of trial counsel, which will state with specificity the precise categories of information that were searched and the particular sources from which mitigating evidence was derived. In examining counsel's certification, the appellate court will be in a position to assess the breadth of counsel's investigation, and determine whether the decision to investigate itself, both in kind and degree, was proper based on the relevant facts. In addition, the appellate court will also review specific waivers by counsel into certain areas of potentially mitigating evidence, and in assessing the propriety of such waivers, be in a position to issue meaningful decisions that guide future behavior for trial counsel in capital cases.

After reviewing the trial court's decision and counsel's certification, the appellate court will also have the opportunity to directly review the record to examine the manner and method by which counsel presented defendant's mitigating evidence to the jury. In other words, the appellate court's role will be to ensure that mere technical compliance with the guidelines is not sufficient. Instead, counsel must be able to marshal these resources into a compelling story that portrays the defendant's background, character and history in the most sympathetic—and truthful—light. This is the essence of effective representation.

After consulting the trial court's decision, counsel certifications, the record for both errors of commission and omission, if the appellate court believes that the trial court's decision to certify that defense counsel complied with the guidelines, both in investigation and actual performance, was proper, then this shall create a presumption that counsel's performance was objectively reasonable as a matter of law. This presumption will be predicated both upon the trial court's oversight role and the fact that it possessed the ability to implement corrective measures during the penalty phase if it deemed counsel's mitigation efforts insufficient. Thus, should the defendant subsequently allege ineffective assistance of counsel, he will be responsible for rebutting this presumption by adducing specific evidence demonstrating that counsel's representation was ineffective.

However, if based upon its review of the record, the appellate court determines that the trial court's certification decision was erroneous, then there shall exist a presumption in favor of the defendant that such representation was ineffective as a matter of law, and the burden will be upon the state to adduce evidence that defense counsel's performance was consistent with prevailing professional norms. In other words, *Strickland*'s reasonableness prong will be strengthened substantially under this system, and serve as a substantial barrier to defendants seeking to assert ineffective assistance claims, as well as to prosecutors seeking to gain a benefit from truly substandard representation. Furthermore, in rendering its decision, the appellate court should state with specificity the precise reasons, both with references to law and fact, upon which its decision is based. The court should particularly emphasize those facts that it found critical to supporting the decision

that counsel's performance was reasonable, and it should explain precisely why certain decisions made both in the investigative and performance phases warranted a finding of reasonableness. In doing so, the appellate courts can serve an important function in providing guidance to both the Commission and future counsel in capital cases concerning the standards that will be expected before a determination of reasonableness will be justified. The Commission can then use this data to update their guidelines and, as a result, the guidelines themselves can evolve, resulting in an overall improvement in the quality of legal representation for all criminal defendants.

It must be noted, however, that this system will undergo some degree of change when the defendant exhausts appellate efforts in the state court system and commences habeas relief efforts at the federal level. Indeed, once federal habeas relief is sought, the provisions of the AEDPA are implicated, which, broadly speaking, provide substantially more deference to the trial court's factual and legal determinations. Specifically, under the AEDPA, "[i]n order to grant a capital defendant's request for habeas relief, a federal court must find that the state court's adjudication 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.'"<sup>370</sup>

Now, in the current state of federal jurisprudence, it is highly unlikely that the courts are going to unilaterally abandon *Strickland* and suddenly eliminate the prejudice prong. In addition, under the AEDPA, it is not sufficient to "convince a federal habeas court that the state court was incorrect in its application of *Strickland* . . . . [Instead] a capital defendant must demonstrate that the state court applied *Strickland* in an objectively unreasonable manner."<sup>371</sup> In other words, "the state court's determination will be sustained if it is 'at least minimally consistent with the facts and circumstances of the case.'"<sup>372</sup>

However, the provisions of the AEDPA do not provide any obstacle whatsoever to the proposal in this Article because this Article is advocating that the law *itself* needs to be changed, while the AEDPA is merely addressing the level of deference to which lower courts are entitled when conducting ineffective assistance analysis of the extant law. Also, the AEDPA provides that a federal court can overturn a state court decision that is contrary to or involves an unreasonable application of clearly established federal law. Thus, when reviewing the decisions of state or lower federal courts, appellate courts will likely never overturn a decision based upon the "contrary to" language, because courts will almost always identify *Strickland* as the controlling legal standard.

