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DOES STRICKLAND PREJUDICE DEFENDANTS ON DEATH ROW?

Kenneth Williams *

I. INTRODUCTION

Whether one ends up on death row is usually determined not by the heinousness of the crime, but by the quality of trial counsel.¹ The public has increasingly been made aware of this fact.² There have been stories about sleeping lawyers,³ missed deadlines,⁴ alcoholic and disoriented lawyers,⁵ and lawyers who failed to vigorously defend their clients.⁶ Several Supreme Court justices have acknowledged the problem.⁷ The United States Senate

* Copyright Kenneth Williams, 2009. Professor of Law, Southwestern Law School. I would like to thank Professor Janine Kim of Marquette Law School for reading a draft of the article and providing input. I would also like to thank the faculty of the University of Miami School of Law for providing helpful comments and for inviting me to present the article at one of its faculty symposiums.

1. See, e.g., 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, 1836–37 (1994).

2. See, e.g., Shaila Dewan, *Executions Resume, as Do Questions of Fairness*, N.Y. TIMES, May 7, 2008, at A1 (“The release of the third death row inmate in six months in North Carolina last week is raising fresh questions about whether states are supplying capital-murder defendants with adequate counsel . . .”).

3. See, e.g., *Burdine v. Johnson*, 262 F.3d 336, 338 (5th Cir. 2001) (finding that defendant had ineffective assistance of counsel because his lawyer slept through significant portions of his capital murder trial). But see *Ex parte McFarland*, 163 S.W.3d 743, 748–49 (Tex. Crim. App. 2005) (finding no ineffective assistance even though lead counsel slept through nearly entire trial).

4. See, e.g., Adam Liptak, *Date Missed, Court Rebuffs Low-I.Q. Man Facing Death*, N.Y. TIMES, Dec. 17, 2005, at A14 (detailing case of Marvin Lee Wilson, who “made a prima facie showing of mental retardation,” but was unable to pursue the claim because his lawyers missed the filing deadline (quoting *In re Wilson*, 433 F.3d 451, 455 (5th Cir. 2005), withdrawn, 442 F.3d 872, 873 (5th Cir. 2000))).

5. See, e.g., Susannah A. Nesmith, *Jimmy Ryce Case: Defense Attorney Says He Told Boy’s Killer To Lie on Stand*, MIAMI HERALD, Jan. 19, 2007, at A1 (“[A lawyer] told his client to lie on the stand because he was on medication and ‘disoriented’ during the trial.”).

6. See, e.g., Susannah A. Nesmith, *Jimmy Ryce Case: Dad: Boy a Pawn in “Ego Contest” Between Lawyers*, MIAMI HERALD, Jan. 12, 2007, at B5 (assistant public defender accused public defender of hindering accused killer’s defense for political reasons).

7. Justice Ruth Bader Ginsburg remarked, “I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant

held a hearing on the problem of inadequate counsel in death penalty cases,⁸ and President Bush even addressed the issue in his 2005 State of the Union address.⁹ The public has not been made aware, however, of the fact that very few defendants who receive substandard representation have been successful in overturning their convictions on appeal.¹⁰

was well represented at trial." Ruth Bader Ginsburg, Assoc. Justice of the Supreme Court of the United States, Remarks at the University of the District of Columbia David A. Clarke School of Law Joseph L. Rauh Lecture: In Pursuit of the Public Good: Lawyers Who Care (Apr. 9, 2001), http://supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html (last visited Apr. 9, 2009). Former Justice Sandra Day O'Connor had this to say on the topic: "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." Sandra Day O'Connor, Former Assoc. Justice of the Supreme Court of the United States, Speech to the Minnesota Women Lawyers (July 2, 2001), <http://www.thejusticeproject.org/national/problem> (last visited Apr. 9, 2009). In an address to the American Bar Association, Justice John Paul Stevens said:

[Justice Thurgood Marshall's] rejection of the death penalty rested on principles that would be controlling even if error never infected the criminal process. Since his retirement, with the benefit of DNA evidence, we have learned that a substantial number of death sentences have been imposed erroneously. That evidence is profoundly significant—not only because of its relevance to the debate about the wisdom of continuing to administer capital punishment, but also because it indicates that there must be serious flaws in our administration of criminal justice. Many thoughtful people have quickly concluded that inadequate legal representation explains those errors. It is true, as many have pointed out and as our cases reveal, that a significant number of defendants in capital cases have not been provided with fully competent legal representation at trial.

Justice John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html (last visited Apr. 9, 2009).

8. On April 8, 2008, the U.S. Senate Committee on the Judiciary held a hearing on "The Adequacy of Representation in Capital Cases." See *The Adequacy of Representation in Capital Cases: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. (2008). The transcript of the hearing is available at <http://judiciary.senate.gov/resources/110transcripts.cfm> (last visited Apr. 9, 2009).

9. In his February 2005 State of the Union address, President Bush said:

Because one of the main sources of our national unity is our belief in equal justice, we need to make sure Americans of all races and backgrounds have confidence in the system that provides justice. In America, we must make doubly sure no person is held to account for a crime he or she did not commit, so we are dramatically expanding the use of DNA evidence to prevent wrongful conviction. Soon I will send to Congress a proposal to fund special training for defense counsel in capital cases, because people on trial for their lives must have competent lawyers by their side.

Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126, 130 (Feb. 2, 2005).

10. See, e.g., Stephen Henderson, *Bad Defense Often Slides in Death Cases*, NEWS & OBSERVER (Raleigh, N.C.), Jan. 21, 2007, at A1 (describing a study of eighty death penalty cases from Alabama, Georgia, Mississippi, and Virginia regarding the poor quality of legal

In *Strickland v. Washington*, the Supreme Court held that a defendant seeking to overturn his conviction on grounds of ineffective assistance of counsel must demonstrate not only that his attorney performed deficiently, but also that he was prejudiced as a result of counsel's performance.¹¹ The prejudice standard has proven to be so onerous that few defendants are able to satisfy it. Justice Marshall was prophetic in his *Strickland* dissent, predicting that very few defendants would be able to satisfy the burden of proving prejudice.¹² The purpose of this article is to demonstrate that Justice Marshall was correct in his prediction and to make the case that the prejudice prong of *Strickland* needs to be eliminated rather than re-tooled. To buttress this argument, I conducted a survey of lower court decisions both before and after the Supreme Court's decision in *Wiggins v. Smith*,¹³ which was intended to ameliorate the harshness of *Strickland*'s prejudice requirement. Results indicate that capital defendants did not achieve any greater success in obtaining relief after *Wiggins* than they did before *Wiggins*.¹⁴

Part II begins with a discussion of the numerous problems that are created when defendants are not properly represented. Part III provides a full discussion of *Strickland*, Justice Marshall's concerns regarding the majority's adoption of a prejudice requirement, and how the prejudice requirement often results in a breakdown in the adversarial system. Part IV analyzes three subsequent decisions of the Supreme Court designed to clarify *Strickland*, and presumably, to make it easier for defendants to prove a claim of ineffective assistance of counsel.

Part V presents the results of a survey of circuit court decisions conducted to gauge the impact of the Court's decision in *Wiggins*, which was the most important decision of those cases intended to clarify the *Strickland* test. The article concludes that, while subsequent decisions have improved some aspects of *Strickland*, especially for defendants whose attorneys performed poorly during the sentencing phase of their capital case, the concerns that Justice Marshall expressed regarding the prejudice prong persist,

representation in death penalty cases and the failure of appellate courts to reverse convictions in most of those cases).

11. 466 U.S. 668, 687 (1984).

12. See *id.* at 710 (Marshall, J., dissenting).

13. *Wiggins v. Smith*, 539 U.S. 510, 514 (2003).

14. Part V, *infra*.

and defendants have not achieved any greater success in obtaining relief on claims of ineffective assistance of counsel.

In Part VI, I discuss a case that I litigated to illustrate the continuing problems with the prejudice prong of *Strickland*. Part VII discusses some proposals that others have made for improving the prejudice prong. The article concludes that, because tinkering with the prejudice requirement has not proven to be successful and will not be successful in the future, it is best to eliminate the requirement that capital defendants prove prejudice in order to prevail on a claim of ineffective assistance of counsel. Finally, attached is an appendix containing a brief synopsis of the successful cases five years before and after the Supreme Court's decision in *Wiggins v. Smith*.¹⁵

This article focuses on the urgent need to eliminate the prejudice prong in capital cases. As the Supreme Court has frequently stated, "death is different."¹⁶ There is no doubt that many other defendants have been poorly represented.¹⁷ It may well be the case that the prejudice prong is also problematic in non-capital cases, but that discussion is beyond the scope of this article.

15. App'x, *infra*.

16. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("[P]enalty of death is different in kind from any other punishment . . ."); *see also Furman v. Georgia*, 408 U.S. 238, 286, 289 (1972) (Brennan, J., concurring) (noting that "[d]eath is a unique punishment" and that "[d]eath . . . is in a class by itself"). The Supreme Court has invoked the argument that "death is different" to justify careful scrutiny of capital cases and to provide heightened protections to capital defendants. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (holding that because death is "qualitatively different," a sentencer cannot be precluded from considering as a mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Brennan J., concurring) (noting that a mandatory death sentence statute is invalid because "penalty of death is qualitatively different from a sentence of imprisonment, however long"). Other proposals to treat capital cases differently have been made. For instance, Justice Marshall suggested that in order to eliminate the problems of death-qualified juries (juries more likely to convict), two separate juries should be employed in capital cases. *See Lockhart v. McCree*, 476 U.S. 162, 203-06 (1986) (Marshall, J., dissenting). One jury would determine whether the defendant is guilty while the other jury would determine punishment. *Id.* at 203-04 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.18 (1968)).

17. *See e.g.*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE*, REPORT OF THE AMERICAN BAR ASSOCIATION'S HEARING ON THE RIGHT TO COUNSEL IN CRIMINAL PROCEEDINGS 38 (2004) (finding that "[f]orty years after *Gideon v. Wainwright*, indigent defense in the United States remains in a state of crisis").

II. CONSEQUENCES OF BAD LAWYERING

Incompetent attorneys create numerous problems for their clients. The most serious problem they create is the risk that their clients will be wrongly convicted. Wrongful convictions have become a systemic problem in the criminal justice system.¹⁸ Wrongful convictions in capital cases are especially problematic because of the risk that an unjust execution may occur. The Death Penalty Information Center has identified eight individuals who were executed despite serious uncertainty about their guilt.¹⁹ There is no need, however, to speculate about the possibility of wrongful convictions in capital cases. Since 1973, 130 individuals in twenty-six states have been released from death row because of evidence of their innocence.²⁰

Many factors contribute to wrongful convictions. For instance, prosecutorial misconduct, misidentifications, false confessions, jailhouse snitch testimony, and junk science have all been identified as factors.²¹ No factor probably contributes more to wrongful convictions than inadequate counsel.²² A competent attorney will conduct a thorough investigation. She will follow leads, interview witnesses, pursue alibis, and consult experts. She will put herself in position to uncover prosecutorial misconduct, to effectively cross-examine witnesses about mistaken identifications, to undermine the credibility of questionable jailhouse snitches who may fabricate testimony to curry favor with the prosecution, and to challenge the state's "experts." In short, a competent attorney is able to challenge the state's case. When an attorney is able to effectively challenge the state's case, the chance of a wrongful conviction diminishes substantially.

18. For a study of exonerations in the United States, see Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005).

19. Death Penalty Information Center, Executed but Possibly Innocent, <http://www.deathpenaltyinfo.org/node/1935> (last visited Apr. 9, 2009).

20. Death Penalty Information Center, Innocence: List of Those Freed from Death Row (2008), <http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row> (last visited Apr. 9, 2009).

21. Barry Scheck, *Innocence, Race, and the Death Penalty*, 50 HOW. L.J. 445, 451 (2007); see also *Kansas v. Marsh*, 548 U.S. 163, 210 (2006) (Souter, J., dissenting); Gross et al., *supra* note 18, at 530–31.

22. Scheck, *supra* note 21, at 451.

Since the Supreme Court restored capital punishment,²³ it has sought to identify and limit the punishment to those most deserving death. In order to achieve this objective, the Court has mandated that defendants be allowed to present a wide range of mitigating evidence,²⁴ that capital punishment be restricted to the most culpable defendants,²⁵ and that the jury be selected more carefully.²⁶ Not surprisingly, bad lawyering makes it more difficult to identify those most deserving death. As a result of inadequate defense counsel, juries often do not learn of mitigating evidence, and problematic jurors are not removed from the venire.

Incompetent defense counsel often present problems for their clients even after the representation has ended. A timely objection is usually required to preserve an issue for appellate review.²⁷ The failure of defense counsel to make a timely objection prevents defendants from raising an issue on appeal.²⁸ Counsel can also impact an inmate's chances for success in collateral proceedings. An inmate seeking habeas relief must present his claims in state court.²⁹ If counsel fails to exhaust the inmate's claims in state court, he is usually precluded from obtaining relief in federal court.³⁰ A number of capital defendants have been una-

23. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976).

