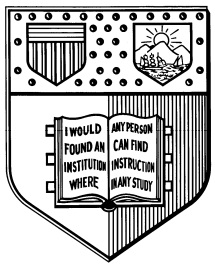

"It's Like Déjà Vu All Over Again:" *Williams v. Taylor*, *Wiggins v. Smith*, *Rompilla v. Beard* and a (Partial) Return to the Guidelines Approach to the Effective Assistance of Counsel

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"IT'S LIKE DEJA 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

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Abstract

Shoddy lawyering in capital cases is well documented. Many defendants facing the death penalty end up on death row not because of the heinousness of the crime they committed but rather because of the poor quality of trial counsel's performance. Despite the acknowledgment of sometimes shockingly poor representation by academics, litigators and even judges, most post-conviction claims of ineffective assistance of counsel are unsuccessful. Why? The legal standard for adjucicating these allegations which the Court adopted in *Strickland v. Washington,* which requires a defendant to demonstrate that his lawyer's performance was outside the "wide range of comeptent assistance" and that because of the substandard representation there is a reasonable probability that the outcome would have been different, has prven to be very difficult to satisfy. The Supreme Court's recent decisions in *Williams v. Taylor, Wiggins v. Smith,* and *Rompilla v. Beard,* however, have provided some reason for optimism. While purporting to operate within the *Strickland* framework, the Court in all cases held that trial counsel's representation was constitutionally inadequate. In doing so, the Court used the ABA Standards for Criminal Justice as norms for counsel's performance in determining what constitued objectively reasonable representation.

This article explores the jurisprudential road to *Strickland,* and from *Strickland* to *Williams, Wiggins,* and *Rompilla.* It then posits that, viewed through the lens of history, the Court's use of the ABA guidelines is reminiscent of the standard Judge Bazelon articulated thirty years ago in *Decoster v. United States* which the Court rejected in

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Strickland. Consciously or subconsciously, the Court has now embraced a variation of the Bazelon's *Decoster* approach when reviewing ineffective assistance of counsel claims. In all likelihood, this is because the Court concluded that *Strickland*'s vague standard was being misunderstood and misapplied by the state and federal courts in a manner that insulated grossly incompetent representation from judicial review. Thus, the Court used the ABA guidelines to put some "flesh" on the *Strickland* "skeleton.". Finally, the article explores the effect of the Court's decisions on ineffective assistance of counsel claims reviewed by the state and federal courts, concluding that additional reforms are needed if the promise of effective assistance of counsel is to become a reality.

INTRODUCTION

Kenny Neal was convicted and sentenced to death for murdering his estranged girlfriend.[1] His court-appointed lawyer had never handled a capital case prior to Mr. Neal's. In fact, the lawyer had just regained his license to practice law, which had been revoked for five years after counsel was convicted of possession of child pornography and sent to federal prison. Immediately after counsel's release from prison, his right to practice law was reinstated, and the state assigned him to represent Kenny Neal in his upcoming capital trial. After Mr. Neal's conviction, two jurors swore in affidavits that they had known of the lawyer's child pornography conviction and that it was a factor when they considered, and then rejected, the lawyer's arguments to spare Mr. Neal's life. However, not only was Kenny harmed by his lawyer's reputation, the practical implications of counsel's inadequacy in performing the basic legal duties necessary for a proper, effective, caused Kenny even greater harm. Records show that despite evidence that Mr. Neal had an IQ well under average, his attorney nonetheless failed to explore the availability of psychological defenses premised on Defendant's documented developmental disability. Counsel also failed to investigate and to use documentary evidence relating to either Kenny's cognitive impairment or his drug addiction, or to adequately prepare and question expert witnesses for the defense.[2]

We wish we could say that Neal's case is unique. It is not. As one scholar has aptly said, many death row inmates face execution not because

[1] *State of North Carolina v. Kenneth Neal*, No. 96-CRS-3561 (N.C. 1996)
[2] *Id.*

they committed the worst crimes, but because they had the worst lawyers.[3] Unfortunately, in spite of the well-known phenomena of shoddy and shameful representation in capital cases, most appeals asserting claims of ineffective assistance of counsel are unsuccessful.[4] But why? There are a host of reasons, but the key driving force is the legal standard for assessing such claims embraced by the Supreme Court in *Strickland v. Washington*.[5]

The Supreme Court's recent decisions in *Williams v. Taylor*, *Wiggins v. Smith*, and *Rompilla v. Beard*, however, have provided some reason for optimism. While purporting to operate within the *Strickland* framework, the Court in all cases held that counsel's representation was constitutionally inadequate.[6] Optimists would say that these recent decisions suggest the Court has seen the limitations of the impenetrable *Strickland* standard, and is

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[3]Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 Yale L. J. 1835 (1994) (recording numerous instances of poor representation in capital cases). *See, e.g.*, James S. Leibman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 Fordham L. Rev. 1607, 1664 (2006) (It is widely recognized that a major flaw in the administration of the death penalty in most states is the quality of counsel and investigative resources provided to indigent defendants. ; Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 B.Y.U. L. Rev. 1, 5 (referencing successful ineffective assistance of counsel case with respect to lawyer who slept through substantial portions of trial, *Burdine v. Johnson*, 262 F.3d 336, 357-401 (5th Cir. 2001) and concluding: that is not unique about his case is the deplorable legal representation that he received. There are a multitude of cases that reveal legal representation of criminal defendants as something that can be described as nothing less than 'poor lawyering.' Unfortunately, this phenomenon occurs more often than our legal system may care to admit.

[4]*See e.g.*, Frye v. Lee, 235 F.2d 897, 907 (4th Cir. 2000) (admitting it was troubled by defense counsel ecades long routine of drinking approximately 12 ounces of rum each evening but denying effective assistance claim where no showing of specific instances of defective performance); *Gardner v. Dixon*, 1992 U.S. App. Lexis 28147, at *17-36 (4th Cir. Oct. 21, 1992) (per curium) (unpublished opinion) (refusing to vacate petitioner death sentence where petitioner had several affidavits demonstrating counsel was severely addicted to cocaine and alcohol and used both substances throughout trial, because evidence was not newly discovered and defendant made not showing that trial would have resulted in a different outcome absent the drug and alcohol use); *Berry v. King*, 765 F.2d 451, 454 (5th Cir. 1985) (finding no ineffective assistance counsel and that, regardless of whether or not counsel used drugs during trial, under *Strickland* the fact that an attorney used drugs is not, *in and of itself*, relevant to an ineffective assistance claim , *cert. denied*, 476 U.S. 1164 (1986).

[5]*See* 466 U.S. 688 (1984); 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. Chief Justice Warren Burger was going around the country talking about how trial lawyers were incompetent at the very same time that the Court he presided over was adopting a standard that amounts to nothing more than 'close enough for government work' in *Strickland vs. Washington*."; *Duncan*, supra note 1, 13-14, (discussing the nordinate difficultly in winning ineffective assistance of counsel claims).

[6]*Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

(finally) attempting to effectuate real improvement in the representation of indigent defendants, especially in capital cases. This optimism would be grounded in the fact that these cases appear to embrace a standard thought to be a mere historical relic in Sixth-Amendment jurisprudence: *Williams, Wiggins*, and *Rompilla* stand for the proposition that the ABA Standards for Criminal Justice should be used as norms for determining what is objectively reasonable representation.

Use of the ABA Standards as a checklist for objectively reasonable representation was first used by Judge Bazelon in the 1970's as the appropriate standard for determining constitutionally effective counsel.[7] At the time, this approach was heralded as the best method for assessing the quality of attorney representation. When the Court adopted the *Strickland* standard, however, it rejected the guidelines approach in favor of the enunciated two-prong standard. Thus, the change possibly effectuated through *Williams, Wiggins*, and *Rompilla*—a requirement that courts look to the ABA standards when assessing the reasonableness of representation—suggests that the Court eventually realized that *Strickland*, at least applied by most state and federal courts, needed a legal facelift.

This article will explore the impact of the *Williams, Wiggins*, and *Rompilla* decisions. We posit that when viewed through the lens of history, the Court's use of the ABA guidelines is reminiscent of the standard Judge Bazelon articulated thirty years ago. Section I of this article contains a brief history of ineffective assistance of counsel jurisprudence. Part II explores the original guidelines approach, and the Supreme Court's ultimate rejection of that approach in *Strickland*. In part III, we examine *Williams, Wiggins*, and *Rompilla*, and the jurisprudential change these opinions established as a result of their heavy reliance upon the ABA standards. Part IV reviews the historical emphasis on the pre-trial investigation and mitigation stages in capital cases. Part V examines the comparison between the "new" guideline approach and the one Judge Bazelon utilized. Finally, the article explores the effect of the Court's decisions on ineffective assistance of counsel claims reviewed by the state and federal courts.

PART I: A BRIEF HISTORY OF THE RIGHT TO EFFECTIVE COUNSEL

The Supreme Court first held indigent defendants had a right

[7] *United States v. Decoster*, 624 F.2d 196, 276-301 (D.C. Cir. 1976) (Decoster III) (Bazelon, J. dissenting) (arguing counsel should be judged against ABA guidelines for standard norms as a method for judging effectiveness).

to effective counsel, at least in capital cases, in *Powell v. Alabama*.[8] Because the Sixth Amendment had not yet been incorporated, *Powell* relied upon the Due Process Clause as the constitutional basis of the right to the effective assistance of counsel.[9] Over time, the Court moved to the more logical Sixth Amendment theory.[10] The Court, however, did not define the level of competence required by the Constitution until many years later.

A. The First Tests.

Although the right to "effective" counsel has existed since the Court's original decisions guaranteeing indigent defendants the right to counsel, the Supreme Court's decisions were case specific and unilluminating.[11] In the interim, lower courts struggled to develop an appropriate standard by which to gauge the quality of counsel's representation.[12]

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[8] *Powell v. Alabama*, 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 likewise a denial of due process within the meaning of the Fourteenth Amendment.") (emphasis added). Although *Powell* was the first case to discuss a client's right to counsel, the actual language of the decision suggested that right only applied to the special circumstances of that case. *See id.* at 71. Six years later, the Court held that the Sixth Amendment guaranteed indigent *federal* defendants, charged with felony convictions, the right to appointed counsel in *Johnson v. Zerbst*. 304 U.S. 458, 462-63 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."). Finally, in *Gideon v. Wainwright*, the Court held that the constitutional right to counsel also applied in state courts through the Fourteenth amendment. 372 U.S. 335, 342-43 (1963) (overruling *Betts v. Brady*, 316 U.S. 455, (1942)).

[9] *Powell*, 287 U.S. 45, 71 (1932).

[10] *See, e.g., Wade v. United States*, 388 U.S. 218, 226-27 (1967) (noting that the right to effective counsel is an integral part of the right to a fair trial, guaranteed by the Sixth Amendment as well as the Fifth Amendment).

[11] U.S. CONST. amend. VI; *see Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963) (holding the Sixth Amendment right to counsel in felony cases extends to State criminal defendants); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938) (holding the Sixth Amendment guarantees indigent federal felony defendants the right to appointed counsel); *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (holding that Defendants in a capital case were denied Due Process Rights by the trial court's failure to make an *effective* appointment of counsel, but limiting its holding to that particular case) (emphasis added).

[12] *See, e.g., Diggs v. Welch*, 148 F.2d 667, 668 (1945). In *Diggs*, the court specifically stated that the Sixth Amendment does not guarantee effective counsel and that a defendant's only source for relief would be through the Fifth Amendment. U.S. CONST. amend VI. ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."); *Diggs*, 80 U.S. App. D.C. at 669-70. The court recognized a strong deference to counsel, regardless of their mistakes, and concluded no test could adequately measure when an attorney's tactical mistakes had crossed the threshold into ineffectiveness. *See id.* at 670. Lower courts' reluctance to find counsel ineffective stemmed from many fears, including that doing so would encourage constant challenges by convicted criminals, burden defense lawyers to such a degree as to discourage them from accepting court assignments and thereby bring the court system to a halt, encourage lawyers to deliberately make mistakes to

Initially, the prevailing standard lower courts used to determine whether counsel's conduct satisfied the Sixth Amendment was the "farce and mockery" test.[13] This minimal standard asked only whether counsel's alleged ineffectiveness was so prevalent that it made the proceedings a "farce and mockery of justice," thereby depriving the defendant of the constitutional right to a fair trial under the Due Process clause. Needless to say, this test frequently left shockingly poor representation beyond the reach of courts to remedy.[14]

Then, in the 1970's, the Supreme Court indicated in *Tollett v. Henderson* and *McMann v. Richardson* that the Sixth Amendment may require more.[15] These cases implied a defendant would prevail in proving he had ineffective assistance if counsel's conduct was not "within the range of that competence demanded of attorneys in criminal cases."[16] After *McMann*, many courts adopted some version of this reasonable competence test.[17] Observers largely criticized this vague test, however, on the basis that it was not significantly different from the "farce and mockery" standard.[18]

Corresponding with the judicial debate about the appropriate level of competence for counsel, the ABA created the Special Committee on Standards for the Administration of Criminal Justice which included as Honorary Chairman Chief Justice Warren E. Burger.[19] The ABA Committee also included an Advisory Committee on the Prosecution and Defense Functions

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assist defendants, and place appellate courts in the undesirable position of second guessing defense tactics with the benefit of hindsight. *See U.S. v. Hager*, 505 F.2d 737, 739-40 (8th Cir. 1974); David L. Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 22 (1973) [hereinafter *Defective Assistance*]; Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths Dead End?*, 86 COLUM. L. REV. 9, 65-66 (1986).

