

## TWO      Effective Assistance of Counsel in Capital Cases

Under the Constitution, a criminal defendant has the right to the effective assistance of counsel at his trial.<sup>1</sup> In a capital case, there may be two trials: first, a guilt trial in which the jury determines whether the defendant is guilty of the capital offense, guilty of a lesser offense, or not guilty; second, a penalty trial in which the same jury, if it found the defendant guilty of the capital offense, decides whether the defendant will be sentenced to death or to a lesser punishment. A capital defendant has the right to the effective assistance of counsel at both the guilt and penalty phases of the capital trial.<sup>2</sup>

One approach to upgrading the quality of lawyers' representations in capital cases would be to rigorously enforce the constitutional guarantee to effective assistance in all criminal cases, or at least in all capital cases. In *Strickland v. Washington*,<sup>3</sup> decided in 1984, the Court made it clear that it was not adopting this approach but rather was concerned with ensuring "reliable results" in criminal cases. *Strickland* provides the principal test for determining whether a criminal defendant received effective assistance of counsel; as explained by the Court, however, the *Strickland* two-pronged test gave capital defendants relatively weak protection against ineffective representation.

Although the Court has adhered to the *Strickland* test, it decided two cases during the past decade that have some potential for strengthening that test. In this chapter, I will begin with the *Strickland* test, explaining both the test itself and the ways in which lower courts have applied it.

1. U.S. Const. amend. VI.

2. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

3. *Id.* at 668.

Then, I will explain the two cases that have the potential for strengthening *Strickland*, focusing especially on *Wiggins v. Smith*,<sup>4</sup> a case that could be interpreted as imposing significant obligations on capital defense attorneys, especially with respect to searching for mitigating evidence that could be introduced at a capital defendant's penalty trial. After explaining *Wiggins*'s application of *Strickland*'s first prong, I will identify three issues left open by *Wiggins*, two of which can be resolved through applying American Bar Association (ABA) Standards similar to the ones applied in *Wiggins* and a third that is more difficult. Then, I will briefly discuss *Williams v. Taylor*'s application of *Strickland*'s second prong, identifying an issue left unresolved by that case. Finally, I will conclude with some observations on how courts should address the unresolved issues I have identified.

### *The Strickland Test*

In *Strickland*, the government's evidence showed that the defendant had gone on a crime spree during which he committed three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders, attempted extortion, and theft. Against his attorney's advice, the defendant pled guilty to all charges, including the three capital murder charges, and elected to be sentenced by the trial judge. After a brief penalty trial, the judge sentenced the defendant to death. The defendant claimed that his lawyer's representation had been ineffective because he failed to investigate for the purpose of introducing mitigating evidence at the penalty trial. Mitigating evidence that the attorney could have introduced included testimony from the defendant's friends, neighbors, and relatives relating to his good character and testimony from mental health experts that the defendant was "chronically frustrated and depressed because of his economic dilemma" at the time of his crimes.<sup>5</sup>

In addressing the defendant's claim, the Court stated that "the purpose of the effective assistance guarantee . . . is not to improve the quality of legal representation"<sup>6</sup> but rather to ensure a fair trial—with a fair trial being defined as one "whose result is reliable."<sup>7</sup> Consistent with this goal, the Court held that in order to establish ineffective assistance of counsel a defendant must establish both that his attorney's representation "fell below

4. 123 S. Ct. 2527 (2003).

5. *Strickland*, 466 U.S. at 676.

6. *Id.* at 689.