24. See *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (plurality opinion).

25. See *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that Eighth Amendment prohibits the imposition of death on juvenile offenders since their diminished mental capacity makes them less culpable for their crimes); *Atkins v. Virginia*, 536 U.S. 304, 306, 321 (2002) (prohibiting execution of mentally retarded offenders because they are less culpable for their crimes); *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (limiting death penalty to those offenders with highly culpable mental states).

26. See *Wainwright v. Witt*, 469 U.S. 412, 424–26 (1985) (holding that prospective jurors cannot be excluded for cause because of their opposition to capital punishment unless they are “unable to faithfully and impartially apply the law”).

27. See *Wainwright v. Sykes*, 433 U.S. 72, 86–87 (1977); *Hughes v. Johnson*, 191 F.3d 607, 614–15 (5th Cir. 1999) (explaining that to preserve a claim for federal review, a defendant must make a specific and timely objection at the time of the allegedly objectionable conduct).

28. *E.g.*, 75 AM. JUR. 2D *Trial* § 342 (2007).

29. See 28 U.S.C. § 2254(b)(1)(A) (2006) (precluding inmates from receiving federal habeas relief “unless it appears that the applicant has exhausted the remedies available in the courts of the State”).

30. See *id.* The Supreme Court has held that claims forfeited under state law can be considered on the merits in federal habeas proceedings only if the inmate can demonstrate cause for the default and prejudice from the asserted error. See *Murray v. Carrier*, 477 U.S. 478, 485–87 (1986); *Engle v. Isaac*, 456 U.S. 107, 110 (1982). *But see* *House v. Bell*, 547 U.S. 518, 536–37 (2006) (recognizing a “miscarriage of justice” exception permitting claims not raised in state court to be considered in federal habeas proceedings if petitioner can demonstrate “that, in light of new evidence, ‘it is more likely than not that no reason-

ble to have their claims, including claims of innocence, considered on the merits in federal court because of their attorneys' failure to present their claims during the state court proceedings.³¹

III. THE SUPREME COURT'S RESPONSE TO INCOMPETENT COUNSEL: *STRICKLAND V. WASHINGTON*

In *Powell v. Alabama*, the Supreme Court recognized a right to counsel for indigent defendants in capital cases.³² However, the standard for determining whether counsel performed effectively was extremely low. Some courts adopted a "farce-and-mockery" standard.³³ As the term implies, counsel's representation passed constitutional muster as long as it did not make a "farce and mockery" of the proceedings.³⁴ Other courts adopted a "reasonable competence" test,³⁵ which required counsel's performance to be "within the range of competence demanded of attorneys in criminal cases."³⁶ These tests proved to be inadequate and led the Supreme Court to adopt a two-prong test for ineffective assistance of counsel claims in *Strickland v. Washington*.³⁷

able juror would have found petitioner found guilty beyond a reasonable doubt" (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

31. See Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1836 (2000).

32. 287 U.S. 45, 71 (1932) ("[T]he necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment."). In *Gideon v. Wainwright*, the right to counsel was extended to most indigent defendants. 372 U.S. 335, 344 (1963). The Court has not extended this right to post-conviction proceedings in capital cases. See *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). For an argument that the right to counsel should be extended to post-conviction proceedings, see Eric M. Freedman, *Fewer Risks, More Benefits: What Governments Gain by Acknowledging the Right to Competent Counsel on State Post-Conviction Review in Capital Cases*, 4 OHIO ST. J. CRIM. L. 183 (2006).

33. *Strickland v. Washington*, 466 U.S. 668, 713 (1984) (Marshall, J., dissenting) (citing *State v. Pacheco*, 588 P.2d 830, 833 (Ariz. 1978); *Hoover v. State*, 606 S.W.2d 749, 751 (Ark. 1980); *Line v. State*, 397 N.E.2d 975, 976 (Ind. 1979)).

34. John H. Blume & Stacey D. 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, 131 (2007).

35. *Strickland*, 466 U.S. at 713–14 (Marshall, J., dissenting) (citing *Trapnell v. United States*, 725 F.2d 149, 155 (2d Cir. 1983); *Cooper v. Fitzharris*, 586 F.2d 1325, 1329 (9th Cir. 1978) (en banc)).

36. *McMann v. Richardson*, 397 U.S. 759, 770–71 (1970).

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

In *Strickland*, the Court held that in order to prevail on a claim of ineffective assistance of counsel, a petitioner had to prove that counsel performed deficiently and that the petitioner suffered prejudice as a result.³⁸ In evaluating the deficient performance prong, reviewing courts were instructed to give deference to counsel's strategic decisions.³⁹ Most importantly, the Court indicated that in assessing claims of ineffective assistance of counsel, reviewing courts could resolve the claim by assessing whether the petitioner had been prejudiced without even addressing counsel's performance.⁴⁰

Justice Marshall dissented and issued a strong critique of the majority's two-prong approach to deciding claims of ineffective assistance of counsel.⁴¹ He felt that the majority's two-prong test would prove to be unhelpful because the deficient performance prong would be "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."⁴² He also thought the adoption of "more specific" and "particularized" standards would be a better approach.⁴³

Justice Marshall provided two reasons for rejecting the prejudice prong.⁴⁴ First, he believed that it would be difficult for a reviewing court to assess the impact of counsel's performance based on a "cold record."⁴⁵ As Justice Marshall indicated, lawyers do make a difference, and "[s]eemingly impregnable cases can sometimes be dismantled by good defense counsel."⁴⁶ Second, Justice Marshall thought the constitutional guarantee of effective assistance of counsel should both prevent the conviction of innocent

38. *Id.*

39. *Id.* at 689.

40. *Id.* at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies."). Many courts have disposed of claims of ineffective assistance of counsel by resolving the prejudice prong and thereby avoiding an evaluation of defense counsel's performance. See, e.g., *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1014 (7th Cir. 1987) (proceeding directly to prejudice prong since performance issue requires "a particularly subtle assessment").

41. *Strickland*, 466 U.S. at 706-19 (Marshall, J., dissenting).

42. *Id.* at 707.

43. *Id.* at 708-09.

44. *Id.* at 710.

45. *Id.*

46. *Id.* One only needs to recall the O.J. Simpson case as an illustration of this point. See Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1234 (1996).

persons and ensure "that convictions are obtained only through fundamentally fair procedures."⁴⁷ He rejected the majority's view "that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney."⁴⁸

Justice Marshall's concerns proved to be valid. The *Strickland* analysis did not work much better than the tests previously employed due to the Court's failure to adopt particularized standards⁴⁹ and the Court's adoption of the prejudice prong.⁵⁰ Most claims of ineffective assistance of counsel were rejected after *Strickland*, even in death penalty cases where counsel's performance was notoriously bad.⁵¹ As a result, the two-prong *Strickland* test has been harshly criticized by scholars⁵² and even by members of the bench.⁵³ The Court evidently recognized that the

47. *Strickland*, 466 U.S. at 711 (Marshall, J., dissenting).

48. *Id.*

49. See Blume & Neumann, *supra* note 34, at 134; Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999).

50. See William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 133 (1995).

51. See, e.g., Bright, *supra* note 1, at 1857-66 (discussing the shortcomings of the *Strickland* standard and the poor quality of legal representation in death penalty cases that satisfies the competency standard under *Strickland*).

52. See Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not "Soft on Crime," but Hard on the Bill of Rights*, 39 ST. LOUIS U. L.J. 479, 498 (1995) ("The Supreme Court shares a major responsibility for the shameful quality of counsel that is tolerated in the nation's courts."); Geimer, *supra* note 50, at 93 ("Directly contrary to its rhetoric in *Strickland*, the Court has effectively ensured that *Gideon* guarantees little more than the presence of a person with a law license alongside the accused during trial.") (footnote omitted); Klein, *supra* note 49, at 1446 ("[T]he *Strickland* Court interpreted the requirements of the Sixth Amendment's right to effective assistance of counsel in such an ultimately meaningless manner as to require little more than a warm body with a law degree standing next to the defendant.") (footnotes omitted).

53. For example, Judge Rubin of the Fifth Circuit stated:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or effective counsel. It requires representation only by a lawyer who is not ineffective under the standard set by *Strickland v. Washington*. Proof that the lawyer was ineffective requires proof not only that the lawyer bungled but also that his errors likely affected the result. Ineffectiveness is not measured against the standards set by good lawyers but by the average—"reasonableness under prevailing professional norms"—and "judicial scrutiny of counsel's performance must be highly deferential." Consequently, accused persons who are represented by "not-legally-ineffective" lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence.

Riles v. McCotter, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring) (citations omitted).

Strickland standard was not functioning as it had hoped and moved toward adopting Justice Marshall's position in several subsequent cases.

IV. WILLIAMS, WIGGINS, AND *ROMPILLA*: A GLIMMER OF HOPE?

The Supreme Court recognized the need for clarification of the two-prong *Strickland* test and attempted to do so in three subsequent decisions, which will be discussed below. Additionally, in *Florida v. Nixon*, the Court clarified that defense counsel's trial strategy is not a valid basis for a claim of ineffective assistance of counsel. This case is also discussed below.

A. Williams v. Taylor

Terry Williams was convicted of capital murder after robbing and killing a neighbor for "a couple of dollars."⁵⁴ At his sentencing hearing, the prosecution's two experts testified that "there was a 'high probability' that Williams would pose a serious continuing threat to society."⁵⁵ Williams's trial counsel offered the testimony of Williams's mother and neighbors, which described Williams as a "nice boy."⁵⁶ The court noted that "[o]ne of the neighbors had not been previously interviewed by defense counsel, but was noticed by counsel in the audience during the proceedings and asked to testify on the spot."⁵⁷ Defense counsel's closing argument was primarily devoted to explaining that it was difficult to find a reason why the jury should spare Williams's life.⁵⁸

Williams's trial attorneys, however, did not present any evidence of the defendant's "nightmarish" childhood.⁵⁹ They did not mention the fact that Williams's parents had been imprisoned for criminal neglect, that his childhood home had feces and urine on the floor, that the children in his household were dirty and without clothing, and that four of the children were found to be under the influence of whiskey.⁶⁰ Williams also had been repeatedly

54. Williams v. Taylor, 529 U.S. 362, 367–68 (2000).

55. *Id.* at 368–69.

56. *Id.* at 369.

57. *Id.*

58. *Id.*

59. *Id.* at 395.

60. *Id.* at 395 & n.19.

beaten by his father, placed in foster care while his parents were in prison, and returned to his parents' custody upon their release.⁶¹ Trial counsel also neglected to present evidence that Williams was "borderline mentally retarded."⁶² Additionally, they failed to point out that the prosecution experts "believed that Williams, if kept in a 'structured environment,' would not pose a future danger to society."⁶³

The Supreme Court found that trial counsel performed deficiently.⁶⁴ Counsel's failure to conduct an investigation that would have uncovered the evidence described easily satisfied the deficient-performance prong of the *Strickland* test.⁶⁵ The Court also found that Williams had been prejudiced by counsel's performance because the cumulative effect of the mitigation evidence may have made a difference to the jury had it been presented.⁶⁶

B. Wiggins v. Smith

Three years later, Kevin Wiggins challenged the adequacy of his representation at a capital sentencing proceeding following his conviction for capital murder.⁶⁷ An investigation into Wiggins's background would have revealed that he suffered severe abuse as a young child living with an "alcoholic, absentee mother."⁶⁸ Counsel also would have learned that Wiggins and his siblings were frequently left alone and forced to "beg for food and to eat paint chips and garbage,"⁶⁹ that he was physically tortured and repeatedly raped while in foster care,⁷⁰ and that he ran away from the abuse and began living on the streets at a young age.⁷¹ According to the Supreme Court, this is "the kind of troubled history" that is "relevant to assessing a defendant's moral culpability."⁷²

61. *Id.* at 395.

62. *Id.* at 396.

63. *Id.* at 371.

64. *Id.* at 396.

65. *Id.*

66. *Id.* at 396–98.

67. *Wiggins v. Smith*, 539 U.S. 510, 514 (2003).

68. *Id.* at 535.

69. *Id.* at 516–17.

70. *Id.* at 535.

71. *Id.* at 517.

72. *Id.* at 535.