[13] *See United States v. Long*, 419 F.2d 91, 94 (4th Cir. 1969)("[T]he rule is well established that counsel's actions or omissions must be of such a nature as to render the trial a farce and a mockery of justice which shocks the conscience of the court.").

[14] *See, e.g., Rice v. United States*, 420 F.2d 863 (5th Cir. 1969); *Grant v. State of Okl.*, 382 F.2d 270 (C.A.Okl. 1967); *Daugherty v. Beto*, 388 F.2d 810 (5th Cir. 1967)

[15] *Tollett v. Henderson*, 411 U.S. 258, 266-67 (1973); *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).

[16] *McMann*, 397 U.S. at 770-71.

[17] *See, e.g., United States v. Bosch*, 584 F.2d 113, 1120-21 (1st Cir. 1978) (using the range of competence test); *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977) , *cert. denied*, 435 U.S. 1011 (1978) (same); *Akridge v. Hopper*, 545 F.2d 457, 459 (5th Cir. 1977), *cert. denied*, 431 U.S. 941 (1977) (same); *United States v. Toney*, 527 F.2d 716, 720 (6th Cir. 1975), *cert. denied*, 429 U.S. 838 (1976) (same); *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979) (same).

[18] *See, e.g., Berger*, *supra* note 12, at 16 (suggesting the farce and mockery definition was autological and hardly useful).

[19] Standards Relating to the Prosecution Function and the Defense Function (Tentative Draft March 1970).

which was chaired by the Chief Justice.[20] These committees created a tentative draft in March of 1970 which included standards for defense counsel.[21] Although these standards were arguably general, and non-specific, when viewed in conjunction with the commentary, the standards acted as guides for defense attorneys establishing some minimum requirements of competency. The new standards placed a heavy focus on certain specific duties, such as the duty to investigate, which, as we shall see, would become the most heavily scrutinized aspect of defense counsel's representation.[22]

The new ABA Guidelines fueled scholarly and judicial debate regarding the appropriate standard courts should use to resolve ineffective assistance of counsel claims. One camp believed the law should not simply be concerned with a particularly poorly represented defendant. Rather, a rigorous legal standard was needed in order to increase the quality of criminal defense representation across the board, particularly in cases involving court appointed counsel for indigent clients.[23] Statistics of unmanageable caseloads combined with inadequate funds had surfaced, and many practitioners and scholars, including defense attorneys themselves, had visions of the mandatory funding and maximum caseload limits that would surely follow a constitutional standard on effectiveness that had some teeth.[24] Others,

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[20] Standards Relating to the Prosecution Function and the Defense Function (Tentative Draft March 1970).

[21] Standards Relating to the Prosecution Function and the Defense Function (Tentative Draft March 1970). The introduction to the Defense Function begins: subjects in the administration of criminal justice are more in need of clarification than the role of the defense lawyer in a criminal case. Standards Relating to the Prosecution Function and the Defense Function (Tentative Draft March 1970) p. 141. *See Infra.*

[22] Standards Relating to the Prosecution Function and the Defense Function (Tentative Draft March 1970) p. 224-28.

[23] *See, e.g., Smithburn & Springmann, supra* note 17 at 497-98 (arguing a Supreme Court standard for effective counsel will prevent claims form arising as well as ease appellate review); *cf.* William S. Geimer, *A Decade of Strickland Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 Wm. & Mary Bill Rts. J. 91, 95 (1995) (commenting how, contrary to promoting superior defense counsel performance, *Strickland* has instead "[f]ostered the continuation of criminal defense performance that is often characterized not only by general laziness, deceit, and incompetence, but also by abandonment of clients to their accusers")**;** *see also* Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 401 (1995) (arguing the primary obstacle to the full implementation of [the procedural and substantive rules afforded to capital defendants] is the chronic and severe underfunding of indigent defense services by state and local governments throughout the United States).

[24] *See* David L. Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO L.J. 811, 815-816 (1976) [hereinafter *Realities*] (documenting problems inherent in the public defense system); Berger, *supra*, note 24 at 60-61 (identifying the problems associated with indigent defense counsel); Steven B. Bright, *Neither Equal Nor Just*: *The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 ANN. SURV. AM. L. 783, 789; Donald A Dripps, *Ineffective Assistance of Counsel: The Case of an Ex Ante Parity Standard*, J. CRIM. L. & CRIMINOLOGY 242, 245 (1997) (documenting the eminent crisis of institutional indigent defense); *Constitutionalization*, *supra* note 16, at 1435-45 (describing the crisis of

however, believed courts should only be concerned with the reliability of the verdict in the case under review.

Entering the fray, Chief Judge David Bazelon of the District of Columbia Circuit announced a standard for evaluating counsel's performance that offered real guidance to lawyers and Judges. Judge Bazelon advocated a categorical or guideline approach that enumerated specific duties counsel must perform.[25] He found these duties in the newly approved ABA standards of criminal practice.[26] The legal world, seeking a more effective method of review, welcomed the addition of this "categorical" or "check-list" approach.[27]

The Supreme Court, however, appeared to relegate Bazelon's approach to the historical archives when it announced its now familiar two-prong test for ineffective assistance of counsel claims in *Strickland v. Washington*.[28] The Court, in fact, specifically rejected the checklist approach in favor of a more deferential standard in the Supreme Court's opinion: "These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance."[29]

Thus, although the Court finally articulated a much needed standard for reviewing courts to utilize when resolving ineffective assistance of counsel claims, as we discuss below, it adopted what most scholars considered to be an essentially meaningless test which, for all practical purposes, was only a slight improvement to the "farce and mockery" test, if at all.[30]

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indigent defense after the time of *Gideon*, 372 U.S. 335, including crowded dockets and severely under-funded resources); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS L.Q. 625, 651, 656-63 (1986) [hereinafter *Emperor Gideon*] (discussing problems with the national defense counsel system).

[25] *See United States v. Decoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973) (Decoster I), *rev en banc*, 624 F.2d 196 (D.C. Cir. 1976); *see also United States v. Decoster* (Decoster III), 624 F.2d 196, 276 (Bazelon, J. dissenting).

[26] *See Decoster III*, 624 F.2d 196 at 276 (Bazelon, J. dissenting); *Decoster I*, 487 F.2d at 1203; ABA Project on Standards for Criminal Justice, STANDARDS RELATING TO: THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION (App. Draft 1971); s*ee also Defective Assistance*, *supra* note 24, at 20-40 (interpreting the checklist approach and effective assistance of counsel in greater depth); *infra* Part II.A.

[27] *See* Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard fro Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L. J. 41, 419 (1988) (noting that the debate as to whether this "categorical" method is the most appropriate procedure for review has occupied courts and commentators throughout the country).

[28] 466 U.S. 668 (1984).

[29] *Id.* at 688.

[30] *See, e.g.*, RANDALL COYNE, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 148 (1995) (referring to the post-*Strickland* analysis as the Foggy Mirror test: One puts a mirror in front of the lawyer's mouth during trial and, so long as the mirror fogs and counsel is alive, the lawyer is deemed effective); William S. Geimer, *A Decade of Strickland Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL OF RTS. J. 91 (1995)

B. The *Strickland* Constitutional Standard

In *Strickland*, the Court established a two-prong test a defendant must satisfy to prove that he was denied of his Sixth Amendment right to the effective assistance of counsel.[31] First, the defendant must show that counsel's performance was deficient because it "fell below an objective standard of reasonableness."[32] Second, the defendant must show that, but for counsel's errors, a reasonable probability exists that the outcome of the proceeding would have been different.[33] The standard the Court adopted proved virtually impossible for defendants to meet, and instead of raising the bar for effective counsel, the Court created a bar to nearly all assertions of attorney inadequacy.[34]

Following *Strickland*, the Supreme Court itself failed to find a single instance of constitutionally inadequate representation for sixteen years. Three years after *Strickland*, in fact, Justice Marshall lamented that since the *Strickland* test was established, the Court had never identified an instance of attorney dereliction that met its stringent standard.[35] Accordingly, what was supposed to be an objective test became a game of luck for convicted criminals attempting to prove ineffective counsel—a game that largely depended upon

(arguing the *Strickland* court has effectively ensured that Gideon guarantees little more than the presence of a person with a law license alongside the accused during trial); Richard Klein, *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1446 (1999) [hereinafter *Constitutionalization*] ("[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."); Richard L. Gabriel, Comment, *The Strickland Standard for Claims of Ineffective Assistance of Counsel: Emasculating the Sixth Amendment in the Guise of Due* Process, 134 U. Pa. L. Rev. 1259 (1986) (arguing the *Strickland* two-prong test undermines the sixth amendment goal of effectuating a just trial result through proper adversarial proceedings).

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

[32] *Id.* at 687.

[33] *Id.*; *see infra* note 82 (discussing the pertinent facts of the case).

[34] *See* 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, 1844 (1994) ("The minimal standard of legal representation in the defense of poor people, as . . . interpreted by the Supreme Court [in *Strickland*] offers little protection to the poor person stuck with a bad lawyer."); *Calhoun*, *supra* note 17, at 427 (writing that the *Strickland* standard creates an almost insurmountable hurdle for defendants claiming ineffective assistance); 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, 93 (1995) ("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."); note 16 and accompanying text

[35] *Mitchell v. Kemp*, 483 U.S. 1026, 1026 (1987) (Marshall J., dissenting from denial of certiorari); *see, e.g.*, *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (finding no ineffective assistance of counsel); *Darden v. Wainwright* (477 U.S. 168, 186 (1986) (same).

the state court or federal court of appeals that reviewed the case.[36]

In 2000, however, things began to change. Beginning with the *Williams* decision, then continuing with *Wiggins* in 2003 and *Rompilla* in 2005, the Court began to actually police defense counsel's performances; in all three cases the Court held that counsel's performance in a capital case was objectively unreasonable. Although ostensibly adhering to *Strickland*, the combined effect of the three cases evidences a clear doctrinal shift.[37] Most significantly, all three cases place great emphasis on existing national standards of adequate representation, such as the ABA guidelines. Thus, one could argue, and we do, that the Court has finally adopted at least the framework of the checklist approach Judge Bazelon advocated thirty years ago. The unresolved questions are whether the Court itself will stay the course and, if so, whether the state and lower federal courts will follow the Supreme Court's lead.

PART II: A LOOK BACK, AND FORWARD, TO THE GUIDELINES APPROACH

A. The Original Guidelines Approach.

The guidelines approach is premised on the belief that certain fundamental, and specific, tasks and duties must be performed in all criminal cases. Thus, the method utilizes a common set of standards that comprise these necessary functions, and considers whether counsel substantially failed in any of the designated areas.

Before *Strickland*, when the range of legal standards discussed previously were in flux, Judge Bazelon strongly advocated for this categorical standard, which proved popular with legal scholars. Although his standard ultimately did not become articulated law,[38] many lamented, and continue to bemoan, the short life of Judge Bazelon's categorical approach.[39]

Judge Bazelon's attempt to articulate a more rigorous standard for assessing the effectiveness of defense counsel's conduct began with Willie

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[36] *See, e.g.*, John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 MD. L. REV. 1480, 1480-82, 1498 (noting that the Fourth Circuit "has always been particularly inhospitable to ineffective assistance of counsel claims in capital cases").

[37] *Leibman*, *supra* note 2, (noting how *Williams*, *Wiggins*, and *Rompilla* "reveal a willingness on the Court's part to scrutinize death sentences more vigorously, particularly in cases falling near the mitigated circumference"); *see, e.g.*, *infra* note 168, citing recent cases looking to the ABA standards to evaluate counsel**.**

Decoster's case. Decoster was convicted of aiding and abetting, and in some respects ended, an armed robbery and assault with a dangerous weapon.[40] Decoster's court-appointed attorney's performance during the trial raised several viable issues of ineffectiveness. Counsel made a number of mistakes during the trial, including failing to file a timely bond review motion, failing to obtain a transcript of the preliminary hearing, prematurely indicating that he was ready for trial, failing to make an opening statement, and, most significantly, failing to interview a single witness prior to trial.[41] Following his conviction, Decoster appealed to the District of Columbia Circuit. The Court of appeals, in an opinion by Judge Bazelon, raised the issue of the adequacy counsel's representation sua sponte, and remanded the case for a hearing on the issue of defense counsel's competency. (Decoster I). In that opinion, Judge Bazelon articulated his new standard for effective assistance of counsel claims and adopted the checklist approach to evaluate the representation.[42] Bazelon argued that defendants are entitled to "the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."[43] Importantly, Bazelon held that the rhetoric "reasonably competent assistance" was merely shorthand terminology and "not subject to ready application."[44] "Effective," according to Judge Bazelon, needed a more tangible definition. Thus, he articulated some particular duties courts should require of counsel.[45] Only if counsel was found to have performed these enumerated tasks would their assistance be considered legally effective.[46] Generally, Bazelon's approach required appellate courts to compare counsel's actions, while still looking at the totality of circumstances of the case,[47] to the responsibilities listed in the newly promulgated American

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[39] *Decoster III*, 624 F.2d at 264-299 (Bazelon, J. dissenting).