7. *Id.* at 687.

an objective standard of reasonableness”<sup>8</sup> and that the defendant was “prejudiced” by his attorney’s substandard performance.<sup>9</sup>

Both the Court’s tone and its application of its new test indicated that *Strickland* was not intended to impose rigorous standards on criminal defense attorneys. The Court emphasized that “[j]udicial scrutiny of counsel’s performance must be highly deferential,”<sup>10</sup> iterating that strategic choices made after a full investigation of the relevant facts and law are “virtually unchallengeable” and “choices made after less than complete investigation are reasonable” if “reasonable professional judgments support the limitations on investigation.”<sup>11</sup>

The Court’s application of the first prong of its test demonstrated that the latter standard of reasonableness was quite low. *Strickland*’s attorney had given two explanations for his failure to investigate. He did not request a psychiatric examination, or otherwise seek evidence relating to the defendant’s mental health, because “his conversations with his client gave no indication that [defendant] had psychological problems.”<sup>12</sup> Moreover, he did not seek a further investigation into the defendant’s background because he believed such an investigation might reveal harmful information that could have had an adverse effect at the penalty trial.<sup>13</sup>

The *Strickland* majority essentially accepted counsel’s explanations. Without discussing the then-existing literature relating to defending capital clients,<sup>14</sup> Justice O’Connor concluded that counsel’s failure to seek mitigating evidence relating to the defendant’s character or psychological background was reasonable because, given the overwhelming aggravating circumstances, such evidence “would be of little help”<sup>15</sup> and counsel’s decision not to present it had the advantage of “ensur[ing] that contrary character and psychological evidence and [defendant’s] criminal history . . .

8. *Id.* at 688.

9. *Id.* at 687, 692. To demonstrate prejudice, *Strickland* held that the defendant must show that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. *Strickland* defined “reasonable probability” as a “probability sufficient to undermine confidence in the outcome” of the proceeding. *Id.*

10. *Id.* at 689.

11. *Id.* at 690–91.

12. *Id.* at 673.

13. *Id.*

14. See Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983); Millard Farmer & James Kinard, *Trial of the Penalty Phase* (1981). Justice O’Connor cited Professor Goodpaster’s article, but only for the proposition that “[e]ven the best criminal defense attorneys would not defend a particular client in the same way.” *Strickland*, 466 U.S. at 689–90.

15. *Strickland*, 466 U.S. at 699.

would not come in.”<sup>16</sup> *Strickland* thus appeared to provide a very tolerant standard for lawyers representing defendants in capital cases.

The Court’s application of its prejudice prong indicated, moreover, that it might be difficult for a capital defendant to establish that his lawyer’s deficient representation resulted in prejudice. The Court tersely concluded that introduction of the mitigating evidence that could have been presented “would barely have altered the sentencing profile presented to the sentencing judge;” therefore, there was “no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances” and thus resulted in a sentence other than death.<sup>17</sup> The Court’s cursory analysis, as well as its conclusion, suggested that it would be difficult in practice for the defendant to establish prejudice within the meaning of *Strickland*’s second prong, at least when the government was able to introduce strong aggravating circumstances at the penalty trial.

Although *Strickland* appeared to set a low standard for attorneys representing criminal defendants, the Court’s opinion left important questions open. In particular, it established no standards for determining when an attorney’s performance falls within the acceptable “range of reasonableness.” Although it indicated that recognized standards (such as those promulgated by the ABA) would be relevant to defining effective assistance, it failed to clarify the role of these standards in evaluating counsel’s performance. In addition, it provided little guidance for determining when counsel’s deficient performance would result in prejudice. Thus, although *Strickland* established a general framework for deciding effective assistance cases, to a large degree it “left to the bar the task of defining what reasonably competent representation requires.”<sup>18</sup>

During the 1980s and 1990s, lower courts frequently applied *Strickland* to invalidate death sentences. In a comprehensive study of death sentences imposed and reviewed by courts between 1973 and 1995, Professor James S. Liebman and his coauthors concluded that state and federal appellate courts reversed 68 percent of all death sentences imposed during that

16. *Id.* These two points seem to cut against each other. If the evidence against the defendant was already overwhelming, counsel would have less reason to be concerned about the introduction of more harmful evidence. Under the circumstances, it would seem that counsel would have relatively little to lose by introducing mitigating evidence.

17. *Id.* at 700.