Counsel, however, chose to “focus their efforts on ‘retry[ing] the factual case’ and disputing Wiggins’ direct responsibility for the murder.”⁷³ The Court found that, although this was a strategic decision, it was not an informed decision based on the benefit of an investigation into all the facts and therefore was not reasonable: “We base our conclusion on the much more limited principle that ‘strategic choices made after less than complete investigation are reasonable’ only to the extent that ‘reasonable professional judgments support the limitations on investigation.’”⁷⁴

The Court also found that Wiggins had been prejudiced by counsel’s performance.⁷⁵ In light of Wiggins’s “excruciating life history” and the absence of any record of violent conduct to offset the “powerful mitigating narrative,” the Court concluded that there was a reasonable probability that the jury, confronted with evidence of Wiggins’s background, would have returned a different verdict.⁷⁶

C. *Rompilla v. Beard*

Rompilla also involved a challenge to trial counsel’s performance in the sentencing phase of a capital case.⁷⁷ Ronald Rompilla’s severely alcoholic parents reared him in a slum environment and physically and verbally abused him.⁷⁸ Rompilla’s parents kept him and his siblings isolated in a filthy home without indoor plumbing, forced him to sleep in an attic with no heat, and did not provide clothing for their children, who were forced to attend school in rags.⁷⁹ Rompilla also suffered from organic brain damage, Fetal Alcohol Syndrome, and mental retardation.⁸⁰ Defense counsel failed to discover any of this evidence and, therefore, it was not presented to the jury.⁸¹ The Supreme Court held that Rompilla was prejudiced by counsel’s failure to discover and

73. *Id.* at 517.

74. *Id.* at 533 (quoting *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984)).

75. *Id.* at 535–38.

76. *Id.* at 536–37.

77. *Rompilla v. Beard*, 545 U.S. 374, 378–79 (2005).

78. *Id.* at 391–92.

79. *Id.* at 392.

80. *Id.* at 392–93.

81. *Id.* at 392.

present this mitigation evidence because it may have influenced the jury's appraisal of Rompilla's culpability.⁸²

D. Florida v. Nixon

In *Nixon*, unlike *Williams*, *Wiggins*, and *Rompilla*, the Supreme Court found that counsel's performance was reasonable under the very unusual circumstances of the case.⁸³ The State had overwhelming evidence of Nixon's guilt: he confessed to the police, his brother, and his girlfriend that he had kidnapped a stranger, stolen her car, and burned her alive; before the murder, an eyewitness saw Nixon and the victim together at a shopping center; Nixon was seen driving the victim's car after her death; his palm print was found on the trunk of the car; and pawnshop records verified that Nixon had pawned her rings following her death.⁸⁴ After deposing the State's witnesses, trial counsel decided to concede guilt and instead focus on the sentencing phase in order to save Nixon's life.⁸⁵ During the sentencing phase, counsel presented extensive evidence that Nixon was "not normal organically, intellectually, emotionally or educationally or in any other way."⁸⁶ Nixon never agreed or objected to defense counsel's strategy.⁸⁷ He later claimed that counsel was ineffective for failing to obtain his consent to concede guilt and for pursuing such a strategy.⁸⁸ The Supreme Court held that, given the strength of the prosecution's case, trial counsel made a reasonable strategic decision in focusing his efforts on trying to prevent his client's execution.⁸⁹

E. Clarification of the Strickland Test

Williams, *Wiggins*, *Rompilla*, and *Nixon* have proven helpful in clarifying several aspects of the *Strickland* two-prong test. First, these decisions make clear that an attorney has an obligation to conduct a reasonable investigation of both the guilt-innocence

82. *Id.* at 393.

83. *Florida v. Nixon*, 543 U.S. 175, 189–92 (2004).

84. *Id.* at 179–80.

85. *Id.* at 180–81.

86. *Id.* at 183.

87. *Id.* at 181.

88. *Id.* at 185.

89. *Id.* at 190–92.

and punishment phases of a capital case.⁹⁰ If counsel has been apprised of a possible defense or has been alerted to possible mitigating evidence, she has an obligation to follow through on the information she has received.⁹¹ Second, an attorney's strategic decisions should continue to receive deference as long as they are reasonable under the circumstances.⁹² The Court has also made it clear, however, that counsel cannot make strategic decisions until he has conducted a complete investigation.⁹³ Finally, the Supreme Court has clarified that lower courts should refer to the American Bar Association ("ABA") Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases in determining whether counsel's performance was reasonable.⁹⁴

These decisions were also intended to clarify the showing required to prove prejudice, at least during the sentencing phase of a capital case. Part V discusses the results of a survey that I conducted on how capital defendants claiming ineffective assistance of counsel have fared since *Wiggins*, as this was the most influential of the Supreme Court's decisions intended to clarify *Strickland*.

V. STUDY OF CIRCUIT COURT DECISIONS

To determine the impact of the *Wiggins* decision, I conducted a survey of decisions by the most active death penalty circuits: the Fourth, Fifth, Ninth and Eleventh Circuits. Specifically, I sought to determine the records of these circuits on claims of ineffective assistance of counsel in capital cases in the five years before and

90. See, e.g., *Smith v. Quarterman*, 515 F.3d 392, 405 (5th Cir. 2008) ("Generally accepted standards of competence require that counsel conduct an investigation into petitioner's background." (citing *Miniel v. Cockrell*, 339 F.3d 331, 344 (5th Cir. 2003))); *Soffar v. Dretke*, 368 F.3d 441, 477 n.40 (5th Cir. 2004) ("We recognize that *Wiggins* was decided in the context of a defense counsel's decision regarding whether to offer a mitigation case during the sentencing phase of the trial. However, this is a difference without distinction. Whether the failure to conduct a reasonable investigation occurs at the sentencing phase or the guilt phase should warrant no meaningful distinction in defining a person's right to effective assistance of counsel. The two-prong test established in *Strickland* applies to both phases of trial.").

91. See *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003).

92. See, e.g., *Quarterman*, 471 F.3d at 570 (stating that counsel should present "all reasonably available evidence in mitigation unless there are strong strategic reasons to forgo some portion of such evidence").

93. See *Wiggins*, 539 U.S. at 533.

94. See *id.* at 524.

after the 2003 *Wiggins* decision.⁹⁵ The Fourth Circuit considered claims of ineffective assistance of counsel in thirty-seven capital cases following *Wiggins* and denied relief on each occasion.⁹⁶ During the five years prior to *Wiggins*, the Fourth Circuit also did not grant relief to a single petitioner, though the court considered forty claims.⁹⁷ The Fifth Circuit considered eighty-one ineffective as-

95. The author searched LexisNexis's online database to conduct this survey. Each circuit was searched individually, i.e., the "4th Circuit—Federal & State Cases, Combined," "5th Circuit—Federal & State Cases, Combined," "9th Circuit—Federal & State Cases, Combined," and "11th & Former 5th Circuits—Federal & State Cases, Combined." For the 1998–2003 time period, the following search terms were entered into the Terms and Connectors search box: "Strickland" & "death penalty." For the 2003–2008 time period, the following search terms were entered into the Terms and Connectors search box: "Strickland" & "death penalty." The author considered only those cases brought before the Courts of Appeals of the Fourth, Fifth, Ninth, and Eleventh Circuits. Those cases that were non-capital cases; cases in which a claimant was granted a certificate of appealability, but has not yet succeeded or failed on the merits of the claim; those cases which were denied on procedural grounds, including those claims decided on both procedural and non-procedural grounds; and those cases later reversed or vacated and remanded by the Supreme Court of the United States were not included in the survey. Those cases later overruled on grounds other than ineffective assistance of counsel are included in this survey and their subsequent history is excluded, as that is irrelevant for purposes of this survey.

96. See *Cole v. Branker*, No. 07-20, 2008 U.S. App. LEXIS 22905, at *2 (4th Cir. Nov. 3, 2008); *Jackson v. Johnson*, 523 F.3d 273, 281 (4th Cir. 2008); *Yarbrough v. Johnson*, 520 F.3d 329, 344 (4th Cir. 2008); *Lawrence v. Branker*, 517 F.3d 700, 704 (4th Cir. 2008); *Bell v. Kelly*, 260 F. App'x 599, 606 (4th Cir. 2008); *Bowie v. Branker*, 512 F.3d 112, 114 (4th Cir. 2008); *Call v. Branker*, 254 F. App'x 257, 259 (4th Cir. 2007); *Meyer v. Branker*, 506 F.3d 358, 362 (4th Cir. 2007); *Williams v. Ozmint*, 494 F.3d 478, 490 (4th Cir. 2007); *MacNeill v. Polk*, 476 F.3d 206, 209 (4th Cir. 2007); *Emmett v. Kelly*, 474 F.3d 154, 156 (4th Cir. 2007); *Shuler v. Ozmint*, 209 F. App'x 224, 226 (4th Cir. 2006); *Schmitt v. Kelly*, 189 F. App'x 257, 258 (4th Cir. 2006); *Buckner v. Polk*, 453 F.3d 195, 196 (4th Cir. 2006); *Campbell v. Polk*, 447 F.3d 270, 272 (4th Cir. 2006); *Lenz v. Washington*, 444 F.3d 295, 298 (4th Cir. 2006); *Hedrick v. True*, 443 F.3d 342, 346 (4th Cir. 2006); *Reid v. True*, 349 F.3d 788, 794 (4th Cir. 2006); *Vinson v. True*, 436 F.3d 412, 416 (4th Cir. 2005); *Brown v. Polk*, 135 F. App'x 618, 619, (4th Cir. 2005); *Moody v. Polk*, 408 F.3d 141, 144 (4th Cir. 2005); *Lovitt v. True*, 403 F.3d 171, 175 (4th Cir. 2005); *Walker v. True*, 401 F.3d 574, 576 (4th Cir. 2005); *Jones v. Polk*, 401 F.3d 257, 259 (4th Cir. 2005); *Humphries v. Ozmint*, 397 F.3d 206, 227 (4th Cir. 2005); *Draughn v. Johnson*, 120 F. App'x 940, 941 (4th Cir. 2005); *McHone v. Polk*, 392 F.3d 691, 732 (4th Cir. 2004); *Syriani v. Polk*, 118 F. App'x 706, 708 (4th Cir. 2004); *James v. Harrison*, 389 F.3d 450, 452 (4th Cir. 2004); *Kandies v. Polk*, 385 F.3d 457, 461 (4th Cir. 2004); *Longworth v. Ozmint*, 377 F.3d 437, 440 (4th Cir. 2004); *Richmond v. Polk*, 375 F.3d 309, 314 (4th Cir. 2004); *Bailey v. True*, 100 F. App'x 128, 129 (4th Cir. 2004); *Wilson v. Ozmint*, 352 F.3d 847, 852 (4th Cir. 2003); *Orbe v. True*, 82 F. App'x 802, 803 (4th Cir. 2003); *Tucker v. Ozmint*, 350 F.3d 433, 436 (4th Cir. 2003); *Byram v. Ozmint*, 339 F.3d 203, 205 (4th Cir. 2003).

97. See *Hill v. Polk*, 339 F.3d 187, 190 (4th Cir. 2003); *Bell v. Ozmint*, 332 F.3d 229, 231 (4th Cir. 2003); *Rowsey v. Lee*, 327 F.3d 335, 338 (4th Cir. 2003); *Swisher v. True*, 325 F.3d 225, 226 (4th Cir. 2003); *Walton v. Angelone*, 321 F.3d 442, 461–62 (4th Cir. 2003); *Daniels v. Lee*, 316 F.3d 477, 490 (4th Cir. 2003); *Bramblett v. True*, 59 F. App'x 1, 16 (4th Cir. 2003); *Hayes v. York*, 311 F.3d 321, 327 (4th Cir. 2002); *Hunt v. Lee*, 291 F.3d 284, 286 (4th Cir. 2002); *Wiggins v. Corcoran*, 288 F.3d 629, 632 (4th Cir. 2002), *overruled by* *Wiggins v. Smith*, 539 U.S. 510 (2003); *Carter v. Lee*, 283 F.3d 240, 242 (4th Cir. 2002); *McWee v. Weldon*, 283 F.3d 179, 182 (4th Cir. 2002); *Burch v. Corcoran*, 273 F.3d 577, 580