[40] *See*, e.g., Martin C. Calhoun, *How to Thread the Needle: Toward a Checklist-Based Standard fro Evaluating Ineffective Assistance of Counsel Claims*, 77 GEO. L. J. 413 (1988) (promoting a hybrid checklist/*Strickland* approach as the most viable because of *Strickland*'s in surmountable standard); Joseph D. Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1248-49 (1970) (advocating defense lawyers submit a confidential worksheet to the trial judge indicating specifically which tasks they have completed); J. Eric Smithburn & Theresa L. Springmann, *Effective Assistance of counsel: In Quest of a Uniform Standard of Review*, 17 WAKE FOR. L. REV. 497, 524-526 (urging the Supreme Court to adopt a categorical approach)

[41] *Decoster I*, 487 F.2d. At 1199.

[41] *Decoster III*, 624 F.2d at 211.

[42] *Decoster I*, 487 F.2d at 1197.

[43] *Id.* at 1202; s*ee also supra*, notes 24-27 and accompanying text discussing the "range of competence" standard history.

[44] *Id.* at 1203.

[45] *Id.*; *see also* ABA Standards, Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function (App. Draft 1971).

[46] *Decoster I*, 487 F.2d at 1203.

[47] Although Judge Bazelon used the word check-list and enumerated standards, he never considered the standard to be a type of master list where reviewing judges would actually remand cases for boxes left blank. He wrote:

Bar Association Project on Standards for Criminal Justice.[48]

Specifically, Judge Bazelon said: (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable; (2) Counsel should discuss fully all potential strategies and tactical choices with his client; (3) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them; (4) Counsel must conduct an appropriate investigation, both factual and legal, to determine what defenses are available. [49] Furthermore, Judge Bazelon concluded that where a defendant demonstrates counsel failed to fulfill any of these requirements, the burden of proof would shift to the government to establish a lack of prejudice.[50] It was the Supreme Court's subsequent decision to instead place the burden of establishing prejudice on the defendant that many critics considered to be the straw that broke the proverbial camel's back.

Judge Bazelon was not the first person to suggest a checklist approach.

> Naturally, given the complexities of each case and the constant call for professional discretion, it would be a misguided endeavor to engrave in stone any rules for attorney performance. Nonetheless, preserving flexibility is not incompatible with establishing the minimum components of effective assistance, and the ABA Standards give helpful guidance in pursuing both aims.

Decoster III, 624 F.2d at 276) (Bazelon, J., dissenting). But *See Berger*, *supra* note 24 at 84 (arguing that if the totality of the circumstances are taken into account the specific standards will melt into the reasonableness test and become only guides as they are in *Strickland*).

[48] *See* ABA Standards, Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function (App. Draft 1971).

[49] *Decoster III* 624 F.2d at 276 n.63 (Bazelon, J., dissenting); *Decoster I*, 487 F.2d at 1203-04 (internal citations omitted).

[50] *Decoster III*, 624 F.2d at 290-96 (Bazelon, J., dissenting). Judge Bazelon noted that two factors justified placing the burden on the government. First, requiring the defendant to show prejudice would shift the burden to the defendant to establish the likelihood of his own innocence. This, Judge Bazelon concluded, is the antithesis of the American adversarial system which holds a defendant innocent until proven guilty. Second, proof of prejudice may be absent from the record precisely because defense counsel was ineffective. *Decoster III*, 624 F.2d at 291 (Bazelon, J., dissenting); *Decoster I*, 487 F.2d at 1204. *See Calhoun*, *supra* note 17 at 428-29 (arguing that by placing the burden to show harm on the defendant the *Strickland* Court mistakenly implied that the Sixth Amendment right to effective assistance of counsel exists only to help the factually innocent); Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part One)*, 29 U. Rich. L. Rev. 1327, 1353 (1995) (positing that since the Court seems to equate the fairness of the trial with innocence, the defendant must prove innocence in at least some sense (including the odd concept of innocence of the death penalty) before relief will be forthcoming); *Geimer*, *supra* note 16 at 133-36 (arguing that burden of proof should be on government to show harmless error once defendant has established deficient performance); 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 (1996) (advocating prejudice prong often leads to unjust results and in certain circumstances prejudice must be presumed).

He actually expanded on the opinion by the Fourth Circuit in *Coles v. Peyton*.[51] *Coles* articulated some specific duties attorneys owe their clients:

> Counsel for an indigent defendant should be appointed promptly. Counsel should be afforded a reasonable opportunity to prepare to defend an accused. Counsel must confer with his client without undue delay and as often as necessary, to advise him of his rights and to elicit matters of defense or to ascertain that potential defenses are unavailable. Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.[52]

Like Bazelon, the *Coles* court concluded an attorney's omission or failure to abide by these duties constitutes a denial of effective assistance of counsel and the burden shifts to the government to establish a lack of prejudice.[53]

The checklist approach, as Judge Bazelon described it, attempted to define effective assistance of counsel in terms of services to defendants.[54] In Bazelon's opinion, the Sixth Amendment right to counsel, and concomitantly to effective counsel, is not dependent upon the strength of the evidence of the defendant's guilt.[55] Specified minimum requirements of competent attorney performance, Bazelon believed, would give substance to the Sixth Amendment mandate.[56] Even the most obviously guilty of defendants, who could conceivably never prove counsel's poor representation was likely to alter a trial outcome, is still guaranteed the constitutional right to an attorney who is

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[51] 389 F.2d 224, 226 (4th Cir. 1968). *Coles* is an especially interesting early effective assistance of counsel jurisprudence phenomenon because, after *Strickland*, the Fourth Circuit became the most notorious Circuit for rejecting ineffective assistance of counsel claims in capital cases. *See* Blume & Johnson, *supra* note 18 (discussing the Fourth Circuit inhospitality to ineffective assistance of counsel claims).

[52] *Coles*, 389 F.2d at 226.

[53] *Id.* (emphasis added).

[54] *See Decoster III*, 624 F.2d 196, 266 (D.C. Cir. 1976) (Bazelon, J. dissenting). Judge Bazelon wrote:

> In constructing standards for assessing the ineffective assistance of counsel, we must therefore consider not only what measures are necessary to assure a fair trial in the case of any particular defendant We also must structure our approach to eliminate the gross disparities of representation that make a mockery of our commitment to equal justice.

[55] *Decoster III*, 624 F.2d at 287-290 (Bazelon, J., dissenting).

[56] *See id.* at 275-76 ("[These] duties . . . represent the rudiments of competent lawyering guaranteed by the Sixth Amendment to every defendant in a criminal proceeding.").

"an active advocate in behalf of his client." [57] As Judge Bazelon explained, "[w]here such advocacy is absent, the accused has been denied effective assistance, regardless of his guilt or innocence."[58]

A robust investigation was an essential demand of effective representation.[59] This was so for several reasons. First, in order for the adversary system to function properly, both sides must prepare and organize their case in advance of trial.[60] Second, proper investigation is critical to uncovering favorable facts and allows trial counsel to take full advantage of procedural safeguards for achieving a reliable verdict such as cross-examination and impeachment.[61] Third, investigation ensures that attorneys proffer all possible legal defenses and demand that the government prove the defendant's guilt beyond a reasonable doubt.[62] Finally, investigation is essential for procedural matters outside of trial, such as arguing for lesser bail, urging for the reduction or dismissal of charges, and advocating for appropriate pleas and favorable sentences.[63] Consequently, the attorney who is ineffective in the investigative phase might never be able to rectify her performance and provide her client with an adequate defense.

As previously mentioned, Judge Bazelon's checklist approach emerged when the *Decoster* case came back to D.C. Circuit for the ultimate decision.[64] On remand after *Decoster I*, the district court denied the motion for a new trial.[65] On appeal from that decision, the panel reversed the lower court and held Willie Decoster had been denied effective assistance of counsel *(Decoster II*). The en banc court, however, granted the government's motion for rehearing, vacated the *Decoster II* panel opinion, and ordered supplemental briefing and oral argument. Judge Leventhal, writing for the en banc majority ultimately concluded Willie Decoster's attorney had not been constitutionally

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[57] *Id.* at 288 (quoting Anders v. California, 286 U.S. 738, 744 (1967)); *see also Emperor Gideon*, *supra* note 34, at 644-45 (arguing against the prejudice prong of the *Strickland*, noting the right to adequate representation ought not hinge on the guilt or innocence of the accused); Note, *Identifying and Remedying Ineffective Assistance of Criminal Defense Counsel: A New Look After* United States v. Decoster, 93 Harv. L. Rev. 752, 772 (1980) (advocating Judge Bazelon approach to the prejudice).

[58] *Decoster III*, 624 F.2d at 288 (Bazelon, J., dissenting).

[59] *Id.* at 277-80. According to Judge Bazelon, "prominent among the duties of defense counsel is the obligation to conduct appropriate investigations, both factual and legal, to determine what matter of defense can be developed." *Id.* at 277. (Bazelon, J., dissenting) (quoting *Decoster I* at 1204); *see infra* Part IV (evaluating the historical importance of investigation to effective counsel claims).

[60] *Decoster III*, 624 F.2d at 277-78 (Bazelon, J., dissenting).

[61] *Id.* at 278. Judge Bazelon emphasizes this point by pointing out that in the practical sense cases are won on the facts. *Id.*

[62] *Id.*

[63] *Id.*

[64] *See id.* at 276-301.

[65] *See id.* at 200.

ineffective. (*Decoster III*). By the time *Decoster III* was issued, the Bazelon-Leventhal battle was infamous. Unfortunately, however, the categorical standard approach was not left standing as the round ten winner. In *Decoster III*, Judge Bazelon, joined by Judge Skelly Wright, continued to adamantly argue in his dissenting opinion for the checklist result.[66] Judge Leventhal's majority opinion rejected Bazelon's theory, preferring instead a case-by-case approach to ineffective assistance of counsel claims similar to the method subsequently embraced by the Supreme Court in *Strickland*.

Leventhal's standard first considered whether counsel's performance demonstrated serious incompetency falling measurably below the performance ordinarily expected of fallible lawyers.[67] Moreover, Judge Leventhal's test also required defendants to prove that counsel's inadequacy was likely to have affected the outcome of the trial.[68] When Judge Leventhal applied this new standard to the facts of Decoster's case, Decoster's conviction was upheld.

B. The *Strickland* Judgmental Approach and its Impenetrable Standard of Review

In 1984, the Supreme Court in *Strickland v. Washington*, finally established the constitutional standard for determining whether a defendant was denied his Sixth Amendment right to the effective assistance of counsel.[69] The Court rejected a check-list approach and instead established a two-prong test appealing defendants must meet. The Court indicated the two-prong test was designed primarily to ensure that defense counsel submits the State's case to proper adversarial testing, thereby allowing appellate courts to be assured that the trial outcome was reliable.[70] Thus, the Court delimited the purpose of the Sixth Amendment right to counsel to be that of promoting reliable verdicts.[71]

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[66] *See id.*; *see also Defective Assistance*, *supra* note 24, at *passim* (arguing for the checklist approach to ineffective assistance of counsel claims).

[67] *See Decoster III*, 624 F.2d at 208.

[68] *Id.* ("[The] accused must bear the burden of demonstrating a likelihood that counsel inadequacy affected the out come of the trial."). *Id.* at 221; *see also Strickland*, 466 U.S. at 687 (placing the burden upon the Defendant to prove actual harm). *But cf. Decoster III*, 624.F. 2d at 290-96 (Bazelon, J., dissenting) (arguing where defendant proves that counsel deficiencies were substantially inadequate, the burden shifts to the government to demonstrate beyond a reasonable doubt that counsel performance did not actually affect the result).

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

[70] *Id.* at 686 ("The benchmark for judging any clam of ineffectiveness must be whether counsel conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on has having produced a just result."). *But see supra* note 55 (discussing how in order to keep the proper balance of the adversarial system whereby the defendant is innocent until proven guilty, the burden of proof must be upon the government to prove no harmful result due to ineffective counsel).

[71] *See* U.S. Const. amend XI; s*ee e.g.*, *Brewer v. Williams*, 430 U.S. 387, 426 (1977) ("The fundamental purpose of the Sixth Amendment is to safeguard the fairness of the trial. . . .") *cf. supra*, notes 63-66 and accompanying text (discussing how both guilty and innocent

In *Strickland*, petitioner based his claim primarily on his trial counsel's failure to properly investigate mitigating evidence that could and should have been presented during the sentencing phase of his capital trial.[72] In rejecting this claim, the Court emphasized that great deference should be given to trial counsel's tactical decisions.[73] Additionally, although the Court in *Strickland* mentioned the ABA guidelines, the Court expressly stated a checklist would be an impossible way to measure effectiveness and that the use of guidelines to define effectiveness was improper.[74] Specifically, the Court noted, "[p]revailing norms of practices as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides." [75] The Court insisted that no specific set of rules could properly encapsulate the variety of circumstances lawyers frequently encounter and to which attorneys must often quickly respond.[76] Any such set of rules, the Court concluded, "would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. [77] Notably, the Court cited the *Decoster III* majority opinion for this proposition.