18. See generally William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 Am. Crim. L. Rev. 181, 212 (1984).

period as a result of “serious, reversible error” at the trial level.<sup>19</sup> The Liebman Study found that 41 percent of all death sentences imposed between 1973 and 1995 were reversed upon review at the state direct appeal stage, and those reversals likely reflected the “most glaring errors” committed during the trial phase, such as sentencing a defendant to death despite a lack of sufficient evidence to convict the defendant in the first place, while reversals at later review stages were likely to result from more subtle, yet equally prejudicial, errors. Of the death sentences that survived the state direct appeal stage, approximately 10 percent of those reviewed at the state postconviction stage and 40 percent of those reviewed at the federal habeas stage were reversed. At both these stages, ineffective assistance of counsel led to more death sentence reversals than any other error: the Liebman Study found that 39 percent of the death sentence reversals occurring at the state postconviction stage and 27 percent of the reversals at the federal habeas stage were a result of “egregiously incompetent lawyering.”<sup>20</sup>

The significant proportion of cases in which death sentences are reversed on the basis of attorneys’ deficient performance indicates that some courts are making a serious effort to monitor capital defense attorneys’ representation at capital trials. But it would be a mistake to conclude that reviewing courts have granted death row defendants relief in all or most cases in which these defendants’ attorneys provided substandard representation at trial. Since the *Strickland* two-pronged test is difficult to meet, there may have been many cases in which death row defendants were unable to obtain relief under *Strickland* even though objective observers would agree that their lawyers’ trial representation was inadequate. Indeed, the extent to which a capital defendant was able to obtain relief on the basis of an ineffective assistance of counsel claim varied widely depending on the jurisdiction in which the defendant was sentenced to death. In general, lower courts in jurisdictions with the most executions were least likely to grant relief. In jurisdictions governed by the Fourth, Fifth, and Eleventh Cir-

19. James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* 11 (2002), at <http://www2.law.columbia.edu/brokensystem2/report.pdf> [hereinafter Liebman et al., *A Broken System*]. The accuracy of the 68% reversal rate calculated by Professor Liebman and his coauthors has been the subject of debate. See Joseph L. Hoffmann, *Violence and the Truth*, 76 Ind. L.J. 939 (2001) (claiming that 68% overstates the reversal rate in capital cases). But see Valerie West, Jeffrey Fagan & James S. Liebman, *Look Who’s Extrapolating: A Reply to Hoffmann*, 76 Ind. L.J. 951 (2001) (defending the accuracy of the 68% reversal rate).

20. Liebman et al., *A Broken System*, *supra* note 19, at 41.

cuits, federal courts rarely granted relief, and, with some variations,<sup>21</sup> the state courts within these jurisdictions followed the pattern set by the federal courts. In Virginia, for example, it was almost impossible for a death row inmate to obtain relief on the ground of ineffective assistance of counsel; and in Texas, it was very difficult for a death row inmate to obtain such relief.<sup>22</sup>

In some jurisdictions, moreover, death row defendants were unable to obtain relief even in cases in which the attorney's substandard performance seemed quite striking. In a significant number of cases, for example, lower courts held that a capital defendant's attorney's failure to investigate for mitigating evidence did not constitute ineffective assistance of counsel under *Strickland*. If the attorney provided even an apparently weak reason for the failure to investigate, many courts found that the attorney's failure to investigate was not deficient performance because it was based on the attorney's "strategic" choice. Acceptable strategic choices included following the defendant's instructions;<sup>23</sup> believing that an investigation for mitigating evidence would only lead to double-edged evidence that would be harmful to the defendant;<sup>24</sup> or believing that introducing mitigating evidence at the penalty trial would dilute the force of the innocence or "lingering doubt" claims that would be presented at that trial in the event the defendant was found guilty.<sup>25</sup>

*Strickland*'s second prong—requiring that the defendant show his attorney's deficient performance resulted in prejudice—also posed a significant obstacle for capital defendants. Even if a court assumed that a capital defendant's attorney's performance was deficient, it would often conclude that, given the aggravated nature of the government's case, the defendant was unable to show a "reasonable probability" that the attorney's deficient performance made a difference in the outcome.<sup>26</sup> A court might thus conclude that, even though the attorney had no valid excuse for not conduct-

21. E-mail from Keir Wreble, an attorney who collects and analyzes results in death penalty defendants' federal habeas cases, to author (June 2, 2004) (on file with author).