sistance claims by death row inmates after *Wiggins*⁹⁸ and granted

(4th Cir. 2001); *Beck v. Angelone*, 261 F.3d 377, 392 (4th Cir. 2001); *Rose v. Lee*, 252 F.3d 676, 680 (4th Cir. 2001); *Mickens v. Taylor*, 240 F.3d 348, 351 (4th Cir. 2001); *Frye v. Lee*, 235 F.3d 897, 907 (4th Cir. 2000); *Skipper v. Lee*, No. 00-8, 2000 U.S. App. LEXIS 33346, at *2 (4th Cir. Dec. 19, 2000); *Bacon v. Lee*, 225 F.3d 470, 473 (4th Cir. 2000); *Tucker v. Catoe*, 221 F.3d 600, 614 (4th Cir. 2000); *Evans v. Smith*, 220 F.3d 306, 321 (4th Cir. 2000); *Baker v. Corcoran*, 220 F.3d 276, 295-98 (4th Cir. 2000); *Fisher v. Lee*, 215 F.3d 438, 454 (4th Cir. 2000); *Barnabei v. Angelone*, 214 F.3d 463, 472 (4th Cir. 2000); *Claggett v. Angelone*, 209 F.3d 370, 382-83 (4th Cir. 2000); *Graham v. Angelone*, No. 99-4, 1999 U.S. App. LEXIS 22080, at *52 (4th Cir. Sept. 13, 1999); *Harris v. French*, No. 98-34, 1999 U.S. App. LEXIS 15794, at *34-36 (4th Cir. July 14, 1999); *Williams v. Angelone*, No. 98-28, 1999 U.S. App. LEXIS 8139, at *16 (4th Cir. Apr. 28, 1999); *Rocheville v. Moore*, No. 98-23, 1999 U.S. App. LEXIS 4222, at *15-16 (4th Cir. Mar. 16, 1999); *Thomas v. Taylor*, 170 F.3d 466, 473 (4th Cir. 1999); *Drayton v. Moore*, No. 98-18, 1999 U.S. App. LEXIS 345, at *6 (4th Cir. Jan. 12, 1999); *Jenkins v. Angelone*, No. 98-13, 1999 U.S. App. LEXIS 342, at *2-3 (4th Cir. Jan. 12, 1999); *Chichester v. Taylor*, No. 98-15, 1999 U.S. App. LEXIS 104, at *18-19 (4th Cir. Jan. 6, 1999); *Sexton v. French*, 163 F.3d 874, 884 (4th Cir. 1998); *Williams v. Taylor*, 163 F.3d 860, 862 (4th Cir. 1998), *overruled by Williams v. Taylor*, 529 U.S. 362 (2000); *Keel v. French*, 162 F.3d 263, 266 (4th Cir. 1998); *Fry v. Angelone*, No. 98-8, 1998 U.S. App. LEXIS 27502, at *2 (4th Cir. Oct. 26, 1998); *Ward v. French*, No. 98-7, 1998 U.S. App. LEXIS 27077, at *27 (4th Cir. Oct. 23, 1998); *Wilson v. Greene*, 155 F.3d 396, 403-04 (4th Cir. 1998); *Williams v. French*, 146 F.3d 203, 213 (4th Cir. 1998); *Huffington v. Nuth*, 140 F.3d 572, 583 (4th Cir. 1998).

Though the Fourth Circuit denied relief in *Williams v. Taylor*, 163 F.3d 860, 862 (4th Cir. 1998), and *Wiggins v. Corcoran*, 288 F.3d 629 (4th Cir. 2002), the Supreme Court of the United States later reversed and granted the inmates' claims of ineffective assistance of counsel. See *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000).

98. *Moore v. Quarterman*, 534 F.3d 454, 457 (5th Cir. 2008); *Villegas v. Quarterman*, 274 F. App'x 378, 379 (5th Cir. 2008); *Hudson v. Quarterman*, 273 F. App'x 331, 332 (5th Cir. 2008); *Reis v. Quarterman*, 522 F.3d 517, 520 (5th Cir. 2008); *Martinez v. Quarterman*, 270 F. App'x 277, 280 (5th Cir. 2008); *Bishop v. Epps*, 265 F. App'x 285, 295 (5th Cir. 2008); *Smith v. Quarterman*, 515 F.3d 392, 397 (5th Cir. 2008); *Perkins v. Quarterman*, 254 F. App'x 366, 367 (5th Cir. 2007); *Wood v. Quarterman*, 503 F.3d 408, 410 (5th Cir. 2007); *Bower v. Quarterman*, 497 F.3d 459, 464 (5th Cir. 2007); *Coble v. Quarterman*, 496 F.3d 430, 433 (5th Cir. 2007); *Diaz v. Quarterman*, 239 F. App'x 886, 887 (5th Cir. 2007); *Manns v. Quarterman*, 236 F. App'x 908, 916 (5th Cir. 2007); *Berry v. Epps*, 230 F. App'x 386, 388 (5th Cir. 2007); *Scheanette v. Quarterman*, 482 F.3d 815, 817 (5th Cir. 2007); *Smith v. Quarterman*, 222 F. App'x 406, 407 (5th Cir. 2007); *Turner v. Quarterman*, 481 F.3d 292, 298 (5th Cir. 2007); *Martinez v. Quarterman*, 481 F.3d 249, 251 (5th Cir. 2007); *Sonnier v. Quarterman*, 476 F.3d 349, 359-61 (5th Cir. 2007); *Conner v. Quarterman*, 477 F.3d 287, 288 (5th Cir. 2007); *Parr v. Quarterman*, 472 F.3d 245, 261 (5th Cir. 2006); *Smith v. Quarterman*, 471 F.3d 565, 567 (5th Cir. 2006); *St. Aubin v. Quarterman*, 470 F.3d 1096, 1097 (5th Cir. 2006); *Wright v. Quarterman*, 470 F.3d 581, 592 (5th Cir. 2006); *Rodriguez v. Quarterman*, 204 F. App'x 489, 491 (5th Cir. 2006); *Anderson v. Quarterman*, 204 F. App'x 402, 404 (5th Cir. 2006); *Gutierrez v. Quarterman*, 201 F. App'x 196, 198 (5th Cir. 2006); *Whitaker v. Quarterman*, 200 F. App'x 351, 352 (5th Cir. 2006); *Reyes v. Quarterman*, 195 F. App'x 272, 273 (5th Cir. 2006); *Henderson v. Quarterman*, 460 F.3d 654, 656 (5th Cir. 2006); *Amador v. Quarterman*, 458 F.3d 397, 399 (5th Cir. 2006); *Gonzales v. Quarterman*, 458 F.3d 384, 386 (5th Cir. 2006); *Granados v. Quarterman*, 455 F.3d 529, 537 (5th Cir. 2006); *United States v. Hall*, 455 F.3d 508, 510 (5th Cir. 2006); *Knight v. Quarterman*, 186 F. App'x 518, 534-35 (5th Cir. 2006); *Garcia v. Quarterman*, 454 F.3d 441, 449 (5th Cir. 2006); *Moore v. Dretke*, 182 F. App'x 329, 337 (5th Cir. 2006); *Moreno v. Dretke*, 450 F.3d 158, 161 (5th Cir. 2006); *Mosley v. Dretke*, 370 F.3d 467, 470 (5th Cir.

relief on three occasions.⁹⁹ During the five years prior to *Wiggins*, though it heard forty-one claims of ineffective assistance of counsel, the Fifth Circuit granted relief to only three inmates.¹⁰⁰ The

2006); *Martinez v. Dretke*, 173 F. App'x 347, 348 (5th Cir. 2006); *Cannady v. Dretke*, 173 F. App'x 321, 323 (5th Cir. 2006); *Pippin v. Dretke*, 434 F.3d 782, 784 (5th Cir. 2005); *O'Brien v. Dretke*, 156 F. App'x 724, 726 (5th Cir. 2005); *Leal v. Dretke*, 428 F.3d 543, 552 (5th Cir. 2005); *Draughon v. Dretke*, 427 F.3d 286, 298 (5th Cir. 2005); *Neville v. Dretke*, 423 F.3d 474, 482–83 (5th Cir. 2005); *Frazier v. Dretke*, 145 F. App'x 866, 875 (5th Cir. 2005); *Brown v. Dretke*, 419 F.3d 365, 378–79 (5th Cir. 2005); *Ford v. Dretke*, 135 F. App'x 769, 775 (5th Cir. 2005); *Cardenas v. Dretke*, 405 F.3d 244, 254 (5th Cir. 2005); *Howard v. Dretke*, 125 F. App'x 560, 566 (5th Cir. 2005); *Shields v. Dretke*, 122 F. App'x 133, 154 (5th Cir. 2005); *Martinez v. Dretke*, 404 F.3d 878, 891 (5th Cir. 2005); *Ramirez v. Dretke*, 398 F.3d 691, 699 (5th Cir. 2005); *United States v. Webster*, 392 F.3d 787, 790 (5th Cir. 2004); *Sterling v. Dretke*, 117 F. App'x 328, 329 (5th Cir. 2004); *Wolfe v. Dretke*, 116 F. App'x 487, 488 (5th Cir. 2004); *Roberts v. Dretke*, 381 F.3d 491, 501 (5th Cir. 2004); *Cartwright v. Dretke*, 103 F. App'x 545, 546 (5th Cir. 2004); *Martinez v. Dretke*, 99 F. App'x 538, 544 (5th Cir. 2004); *Medellin v. Dretke*, 371 F.3d 270, 279 (5th Cir. 2004); *Cole v. Dretke*, 99 F. App'x 523, 525 (5th Cir. 2004); *Morrow v. Dretke*, 99 F. App'x 505, 507 (5th Cir. 2004); *Sofar v. Dretke*, 368 F.3d 441, 480 (5th Cir. 2004), *modified on reh'g*, 391 F.3d 703 (5th Cir. 2004); *Hood v. Dretke*, 93 F. App'x 665, 671 (5th Cir. 2004); *Riley v. Dretke*, 362 F.3d 302, 303 (5th Cir. 2004); *Kincy v. Dretke*, 92 F. App'x 87, 88 (5th Cir. 2004); *Cockrell v. Dretke*, 88 F. App'x 34, 35 (5th Cir. 2004); *Busby v. Dretke*, 359 F.3d 708, 717 (5th Cir. 2004); *Lewis v. Dretke*, 355 F.3d 364, 369 (5th Cir. 2003); *Kunkle v. Dretke*, 352 F.3d 980, 983 (5th Cir. 2003); *Flores v. Dretke*, 82 F. App'x 92, 96 (5th Cir. 2003); *Green v. Dretke*, 82 F. App'x 333, 339 (5th Cir. 2003); *Moody v. Dretke*, 77 F. App'x 722, 722 (5th Cir. 2003); *LaGrone v. Cockrell*, No. 02-10976, 2003 U.S. App. LEXIS 18150, at *18 (5th Cir. Sept. 2, 2003); *Cotton v. Cockrell*, 343 F.3d 746, 748 (5th Cir. 2003); *Bruce v. Cockrell*, 74 F. App'x 326, 338–39 (5th Cir. 2003); *Perez v. Cockrell*, 77 F. App'x 201, 205–06 (5th Cir. 2003); *Miniel v. Cockrell*, 339 F.3d 331, 335 (5th Cir. 2003); *Wilson v. Cockrell*, 70 F. App'x 219, 229–30 (5th Cir. 2003); *Allridge v. Quarterman*, 92 F. App'x 60, 76 (5th Cir. 2003).

99. Relief was granted in *Draughon v. Dretke*, 427 F.3d 286, 298 (5th Cir. 2005); *Sofar v. Dretke*, 368 F.3d 441, 480 (5th Cir. 2004), *modified on reh'g*, 391 F.3d 703 (5th Cir. 2004); and *Lewis v. Dretke*, 355 F.3d 364, 369 (5th Cir. 2003).

100. Relief was granted in *Burdine v. Johnson*, 262 F.3d 336, 350 (5th Cir. 2001); *Lockett v. Anderson*, 230 F.3d 695, 697 (5th Cir. 2000); and *Moore v. Johnson*, 194 F.3d 586, 622 (5th Cir. 1999).