Thus, the Court adopted what had been referred to as the judgmental

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defendants possess the constitutional right to a fair trial and how the checklist approach safeguards that right).

[72] *Strickland*, 466 U.S. at 675. Specifically, Petitioner asserted counsel was ineffective for his failure to "request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner reports or cross-examine the medical experts." *Id.* Respondent in *Strickland* pled guilty to three brutal capital murders. During his preparation for the sentencing hearing, the defense counsel did not seek out character witnesses for respondent, other than his wife and mother, nor did counsel request a psychiatric examination. Moreover, counsel decided he would not present evidence concerning respondent's character and emotional state, so he did not investigate such evidence. Defense counsel stated he felt hopeless about the case and based his strategy upon the trial judge reputation for leniency for those criminals who, like the respondent, had accepted responsibility for their crimes. However, because the trial judge found several aggravating circumstances and no substantial mitigating circumstances, he sentenced petitioner to death. *Id.* at 671-75.

[73] *Id.* at 689 ("Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.").

[74] *Id.* at 688-89. The Court wrote:

> Prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable, but they are only guides. . . . Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause.

(Internal citations omitted).

[75] *Id.* at 688.

[76] *See id.* at 688-89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

[77] *Id.* at 689 (citing *Decoster III*, 624 F.2d at 208).

approach, similar to Judge Leventhal's method, for effective assistance claims whereby cases are adjudicated on a case-by-case basis using a general and vague reasonableness standard to gauge attorney performance.[78]

III. THE "TRIUMVIRATE" (BUT PARTIAL) RETURN OF THE CHECKLIST APPROACH

The *Strickland* standard proved virtually impossible to meet. Almost all representation was found to be within *Strickland's* "wide range of competent assistance." Claims that navigated safely through the performance prong channel generally went aground on the rock of prejudice. Even in capital cases, where life and death literally hung in the balance, courts often deferred to incomprehensible "strategic" decisions provided by trial counsel rationalizing their slothful representation. As we shall see, shortly, the Court itself rejected several substantial claims of ineffective assistance of counsel under *Strickland* [79]

A. *Williams*, *Wiggins*, and *Rompilla*: A Return to the Guidelines Approach

With the new millennium came change. The first chip in *Strickland's* armor came in *Williams v. Taylor* when the Court concluded that Terry Williams's counsel had been constitutionally ineffective. [80] Although a landmark result, much of the opinion was dedicated to explaining the meaning of 28 U.S.C. §2254(d), which was part of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The ultimate decision was in some respects anticlimactic with respect to the standard for evaluating ineffective assistance of counsel claims.[81] Nonetheless, the Court, citing the ABA

[78] *See Calhoun*, *supra* note 17, at 419; *see also* John C. Jeffries & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. Chi. L. Rev. 679, 682 (1990) ("In practice, the constitutional standard for ineffective assistance of counsel approximates gross negligence.").

[79] Sixteen years passed, and the Court did not once find assistance of counsel. *Burger v. Kemp*, supra; *Darden v. Wainwright*, supra. *Mitchell v. Kemp*, 483 U.S. 1026, 1026 (1987) (Marshall, J., dissenting from a denial of certiorari). Marshall expressed his fear that such a precedent would "permit the lower courts to conclude that the Sixth Amendment guarantees no more than that of 'a person who happens to be a lawyer is present at trial alongside the accused.'" *Id.* (quoting *Strickland*, 466 U.S. at 685, which specifically held that such a lawyer is not enough to satisfy the constitutional command). What Justice Marshall did not know then was that, including the three years that had already passed, thirteen *more* years would pass before the Court would ever find an attorney to have been ineffective. The lower courts seemed to have reached Marshall's feared conclusion about the Sixth Amendment guarantees after all.

[80] 529 U.S. 362 (2000).

[81] One reason why *Williams's* reach is limited is because the Court, in its effort to decide *Wiggins v. Smith*, went out of its way to demonstrate that it had created "no new law" in *Williams*. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). Interestingly, this declaration seems to highlight the clear doctrinal shift that began in *Wiggins*—by insinuating that *Williams* did not create new law, the Court emphasized that *Wiggins*, in contrast, did. Moreover, Justice Scalia's dissent in *Wiggins*, based largely on the appropriate scope of habeas review, explicitly

Standards for Criminal Justice, concluded that "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background," and that because of this deficiency, there was a reasonable probability that the outcome of the proceeding would have been different, and the Court remanded the case for a new trial.[82]

Specifically, the Court found that counsel had not even started preparing for the sentencing phase of the proceedings until a week before the trial,[83] and had "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams's nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records."[84] Additionally, counsel presented none of the available evidence showing "Williams was borderline mentally retarded and did not advance beyond sixth grade in school."[85] Counsel failed to seek prison records recording commendations for Williams or to obtain favorable testimony by prison officials.[86] In documenting counsel's deficiencies, the Court relied upon the ABA guidelines in concluding counsel's performance was objectively unreasonable. Thus, the Court began the process of moving the jurisprudential mountain. Notably, Justice O'Connor, the author of *Strickland*, authored the majority opinion for the Court.

Three years after *Williams*, the Court agreed to hear Kevin Wiggins's

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stated that he believed the majority created new law on ineffective assistance of counsel in the *Williams* decision. *See id.* at 542 (Scalia, J., dissenting). In his dissent, Scalia argued not only that *Wiggins* was not denied the effective assistance of counsel, but, moreover, the Court should not even have considered the merits of the issue case due to the limited review permitted to federal courts in 28 U.S.C. § 2254(d)(1). *Id.* at 538-57 (Scalia J., dissenting).

In order to grant habeas relief, a federal court must determine that the state court decision was "contrary to, or involved an unreasonable application of, clearly established federal law" that was in effect *at the time* of the relevant state-court's decision. 28 U.S.C. § 2254(d)(1). Justice Scalia complains that the *Wiggins* Majority cites to *Williams*, 529 U.S. 362, when referring to the federal authority to grant the habeas review, even though *Williams* was decided *after* the State court rejected *Wiggins*'s initial ineffective assistance claim. *Wiggins*, 539 U.S. at 541-43 (Scalia, J., dissenting). Justice Scalia argued that the Court cannot use *Williams* as authority for how the State Court unreasonably applied Federal Law, because *Williams*, being *new law*, was not in effect at the time of the state court decision. *See id.* (emphasis added).

Justice Scalia used the fact that the *Williams* court cited to the ABA standards, even though *Strickland* had eschewed courts from demanding counsel to perform to such standards, to argue that the Court *did* make new law in *Williams*. *Id.* at 543. Thus, Justice Scalia recognized and pronounced the shift in ineffective assistance of counsel jurisprudence in relying upon the ABA Standards as guidelines for determining reasonableness.

[83] *Williams*, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed.1980)

[84] *Id*. at 395

[85] *Id.* at 396.

[86] *Id.*

ineffective assistance of counsel claim.[87] The Court again embraced the ABA guidelines as a critical tool in evaluating counsel's performance. In *Wiggins*, the Court held that petitioner's attorneys were ineffective for failing to properly investigate their client's background and social history in preparation for the sentencing phase of Wiggins's capital trial. The Court theoretically applied the *Strickland* test, but did so in a more robust manner which was ultimately different not only in degree but in kind from *Strickland*. In effect, the Court countenanced a method for evaluating counsel's representation that greatly resembled the categorical approach Judge Bazelon advocated.

An examination of the facts of the case will help set the stage. Kevin Wiggins was convicted by a trial judge, after waiving his right to a jury trial, of first-degree murder, robbery, and two counts of theft. After his conviction, Wiggins elected to be sentenced by a jury. Counsel moved to bifurcate the sentencing phase in order to first present evidence that Wiggins did not kill the victim by his own hand and then, if necessary, to present evidence in mitigation. The Court denied the motion, and in her opening statement trial counsel told the jurors they would hear evidence that another person killed the victim. Furthermore, counsel told the jury they would learn about Kevin Wiggins's difficult and tumultuous life. However, counsel introduced no evidence regarding Wiggins's life history. The jury sentenced Wiggins to death.[88]

When the case finally made it to the Supreme Court, the Court held that Kevin Wiggins was denied his constitutional right to the effective assistance of counsel.[89] First, the Court referenced *Williams v. Taylor's* conclusion that Williams's attorneys' failure to uncover and present abundant mitigation evidence at sentencing could not be a tactical choice because counsel had not "fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background."[90] The *Wiggins* majority likewise concluded that the attorneys' decision not to present mitigation evidence was unreasonable because it too was based on an inadequate investigation into the possible mitigation evidence. Importantly, as in *Williams*, the Court relied upon the ABA Standards for Criminal Justice as establishing the requisite standard of care.[91]

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[87] *Wiggins v. Smith*, 539 U.S. 510 (2003)
[88] *Id.* at 514-17.
[89] See *id.* at 517-19 for the procedural posture of the case.
[90] *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)) (alterations in original).
[91] *See Wiggins*, 539 U.S. at 522; see also *Wiggins*, 520 U.S. at 396 (citing 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, commentary, p. 4-55 (2d ed. 1980)). *See also supra*, note 81 discussing how Justice Scalia uses the very fact that *Williams* referred to the ABA Standards for ineffective assistance of counsel as evidence that the Court changed the standard for ineffective assistance of counsel.

Wiggins, however, sent a much stronger message on the importance of the ABA standards in evaluating attorney competence than did *Williams*. The Court repeatedly referred to national standards, such as the ABA Guidelines, as well as local attorney practice. It concluded that, in light of trial counsel's failure to perform the tasks outlined in the ABA Standards and local state professional practice, the attorneys acted unreasonably.[92] "Counsel's conduct," according to the Court, "fell short of the standards for capital defense work articulated by the American Bar Association (ABA)—standards to which we long have referred as 'guides to determining what is reasonable.'"[93] Wiggins's counsel's performance should have followed ABA guidelines that "provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"[94] Assessed against these norms, the Court found counsel's representation was objectively unreasonable. Because counsel's deficient performance was prejudicial to the outcome of Wiggins's trial, the Court reversed the judgment of the Fourth Circuit and ordered a new sentencing hearing.[95]

The *Wiggins* Court posited it was applying the "clearly established" *Strickland* standard. While true to some degree, the Court's use of the ABA standards to place much needed legal flesh on the *Strickland* skeleton in fact marked a significant doctrinal shift.[96] Justice Scalia, in a vigorous dissent, outlined the manner in which the majority created new law by using of the ABA standards to define for competent attorney performance.[97] While the dissent is Scalia-like and typically hyperbolic, it is not completely off the mark.

In its prior ineffective assistance of counsel cases, the Court had *specifically* rejected the idea of minimum standards for a reasonable investigation holding that the minimal investigation conducted by trial counsel in those cases to be sufficient.[98] The *Wiggins* Court, by contrast, recast the

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[92] *Id.* at 522-25. The Court refereed to the ABA guidelines as "well-defined norms." *Id.* at 524. *See infra* Part V.A (discussing how the phrasing of ABA guidelines as "norms" is contrary to the *Strickland* articulation).

[93] *Id.* at 524 (quoting *Strickland*, 466 U.S. 690, 698 (1984)).

[94] *Id.* (quoting the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(c), p. 93 (1989)) (alteration in original).

[95] Terry Williams and Kevin Wiggins were both subsequently sentenced to life imprisonment rather than the death penalty.

[96] *Id.* at 2525 ("In highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same earlier established precedent of *Strickland* we apply today.").

[97] *See Wiggins*, 539 U.S. at 542-43 (Scalia, J., dissenting); *supra* note 93.

[98] *See, e.g.*, *Strickland*, 466 U.S. at 698-99; *Burger v. Kemp*, 483 U.S. 776, 794 (1987); *Darden v. Wainwright* (477 U.S. 168, 186 (1986); *infra* pp. 27-29.

prior decisions as involving situations where the evidence counsel had uncovered in the investigation suggested further investigation would have been fruitless or counterproductive. Because in *Wiggins's* case no evidence uncovered implied fruitlessness, the Court explained that counsel should have continued to investigate possible mitigating evidence. The Court's distinction is circular: the Court essentially concluded the investigations it found sufficient in the previous cases were not unreasonable because the Court found the investigation in those cases reasonable. Circular or not, however, the Court's efforts to distinguish[99] the prior cases and emphasize that it was making no new law, serves only to highlight the new lens through which the Court evaluated trial counsel's conduct.[100]

The Court's most recent ineffective assistance decision, *Rompilla v. Beard*,[101] solidified the centrality of existing professional norms, especially the ABA standards, for determining whether counsel's performance fell below the reasonableness bar. *Rompilla*, like the two prior cases, involved a challenge to trial counsel's investigation in a capital case. However, *Rompilla* inserts the additional step of requiring trial counsel to conduct a thorough pre-trial investigation not only to uncover mitigating evidence but also to rebut the prosecution's case for death.