22. *Id.*

23. *See, e.g.*, *Funchess v. Wainwright*, 772 F.2d 683, 689 (11th Cir. 1985); *Mitchell v. Kemp*, 762 F.2d 886, 888–89 (11th Cir. 1985).

24. *See, e.g.*, *Brown v. Jones*, 255 F.3d 1273, 1277–78 (11th Cir. 2001); *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999).

25. *See, e.g.*, *Chandler v. United States*, 218 F.3d 1305, 1321 (11th Cir. 2000); *Tarver v. Hopper*, 169 F.3d 710, 715–16 (11th Cir. 1999).

26. *See, e.g.*, *Duhamel v. Collins*, 955 F.2d 962 (5th Cir. 1992); *Daugherty v. Dugger*, 839 F.2d 1426 (11th Cir. 1988); *Moke v. Thompson*, 852 F. Supp. 1310 (E.D. Va. 1994).

ing a search for mitigating evidence, and the mitigating evidence that the attorney failed to find was quite powerful, the defendant was unable to establish that the attorney's failure to investigate established prejudice within the meaning of *Strickland*.

*Strickland*'s overall impact was thus mixed, at best. Even though a significant number of death row inmates obtained relief on the basis of the Court's two-pronged test, the test did not have enough teeth to ensure that it would provide consistent protection to capital defendants or any incentive to states to impose stricter standards for attorneys representing capital defendants. Moreover, although the Court justified its test on the basis that its prime concern was ensuring reliable results, the Court's test was in fact too malleable to provide adequate safeguards against unreliable results in capital cases. As cases discussed in later chapters will show,<sup>27</sup> innocent capital defendants who were convicted and sentenced to death after receiving substandard representation from their attorneys at trial were not necessarily able to invalidate their convictions or death sentences on the basis of *Strickland*.

### Williams and Wiggins

During the 1980s and 1990s, the Court considered a number of cases in which a capital defendant attacked his conviction or death sentence on the ground that his attorney was ineffective. Invariably, the Court rejected these claims.<sup>28</sup>

In *Williams v. Taylor*,<sup>29</sup> decided in 2000, and *Wiggins v. Smith*,<sup>30</sup> decided in 2003, however, the Court reversed the capital defendants' death sentences on the grounds that their attorneys' performances during the penalty phase of the cases were ineffective. Both cases are potentially significant: *Wiggins* because it could dramatically expand a capital defendant's attorney's obligation to investigate mitigating evidence in preparing for the penalty trial, and *Williams* because it could alter the way in which courts apply *Strickland*'s prejudice prong in capital cases.

27. See *infra* Chapters 3 and 7.

28. See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Burger v. Kemp*, 483 U.S. 776 (1987).

29. 529 U.S. 362 (2000).

30. 123 S. Ct. 2527 (2003).

*Wiggins's Interpretation of Strickland's First Prong*

In *Wiggins v. Smith*,<sup>31</sup> the Court considered an ineffective assistance of counsel case in which the reasonableness of a capital defendant's attorneys' decision to curtail investigation for mitigating evidence was at issue. The government sought to justify the attorneys' failure to conduct a full investigation for mitigating evidence on the ground that the attorneys had made a strategic choice that eliminated the need for further investigation. The Court's refusal to accept the government's position may have a significant impact in other cases in which a capital defendant's attorney curtails investigation for mitigating evidence. Wiggins's attorneys' decision to curtail investigation was made under unusual circumstances, however. In assessing *Wiggins's* potential impact, it is thus necessary first to explain the Court's holding and then to identify three issues that the Court's opinion left unresolved.