The court denied relief in *Henderson v. Cockrell*, 333 F.3d 592, 594 (5th Cir. 2003); *Hopkins v. Cockrell*, 325 F.3d 579, 586 (5th Cir. 2003); *Black v. Cockrell*, 314 F.3d 752, 755–57 (5th Cir. 2003); *Harris v. Cockrell*, 313 F.3d 238, 243–44 (5th Cir. 2002); *Ladd v. Cockrell*, 311 F.3d 349, 350 (5th Cir. 2002); *Johnson v. Cockrell*, 301 F.3d 234, 239 (5th Cir. 2002); *Collier v. Cockrell*, 300 F.3d 577, 588 (5th Cir. 2002); *Ogan v. Cockrell*, 297 F.3d 349, 357–58 (5th Cir. 2002); *Foster v. Johnson*, 293 F.3d 766, 770 (5th Cir. 2002); *Riddle v. Cockrell*, 288 F.3d 713, 719 (5th Cir. 2002); *Neal v. Puckett*, 286 F.3d 230, 233 (5th Cir. 2002); *Broxton v. Cockrell*, 278 F.3d 456, 458 (5th Cir. 2002); *Santellan v. Cockrell*, 271 F.3d 190, 191 (5th Cir. 2001); *Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001); *Rudd v. Johnson*, 256 F.3d 317, 322 (5th Cir. 2001); *Martin v. Cain*, 246 F.3d 471, 472–73 (5th Cir. 2001); *Tucker v. Johnson*, 242 F.3d 617, 619 (5th Cir. 2001); *Wheat v. Johnson*, 238 F.3d 357, 362–63 (5th Cir. 2001); *Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000); *Clark v. Johnson*, 227 F.3d 273, 284–85 (5th Cir. 2000); *Knox v. Johnson*, 224 F.3d 470, 481 (5th Cir. 2000); *Hernandez v. Johnson*, 213 F.3d 243, 249–250 (5th Cir. 2000); *Soria v. Johnson*, 207 F.3d 232, 236 (5th Cir. 2000); *Miller v. Johnson*, 200 F.3d 274, 277 (5th Cir. 2000); *Kitchens v. Johnson*, 190 F.3d 698, 699 (5th Cir. 1999); *Lamb v. Johnson*, 179 F.3d 352, 359 (5th Cir. 1999); *Crane v. Johnson*, 178 F.3d 309, 315 (1999); *Beathard v. Johnson*,

Eleventh Circuit considered twenty-two claims of death row inmates following *Wiggins*¹⁰¹ and granted relief on one occasion.¹⁰² During the five years prior to *Wiggins*, the Eleventh Circuit heard thirty-five claims of ineffective assistance of counsel,¹⁰³ and relief was granted on three occasions.¹⁰⁴ The Ninth Circuit, however,

177 F.3d 340, 346–47 (5th Cir. 1999); *Moreland v. Scott*, 175 F.3d 347, 350 (5th Cir. 1999); *Boyd v. Johnson*, 167 F.3d 907, 908–09 (5th Cir. 1999); *Little v. Johnson*, 162 F.3d 855, 857 (5th Cir. 1998); *Thompson v. Cain*, 161 F.3d 802, 804 (1998); *Green v. Johnson*, 160 F.3d 1029, 1042 (5th Cir. 1998); *Davis v. Johnson*, 158 F.3d 806, 815 (1998); *Vega v. Johnson*, 149 F.3d 354, 362 (5th Cir. 1998); *Moody v. Johnson*, 139 F.3d 477, 483 (5th Cir. 1998); *Lucas v. Johnson*, 132 F.3d 1069, 1078–79 (5th Cir. 1998), *overruled in part by Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006); and *Earhart v. Johnson*, 132 F.3d 1062, 1064 (5th Cir. 1998).

101. *Lawhorn v. Allen*, 519 F.3d 1272, 1297 (11th Cir. 2008); *Jennings v. McDonough*, 490 F.3d 1230, 1232 (11th Cir. 2007); *Lynd v. Terry*, 470 F.3d 1308, 1319 (11th Cir. 2006); *Grossman v. McDonough*, 466 F.3d 1325, 1329 (11th Cir. 2006); *Osborne v. Terry*, 466 F.3d 1298, 1301 (11th Cir. 2006); *Davis v. Terry*, 465 F.3d 1249, 1256 (11th Cir. 2006); *Alderman v. Terry*, 468 F.3d 775, 795 (11th Cir. 2006); *Henyard v. McDonough*, 459 F.3d 1217, 1220 (11th Cir. 2006); *Hallford v. Culliver*, 459 F.3d 1193, 1197 (11th Cir. 2006); *Williams v. Allen*, 458 F.3d 1233, 1235 (11th Cir. 2006); *Zakrewski v. McDonough*, 455 F.3d 1254, 1256 (11th Cir. 2006); *Schwab v. Crosby*, 451 F.3d 1308, 1330 (11th Cir. 2006); *McNair v. Campbell*, 416 F.3d 1291, 1296 (11th Cir. 2006); *Atwater v. Crosby*, 451 F.3d 799, 802 (11th Cir. 2006); *Callahan v. Campbell*, 427 F.3d 897, 903 (11th Cir. 2006); *Jones v. Campbell*, 436 F.3d 1285, 1288 (11th Cir. 2005); *Rutherford v. Crosby*, 385 F.3d 1300, 1318 (11th Cir. 2004); *Peoples v. Campbell*, 377 F.3d 1208, 1211 (11th Cir. 2004); *Conklin v. Schofield*, 366 F.3d 1191, 1195 (11th Cir. 2004); *Hightower v. Schofield*, 365 F.3d 1008, 1011 (11th Cir. 2004); *Quince v. Crosby*, 360 F.3d 1259, 1267 (11th Cir. 2004); *Turner v. Crosby*, 339 F.3d 1247, 1249 (11th Cir. 2003).

102. Relief was granted in *Lawhorn v. Allen*, 519 F.3d 1272, 1297 (11th Cir. 2008).

103. *Parker v. Sec'y*, 331 F.3d 764, 766 (11th Cir. 2003); *Hardwick v. Crosby* 320 F.3d 1127, 1130–31 (11th Cir. 2003); *Hubbard v. Haley*, 317 F.3d 1245, 1247 (11th Cir. 2003); *Crawford v. Head*, 311 F.3d 1288, 1292 (11th Cir. 2002); *Hall v. Head*, 310 F.3d 683, 684 (11th Cir. 2002); *Brownlee v. Haley*, 306 F.3d 1043, 1045–46 (11th Cir. 2002); *Robinson v. Moore*, 300 F.3d 1320, 1345–46, 1352–53 (11th Cir. 2002); *Fortenberry v. Haley*, 297 F.3d 1213, 1215 (11th Cir. 2002); *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1320 (11th Cir. 2002); *Putnam v. Head*, 268 F.3d 1223, 1227 (11th Cir. 2001); *Mobley v. Head*, 267 F.3d 1312, 1314 (11th Cir. 2002); *Fugate v. Head*, 261 F.3d 1206, 1208 (11th Cir. 2001); *Grayson v. Thompson*, 257 F.3d 1194, 1197 (11th Cir. 2001); *Johnson v. Alabama*, 256 F.3d 1156, 1165 (11th Cir. 2001); *Brown v. Jones*, 255 F.3d 1273, 1282 (11th Cir. 2001); *Parker v. Head*, 244 F.3d 831, 841 (11th Cir. 2001); *Chandler v. Moore*, 240 F.3d 907, 909 (11th Cir. 2001); *Housel v. Head*, 238 F.3d 1289, 1292 (11th Cir. 2001); *Gilreath v. Head*, 234 F.3d 547, 548 (11th Cir. 2000); *Bottoson v. Moore*, 234 F.3d 526, 529 (11th Cir. 2000); *Meeks v. Moore*, 216 F.3d 951, 953 (11th Cir. 2000); *Glock v. Moore* 195 F.3d 625, 626 (11th Cir. 1999); *Tompkins v. Moore*, 193 F.3d 1327, 1342 (11th Cir. 1999); *Williams v. Head*, 185 F.3d 1223, 1225 (11th Cir. 1999); *Collier v. Turpin*, 177 F.3d 1184, 1187 (11th Cir. 1999); *Hill v. Moore*, 175 F.3d 915, 917 (11th Cir. 1999); *Wright v. Hooper*, 169 F.3d 695, 698 (11th Cir. 1999); *Mills v. Singletary*, 161 F.3d 1273, 1277 (11th Cir. 1998); *Duren v. Hopper*, 161 F.3d 655, 667 (11th Cir. 1998); *Sims v. Singletary*, 155 F.3d 1297, 1302 (11th Cir. 1998); *Baldwin v. Johnson*, 152 F.3d 1304, 1308 (11th Cir. 1998); *Dobbs v. Turpin*, 142 F.3d 1383, 1391 (11th Cir. 1998); *Oats v. Singletary*, 141 F.3d 1018, 1021 (11th Cir. 1998); *Bryan v. Singletary*, 140 F.3d 1354, 1361 (11th Cir. 1998); *Neeley v. Nagle*, 138 F.3d 917, 920 (11th Cir. 1998).

104. Relief was granted in *Brownlee v. Haley*, 306 F.3d 1043, 1080 (11th Cir. 2002);

considered eighteen ineffective assistance claims post-*Wiggins*¹⁰⁵ and granted relief in ten cases.¹⁰⁶ Inmates were also more successful in the Ninth Circuit than in the other circuits during the five years prior to *Wiggins*, as the Ninth Circuit found that the representation provided to death row inmates failed to meet constitutional standards in eleven cases of the twenty-four brought before it.¹⁰⁷ On those occasions when defendants are successful, it is usually on claims that their counsel was ineffective during the sentencing phase of their capital cases, as opposed to ineffective during the guilt/innocence phase of their cases.¹⁰⁸

Dobbs v. Turpin, 142 F.3d 1383, 1391 (11th Cir. 1998); and *Collier v. Turpin*, 177 F.3d 1184, 1204 (11th Cir. 1996).

105. *Correll v. Ryan*, 539 F.3d 938, 956 (9th Cir. 2008); *Belmontes v. Ayers*, 529 F.3d 834, 836 (9th Cir. 2008); *Jackson v. Brown*, 513 F.3d 1057, 1060–61 (9th Cir. 2008); *Stenson v. Lambert*, 504 F.3d 873, 877 (9th Cir. 2007); *Fields v. Brown*, 503 F.3d 755, 776 (9th Cir. 2007); *Lambright v. Schriro*, 490 F.3d 1103, 1106 (9th Cir. 2007); *Raley v. Ylst*, 470 F.3d 792, 795 (9th Cir. 2006); *Lankford v. Arave*, 468 F.3d 578, 579 (9th Cir. 2006); *Frieron v. Woodford*, 463 F.3d 982, 983 (9th Cir. 2006); *Hovey v. Ayers*, 458 F.3d 892, 898 (9th Cir. 2006); *Hoffman v. Arave*, 455 F.3d 926, 945 (9th Cir. 2006); *Daniels v. Woodford*, 428 F.3d 1189, 1214 (9th Cir. 2005); *Summerlin v. Schriro*, 427 F.3d 623, 627 (9th Cir. 2005); *Sims v. Brown*, 425 F.3d 560, 560 (9th Cir. 2005); *Boyde v. Brown*, 404 F.3d 1159, 1180–81 (9th Cir. 2005); *Allen v. Woodford*, 366 F.3d 823, 829 (9th Cir. 2004); *Beardslee v. Woodford*, 358 F.3d 560, 565 (9th Cir. 2003); *Alcala v. Woodford*, 334 F.3d 862, 865–66 (9th Cir. 2003).

106. Relief was granted in *Correll v. Ryan*, 539 F.3d 938, 955–56 (9th Cir. 2008); *Lambright v. Schriro*, 490 F.3d 1103, 1128 (9th Cir. 2007); *Lankford v. Arave*, 468 F.3d 578, 592 (9th Cir. 2006); *Frieron v. Woodford*, 463 F.3d 982, 997 (9th Cir. 2006); *Hovey v. Ayers*, 458 F.3d 892, 931 (9th Cir. 2006); *Hoffman v. Arave*, 455 F.3d 926, 945 (9th Cir. 2006); *Daniels v. Woodford*, 428 F.3d 1181, 1214 (9th Cir. 2005); *Summerlin v. Schriro*, 427 F.3d 623, 643 (9th Cir. 2005); *Boyde v. Brown*, 404 F.3d 1159, 1180 (9th Cir. 2005); and *Alcala v. Woodford*, 334 F.3d 862, 894–95 (9th Cir. 2003).

107. Relief was granted in *Douglas v. Woodford*, 316 F.3d 1079, 1094–95 (9th Cir. 2003); *Jennings v. Woodford*, 290 F.3d 1006, 1019–20 (9th Cir. 2002); *Viscotti v. Woodford*, 288 F.3d 1097, 1117–19 (9th Cir. 2002), *rev'd by* 537 U.S. 19 (2002); *Karis v. Calderon*, 283 F.3d 1117, 1121–22 (9th Cir. 2002); *Caro v. Woodford*, 280 F.3d 1247, 1250 (9th Cir. 2002); *Silva v. Woodford*, 279 F.3d 825, 855–56 (9th Cir. 2002); *Mayfield v. Woodford*, 270 F.3d 915, 932–93 (9th Cir. 2001); *Ainsworth v. Woodford*, 268 F.3d 868, 878 (9th Cir. 2001); *Jackson v. Calderon*, 211 F.3d 1148, 1166 (9th Cir. 2000); *Smith v. Stewart*, 189 F.3d 1004, 1014 (9th Cir. 1999); and *Lord v. Wood*, 184 F.3d 1083, 1090 (9th Cir. 1999).

The court denied relief in *Davis v. Woodford*, 384 F.3d 628, 634 (9th Cir. 2003); *Hayes v. Woodford*, 301 F.3d 1054, 1072 (9th Cir. 2002); *Pizzuto v. Arave*, 280 F.3d 949, 976–77 (9th Cir. 2002); *Landrigan v. Stewart*, 272 F.3d 1221, 1223 (9th Cir. 2001); *Payton v. Woodford*, 258 F.3d 905, 909 (9th Cir. 2001); *Cooper v. Calderon*, 255 F.3d 1104, 1107 (9th Cir. 2001); *Anderson v. Calderon*, 253 F.3d 1053, 1097–98 (9th Cir. 2000); *Mayfield v. Calderon*, 229 F.3d 895, 897 (9th Cir. 2000); *Coleman v. Calderon*, 150 F.3d 1105, 1108 (9th Cir. 1998); *Ortiz v. Stewart*, 149 F.3d 923, 928 (9th Cir. 1998); *Ainsworth v. Calderon*, 138 F.3d 787, 789 (9th Cir. 1998); *LaGrand v. Stewart*, 133 F.3d 1253, 1257 (9th Cir. 1998); and *Siripongs v. Calderon*, 133 F.3d 732, 737 (9th Cir. 1998).