Ronald Rompilla's relatively brief sentencing hearing consisted of testimony by five of his family members who effectively argued for residual doubt and "beseeched the jury for mercy," and testimony by Rompilla's teenage son who testified to his love for his father and that he would visit him in prison."[102] The Court acknowledged Rompilla's lawyers, had in fact conducted some investigation into possible mitigation evidence, and they had interviewed family members and secured the assistance of mental heath experts. The Court stated: "This is not a case in which defense counsel simply ignored their obligation to find mitigating evidence, and their workload as busy public defenders did not keep them from making a number of efforts, including interviews with Rompilla and some members of his family, and examinations of reports by three mental health experts who gave opinions at

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[99] *See Wiggins*, 539 U.S. at 522-23 (attempting to distinguish).

[100] As the Ninth Circuit confirmed after looking to the ABA Guidelines for establishing professional norms in an ineffective assistance of counsel case following *Williams*:

> To be sure, *Strickland* advises us that prevailing professional norms of practice, such as those reflected in manuals, are guides to determining what is reasonable, but they are only guides. . . . We nonetheless find it significant that these professional standards were cited approvingly by the Supreme Court in the recent *Williams* decision.

Silva v. Woodford, 279 F.3d 825, 840 (9th Cir. 2002) (internal citations omitted) (finding trial counsel constitutionally ineffective in failing to investigate defendant background and present potentially mitigating evidence at penalty phase of trial and remanding for new sentence).

[101] 545 U.S. 374 (2005)

[102] *Id.* at 378.

the guilt phase. None of the sources proved particularly helpful."[103]

Trial counsel stated that based on these efforts, it concluded that further investigation would not unearth any helpful evidence. Rompilla was convicted of murder and sentenced to death. His post-conviction counsel, however, "identified a number of likely avenues the trial lawyers could fruitfully have followed in building a mitigation case."[104] The Court, looking to the ABA standards, concluded after review counsel should have examined school records, "which trial counsel never examined in spite of the professed unfamiliarity of the several family members with Rompilla's childhood, and despite counsel's knowledge that Rompilla left school after the ninth grade," as well as juvenile and adult incarceration records.[105] The Court noted that trial counsel also failed to look for evidence of a history of alcohol dependence that might have extenuating significance, despite evidence that such a dependency existed. Moreover, the Court determined that above all else it was "clear and dispositive" that counsel was deficient in not examining the files regarding Rompilla's prior conviction, which the prosecution had made clear it intended to use extensively at the sentencing hearing, and which, being factually similar to the pending capital charges, also effectively negated the defense theory of residual doubt.[106]

The *Rompilla* majority, relying on *Williams* and *Wiggins* quoted extensively from the ABA standards. The Court particularly referenced the ABA Guidelines regarding the duty to investigate regardless of the accused's admissions or statements and the standard that the "investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities."[107] The majority, also looked to ABA Guidelines regarding death penalty defense work,[108] specifically its requirement that counsel in capital case, thoroughly investigate any and all prior convictions.[109]

The jurisprudential shift is now evident and established. Lower courts must consider the ABA Guidelines and other national standards to determine the reasonableness of counsel's behavior in light of prevailing professional norms as part of the ineffective assistance of counsel analysis.

A. An Effective Comparison

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[103] *Id.* at 381
[104] *Id.* at 382.
[105] *Id.*
[106] *Id.*
[107] *Id*. at 387 (quoting 1 ABA Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.)).
[108] *Id.*
[109] *Id*. (citing ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.7, comment. (rev. ed. 2003)).

To anyone familiar with capital litigation, it was obvious that trial counsel's performance in *Williams*, *Wiggins*, and *Rompilla*, while poor, was by no means extraordinarily poor. Every lawyer who has represented death sentenced inmates for any period of time has had courts reject much stronger ineffective assistance of counsel claims. This is not to suggest the court reached the wrong result in *Williams, Wiggins* and *Rompilla*, but only to make clear that, in the scheme of things, the attorneys were more competent than many of the attorneys whose performance when challenged was found to have cleared *Strickland's* low bar.[110]

i. *Strickland, Burger*, and *Darden*: Examples of Adequate Investigation?

A comparison of the representation in the three cases referenced above to the Court's prior ineffective assistance of counsel decisions demonstrates the transition in the rigor of the Court's review of claims that trial counsel conducted an inadequate investigation. In *Strickland v. Washington*, Washington's lawyers efforts were minimal. He spoke with the defendant about his background, and he talked to the defendant's wife and mother via telephone. Counsel attempted one unsuccessful meeting with Washington's wife and mother, but never followed up.[111] According to the Court, the attorney "did not otherwise seek out character witnesses for respondent."[112] Nor did the attorney request a psychiatric examination because, based on his conversations with his client, he did not think the defendant had psychological problems.[113] Despite the obvious shortcomings in trial counsel's development and presentation of mitigating evidence, Washington's attorney was found to have conducted an objectively reasonable investigation "in light of prevailing professional norms."

Two years after *Strickland*, the Court reviewed counsel's efforts in *Darden v. Wainwright*.[114] Petitioner's claim centered around his trial lawyer's refusal to present any mitigating evidence whatsoever at the sentencing hearing. In fact, trial counsel testified at the habeas hearing that "after a perusal of the mitigating circumstances in the Florida Statute 921.141 [,] . . . we reached the conclusion that Mr. Darden did not qualify" for any of the statutory factors.[115] Moreover, trial counsel conceded: "I was completely

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[110] *See, e.g.*, Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 AM. J. CRIM. LAW 1, 7-9 (1999) (listing cases of lawyers found effective despite seemingly obvious deficiencies such as using drugs, sleeping through trial, and suggesting in closing that death is an appropriate punishment).
[111] *Strickland*, 466 U.S. at 672-73.
[112] *Id.*
[113] *Id.* at 673.
[114] 477 U.S. 168 (1986).
[115] *Darden v. Wainwright*, Brief of the Petitioner, 1985 WL 669179

unaware that any mitigating circumstance, if relevant, is admissible."[116] The Supreme Court concluded, however, that because the trial court had informed counsel it could present mitigating evidence as to any other facts that might have been pertinent, at that point "they knew they were free to offer nonstatutory mitigating evidence, and chose not to do so."[117] Apparently, this choice to present no mitigating evidence in light of a stated and actual misunderstanding of the law was objectively reasonable; the Court gave short shrift to Darden's ineffective assistance of counsel claim.

Perhaps even more egregious, the Court then concluded in *Burger v. Kemp*, over a four-justice dissent, that even though *Burger's* court appointed counsel had "offered no mitigating evidence at all," Burger failed to show that counsel's performance was deficient. Chris Burger was just seventeen-years-old at the time of the murder which resulted in his death sentence.[118] He and an older companion, Thomas Stevens, kidnaped, sodomized, and drowned a cab driver in rural Georgia. Chris was of limited intelligence with an IQ level that bordered on mental retardation, and he had a violent and troubled family history that resulted in a history of psychological problems. Counsel had available to him his client's mother, other family members and a lawyer who had been involved with Chris through the Big Brother program from the defendant's youth, who were all willing to testify at the sentencing hearing regarding the physical and emotional abuse Chris endured, as well as positive character traits Chris possessed. Yet, trial counsel presented none of this testimony to the jury in mitigation of punishment. Counsel stated at the federal habeas hearing that he had "based his decision not to move the court for a complete psychological examination of petitioner on [counsel's] experience with the mental hospital," which counsel thought to be biased against criminal defendants generally.[119] After Chris's first death sentence was reversed on appeal, and the case was remanded for a new sentencing trial, counsel "simply proceeded in the same manner that had resulted in petitioner's being sentenced to death at the first hearing."[120] Ultimately, even though the majority admitted "the record at the habeas corpus hearing does suggest that [counsel] could well have made a more thorough investigation than he did," it concluded that counsel's decision to stop investigating possible mitigating evidence was reasonable.[121]

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[116] *Darden v. Wainwright*, Brief of the Petitioner, 1985 WL 669179

[117] *Id.* at 185.

[118] The Supreme Court has since held that executing individuals where were under the age of eighteen at the time of their capital crime is prohibited by the Eight and Fourteenth Amendments of the United States Constitution. *Roper v. Simmons*, 543 U.S. 551 (2005).

[119] *Id*. at 812 (Blackman, J., dissenting).

[120] *Id.* (Blackman, J., dissenting)(internal quotations omitted).

[121] 483 U.S. 776, 794 (1987) ("[W]e agree with the courts below that counsel's decision not to mount an all-out investigation into petitioner's background in search of mitigating circumstances was supported by reasonable professional judgment."). Justices Blackman, Brennan, Marshall, and Powell joined in Part II of the *Burger* dissent which focused on

Wiggins's attorneys, for comparison, had obtained a written PSI report that included a one-page account of Wiggins's personal history where he had described his own background, spent largely in foster care, as disgusting.[122] Counsel also "tracked down" records from the Baltimore City Department of Social Services (DSS) that documented the defendant's various placements in the State's foster care system.[123] Moreover, counsel arranged for William Stejskal, a psychologist, to conduct a number of tests.[124]

As noted previously, Justice O'Connor was the author of both *Strickland* and *Wiggins.* She also wrote a separate concurrence which provided the essential fifth vote in *Williams*. Thus, the divergent articulations of the investigation requirements in these cases are particularly striking and provide persuasive evidence that the Court intentionally changed course. For instance, in *Strickland*, Justice O'Connor wrote "choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."[125] She continued, "[w]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether."[126] She thus originally allowed for only cursory investigation so long as counsel was able to determine more investigation would be futile. This requirement, when combined with the Court's stated deference to counsel's tactical determinations, mandated only a very minimal investigations.

In contrast, in *Wiggins*, Justice O'Connor writing for the majority concluded that the Maryland Court of Appeals erred when it erroneously "assumed that because counsel had *some* information with respect to petitioner's background . . . they were in a position to make a tactical choice not to present a mitigation defense."[127] This contrary conclusion, particularly in light of the mantra that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," illuminates the Court's new method for ineffective assistance of counsel review.

Counsel's failure to investigate possible mitigating evidence as a denial of petitioner's right to the effective assistance of counsel. *Id.* at 811-25 (Blackmun, J., dissenting) ("Application of the *Strickland* standard to this case convinces me that further investigation was compelled constitutionally because there was inadequate information on which a reasonable professional judgment to limit the investigation could have been made.").

[122] *Wiggins*, 539 U.S. at 523-24.

[123] *Id.*

[124] *Id.*

[125] *Id.* at 690-91.

[126] *Id.* at 691.

[127] *Wiggins*, 539 U.S. at 527.

In *Williams*, the court also found inadequate performance based on an insufficient investigation, primarily into possible mitigation.[128] Before *Williams*, none of the cases had required anything even remotely resembling the investigation the Court suddenly found legally inadequate. [129]

Rompilla, is probably the most divergent of the prior cases in the stringent requirements it places on counsel to conduct a meaningful investigation. As mentioned previously, the Court acknowledged that trial counsel had done some investigation and questioned several possible mitigation witnesses and reviewed mental health examinations.[130] Compared with Darden's lawyers rash decision to present no mitigation based on a legally incorrect premise and barely any investigation at all, and Burger's counsel's decision to put the brakes on his investigation in its infancy, it is apparent that a new standard has emerged.

It is also important to note that *Williams*, *Wiggins* and *Rompilla* were all governed by AEDPA.[131] In order to grant the writ of habeas corpus, the Court had to conclude that the lower state courts' decision that trial counsel's performance was not objectively unreasonable was itself objectively unreasonable.[132] The skeptical review of counsel's behavior hardly coincides with the Court that once held "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight."[133]

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[128] See, *supra*, page 35 and surrounding text with respect to Williams investigation.

[129] Again Justice Scalia highlighted this point when he referred to the new law made in *Williams* in his dissent in *Wiggins*:

> The Court is mistaken to assert that [the *Williams*] discussion "made no new law," *ante*, at 2535. There was nothing in *Strickland*, or in any of our "clearly established" precedents at the time of the Virginia Supreme Court's decision, to support *Williams*' statement that trial counsel had an "obligation to conduct a thorough investigation of the defendant's background," 529 U.S., at 396, 120 S.Ct. 1495. . . . Insofar as this Court's cases were concerned, *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987), had *rejected* an ineffective-assistance claim even though acknowledging that trial counsel "could well have made a more thorough investigation than he did." And *Strickland* had eschewed the imposition of such "rules" on counsel, 466 U.S., at 688-689, 104 S.Ct. 2052, specifically stating that the very ABA standards upon which *Williams* later relied "are guides to determining what is reasonable, *but they are only guides.*" 466 U.S., at 688, 104 S.Ct. 2052 (emphasis added). *Williams did* make new law . . . .

Wiggins, 539 U.S. at 542-543 (Scalia, J., dissenting).

[130] See *supra* page 42-43 and surrounding text.

[131] 28 U.S.C § 2254 (d)(1)(The Antiterrorism and Effective Death Penalty Act) (mandating that a petitioner may not obtain relief through federal habeas corpus unless a State's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States"); see generally, John H. Blume, *AEDPA: The "Hype" and the "Bite,"* 91 Corn. L. Rev. 259 (2006)

[132] *Id.* at 540-41 (emphasis added); *see also supra* note 93 (discussing the habeas portions of the decision.)