Kevin Wiggins was charged with the murder of Florence Lacs, a seventy-seven-year-old woman who was found drowned in the bathtub of her ransacked apartment in Woodlawn, Maryland, on September 17, 1988. Ms. Lacs was last seen alive on the afternoon of September 15 when a government witness said Wiggins thanked Ms. Lacs for watching his sheetrock.<sup>32</sup> Geraldine Armstrong, Wiggins's girlfriend, testified that Wiggins picked her up at about 7:45 P.M. on September 15. At that time, Wiggins was driving Ms. Lacs's Chevette and was in possession of her credit card, which Wiggins and Armstrong used when they went shopping that evening and the next day.<sup>33</sup> When Wiggins was arrested, he told the police that he had found Ms. Lacs's car with the keys in it in a restaurant parking lot on September 16 and that Armstrong "didn't have anything to do with this."<sup>34</sup> The government also sought to establish through expert testimony and other evidence that Ms. Lacs had been murdered on September 15, the same day on which Wiggins had been seen in the vicinity of her apartment.<sup>35</sup>

The government's case was thus based primarily on evidence that Wiggins was seen near the victim's apartment shortly before the time of her

31. *Id.*

32. *Wiggins v. Corcoran*, 288 F.3d 629, 633 (4th Cir. 2002).

33. *Id.* at 634.

34. *Id.*

35. The medical examiner testified that the victim had been murdered and that the date of death could have been September 15. In addition, a friend of the victim testified that on September 15 the victim had been wearing the clothes that were found on her murdered body on September 17, and Wiggins's employer testified that Wiggins had been working near the defendant's apartment on the afternoon of September 15. *Id.* at 632-34.

murder and that he had possession of property taken from her apartment after the time of the murder.<sup>36</sup> No eyewitnesses or forensic evidence supported the government's claim that Wiggins had been in Ms. Lacs's apartment on September 15. On the other hand, an unidentified fingerprint was found in the apartment, and the police did have other possible suspects, particularly Armstrong's brother who lived just below Ms. Lacs's apartment.<sup>37</sup>

The defense sought to refute the government's case by showing that Ms. Lacs was still alive when Wiggins was shown to be in possession of the property taken from her apartment. Dr. Kaufman, an expert in forensic pathology, testified that "within a reasonable degree of medical certainty, Ms. Lacs's time of death was no earlier than 3 A.M. on Saturday, September 17."<sup>38</sup> If Ms. Lacs had not been killed until September 17, the government's case against Wiggins was obviously insufficient to establish his guilt.

The defense elected to have the defendant's guilt determined by a judge sitting without a jury. The judge rejected Dr. Kaufman's conclusion as to the time of Ms. Lacs's death. He then concluded that Wiggins's possession of property taken from a recently murdered victim combined with the other circumstantial evidence was sufficient to establish his guilt beyond a reasonable doubt.<sup>39</sup>

The defense chose to have Wiggins's penalty trial before a jury. In order to obtain a death sentence, the government had to prove that Wiggins was a "principal in the first degree," meaning that he had actually killed Ms. Lacs<sup>40</sup> and that the aggravating factors outweighed the mitigating factors.<sup>41</sup>

36. In addition, two inmates testified that Wiggins confessed to the murder while incarcerated; in arriving at a verdict, however, the trial judge indicated that he did not believe either of these inmates. *Id.* at 634.

37. See *Wiggins v. Corcoran*, 164 F. Supp. 2d 538, 554 n.9, 557 (D. Md. 2001).

38. *Wiggins*, 288 F.3d at 634.

39. In reaching this verdict, the trial judge relied on five factual findings: (1) Wiggins was in the vicinity of the apartment at the time of the murder; (2) he gave a false statement to the police about the stolen goods; (3) he knew the victim; (4) the victim was wearing the same clothes on September 15 as she was when she was found dead on September 17; (5) the victim's apartment had been ransacked. See *Wiggins*, 164 F. Supp. 2d at 555-56.