108. See, e.g., *Correll*, 539 F.3d at 956; *Lawhorn*, 519 F.3d at 1297; *Lewis*, 355 F.3d at 370.

Percentage of Successful
Ineffective Assistance of Counsel Claims Cases

<i>Jurisdiction</i>	<i>5 Years</i>	<i>5 Years</i>
	<i>Before Wiggins</i>	<i>After Wiggins</i>
4th Circuit	0%	0%
5th Circuit	7.3%	3.8%
9th Circuit	45.8%	52.6%
11th Circuit	8.5%	4.5%

Based on this survey, my primary conclusion is that the Supreme Court's decision in *Wiggins* does not appear to have had much impact—defendants were no more likely to prevail after the *Wiggins* decision than they were prior to the decision. In fact, in two of the circuits, the Fifth and Eleventh Circuits, defendants have actually fared worse. Only in the Ninth Circuit have defendants fared slightly better post-*Wiggins*.

In addition, the few successful defendants were more likely to have the court overturn their death sentences than their convictions. This can be explained, in part, by the fact that it is less burdensome for the state to retry the sentencing phase. Additionally, the Supreme Court has made it clear that counsel must investigate and present compelling mitigation evidence during sentencing,¹⁰⁹ and it is more likely to conclude that the defendant suffered prejudice when counsel fails to do so. For instance, it is easier for a court to conclude that a defendant was prejudiced by counsel's failure to uncover mitigation evidence of serious childhood abuse than by counsel's failure to investigate a potential alibi when there is evidence implicating the defendant.

Finally, I conclude that Justice Marshall's concern that the prejudice prong was too malleable has proven to be accurate.¹¹⁰ There is evidence to suggest that the Fifth Circuit, for instance, may be

109. See *Wiggins v. Smith*, 539 U.S. 510, 533 (2003).

110. See *Strickland v. Washington*, 466 U.S. 668, 707 (1984) (Marshall, J., dissenting).

inclined to rule in favor of the state,¹¹¹ and the prejudice prong can be easily manipulated to do just that. There is also evidence that the Ninth Circuit may be more inclined to rule favorably for the defendant,¹¹² and the prejudice prong permits that circuit to follow its inclination.

While the decisions in *Williams*, *Wiggins*, and *Rompilla*—most importantly *Wiggins*—have proven to be somewhat helpful in assessing ineffective assistance claims during the sentencing phase, the requirement that defendants prove prejudice continues to be problematic. The prejudice prong is easy to manipulate. Furthermore, the Supreme Court still has not clarified the showing required to prove prejudice during the guilt-innocence phase of a capital case. In *Strickland*, the Court held that the prejudice prong is satisfied by a showing that “there is a reasonable probability that, absent [counsel’s] errors, the factfinder would have had a reasonable doubt respecting guilt.”¹¹³ In articulating the prejudice standard, the Court rejected an outcome-determinative standard: “[A] defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.”¹¹⁴

The Supreme Court has also rejected a sufficiency of the evidence test.¹¹⁵ Lower courts, however, routinely apply a sufficiency of the evidence test in assessing prejudice during the guilt-innocence phase.¹¹⁶ As long as there is sufficient evidence in the record of the defendant’s guilt, the courts usually excuse counsel’s

111. See, e.g., Bruce Alpert, *Latest Reversal Par for the Court; 5th Circuit Rulings Often Struck Down*, TIMES-PICAYUNE (New Orleans), June 27, 2005, at 1; Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court’s Patience*, N.Y. TIMES, Dec. 5, 2004, at 1; Harvey Rice, *5th Circuit Court Rules in Its Own Way; Its Decisions Have a History of Defying the Supreme Court*, HOUS. CHRON., July 5, 2005, at B1; Neil S. Siegel, Op-Ed., *Why President Bush Should Not Take the 5th; Judges Who Ignore Law Are Possible Court Candidates*, HOUS. CHRON., June 17, 2005, at B11.

112. See, e.g., Rone Tempest, *Death Row Often Means a Long Life; California Condemns Many Murderers, but Few Are Ever Executed*, L.A. TIMES, Mar. 6, 2005, at B1 (noting that one important factor in the delay of executions in California is that “the U.S. 9th Circuit Court of Appeals, serving California and consisting largely of Democratic appointees, is more likely to hear death penalty petitions than the more conservative appeals courts serving Texas (5th Circuit) and Virginia (4th Circuit)”).

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

114. *Id.* at 693.

115. In *Strickland*, the Court stated that “the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution.” *Id.* at 694 (citing *United States v. Agurs*, 427 U.S. 97, 104, 112–13 (1975)). The Court has said that the materiality test “is not a sufficiency of evidence test.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).

116. See, e.g., *Halford v. Culliver*, 459 F.3d 1193, 1201 (11th Cir. 2006).

substandard performance and find that the defendant suffered no prejudice.¹¹⁷ Courts are reluctant to overturn the convictions of defendants they believe to be guilty and to burden the state with

117. See, e.g., *Davis v. Terry*, 465 F.3d 1249, 1255–56 (11th Cir. 2006). Davis alleged that counsel was ineffective for failing to interview crucial witnesses and for not impeaching some of the prosecution witnesses. *Id.* at 1253. Although there was no physical evidence implicating Davis—no murder weapon was ever found and the case against him consisted entirely of eyewitness testimony—the court held that “none of the testimony which Davis asserts counsel should have obtained would overcome the prejudice requirement of *Strickland* in light of the totality of the evidence presented at trial.” *Id.* at 1256. The Georgia Board of Parsons and Poles granted Davis a ninety-day reprieve on the eve of his execution after all but two of the eyewitnesses who testified against him recanted. Amnesty International USA, Troy Davis—Finality Over Fairness, <http://www.amnestyusa.org/death-penalty/troy-davis-finality-over-fairness/page.do?id=1011343> (last visited Apr. 9, 2009).

In *Colvin-Ely v. Nuth*, the defense “put on no proof during the guilt phase of the trial” despite the existence of evidence suggesting the possibility of a different perpetrator, including the “unidentified fingerprint found on the piece of paper in [the victim’s] purse, which [was] shown not to have been that of the [defendant].” Nos. 98-27, 98-29, 1999 WL 436776, at *2-3 (4th Cir. June 17, 1999). The Fourth Circuit Court of Appeals held that the defendant was unable to prove prejudice and denied relief. *Id.* at *7. The Governor of Maryland subsequently commuted the defendant’s sentence to life because the Governor “came to the conclusion that [the defendant] was almost certainly guilty of this horrible crime, but ‘almost certainly’ is not strong enough.” Thomas W. Waldron & Dennis O’Brien, *Glendening Acts To Stop Execution; Death Sentence Is Commuted to Life Imprisonment*, BALT. SUN, June 8, 2000, at A1.

In *Anderson v. Quarterman*, appellate counsel only raised three issues on direct appeal because appellate counsel thought that raising other issues was a “waste of time.” 204 F. App’x 402, 410 (5th Cir. 2006). Although the court found that appellate counsel’s performance was deficient, relief was denied because the court found that the defendant had not been prejudiced. *Id.* at 410.

In *McFarland v. Scott*, Justice Blackmun provided illustrations of cases in which defendants clearly received substandard representation but were still unsuccessful in asserting a claim of ineffective assistance of counsel under the *Strickland* standard.

The impotence of the *Strickland* standard is perhaps best evidenced in the cases in which ineffective-assistance claims have been denied. John Young, for example, was represented in his capital trial by an attorney who was addicted to drugs and who a few weeks later was incarcerated on federal drug charges. The Court of Appeals for the Eleventh Circuit rejected Young’s ineffective-assistance-of-counsel claim on federal habeas, and this Court denied review. Young was executed in 1985

Jesus Romero’s attorney failed to present any evidence at the penalty phase and delivered a closing argument totaling 29 words. Although the attorney later was suspended on unrelated grounds, Romero’s ineffective-assistance claim was rejected by the Court of Appeals for the Fifth Circuit, and this Court denied certiorari. Romero was executed in 1992. Larry Heath was represented on direct appeal by counsel who filed a 6-page brief before the Alabama Court of Criminal Appeals. The attorney failed to appear for oral argument before the Alabama Supreme Court and filed a brief in that court containing a 1-page argument and citing a single case. The Eleventh Circuit found no prejudice, and this Court denied review. Heath was executed in Alabama in 1992.

512 U.S. 1256, 1259–60 (1994) (Blackmun, J., dissenting) (citations omitted).

retrying cases many years later, when evidence may be lost and witnesses' memories may be diminished.¹¹⁸ However, an approach that focuses on the sufficiency of the evidence was rejected by the Supreme Court in *Strickland*.¹¹⁹ Judge Harry Edwards has identified another flaw in such an approach:

The most serious flaw in the guilt-based approach . . . is its tendency to undermine our most important legal principles. . . . [A]ny analysis measuring the harmlessness of error according to the weight of the evidence that the prosecution stacks against a defendant erodes the individual rights and liberties that are presumed to elevate our system of justice. A focus on guilt skews the judicial assessment of harmlessness. The values that underlie the individual rights guaranteed by the Constitution, federal statutes, and procedural rules often are general. Constitutional rights, in particular, often represent broad ideals of individual liberty and human dignity. By contrast, a criminal act appears vivid and almost tangible, so the need to punish the guilty is both immediate and strongly felt. A wrong, often a grievous wrong, has occurred, and the defendant, by all appearances, is responsible. It is, therefore, to be expected that the desire to punish the guilty will frequently prevail over the need to honor individual rights.¹²⁰

Part VI discusses a case that perfectly illustrates the continuing problems with the prejudice prong.

VI. THE CONTINUING DIFFICULTY OF PROVING PREJUDICE: THE CASE OF JOHNNY RAY CONNER

I was appointed to represent Johnny Ray Conner in his federal habeas proceedings. Conner had been convicted of murdering the owner of a Houston, Texas convenience store during a botched robbery.¹²¹ The State's evidence against Conner consisted of the testimony of three eyewitnesses and a fingerprint found in the store.¹²²

Six individuals claimed to have seen the assailant.¹²³ The only thing upon which they could agree was that the assailant ran swiftly from the crime scene and that the assailant had no diffi-

118. *Herrera v. Collins*, 506 U.S. 390, 417 (1993).

119. *See Strickland*, 466 U.S. at 695–96.

120. Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1194 (1995) (footnotes omitted).

121. *Conner v. Dretke*, No. H-02-4627, slip op. at 2, 4 (S.D. Tex. Mar. 22, 2005).

122. *Id.* at 4.

123. *Id.* at 2–4.

culty running.¹²⁴ Witnesses gave varying descriptions of the assailant to the police shortly after the crime.¹²⁵ One witness described the assailant's height as between 5'10" and 6'1".¹²⁶ The witnesses disagreed as to the clothing worn by the assailant: he was described as either wearing shorts above his knee or long pants below his ankles, and some of the witnesses indicated that he wore a baseball cap while others said that he did not.¹²⁷ None of the eyewitnesses indicated that the assailant had a tattoo on his face, including the two eyewitnesses who said they observed the assailant for an extended period of time at close range.¹²⁸

The Houston Police Department presented the six eyewitnesses with a photo array.¹²⁹ Only three picked Mr. Conner out of the array.¹³⁰ One of the three eyewitnesses who made a positive identification admitted during the trial that she picked Conner out of the photo array because his picture was the only one containing Houston Police Department booking numbers.¹³¹

During their investigation, the police discovered a juice bottle on the floor near the counter.¹³² The State presented evidence that one of the fingerprints on the bottle was Conner's.¹³³ Police found another unidentified fingerprint on the bottle—the source

124. *See id.*

125. *See id.*

126. *See id.* at 3. Mr. Conner's medical records indicated that he was 5'6" tall. *Id.* at 18.

127. *Id.* at 2-4.

128. *Id.* at 17-18. Mr. Conner had a "distinctive tattoo of a teardrop under his eye." *Id.* at 18.

129. *Id.* at 4.

130. *Id.*

131. Martha Meyers testified as follows:

Q: Isn't it a fact, ma'am, the only particular individual in this particular grouping that has any type of numbers that denotes any type of police record is number five?

A: Yes, sir.

Q: Would that have anything to have done [sic] with you picking out number five?

A: Yes, sir.

Q: Are you absolutely positive about that?

A: Yes sir.