[133] *Strickland*, 466 U.S. at 689.

IV. THE RETURN OF THE GUIDELINES APPROACH

A. The Guidelines Approach Then and Now

As we have said, the most significant development doctrinally, was the Court's reliance on the ABA's Guidelines. The ABA Guidelines and Standards regarding the obligation to thoroughly investigate permeate the three opinions. Much like Bazelon's original checklist approach, the Court basically adopted the ABA's Guideline requirements for investigation as establishing the prevailing norm for defense counsel. In effect, when considering the adequacy of trial counsel's investigation, courts must now look to the ABA standards, as well as local practice, in order to determine whether the Sixth Amendment has been satisfied.

Williams mentioned the ABA guidelines only once, for the proposition that counsel did not fulfill their professional obligation to conduct an adequate investigation.[134] *Wiggins* referenced the ABA Standards[135] six times as the benchmark of appropriate attorney conduct.[136] And, finally, *Rompilla* cited to the ABA standards on eight occasions as evidence that trial counsel's efforts fell below the constitutional floor.[137] For example, the Court noted that Wiggins's attorneys' investigation "fell short of the professional standards that prevailed in Maryland in 1989."[138] The Court declared counsel's conduct "similarly fell short of the standards for capital defense work articulated by the American Bar Association." Moreover, Justice O'Connor listed specific topic areas on which the ABA had declared counsel should consider presenting evidence during the mitigation stage, such as the client's medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences.[139]

In essence, these three decisions mark a shift towards the effective assistance of counsel standard once hailed by Judge Bazelon. Although it would be an overstatement to say that the Court has adopted the guidelines or check-list method, the Court's repeated reliance upon the ABA guidelines reveals the similarities to Judge Bazelon's approach. *Wiggins* in particular

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[134] *Wiggins*, 539 U.S. at 522.

[135] *Wiggins* also referred to local state standards of practice. *Id.*

[136] Furthermore, Justice Scalia also emphasized the majority's use of the ABA Standards as evidence that the decision effectually changes the law for ineffective assistance of counsel. *See id.* at 543 (Scalia, J., dissenting); *supra* page 23 and corresponding notations.

[137] *Rompilla*, 545 U.S. at 387-99.

[138] *Wiggins*, 539 U.S. at 524.

[139] *Id*. (quoting 1 ABA guidelines fo the appointment and performance of counsel in death penalty cases 11.8.6, p. 133) (alterations in original)).

embodies Judge Bazelon's Decoster III dissent. The clearest evidence of this embodiment is the *Wiggins* majority's description of the ABA Standards as "norms." Initially, in *Decoster III*, Judge Bazelon referred to the then-newly-adopted standards as accepted "'national norms.'"[140] This stands in sharp contrast to Justice O'Connor's admonishment in *Strickland* that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,"[141] and ABA standards are to be used merely as guides to determine reasonableness and *not* as "norms." Nineteen years later, however, Justice O'Connor described Wiggins's counsel's abandonment of the "well-defined *norms*" of the ABA standards. This shift in categorization of the ABA standards initiates a modern doctrinal view that embodies Judge Bazelon's view of the normative role of the ABA standards[142]

Another example of the Court's adoption of a guidelines type approach for assessing the adequacy of trial counsel's representation is the *Wiggins* Court's use of the "list" compiled by the ABA.[143] The Court, referencing the ABA list of counsel's obligations, held that counsel's failure in one of the delineated categories evidenced her ineffectiveness. This comparison is again remarkably similar to the approach of Judge Bazelon, who advocated courts utilize ABA standards to define minimum components of effective performance.[144] According to Judge Bazelon, "[a] demonstration that counsel has violated one of these duties compels further inquiry into counsel's conduct to determine whether, in this specific case, counsel's departure from the prescribed standards was either 'excusable' or 'justifiable.'"[145]

The *Wiggins* Majority analyzed that case in precisely the manner Judge Bazelon advanced. After determining that counsel "abandoned" some of the ABA defined norms when the attorneys, for example, failed to investigate Wiggins's family and social history, the Court went on to determine whether this abandonment was unreasonable in light of what the attorneys had in fact discovered. Faithful to the checklist approach, Justice O'Connor compared counsels' performance to the ABA Standards and, when she found counsel violated one of the articulated duties of counsel, she inquired further to see if counsel's omission was reasonable. Upon determining the failure to abide by the guidelines was not reasonable, she concluded that the defendant had been denied his Sixth Amendment right to effective assistance of counsel. Admittedly, Judge Bazelon would have been more up-front with his check-list technique. Nonetheless, had he been the Justice deciding Wiggins's claim, he

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[140] *Decoster III*, 624 F.2d at 276 n.66 (Bazelon, J., dissenting) (quoting Hodson, *Revising the Criminal Justice Standards*, 64 A.B.A. J. 986, 987 (1978)).
[141] *Strickland v. Washington*, 466 U.S. 668, 688 (1984).
[142] *Wiggins*, 539 U.S. at 524 (emphasis added).
[143] *Id.*
[144] *Decoster III*, 624 F.2d at 282 (Bazelon, J., dissenting).
[145] *Id.*

likely would have proceeded in precisely the same fashion.

While we do not want to psychoanalyze the Court, we submit that this shift was intentional. Roughly twenty years of experience with the amorphous *Strickland* performance prong convinced a majority of the Court that more was needed. While the *Strickland* majority had been concerned that a guidelines approach might be a straightjacket leading to excessive, futile, work on behalf of attorneys and courts, the reality was that in the hands of most state courts and many federal courts of appeal, the performance prong was a license to do nothing. In essence, the Supreme Court realized that *Strickland* was part of the problem, not a solution to poor representation in capital cases. Capital defendants were frequently being represented by ineffective counsel, and the high threshold standard tied the hands of appellate courts from doing much about the problem.[146] We note, moreover, that some of our analysis is not mere speculation, as Supreme Court Justices themselves have said as much regarding under-represented defendants.[147] Accordingly, faced with the reality of the representation and the ineffectiveness of the review process, the Court adopted the general approach Judge Bazelon articulated thirty years prior.

1. The ABA Standards

The ABA Standards Relating to the Defense Function have been through three editions since the original tentative draft in 1970. The first approved draft was published in 1971, the subsequent edition was published in 1980, and a third edition in 1993. The editions, however, are nearly identical; the changes have been stylistic.

Standard 4-4.1 of the Defense Function delimits the duty to investigate. The *Williams* Court cited to the commentary portion of the ABA Standards for Criminal Justice (Standards) as support for the Court's disposition.[148] The

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[146] *See* Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 303 (2002) (suggesting the "deplorable state of criminal defense services" should motive judicial action).

[147] *See e.g.*, Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases*, N.Y. TIMES, July 5, 2001, at A1 (quoting Justice O'Connor who voiced concern that the judicial system was possibly continuing to execute innocent defendants and that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases"); Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States, Joseph L. Raugh Lecture: *In Pursuit of the Public Good: Lawyers Who Care* (April 9, 2001) ("I have yet to see a death case, among the dozens coming to the Supreme Court on eve of execution, in which the defendant was well represented at trial.").

[148] *See Williams*, 529 U.S. at 396 (citing 1 ABA Standards for Criminal Justice 4-4.1, commentary, p. 4-55 (2d ed. 1980). Although the Court cited to the second edition, the commentary for the third edition is the same. All three editions note that the failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel. (Only the third edition contains the word "also.") Ironically, the Second and third editions cite to *Strickland* as support for this proposition. The first edition contains

commentary contains a more robust discussion on the role of investigation and the importance of mitigation evidence than the standard itself. Moreover, the commentary lists specific actions it advises are minimal to conducting an adequate investigation.[149] Similarly, the *Wiggins* court also cited to the commentary as part of the "well-defined norms" of attorney conduct. [150] The Court noted the suggestion in the commentary that the "defendant['s] background, education, employment record, mental and emotional stability, [and] family relationships [are] important topics to investigate as possible sources of mitigation evidence."[151]

The Court also cited to a list compiled by the ABA Guidelines to the Appointment and Performance of Counsel in Death Penalty Cases that detailed topics counsel should pursue for mitigation evidence (Guidelines).[152]

These same Guidelines establish that defense counsel has a duty to discover all reasonably available evidence.[153] Published in 1989 by the American Bar Association in order to simplify previously adopted Association positions on *effective assistance of counsel* in capital cases, [154] the Guidelines state that their impetus is to improve representation in capital cases because post-conviction review does not, and can not, cure the problem of deficient counsel: "examples of poor performance by trial counsel cannot be ignored on the theory that appellate or post-conviction review will curtail trial level error; in several instances deficient performance has not led to reversal." [155]

2. Other Advocates for Enumerated Standards

The concept of "standards" for counsel was not a novel idea, even before the initial ABA promulgations relied upon by Judge Bazelon in his *Decoster III* dissent. For example, in *Gideon v. Wainwright*,[156] which mandated that states provide counsel to indigent defendants facing felony charges, the Court indirectly touched on defense counsel's obligations.[157] Abe

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the same language, but cites to *Shephard v. Hunter*, 163 F.2d 872, 873 (10th Cir. 1957) (denying petitioner ineffective assistance of counsel claim but noting that counsel conducted an investigation). *But see Emperor Gideon*, *supra* note 34, at 654-656 (advocating for a standard-based approach but noting that the ABA standards for Criminal Justice are not specific enough to be accurate guidelines for effective counsel).

[149] *See* 1 ABA Standards for Criminal Justice 4-4.1, commentary.

[150] *Wiggins*, 539 U.S. at 524.

[151] *See* 1 ABA Standards for Criminal Justice 4-4.1, commentary.

[152] ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6., p. 133 (1989) (The Defense Counsel at the Sentencing Phase).

[153] *See* Guidelines at 11.4.1(c), p. 93 ("Investigation").

[154] Guidelines, Introduction (emphasis added).

[155] Guidelines, at 1.1, commentary p. 33.

[156] 372 U.S. 335 (1963).

[157] *See* Anthony Lewis, Gideon Trumpet 208-238 (1964) (detailing the historical significance of the *Gideon* decision).

Fortas, who later became a Supreme Court Justice, represented Gideon. His appellate brief focused not just on why a defendant was constitutionally entitled to the assistance of counsel, but on how competent counsel in Mr. Gideon's case would have proceeded.[158] Moreover the amicus brief by the attorneys general, who argued *against* the mandatory appointment of counsel for state indigent defendants, acknowledged that counsel would help the accused perform various specific tasks, including making evidentiary motions, making objections, examining and cross-examining witness, and arguing to the jury, activities they characterized as necessary aspects of a criminal trial.[159] Thus, *Gideon v. Wainwright*, was grounded on accepted standards of what constitutes effective representation.

V. INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS TODAY.

The remolding of the *Strickland* standard in these three decisions has begun to bear fruit in the lower state and federal courts. As one of court of appeals has stated: "[G]eneral principles have emerged regarding the duties of criminal defense attorneys that inform our view as to the objective standard of reasonableness by which we assess attorney performance, particularly with respect to the duty to investigate. . . . [T]he Supreme Court has cited with approval the ABA Standards for Criminal Justice as indicia of the obligations of criminal defense attorneys."[160] Judicial statements such as these evidence the effect of the Court's decisions.

Because our conclusions as to the effect of the decisions could be merely impressionistic, we thought it prudent to test our theory. To do so, we determined how many ineffective assistance of counsel claims succeeded in the six years before *Williams*, and compared that number to the number of successful cases since *Williams*. Our analysis revealed a marked increase in the number of successful cases. In the state courts, the total number of successful ineffective assistance of counsel claims from 1994 until the Court's decision in *Williams* was 223. After *Williams*, in the same time period, the number of successful cases rose to 330. We also examined the number of successful ineffective assistance of counsel claims in state courts involving

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[158] *See* Brief for the Petitioner at 48-50, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 1962 WL 75206).

[159] Brief of Amici Curiae State of Alabama at 10, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 1962 WL 75210) (arguing that because the indigent defendant lacks counsel to do such activities, the prosecution will also generally due away with such critical practices); *see also* Taylor-Thompson, *supra* note 90 at 1476 (indicating the circumstances of *Gideon*).

[160] *Summerlin v. Schriro*, 427 F.3d 623, 629 (9th Cir. 2005) (quoting *Strickland*, 466 U.S. at 694) (examining counsel's performance in light of the ABA Standards from Criminal Justice 4-4.1 and reversing conviction for attorney's failure to investigate and develop potential mitigating evidence for presentation at the penalty phase, conducted no investigation of family or social history, spoke neither to defendant's family nor friends, and used pre-trial competency examination as only mental health defense evidence).

death-sentenced inmates. Comparing the same time periods, the number of successful claims in state courts rose from thirty-four (34) to forty-seven (47). In federal courts we observed the same pattern. From 1994 until the Court's decision in *Williams*, there were seventy-five (75) successful ineffective assistance of counsel claims. Post-*Williams*, the number increased to one hundred twenty-two (122). When we examined capital cases decided by the federal courts of appeal over the same time period, the number of successful ineffective assistance of counsel claims rose from thirty-two (32) to forty-seven (47). These numbers are captured in table 1.