40. Under Maryland's capital sentencing statute, the jury may not impose the death penalty unless it first concludes that the defendant was a "principal in the first degree." Md. Code Ann., [Criminal Law] § 2-202(a)(2)(i) (2002). Under Maryland law, "[a] principal in the first degree is one who actually commits a crime, either by his own hand, or by an inanimate agency, or by an innocent human agent." *State v. Ward*, 396 A.2d 1041, 1046-47 (Md. 1978).

41. A jury must determine by a preponderance of the evidence that the aggravating circumstances outweigh the mitigating evidence. Md. Code. Ann., [Criminal Law] § 2-303(i)(2)(i) (2002).

One month prior to the scheduled beginning of the penalty trial, Wiggins's attorneys filed a motion for bifurcation of the penalty trial so that the defense could first present evidence showing that Wiggins did not kill Ms. Lacs and then, if necessary, present a mitigation case. The defense claimed that "separating the two cases would prevent the introduction of mitigating evidence from diluting their claim that Wiggins was not directly responsible for the murder."<sup>42</sup>

About a month later, the judge denied the defense's bifurcation motion and the penalty trial began. In her opening statement, one of Wiggins's two defense attorneys told the jury they would "hear evidence suggesting that someone other than Wiggins actually killed Lacs."<sup>43</sup> She also told them they were going to hear evidence relating to Wiggins's life and that he had "had a difficult life."<sup>44</sup> During the penalty trial, however, the defense introduced no evidence relating to Wiggins's life history.<sup>45</sup> Instead, it again introduced expert testimony attacking the government's theory as to Ms. Lacs's time of death. In essence, the defense sought to convince the jury that Wiggins could not have been a principal in the first degree because he was not in any way involved in her murder.

At the conclusion of the penalty trial, the judge instructed the jury that Wiggins had been convicted of the first-degree murder of Ms. Lacs and that they were required to accept that conviction as "binding" even if they believed it "to have been in error."<sup>46</sup> He then explained the standard for determining whether Wiggins was a "principal in the first degree" and told the jurors that, if they found that Wiggins was a "principal in the first degree," they should determine whether the death penalty should be imposed by weighing the aggravating and mitigating circumstances.<sup>47</sup> The jury imposed a death sentence.

Wiggins claimed that his trial attorneys were ineffective because they failed to conduct a full investigation for mitigating evidence relating to his personal history. Wiggins's trial attorneys had obtained some information relating to his background, including a pre-sentence investigation report prepared by the Division of Parole and Probation, and Department of Social Services (DSS) records "documenting [Wiggins's] various place-

42. *Wiggins*, 123 S. Ct. at 2532.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Wiggins v. Smith*, Joint Appendix of Petitioner and Respondent 369.

47. *Id.*

ments in the State's foster care system."<sup>48</sup> They had not, however, retained a forensic social worker to prepare a full compilation of Wiggins's social history, even though funds for that purpose were available.<sup>49</sup> Wiggins's senior attorney explained that the attorneys had decided, well in advance of trial, "to focus their efforts on 'retrying the factual case' and disputing Wiggins's direct responsibility for the murder."<sup>50</sup> They believed that compiling a social history was unnecessary because they did not want to present a shotgun defense that might dilute the force of the evidence disputing Wiggins's responsibility.