Transcript of Record at 51, *Conner v. Texas*, No. 785421 (Dist. Ct. Harris County, TX, June 7, 1999) (testimony on file with *University of Richmond Law Review*).

132. *Conner*, No. H-02-4627, at 4.

133. *See id.*

of which neither defense counsel nor the police made any effort to ascertain.¹³⁴

Trial counsel presented no defense other than cross-examining the prosecution's witnesses, and Conner was convicted and sentenced to death.¹³⁵ After Conner was sentenced, it was discovered that, prior to the crime, Conner had broken his right leg, which resulted in traumatic nerve damage to his right peroneal nerve and the development of a condition known as "foot drop."¹³⁶ Foot drop would make it difficult for Conner to have run in a normal manner.¹³⁷ Conner's condition had been documented in his medical records.¹³⁸ However, trial counsel never consulted Conner's medical records, and, as a result, never investigated the possibility that Conner could not run—even though six eyewitnesses indicated that the assailant ran swiftly from the crime scene.¹³⁹

Because I was unable to bring an actual innocence claim,¹⁴⁰ I brought a claim of ineffective assistance of counsel instead.¹⁴¹ I claimed on Conner's behalf that, as a result of trial counsel's failure to review Conner's medical records and to submit them for analysis by an appropriate expert, trial counsel was ineffective, given the fact that the witnesses had stated the assailant had no difficulty running fast.¹⁴²

The federal district court found that Conner satisfied both prongs of *Strickland*.¹⁴³ According to the court, "lead trial counsel Ricardo Rodriguez decided before trial that he would invest little time and effort into contesting Conner's guilt. As a result of this decision, Rodriguez conducted very little investigation into Con-

134. *See id.*

135. *Id.* at 4, 6, 12.

136. *Id.* at 10, 13.

137. *Id.* at 17. "Foot drop is caused by weakness or paralysis of the muscles on the side of the shinbone, and causes the toes to drag and the foot to hang." *Id.* at 10.

138. *Id.* at 17.

139. *Id.* at 12, 14, 16–17.

140. In *Herrera v. Collins*, the Supreme Court assumed without deciding that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." 506 U.S. 390, 417 (1993). The Court, however, had never held such a claim to be cognizable in a federal habeas proceeding prior to my filing of Mr. Conner's federal habeas claim. Subsequent to my filing, the Court did recognize that an inmate who could make a clear showing of his innocence could pursue claims not previously presented in state court. *See* House v. Bell, 547 U.S. 518, 522 (2006).

141. *Conner*, No. H-02-4627, at 10.

142. *Id.* at 10–18.

143. *Id.* at 14, 18.

ner's background, and no investigation into Conner's medical history."¹⁴⁴ The district court held that trial counsel's decision was unreasonable in light of the ABA guidelines:

In this case, had counsel conducted a prompt and reasonably diligent investigation into any possible mitigating evidence in Conner's medical history, they would have discovered before trial that Conner suffers from foot drop, and they could have used this evidence to further undermine the State's already weak case. Counsel's investigation therefore fell below objective standards of professionally reasonable conduct.¹⁴⁵

The district court also held that trial counsel's deficient performance prejudiced Conner:

[T]he State's case against Conner was weak. While the testimony of six witnesses all identifying Conner as the gunman may have seemed compelling, the testimony of these witnesses was riddled with inconsistencies. In addition to the explicit inconsistencies, two of the witnesses testified that they saw the gunman's face for an extended period, yet neither testified that the gunman had Conner's distinctive tattoo of a teardrop under his eye—a tattoo about which the prosecution made much ado during the sentencing phase. . . . Yet, there is significant evidence before this Court that Conner could not run without lifting his entire right leg and throwing his foot forward because of his foot drop—a physical fact that would result in a very distinctive gait, and one discoverable through a review of Conner's medical records. In light of the glaring inconsistencies in the witness identification testimony and the lack of physical evidence against Conner, counsel's failure to discover and present this evidence—evidence that would have cast grave doubt on whether Conner was the person the witnesses actually saw—is sufficient to undermine confidence in the outcome of Conner's trial.¹⁴⁶

The Fifth Circuit Court of Appeals reversed the federal district court's grant of habeas relief.¹⁴⁷ The Fifth Circuit did not address the trial counsel's performance.¹⁴⁸ Instead, the Court held that Conner was not entitled to relief because he "cannot show prejudice resulting from his counsel's alleged deficiency in not reviewing his medical history."¹⁴⁹ The Fifth Circuit held, without acknowledging the flaws in the evidence, that Conner could not

144. *Id.* at 14.

145. *Id.* at 16.

146. *Id.* at 17–18 (citations omitted).

147. *Conner v. Quarterman*, 477 F.3d 287, 294 (5th Cir. 2007).

148. *Id.* at 293–94.

149. *Id.* at 294.

establish prejudice because he “has done nothing to lessen the impact of the other evidence against him,” including the eyewitness identifications and the fingerprint in the store.¹⁵⁰

Instead of analyzing whether there should be confidence in a conviction in which trial counsel failed to conduct an investigation into potentially exculpatory evidence and whether confidence is warranted when that conviction is based solely on flawed eyewitness testimony and unreliable fingerprint analysis, contrary to the mandate of *Strickland*, the Fifth Circuit merely applied a sufficiency of the evidence test.¹⁵¹ Most courts have analyzed the prejudice prong in a similar manner.¹⁵² The problem with analyzing the prejudice prong in this way, however, is that there will almost always be evidence implicating the defendant, and this is the primary reason that defendants prevail so infrequently on ineffective assistance claims.

This case highlights some of the problems with the prejudice prong even after the Supreme Court decisions in *Williams*, *Wiggins*, and *Rompilla*. Courts are likely to find that the defendant was not prejudiced as long as there is evidence implicating him, and, in most cases, such evidence will exist.

VII. PROPOSAL

It is my belief that the situation will not drastically improve until the Supreme Court totally abandons the prejudice prong. At the present time, states have little incentive to ensure that defendants receive quality representation. They know that the chances of a defendant prevailing on an ineffective assistance claim are minimal. However, if defendants did not have to prove prejudice, they would prevail much more frequently. The states would want to avoid the expense of retrials and, therefore, would devote greater resources to ensure that defendants receive competent trial attorneys. Trial judges are also aware that, under the current *Strickland* standard, the chances of a reversal are slim, so they do not have enough incentive to take sufficient care in ap-

150. *Id.* The Supreme Court subsequently denied certiorari, though Justices Stevens and Ginsburg voted to stay Conner's execution. *Conner v. Quarterman*, 128 S. Ct. 24 (2007). On August 22, 2007, Mr. Conner was executed. *Texas Executes 400th Inmate Since 1982*, MSNBC, Aug. 22, 2007, <http://www.msnbc.msn.com/id/20398934>.

151. See *Conner*, 477 F.3d at 293–94.

152. See, e.g., *Hallford v. Culliver*, 459 F.3d 1193, 1201 (11th Cir. 2006).

pointing counsel. That would change if defendants were not required to prove prejudice and cases were reversed more frequently.

While I have concluded that the prejudice prong should be discarded altogether, others have proposed merely tinkering with the prejudice prong. In *Strickland*, the Supreme Court placed the burden of proving prejudice on the defendant.¹⁵³ An obvious alternative would be to place the burden on the government. That is, the government would have to prove that the defendant suffered no prejudice as a result of counsel's poor performance. Judge Bazelon made such a proposal in *United States v. Decoster*.¹⁵⁴ According to Judge Bazelon, "To place the burden on the defendant would require him to establish the likelihood of his innocence."¹⁵⁵ The problem with requiring the defendant to prove his innocence, according to Judge Bazelon, is that "[t]he presumption of innocence that cloaks the accused cannot be stripped by a conviction obtained in something less than a constitutionally adequate trial."¹⁵⁶ Judge Bazelon emphasized that the government's burden should not be met simply by pointing to evidence of the defendant's guilt:

To satisfy its burden of establishing lack of prejudice, it is not enough for the government simply to point to the evidence of guilt adduced at trial, no matter how overwhelming such evidence may be. In the first place, "proof of prejudice may well be absent from the record precisely because counsel has been ineffective." When, as in this case, ineffectiveness is founded upon gross omissions of counsel rather than specific errors, counsel's violations so permeate the trial that they necessarily cast doubt on the entire adjudicative process. Even where the consequences of counsel's omissions are less pervasive, it will generally be impossible to know precisely how the proceedings were affected, and the resulting prejudice will be "incapable of any sort of measurement." As the Supreme Court has emphasized, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial."

Moreover, "prejudice" to the defendant may take many forms. The likelihood of acquittal at trial is not the only touchstone against which the consequence of counsel's failures is to be measured. The duties of

153. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

154. 624 F.2d 196, 287-89 (D.C. Cir. 1976) (Bazelon, J., dissenting).

155. *Id.* at 291.

156. *Id.* (footnote omitted).

an attorney extend to many areas not necessarily affecting the outcome of trial. As the present case highlights, inadequate investigation and preparation may prejudice the defendant not only *at* trial but *before* trial—in counsel's inability to offer informed, competent advice on whether to plead guilty and whether to demand a jury trial—as well as *after* trial—in providing ineffective representation at sentencing.¹⁵⁷

While Judge Bazelon's proposal sounds good in theory and is certainly worthy of consideration, I do not think it would be much of an improvement over the present situation. Even if the burden is shifted to the government to prove lack of prejudice, the government will continue to point to the defendant's guilt as evidence that the defendant suffered no prejudice, and courts will continue to utilize a guilt-based approach because of their desire to uphold convictions and to avoid forcing states to retry cases.

Another alternative to abolishing the prejudice prong is to allow the prejudice prong to be satisfied if the defendant can demonstrate that counsel's failure to perform adequately, such as by failing to interview crucial witnesses, raises a reasonable doubt about his guilt. The problem with this alternative is that it puts the burden on the defendant to prove his innocence—so it is no improvement over the present situation. Likewise, a prejudice standard that is met by proof that counsel's performance had a conceivable effect on the outcome is inadequate for the same reasons.

Others have suggested that prejudice could be presumed under certain circumstances.¹⁵⁸ Defendants are not required to make the *Strickland* prejudice showing where the defendant actually or effectively had no counsel,¹⁵⁹ where defense counsel was not licensed to practice,¹⁶⁰ and where counsel had an actual conflict of interest.¹⁶¹ Thus, prejudice could be presumed in the event that counsel failed to perform certain tasks, such as failing to investigate a potential alibi. The problem with this approach, however,

157. *Id.* at 291–93 (footnotes omitted).

158. See, e.g., Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 465–70 (1996).

159. See *United States v. Cronin*, 466 U.S. 648, 658–59 (1984).

160. See *United States v. Novak*, 903 F.2d 883, 890 (2nd Cir. 1990).

161. See *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980).

is in distinguishing situations when prejudice ought to be presumed from situations when it ought not be presumed.

The Supreme Court took a step forward by adopting the guidelines approach in *Williams*, *Wiggins*, and *Rompilla*.¹⁶² The guidelines reflect the minimal preparation required for a capital case. There can be no confidence in an outcome in which the counsel of an individual sentenced to death failed to perform reasonably, and unreasonable performance alone should be sufficient to warrant a new trial without any showing of prejudice. Abandoning the prejudice requirement would also have a deterrent effect. As stated, states and trial judges have shown little interest in ensuring that defendants receive competent representation. If defendants did not have to prove prejudice, reversals would increase, and states and trial judges would put more care into selecting counsel. Although Judge Bazelon favored retaining the prejudice requirement, he conceded, "[I]t may be that only a rule requiring automatic reversal can provide the deterrent effect necessary to ensure that all defendants—innocent or guilty—receive the effective assistance of counsel."¹⁶³

VIII. CONCLUSION

There are many problems with the way the death penalty is administered. For instance, race often distorts who is sentenced to death,¹⁶⁴ and prospective jurors with moral qualms about the death penalty are often removed.¹⁶⁵ An even greater problem is that many defendants lack adequate legal representation during trial. The Supreme Court has long recognized the importance of counsel, especially in capital cases. Yet, there has been a breakdown in the adversarial system because so many defendants are being convicted and sentenced to death as a result of substandard representation. *Strickland*'s prejudice prong is primarily responsible for this result. The states and trial judges who preside over capital trials have proven to be either disinterested or ineffectual

162. See *Rompilla v. Beard*, 545 U.S. 374, 387 (2005).

163. *United States v. Decoster*, 624 F.2d 196, 293 (D.C. Cir. 1976) (Bazelon, J., dissenting).

164. See American Civil Liberties Union, *Race and the Death Penalty*, Feb. 26, 2003, <http://www.aclu.org/capital/unequal/10389pub20030226.html>.