TABLE 1

SUCCESSFUL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS				
	All State Cases	State Capital Cases	All Federal Cases	Federal Capital Cases
1994 to *Williams*	223	34	75	32
Williams to 1996	330	47	122	47

While these numbers are not definitive, [161] they do seem to support the proposition that *Strickland's* choke hold on ineffective assistance claims has been loosened.[162] Courts' reliance upon the Guidelines when analyzing ineffective assistance of counsel claims has also increased significantly.

[161]We say this because it is possible, although not likely, that the increase in successful cases could be the result of more ineffective assistance of counsel claims being raised.

[162] For example, the Fifth Circuit remanded to district court to further evaluate capital defendant's ineffective assistance of counsel claim based on counsel's failure to investigate and present mitigation evidence, largely because of the sole investigator's conflict of interest where during the course of his investigation he developed a relationship with the decedent's mother, so much so that he was sole beneficiary of her estate when she died a mere six months after trial. *Guy v. Cockrell*, 343 F.3d 348 (5th Circ. 2003). Counsel presented only four witnesses at the mitigation stage who were not very familiar with the defendant, and did not interview any close relatives including defendant's mother or aunt. The Fifth Circuit referenced *Wiggins* and *Williams* and noted "the Supreme Court's recent emphasis on ineffective counsel claims indicates that we must be accurate and use care in reviewing Guy's claim." *Id.* at 354 (citing *Wiggins* and *Williams*); *see also Willis v. Cockrell*, 2004 WL 1812698 (W.D. Tex. Aug. 9, 2004) (unpub. opinion) (repeatedly referencing *Williams* and *Wiggins* and finding ineffective assistance of counsel for failing to investigate defendant's medical history where defendant was being medicated, absent medical need, with inappropriately high doses of antipsychotic drugs and the effect of defendant's demeanor was apparent; the state frequently referenced defendant's flat demeanor; and for counsel's failure to properly investigate mitigating evidence or present any mitigation at the penalty phase or challenge the state's witnesses).

Courts have recognized that counsels' performances, especially in capital cases must be judged against "prevailing professional norms such as those found in the ABA Standards for Criminal Justice."[163] In Circuits more hostile to ineffective assistance of counsel claims, such as the Fourth and Fifth Circuits, dissenting judges use the Guidelines even when the majority does not.[164]

A brief look at some representative cases will help illustrate the change in state and federal courts' analyses. In *Williams v. Anderson*, for example, the Sixth Circuit concluded that the Ohio Supreme Court's decision was contrary to federal law because, in examining the petitioner's ineffective assistance claim, it applied *Strickland* and concluded, without analysis, that "counsel's failure to investigate and present mitigating evidence was reasonable under prevailing professional norms." [165] The court cited to *Rompilla's* , *Wiggins's* , and *Williams's* reliance on the ABA Guidelines as mandating that "trial counsel has an obligation to conduct a thorough investigation of the defendant's background in death penalty cases." Because trial counsel did not conduct a thorough investigation and because the failure

[163] *See, e.g., Marshall v. Cathel*, 428 F.3d 452, 463 (3d Cir. 2005) (finding the New Jersey Supreme Court unreasonably applied federal law in concluding counsel was not ineffective when the attorney failed to conduct an adequate investigation for the penalty phase and relying on ABA Standards for Criminal Justice 4-4.1 to conclude such investigation was a professional norm at the time of the trial); *Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005) (citing to the ABA Standards for Criminal Justice, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty cases, the National Legal Aide and Defender Association Performance Guidelines for Criminal Defense Representation, and the Indiana Rules of Professional Conduct for determining counsel's failing to consult with defendant regarding his ability to testify at the penalty phase was deficient representation.)

[164] See, e.g., *Buckner v. Polk*, 453 F.3d 195, 215-16 (4th Cir. 2006) (Gregory J., dissenting) (looking to ABA Guidelines as the-prevailing norms of attorney conduct to analyze counsel deficiencies where majority fails to use ABA guidelines and denies ineffective assistance of counsel claim); *Moore v. Parker*, 425 F.3d 250 (6th Cir. 2005) (Martin J., dissenting) (finding ineffective assistance of counsel:

> The Supreme Court has made clear that the ABA standards for counsel in death penalty cases provide the guiding rules and standards to be used in defining the prevailing professional norms' in ineffective assistance cases. *Hamblin v. Mitchell*, 354 F.3d 482, 486 (6th Cir. 2004) (quoting Wiggins, 539 U.S. at 524, 123 S.Ct. 2527). Those standards provide that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigation evidence, which should include investigation into medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. Wiggins, 539 U.S. at 524, 123 S.Ct. 2527 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.8.6 (1989) (emphases added)). The Majority here fails to explain adequately, let alone at all, how counsel's decisions, were consistent with prevailing professional norms. The reason, I suspect, is because counsel's performance did not meet that standard.

[165] 460 F.3d 789, 801 (6th Cir. 2006).

to do so was prejudicial, that court granted the Writ of Habeas Corpus.[166]

In *Dickerson v. Bagley*, the court found ineffective assistance of counsel where counsel failed to conduct a thorough and complete mitigation investigation, pointedly noting "the Supreme Court . . . has made it clear and come down hard on the point that a thorough and complete mitigation investigation is absolutely necessary in capital cases. The Court has relied on 1989 and 2003 ABA Guidelines for the Appointment and Performance of Defenses Counsel in Death Penalty Cases, for the required norms and duties of counsel."[167] The court quoted extensively from the ABA Guidelines in its decision, and affirmatively indicates that the Sixth Circuit has "made it clear that the *Wiggins and Rompilla* decisions mean[] that counsel for defendants in capital cases must fully comply with these professional norms." [168]

The ABA guidelines have now become an important and, more importantly, widely accepted tool in evaluating defense counsel's conduct.

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[166] In *Clark v. Mitchell*, however, the Sixth Circuit affirmed the denial of petitioner's habeas corpus challenge, saying in a footnote, "[t]he fact that Clark's counsel retained psychological and psychiatric experts to aid in Clark's defense demonstrates that Clark's counsel complied with American Bar Association Guidelines requiring counsel to perform an investigation into a defendant's mental health status and not to rely merely on their own observations to detect any possible mental health conditions from which the defendant may be suffering." 425 F.3d 270, 285 n.5 (6th Cir. 2005) (citing the ABA Guidelines). Judge Merritt criticized the majority opinion as being "irreconcilable with *Rompilla"* and other case law concerning counsel's duty to investigate mitigating evidence in capital cases. *Id.* at 290 (Merritt, J., dissenting). Judge Merritt relied heavily upon various requirements of the ABA Standards, which he contends counsel breached, and concluded the majority simply refuses to apply ABA Guidelines and the *Rompilla* case. *Id.* at 294 (Merritt, J., dissenting).

[167] 453 F.3d 690, 693 (6th Cir. 2006); *see also Harries v. Bell*, 417 F.3d 631, 638 (6th Cir. 2005) (Using ABA guidelines as prevailing professional norms that investigations into mitigating evidence should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence the prosecutor may introduce, and finding counsel performance was deficient and defendant was prejudiced by the deficiency); *Howard v. Bouchard*, 405 F.3d 459, 480 (6th Cir. 2005) (citing ABA standard 4-7.1(d) noting duty of defense attorney to preserve record for appeal for finding counsel ineffective, although not prejudicially so); *Powell v. Collins*, 332 F.3d 376, 399 (6th Cir. 2003) (citing ABA 4-4.1); *Coleman v. Mitchell*, 268 F.3d 417, 452 (6th Cir. 2001) (analogizing to *Williams* and citing ABA standards for finding ineffective assistance of counsel)

[168] *Bagley*, 460 F.3d at 780; *see also, e.g., Landrigan v. Schriro*, 441 F3d 638, 643 (9th Cir. 2006) (citing to ABA Guidelines when concluding counsel's performance failed to conform with prevailing standards by failing to investigate and present mitigating evidence, and remanding to allow petitioner evidentiary hearing on ineffective assistance of counsel claim); *Earp v. Ornoski*, 431 F.3d 1158, 1175 (9th Cir. 2005) (same); *Daniels v. Woodford*, 428 F.3d 1181, 1202-03 (9th Cir. 2005) (citing ABA Standards 4-4.1 for concluding failure to investigate brain damage and mental illness constituted ineffective assistance); *Gerstein v. Senkowski*, 426 F.3d 588 (2d Cir. 2005) (citing ABA Standards 4-4.1 for concluding counsel's "apparent failure even to request to examine [slides representing victim physical trauma] was a serious dereliction of his duty to investigate the facts and circumstances of petitioner's case" and referring to *Rompilla* and *Wiggins* for further support of ABA Guidelines to determine reasonableness).

And, as noted above, using the guidelines approach seems to make a difference.[169] This is a positive development not only because justice in individual cases is further served, but is also a positive development systematically because the acceptance of the Guidelines as professional norms draws lawyers attention to specific duties and tasks which are integral to effective representation.[170]

We wish we could end this article on a positive note. But that would not be characteristic of at least one of us. Despite the Supreme Court's clear message, a number of courts still remain hostile to ineffective assistance of counsel claims and are still willing to put a judicial stamp of approval on appallingly inadequate representation. The Texas Court of Criminal Appeals falls in this category. In fact, during the entire period we observed, only one death-sentenced inmate prevailed on his ineffective assistance of counsel claim. Some of cases affirmed by that court involved truly abysmal representation. For example, in the capital case *Ex Parte Martinez*,[171] although evidence existed that the defendant—who had no history of violence in his

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[169] *See, e.g.*, *Reyes v. Quarterman*, 2006 WL 2474268 (5th Cir. Aug. 28, 2006) (slip opinion) (looking to ABA guidelines to affirm district court conclusion that counsel was ineffective for failing to conduct an investigation into punishment before starting the capital trial and failing to offer certain mitigation evidence, although affirming decision that deficient representation was not prejudicial); *Davis v. Greiner*, 428 F.3d 82 (2d Cir. 2005) (referring to the Model Rules of Professional Conduct for concluding defense counsel's failure to inform petitioner during plea negotiations that his statements at proffer sessions could be used against him if he stood trial was not in accord with professional norms and fell below an objective standard of reasonableness, and referencing *Wiggins* acknowledgment of the ABA Guidelines as guides for reasonableness for further support, but ultimately holding petitioner was not prejudiced by the inadequate representation). *But see, e.g., United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005) (citing *Rompilla* use of the ABA Standards 4-4.1, but finding no ineffective assistance of counsel).

[170] For example, the Second Circuit countenanced:

> Norms of practice, reflected in national standards like the American Bar Association (ABA) Standards for Criminal Justice, are useful guides for evaluating reasonableness. The Supreme Court has frequently cited the ABA Standards in its decisions evaluating the constitutional sufficiency of defense counsels investigations. . . . Moreover, a New York practice treatise adds that counsel should enlist the support of an investigator to attempt to locate any witnesses whose names or locations are unknown.

Greiner v. Wells, 417 F.3d 305, 321 (2d Cir. 2005) (concluding counsel acted consistent with ABA Standards, such as 4-7.6, and finding insufficient evidence to overcome presumption of constitutionally effective counsel based on the record of performance). Similarly, the Eighth Circuit in *Noner v. Norris* heavily examined the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, quoting the language extensively to articulate why counsel performance was deficient. 402 F.3d 801, 812-13 (8th Cir. 2005) (finding deficient performance by counsel and remanding for further proceedings with respect to prejudice); *McClure v. Thompson*, 323 F.3d 1233, 1241-42 (9th Cir. 2003) (citing to ABA Guidelines and ABA Model Rules of Professional Conduct, although holding no ineffective assistance of counsel); *Frye v. Lee*, 235 F.3d 897 (4th Cir. 200) (referencing ABA Guidelines but finding representation legally adequate because counsel performed some sufficient steps)

[171] 195 S.W.3d 713 (Tex. Crim. App. 2006)

background—had ingested large amounts of a strong psychoactive drug known to increase aggressive tendencies in certain circumstances, along with other narcotics and alcohol, counsel failed to investigate or present evidence of the drugs or how they may have effected his mental condition at the time of the offense. Counsel also failed to present evidence at the mitigation stage regarding defendant's intoxication or the possibility that the drug may have increased the defendant's aggressive tendencies.[172] Counsel failed to investigate or present evidence regarding the severe physical, emotional, and sexual abuse defendant suffered as a child even though several family members asserted at state habeas proceedings that had they been contacted they would have testified regarding the severe physical and emotional abuse defendant had suffered as a child at the hands of his grandparents and his mother, and the sexual abuse his mother inflicted.[173] Trial counsel failed to interview persons with whom defendant had lived who would have further substantiated the abuse,[174] nor did counsel investigate or discover that the county social services department had allegedly been involved with the family for several years.[175] In fact, at the penalty phase counsel obtained the testimony of defendant's mother, but failed to mitigate or redirect her damning statement when she turned to defendant on cross-examination and said "why did you do it?"[176]