Critically, however, the AEDPA permits reversal of a state appellate or lower federal court decision where it involves an "unreasonable application" of such law, and this is precisely the point at which appellate courts exercise the authority to engage in meaningful review of the trial court's decision and counsel's performance. Specifically, if the appellate court believes that the trial court's certification was based upon an improper assessment of counsel's performance, or

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370. *Id.* at 143 (quoting 28 U.S.C. § 2254(d)(1) (2002)).

371. *Id.* at 144.

372. *Id.* (quoting *Conner*, 375 F.3d at 664).

that counsel's investigation was insufficient, then it will have grounds upon which to reverse pursuant to the AEDPA's "unreasonable application" provision. Stated simply, while the AEDPA does provide more deference to the state courts' factual and legal findings, it does not give them the authority to act in a manner that is inconsistent with either the Sixth Amendment or the most basic principles of fairness and due process. This point is no more underscored than the fact that *Williams*, *Wiggins*, and *Rompilla*—the only cases where the Supreme Court has ever found ineffective assistance—were decided because the lower court, in the majority's view, "unreasonably applied" *Strickland*'s two-pronged test.<sup>373</sup> In short, the AEDPA is not an obstacle to finding that trial counsel acted in a manner incongruous with prevailing professional norms. Furthermore, it is not an obstacle to normative changes in the law that are based upon sound public policy.

Indeed, it can be evident under this system that *Strickland*'s prejudice prong is unnecessary and should be eliminated. First, it is nearly impossible and certainly impractical to discern whether the incompetent performance of counsel truly affected the outcome of a trial. As the Court itself noted in *Strickland*, the "distorting effects of hindsight"<sup>374</sup> can surely not provide courts with the sufficient context and given circumstances to know how each jury member may have reacted to the inclusion of specific mitigating evidence at the penalty phase of a trial. There is simply no method by which to know how a juror would react to evidence that he has never seen, and to ask a defendant who has been the victim of truly incompetent representation to make such a showing is offensive to any notion of fundamental fairness. In fact, that is precisely the point—being the victim of incompetent representation, particularly when your life is at stake, should be enough to warrant a Sixth Amendment violation.

A defendant should be required to prove no more to a court. Under the Constitution, it should be sufficient to say that a defendant, whose life is at stake, deserves relief when he has been the victim of truly abysmal representation. Whether the outcome was affected should not be relevant, because the process matters just as much as the outcome. This system is focused precisely upon a process that engenders fairness, a fairness that aspires to improve the quality of legal representation, something that the *Strickland* Court openly said it was not seeking to accomplish.

## V. CONCLUSION

It is disconcerting to realize that many criminal defendants have been the victims of atrocious representation during capital trials yet have had no success in pursuing their claims in the appellate courts and were subsequently executed. That system, which resulted largely from *Strickland*'s nearly impregnable standards, needs to change. The criminal justice system should not tolerate for one more day attorneys whose performance during the capital trial practically guarantees that a defendant will be sentenced to death. Instead, the standards for capital representation should continually seek to improve the quality of legal representation, not merely establish minimum standards that tolerate sleeping

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373. See *supra* Part III.

374. *Strickland*, 466 U.S. at 689.

lawyers, lawyers with substance abuse problems, and lawyers whose disciplinary problems follow them all the way into the courtroom. This is not justice, and *Strickland* is not justifiable.

This Article strives to implement lasting change through a simple solution that bases itself on the fundamental values of accountability, transparency, and fairness. Capital defendants deserve the best representation possible, and if they do not get it, courts should provide a remedy regardless of prejudice. Deprivation of the right to counsel in and of itself is an actionable Constitutional violation. However, defendants should not have to wait until they are sentenced to death to obtain that remedy. The implementation of guidelines and the contemplation of an active trial court will ensure that potentially incompetent representation is identified and corrected. Furthermore, if the trial judge ultimately decides erroneously that counsel's performance was competent, then the appellate court will have the obligation and responsibility to review the reasonableness of counsel's performance and provide relief where the facts warrant. Under this system, procedural fairness is critical to ensuring the overall efficacy of our system of representation, which ultimately should provide for a system of representation that vindicates the notion of effective counsel under the Sixth Amendment.