165. See *Greene v. State*, 469 S.E.2d 129, 145 (Ga. 1996) (Bentham, C.J., concurring in part and dissenting in part).

in ensuring the proper functioning of the adversarial system. Death row inmates lack the political clout to change the situation through the political process. Therefore, only the Supreme Court can ensure that the Sixth Amendment guarantee of effective assistance of counsel is realized—and that will only happen by completely abandoning *Strickland*'s prejudice prong.

APPENDIX

SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

Prior to *Wiggins*:

Dobbs v. Turpin, 142 F.3d 1383 (11th Cir. 1998). Counsel was ineffective for failing to pursue and present evidence of petitioner's unfortunate childhood, including evidence that his mother often would not let him stay in the house with her, and when she did allow him to stay, she ran a brothel where she exposed him to sexual promiscuity, alcohol, and violence. Additionally, the court found counsel's closing argument at sentencing to be inadequate, during which counsel first read Justice Brennan's concurring opinion in *Furman v. Georgia* and then argued that the current death penalty statute would also be found unconstitutional. Counsel's argument was that the current statute minimized the jury's responsibility for determining the appropriateness of the death penalty and failed to focus on the character and record of the defendant.

Collier v. Turpin, 177 F.3d 1184 (11th Cir. 1999). Counsel was found to be ineffective for failing to present evidence that petitioner had a gentle disposition and a record of helping his family in times of need, that petitioner had performed acts of heroism and compassion, and that petitioner was under severe stress at the time of the crimes due to his recent job loss, his poverty, and his diabetic condition. The court found that the jury was not "presented with the particularized circumstances of his past and of his actions on the day of the crime that would have allowed them fairly to balance the seriousness of his transgressions with the conditions of his life." *Id.* at 1204. Had the jury heard this information, the court "believe[d] that is [was] at least reasonably possible that the jury would have returned a sentence other than death." *Id.*

Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999). Counsel was ineffective for failing to present the testimony of three witnesses who

stated that they had seen the murder victim the day after petitioner allegedly murdered her.

Smith v. Stewart, 189 F.3d 1004 (9th Cir. 1999). Petitioner was granted a resentencing hearing. At petitioner's resentencing proceeding, counsel presented only the same mitigation testimony that had already been rejected by the trial judge at petitioner's first sentencing proceeding. As a result, counsel was found to have rendered ineffective assistance of counsel.

Moore v. Johnson, 194 F.3d 586 (5th Cir. 1999). The court found that petitioner had been prejudiced at his sentencing hearing due to trial counsel's numerous, egregious failures.

Jackson v. Calderon, 211 F.3d 1148 (9th Cir. 2000). Sentencing phase relief was granted as a result of counsel's failure to compile petitioner's social history, which would have yielded useful mitigating evidence; failure to present available expert medical testimony that petitioner lacked the capacity to think consciously at the time of the crime; and failure to investigate the facts underlying one of the aggravating factors.

Lockett v. Anderson, 230 F.3d 695 (5th Cir. 2000). The court found trial counsel ineffective for failing to investigate and present evidence "that [petitioner] suffers from a personality disorder and a brain abnormality associated with a documented history of seizures" along with evidence that petitioner's "seizures may have resulted from temporal lobe epilepsy, caused either organically or as a result of repeated falls as a youth." *Id.*

Burdine v. Johnson, 262 F.3d 336 (5th Cir. 2001). Court found that petitioner was denied counsel during a critical stage of his proceedings when his "counsel was repeatedly asleep, and hence unconscious . . . through a not insubstantial portion of the 12 hour and 51 minute trial." *Id.* at 349. The court rejected the state's argument that petitioner had to demonstrate actual prejudice because "[s]uch absence of counsel at a critical stage of a proceeding makes the adversary process unreliable." *Id.*

Ainsworth v. Woodford, 268 F.3d 868 (9th Cir. 2001). The court found that "counsel engaged in minimal preparation . . . [having] interviewed one defense witness for only ten minutes on the morning she was scheduled to testify," that "counsel failed to examine [petitioner's] employment records, medical records, prison records, past probation reports, and military records," even

though these materials were “readily available”; counsel “abdicated the investigation of [petitioner’s] psychosocial history to one of [his] female relatives”; counsel “failed to present . . . evidence of [petitioner’s] positive adjustment to prison life during his previous incarcerations”; and counsel’s lack of preparation of one defense witness resulted in direct testimony which opened the door to cross-examination eliciting evidence that petitioner had planned to commit another crime. *Id.* at 875. Had counsel undertaken the necessary investigation he would have discovered the following: petitioner had a history of severe substance abuse dating back to childhood; petitioner “grew up in a household where both his mother and father were volatile alcoholics and alcoholic arguments occurred nightly”; petitioner’s “father was physically, verbally and emotionally abusive . . . and on at least two occasions attempted to kill the young boy”; petitioner blamed himself for his father’s suicide, suffered from severe depression and had attempted suicide at least six times by slashing his wrists. *Id.*

Mayfield v. Woodford, 270 F.3d 915 (9th Cir. 2001). The Ninth Circuit granted relief on petitioner’s claim that his trial counsel provided ineffective assistance of counsel at the sentencing phase of his capital case. Counsel’s primary failing was that he failed to call an endocrinologist to explain the effects of petitioner’s diabetes, or a toxicologist to explain petitioner’s substance abuse.

Silva v. Woodford, 279 F.3d 825 (9th Cir. 2002). The Ninth Circuit granted sentencing phase relief on petitioner’s ineffective assistance claim as a result of counsel’s failure to investigate petitioner’s background, including his family, criminal, substance abuse, and mental health history, “based entirely on an overbroad acquiescence in his client’s demand that he refrain from calling his parents as witnesses.” *Id.* at 846.

Karis v. Calderon, 283 F.3d 1117 (9th Cir. 2002). Sentencing phase relief was granted as a result of trial counsel’s failure to investigate and present evidence that petitioner endured brutal violence at the hands of his father and step-father, and that he witnessed similar violent acts committed against his mother by both men.

Jennings v. Woodford, 290 F.3d 1006 (9th Cir. 2002). Relief was granted as a result of trial counsel’s failure to investigate and present available evidence suggesting that as a result of petitioner’s long-term methamphetamine use including on the night of

the murder, petitioner lacked the capacity to form the intent necessary for first degree murder.

Brownlee v. Haley, 306 F.3d 1043 (11th Cir. 2002). Sentencing phase relief was granted as a result of counsel's failure to present evidence of petitioner's "severe intellectual limitations." *Id.* at 1072. The court explained that evidence of petitioner's diminished mental capacity "is particularly significant in light of . . . *Atkins v. Virginia*" and noted that "it is abundantly clear that an individual 'right on the edge' of mental retardation suffers some of the same limitations on reasoning, understanding, and impulse control as those described by the Supreme Court in *Atkins*." *Id.* at 1073.

Post-Wiggins:

Douglas v. Woodford, 316 F.3d 1079 (9th Cir. 2003). Due to an inadequate investigation, counsel failed to discover several items regarding petitioner's background, including: information indicating that a psychologist who examined petitioner in connection with an earlier offense had determined that petitioner may have been incompetent to stand trial and was reasonably certain to have lacked the capacity to plan and execute the actions with which he had been charged; detailed evidence of petitioner's impoverished upbringing at the hands of abusive foster parents who would often lock him in a closet for extended periods of time; evidence that, while incarcerated earlier in life, petitioner was gang-raped by other inmates; and evidence of possible brain damage resulting from petitioner's long-term exposure to toxic solvents while restoring furniture and/or a head injury sustained during an automobile accident.

Alcala v. Woodford, 334 F.3d 862 (9th Cir. 2003). The court found counsel ineffective for inadequately presenting petitioner's alibi defense. This was especially important given the fact that petitioner had been convicted based on inconsistent eyewitness identifications, suspect jailhouse testimony and no physical evidence linked petitioner to the murder.

Lewis v. Dretke, 355 F.3d 364 (5th Cir. 2003). Petitioner's death sentence was reversed as a result of counsel's failure "to investigate mitigating evidence of his abusive childhood." *Id.* at 366–67.

Soffar v. Dretke, 368 F.3d 441 (5th Cir. 2004). Counsel ineffective for failing to investigate and present available evidence supporting their trial theory that petitioner's incriminating statements to law enforcement was false. Counsel failed to interview the sole survivor of the robbery that resulted in the deaths of three others. The court also found counsel ineffective for failing to consult a ballistics expert to examine critical crime scene evidence for discrepancies between that evidence and the contents of the statements petitioner signed for police over three days of uncounseled interrogation.

Boyde v. Browne, 404 F.3d 1159 (9th Cir. 2005). Sentencing phase relief was granted on petitioner's claim that trial counsel was ineffective for failing to develop and present readily available mitigating evidence of the abuse he suffered as a child from his mother and stepfather.

Draughon v. Dretke, 427 F.3d 286 (5th Cir. 2005). Counsel was found to be ineffective for failing to investigate and present evidence contradicting the state's theory of how the fatal shooting occurred.

Summerlin v. Schiro, 427 F.3d 623 (9th Cir. 2005). Counsel was found to be ineffective for failing to conduct any family, social history investigation or mental health investigation, and therefore did not learn that petitioner suffered abuse as a child, was functionally mentally retarded, and had been diagnosed with paranoid schizophrenia.

Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005). The court found counsel's performance to be deficient for several reasons: counsel (1) relied primarily on one inexperienced psychologist, who had conducted only a cursory screening of petitioner; (2) failed to follow up when this preliminary screening suggested that petitioner suffered from a mental disorder; (3) failed to follow up on evidence of paranoia; (4) failed to review Daniel's family and social history which described a family history of mental illness; (5) failed to investigate whether the medication prescribed for Daniels impacted his state of mind at the time of the shootings; and (6) failed to investigate petitioner's use of illegal substances, in particular, the combined impact of these with the prescription medications on his state of mind.

Hoffman v. Arave, 455 F.3d 926 (9th Cir. 2006). The court found counsel ineffective for advising petitioner to reject a plea bargain

under which he could have pled guilty to first-degree murder in exchange for the state's withdrawal of the death penalty as a sentencing option.

Hovey v. Ayers, 458 F.3d 892 (9th Cir. 2006). Counsel ineffective for failing to supply a key expert witness with documentation supporting the expert's schizophrenia diagnosis and other information about petitioner's conduct around the time of the offense.

Frierson v. Woodford, 463 F.3d 982 (9th Cir. 2006). Although this was petitioner's third trial, counsel failed to read the record of the prior proceedings, and therefore failed to learn of various sources of evidence indicating possible organic brain dysfunction predating the offense. Counsel also failed to locate and review available school, hospital, prison and juvenile records showing a history of head injuries and IQ scores of 71 and 90, and counsel failed to consult a neurologist about petitioner's head injuries, despite having been made aware of them.

Correll v. Ryan, 465 F.3d 1006 (9th Cir. 2006). Sentencing phase relief was granted by the court, finding that counsel had been ineffective for failing to investigate and present available mitigating evidence, including substantial evidence that petitioner was one of six children abused and neglected by a mother whose commitment to her religion came before her commitment to her children; a brick wall fell on petitioner's head when he was seven years old, likely causing brain damage; petitioner began using drugs to self-medicate by age ten; all six children in petitioner's family had substance abuse problems, five spent time in juvenile facilities, and all four boys spent time in adult prisons; he was cast out of his parents' home and became a ward of the state and quickly acquired an addiction to heroin; and at the time of the offenses in this case, petitioner was a heavy methamphetamine user, which likely caused impulse control problems, judgment impairment and aggressiveness.

Lankford v. Arave, 468 F.3d 578 (9th Cir. 2006). Counsel was found to be ineffective for requesting a jury instruction which relieved the prosecution of its obligation to present evidence to corroborate the accomplice testimony on which its case was built.

Lambricht v. Schriro, 490 F.3d 1103 (9th Cir. 2007). The court reversed petitioner's death sentence after finding that counsel was ineffective. According to the court, counsel "spent only five and a half hours obtaining evidence and preparing for he penalty

phase," *id.* at 39, and "failed to do even a minimal investigation of 'classic mitigation evidence,' notwithstanding the fact that he knew such evidence potentially existed." *Id.* 36. Such evidence consisted of two prior suicide attempts; a prior psychiatric hospitalization; traumatic experiences in Vietnam; an antisocial personality disorder diagnosis by a court psychologist; a serious drug problem; and an abusive and neglectful upbringing.

Jackson v. Brown, 513 F.3d 1057 (9th Cir. 2006). The Ninth Circuit affirmed the district court's grant of sentencing phase relief as a result of counsel's failure to present mitigating evidence at the penalty phase.

Lawhorn v. Allen, 519 F.3d 1272 (11th Cir. 2008). Counsel waived closing argument at sentencing under the mistaken belief that the prosecutor would be precluded from making a closing argument. Alabama law, however, provides the trial judge with the discretion to permit or deny the prosecution a closing argument. Counsel was ineffective for failing to conduct adequate legal research on this point.