And, unfortunately, the Fifth Circuit is little better. While the number of successful claims challenging counsel's representation in capital cases did rise from four to fourteen, many death sentenced inmates' claims were rejected in spite of strong evidence of attorney incompetence.[177] For illustration, we

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[172]*Id.* at 721-22.
[173]*Id.* at 725-26.
[174]*Id.*
[175]*Id.* at 716.
[176]*Id.* at 725; *see also Ex Parte Wood*, 176 S.W.3d 224, 226-27 (Tex. Crim. App. 2005), (finding no ineffective assistance of counsel even though admitting mitigation presented was "minimal" and evidence existed, but was not presented or sufficiently investigated, of defendant's "deeply troubled past"); *Ex Parte McFarland*, 163 S.W.3d 743 (Tex. Crim. App. 2005) (finding no ineffective assistance of counsel even though retained lead counsel slept through nearly entire trial and second appointed counsel—who had never tried a capital case and was instructed to follow sleeping counsel's lead—failed to interview any state witnesses, visited defendant only once in person before trial, was unable to locate any of the potential witnesses defendant posited, and, at punishment stage, for which defendant's side lasted only fifteen minutes, failed to call any family or character witnesses; court denying ineffective assistance claim notably failed to cite either *Williams* or *Wiggins* in its decision denying relief); *Ramirez v. Dretke*, 398 F.3d 691 (5th Cir. 2005) (denying petition for writ of habeas corpus because Texas Court of Criminal Appeals did not unreasonably apply law when it refused to believe defendant that he had discussed his alibi witness with his defense counsel, who refused to investigate alibi listed, at any rate, in prosecutor's files)
[177]*See, e.g., Alexander v. Quarterman*, 198 Fed. Appx. 354, 359 (5th Cir. Aug. 4, 2006) (unpub. opinion) (explicitly distinguishing *Williams, Wiggins*, and *Rompilla*, and finding that because "most of the evidence brought forth in [defendant's] habeas petition was presented

refer to the recent case *Smith v. Quarterman*, Smith who had three separate punishment trials, each time represented by the same lawyer, raised an ineffective assistance of counsel claim after he was sentenced to death for the third, and final, time, based on his lawyer's failure to present any mitigating evidence whatsoever, any rebuttal evidence on the issue of future dangerousness, and his failure to adequately investigate into possible mitigating evidence. On habeas proceedings, defendant asserted counsel could have presented evidence including testimony from a clinical psychologist that defendant suffers from a chronic brain injury stemming from an accident during his childhood, testimony from another psychologist that the probability that defendant would pose a future danger was low, testimony from his mother, half-sister, aunt, and cousin who would have testified to their love for defendant and pleaded for mercy, as well as his head injury and subsequent impaired intellectual functioning, defendant's own testimony that he was young and intoxicated when he committed the murder and was extremely remorseful, and juvenile offense and jail records. Ultimately, the court

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at the punishment phase of the trial *either by the state* or by trial counsel," counsel was not ineffective for failing to investigate or present mitigating evidence regarding defendant's repeated suicide attempts or emotional trauma surrounding father's sexuality, or for failing to explain how circumstances of defendant's childhood that state introduced in support of death sentence affected defendant and mitigated his culpability) (emphasis added); *Rodriguez v. Quarterman*, 2006 WL 3332977 (5th Cir. Nov. 15, 2006) (slip opinion) (finding trial counsel's failure to investigate nor present evidence on defendant's severe frontal lobe brain damage and the link between that damage and defendant's impulsive nature, failure to introduce records from a psychiatric facility where defendant was treated prior to trial that were known to counsel but not presented; and failure to present testimony of neuro-psychologist that defendant's abusive upbringing, lengthy drug addiction, and cocaine use damaged defendant's brain were strategic choices by counsel who instead presented evidence that defendant was changed person); *Whitaker v. Quarterman*, 200 Fed. Appx. 351 (5th Cir. Sept. 19, 2006) (unpub. opinion) (finding state did not act unreasonably in denying petitioner's ineffective assistance of counsel claim where trial counsel, who knew petitioner was "beaten as a child, periodically suffered seizures, had attempted to commit suicide on several occasions, and had suffered a head injury after falling from a moving truck as a child, failed to have [petitioner] examined by, or to present testimony from, a mental health expert during the punishment phase of his trial" because petitioner had presented no evidence on state habeas proceedings as to how such a mental health expert would have in fact testified); *Hood v. Dretke*, 93 Fed. Appx. 665 (5th Cir. April 2, 2004) (unpub. opinion) (noting the court's "determination as to whether the state court unreasonably applied *Strickland* is guided by the Supreme Court's decisions in *Williams* and . . . *Wiggins*," but finding no prejudice in counsel's failure to present mitigation evidence consisting of affidavits, social services records, school records, and a social history report that presented additional details about defendant's injuries when he was nearly crushed by a truck, behavioral problems in school and learning disability, and indicated that defendant and his brother were physically and emotionally abused by their father and father sexually molested defendant's two sisters, and that defendant may have suffered some type of brain damage at birth; the court carefully distinguished *Wiggins*, ultimately concluding that the mitigation evidence Hood's counsel failed to present was not as significant as that left out in *Wiggins's* penalty phase, and that the aggravating factors were also more significant); *Chase v. Epps*,83 Fed. Appx. 673 (5th Cir. Dec. 3, 2003) (finding no ineffective assistance even though counsel failed to investigate clear evidence of mental retardation or present such evidence at penalty phase)

concluded defense counsel's decision not to call a single witness, or adequately rebut the future dangerousness, were strategic decisions and not unreasonable.

The worst offender, however, is the Fourth Circuit.[178] Every single ineffective assistance of counsel claim raised by a death sentenced inmate after *Williams* has been repudiated.[179] In *Buckner v. Polk*, a capital case were defendant was asserting an actual innocence claim, the Majority found counsel was not ineffective despite the court's acknowledgement that the bulk of counsel's work in preparation for mitigation occurred during the week that he was also participating in the guilt phase of the trial and handling his partnership's IRS difficulties, and that counsel's "efforts were certainly less than optimal."[180] Counsel had in fact attempted to withdraw as trial counsel when it "became clear that his partnership's financial difficulties would unacceptably interfere with his representation, but the state trial court denied his motion."[181]

Thus, although the situation with ineffective assistance of counsel claims has improved since the three decisions, the guidelines are not a panacea.

Additionally while we acknowledge that a full discussion on the subject is better left to another article, our discussion with respect to ineffective assistance of counsel claims in Texas would not be complete if we did not also draw attention to the effect of abysmal state habeas lawyering on ineffective assistance of counsel claims in that region.[182] The effect of the poor post-conviction representation is that many meritorious ineffective assistance of trial counsel claims are simply not uncovered because the second level of

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[178]See also, John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword":Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 Maryland L. Rev. 1480 (1999).

[179] *See, e.g., Emmett v. Kelley*, 2007 WL 155186 (4th Cir. Jan. 22, 2007) (concluding, over an adamant dissent, that counsel was not ineffective even though he had failed to retrieve the defendant's juvenile mental health records, social services records, or juvenile court file, or interview additional relatives and juvenile authorities, sources that would have provided information about the squalid, abusive circumstances in which the defendant was waived); *Lovitt v. True*, 403 F.3d 171, 178 (4th Cir. 2005) (finding counsel effective despite limited investigation and failure to present any mitigating evidence regarding defendant's horrific childhood).

[180] *Buckner v. Polk*, 453 F.3d 195, 202 (4th Cir. 2006)

[181]*Id.* at 202 n.5; see also *Id.* at 208 (Gregory, J., dissenting) ("No reasonable defense attorney in a death penalty case would fail to pursue mental health expert advice when faced with clear signs that the defendant had suffered psychological trauma.").

[182]*See Texas Defender Service*, Lethal Indifference: The Fatal Combination of Incompetent Attorneys and Unaccountable Courts in Texas Death Penalty Appeals, 2002; Target: Sloppy inmate appeals, Chuck Lindell, The Austin American Statesman, December 12, 2006.

incompetence—the habeas counsel ineffectiveness—covers the first.[183] The significance of the problem of dual ineffectiveness is impossible to overstate: When these dual cases reach federal court, legitimate ineffective assistance claims simply cannot be uncovered because the state habeas lawyers' incompetence defaulted the claims below, barring their federal review.[184]

Finally, we note that the court's increased use of the ABA standards is only relevant to the performance component of ineffective assistance of counsel claims. As we alluded to above, *Strickland's* prejudice prong, which requires the defendant to prove by a preponderance of the evidence that there is a reasonable probability that the outcome would have been different is also badly in need of modification. Unless and until the court decides to adopt the second part of Bazelon's method of analysis, and require that once deficient performance has been proven the prosecution has the burden to demonstrate counsel's deficiencies did not effect the outcome, ineffective assistance of counsel claims will still be difficult to win.[185]

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[183]Ineffective assistance of counsel claims are difficult to prove on direct appeal. *See Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (noting that allegations of ineffective trial counsel must be firmly founded in the record and in most cases, record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions). Defendants, however, have no constitutional right to habeas counsel. *Ogan v. Cockrell*, 297 F.3d 349 (5th Cir. 2002) (holding an ineffective assistance of state habeas counsel claim does not constitute sufficient cause to overcome the procedural bar to federal review because there is no constitutional right to competent habeas counsel); *In re Goff*, 250 F.3d 273, 275 (5th Cir. 2001) (explaining that states that chose to provide petitioners with counsel for state post-conviction proceedings are not obligated to ensure counsel meets constitutional minimums for defense attorneys at trial or on direct appeal). Thus, incompetence on the part of habeas counsel disallows review of any legitimate ineffective assistance of trial counsel claims, effectively stripping defendants of review of their constitutional right to effective counsel at trial.

[184]*See, e.g., Neville v. Dretke*, 423 F.3d 474 (5th Cir. 2005) (holding failure to exhaust actual innocence claims in state court barred federal review); *Shields v. Dretke*, 2005 WL 388393 (5th Cir. Feb. 17, 2005) (unpub. opinion) (holding in capital case where defendant raised twenty-eight claims regarding ineffective assistance of counsel at trial that all but three claims were procedurally defaulted for failure to bring those claims at the state habeas level); *Whitaker v. Quarterman*, 200 Fed. Appx. 351 (5th Cir. Sept. 19, 2006) (unpub. opinion) (noting capital defendant's failure to present evidence at state habeas proceedings regarding how mental expert would have testified regarding defendant's severe brain damage had trial counsel presented such evidence at mitigation stage prevented court from being able to conclude defendant suffered prejudice from lack of such mitigation testimony, and reiterating that the "law is clear in this circuit . . . that ineffective assistance of state habeas counsel does not excuse a petitioner's failure to properly present his federal habeas claims").

[185] In *Sonnier v. Quarterman*, 2007 WL 136460 (5th Cir. Jan. 22, 2007), the Fifth Circuit referred to the *Strickland* standard for "[r]elying upon the guideposts of the American Bar Association'' Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases," to conclude that trial counsel's failure to "mak[e] a reasonable investigation for purposes of uncovering relevant mitigating evidence that could have been useful in reaching two goals that it was their duty to pursue" constituted ineffective assistance of counsel. *Id.* at *4. While counsel's failure to present any mitigation was not unreasonable because it was based on defendant's explicit instructions, the court concluded that, in any event, defendant

VII. Conclusion

As we have tried to demonstrate, *Williams*, *Wiggins*, and *Rompilla* marked a significant step forward in ineffective assistance of counsel litigation. The Court's acceptance of the ABA Guidelines as professional norms has invigorated judicial review of ineffective assistance of counsel claims. Many courts now require a meaningful investigation into the full range of mitigating evidence. But, unfortunately, those courts that were most hostile to ineffective assistance of counsel claims under *Strickland's* laizez faire regime, have remained so. The Supreme Court likely still has more work to do before the Sixth Amendment right to the assistance of counsel is a reality.

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could not satisfy the prejudice prong even if counsel had investigated and presented the testimony of numerous friends and relatives who were available to testify to defendant's good character, respectful and loving nature, and clam demeanor, "given the overwhelming aggravating factors, there was no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed." *Id. at* *5-*7 (citing *Strickland*, 466 U.S. at 700); *see also Amador v. Quarterman*, 458 F.3d 397 (5th Cir. 2006) (finding appellate counsel deficient for failing to identify a docket entry reflecting that the trial court had entered an adverse ruling on his objection to the admission of witness's in-court identification of him, thereby preserving the objection for appeal and concluding that identification procedure was unnecessary and suggestive but did not render subsequent in-court identification unreliable so defendant was not prejudiced); *Reyes v. Quarterman*, 2006 WL 2474268 (5th Cir. Aug. 28, 2006) (slip opinion) (affirming finding of ineffective assistance of counsel, but concluding no prejudice); *Davis v. Greiner*, 428 F.3d 82 (2d Cir. 2005) (referring to the Model Rules of Professional Conduct for concluding defense counsel for concluding counsel did not act in accord with professional norms and fell below an objective standard of reasonableness, but ultimately holding petitioner was not prejudiced by the inadequate representation); *see also Hood v. Dretke*, supra, note 174.