The Maryland state courts rejected Wiggins's ineffective assistance of counsel claim, concluding that his attorneys had made a "deliberate, tactical" decision to concentrate their efforts on convincing the penalty jury that Wiggins was not responsible for Ms. Lacs's murder.<sup>51</sup> Wiggins challenged this ruling in a federal writ of habeas corpus. Under the applicable federal habeas statute,<sup>52</sup> the issue before the Supreme Court was whether the Maryland state courts' ruling denying Wiggins's ineffective assistance of counsel claim was an "unreasonable application of clearly established federal law."<sup>53</sup> In order to establish this, Wiggins had to show that his attorneys' decision to curtail investigation before they had obtained his complete social history was deficient performance under the first prong of the *Strickland* test.<sup>54</sup>

In addressing this issue, Justice O'Connor's majority opinion focused on a capital defense attorney's obligation to investigate for mitigating evidence. Justice O'Connor stated that Wiggins's attorneys' decision to curtail the investigation "fell short of the professional standards that prevailed in Maryland in 1989" because "standard practice in Maryland in capital cases" at that time "included the preparation of a social history report."<sup>55</sup> She indicated, moreover, that Wiggins's attorneys' decision could not be attributed to a lack of resources because "the Public Defender's office made funds

48. *Wiggins*, 123 S. Ct. at 2536.

49. *Id.*

50. *Id.* at 2533.

51. *Id.*

52. See 28 U.S.C. § 2254 (2000).

53. *Wiggins*, 123 S. Ct. at 2534 (citing 28 U.S.C. § 2254(d)(1)).

54. In addition, Wiggins had to show that his attorneys' deficient performance constituted prejudice under the second prong of the *Strickland* test. See *id.* at 2542; *Strickland v. Washington*, 466 U.S. 668, 692–94 (1984).

55. *Wiggins*, 123 S. Ct. at 2536.

available for the retention of a forensic social worker” who would prepare the necessary report.<sup>56</sup>

The majority also observed that “[t]he ABA Guidelines provide that investigations into mitigating evidence ‘should comprise efforts to discover *all reasonably available* mitigating evidence,’”<sup>57</sup> adding that under both the ABA Guidelines and the ABA Standards for Criminal Justice, this investigation should delve into various topics, including the defendant’s “family and social history.”<sup>58</sup> Justice O’Connor referred to these standards as “well-defined norms,”<sup>59</sup> thus implying that, in the absence of a reasonable justification, an attorney’s failure to conduct such an investigation would constitute deficient performance under *Strickland*.

Justice O’Connor further concluded that Wiggins’s attorneys’ decision to curtail investigation could not be justified as a reasonable strategic decision; rather, the attorneys’ decision to abandon their investigation “mad[e] a fully informed decision with respect to sentencing strategy impossible.”<sup>60</sup>

### *Three Unresolved Issues*

Although *Wiggins* was ostensibly applying *Strickland*’s ineffective assistance of counsel test, the Court’s analysis indicated that its view of the standard of care required of an attorney representing a capital defendant may have evolved. In *Strickland* the Court had stated that professional standards such as those articulated in the ABA Guidelines would not necessarily define the standard of care for criminal defense attorneys;<sup>61</sup> the *Wiggins* majority indicated, however, that the ABA Guidelines relating to a capital defendant’s attorney’s obligation to investigate for “all reasonably available mitigating evidence” does articulate the standard of care for such an attorney. The defense attorney may not trump this obligation, moreover, by simply asserting that she adopted a strategy that focused exclusively on reasserting the defendant’s possible innocence at the penalty trial.

In assessing *Wiggins*’s application to other situations in which a capital defense attorney makes a strategic decision to curtail investigation for mitigating evidence, three questions seem especially significant. First, in

56. *Id.*

57. *Id.* at 2537.

58. *Id.*

59. *Id.*

60. *Id.* at 2538.

61. 466 U.S. at 688–89.

defining counsel's duty to investigate for mitigating evidence, what does the Court mean by "all reasonably available mitigating evidence"? Second, can a capital defense attorney justify a decision to curtail investigation for mitigating evidence because the defendant requests that no such evidence be presented at the penalty trial? And, third, when may the attorney make a reasonable decision to curtail investigation for mitigating evidence on the basis of a strategic choice that relates to the quality of the available mitigating evidence?

*The Duty to Investigate for "All Reasonably Available Mitigating Evidence"*

As explained by the Court, *Wiggins* provides a clear example of a case in which the mitigating evidence that counsel failed to investigate was "reasonably available." At the time of *Wiggins*'s trial, "the Public Defender's Office made funds available for the retention of a forensic social worker"<sup>62</sup> who would prepare a report relating to the defendant's background. Using funds to obtain such a report would not affect the extent to which counsel would have resources available for the guilt trial because the guilt trial had already been completed. In *Wiggins*, the mitigating evidence was thus "reasonably available" not only because counsel could obtain it but also because it could be obtained without any strain on existing resources.

In other cases, the availability of potential mitigating evidence will not be so clear. In most jurisdictions, judges have discretion as to the amount of funds to be allocated to capital defense attorneys for investigation.<sup>63</sup> In exercising this discretion, judges may limit the number of expert witnesses

62. *Wiggins*, 123 S. Ct. at 2536.

63. In most states, statutes provide judges with wide discretion as to the expenses to be allocated for the investigation and preparation of a capital case. See, e.g., Tex. Crim. Proc. Code Ann. § 26.052(f)–(g) (Vernon 2003) (counsel may request and court shall grant reasonable "advance payment of expenses to investigate potential defenses"); Tenn. Code Ann. § 40–14–207(b) (2002) (court may grant prior authorization for "investigative or expert services or other similar services" necessary to protect defendant's constitutional rights "in a reasonable amount to be determined by the court"); Cal. Penal Code § 987.9(a) (West 1985 & Supp. 2004) (counsel may request funds for payment of "investigators, experts, and others for the preparing or presentation of the defense" and "a judge . . . shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney"). See generally Stephen Bright, *Neither Equal Nor Just: The Rationing and Denial of Equal Services to the Poor When Life and Liberty Are at Stake*, 1997 Ann. Surv. Am. L. 783, 820 (explaining that judges routinely use their discretion to deny defense counsel the funds needed to adequately investigate a case and often do so by requiring counsel to show the need for such funds—"a showing that frequently cannot be made without the very . . . assistance that is sought").

or inform the attorney that the total amount of funds for investigation cannot exceed a certain amount.<sup>64</sup> The judge's authority to exercise discretion is limited, however, by *Ake v. Oklahoma*,<sup>65</sup> which holds that, upon a sufficient showing that his mental condition will be a significant factor in a capital case, a capital defendant is entitled to compensation for a psychiatrist to assist the defense. Lower courts have interpreted *Ake* as requiring compensation of other defense experts if it can be shown that they are needed to assist the defense in developing a significant issue.<sup>66</sup> Under *Ake*, a judge should not be permitted to deny authorizing funds for the retention of a capital defendant's expert witness if the defense adequately demonstrates that the expert is needed to develop a particular type of mitigating evidence.<sup>67</sup>

In some cases, the defendant's attorney may believe—rightly or wrongly—that she should opt for presenting the strongest defense at the guilt stage rather than diminishing the resources available for that purpose by requesting funds to investigate for mitigating evidence.<sup>68</sup> In this situation, the attorney may decide to curtail the investigation for mitigating evidence so as not to diminish the resources available for strengthening the defendant's defense at the guilt stage. In applying *Wiggins* to these situations, courts will have to decide whether counsel's obligation to investigate for "all reasonably available mitigating evidence" encompasses an obligation to seek all such evidence or only an obligation to seek "mitigating evi-

64. See, e.g., *State v. Daniel*, No. W2000-00981-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 967, at \*30-34 (Dec. 28, 2001) (holding that the trial court did not abuse its discretion in refusing to appoint a mitigation specialist because defendant failed to make the required showing that (1) defendant would be deprived of a fair trial without such assistance and (2) there was a reasonable likelihood that such assistance would materially assist the defense); *Commonwealth v. Shabazz*, No. CR03000337-00 & CR02-856, 2003 Va. Cir. LEXIS 74, at \*23-24 (Mar. 31, 2003) (noting that the trial court properly limited mitigation specialist to 20 hours to establish a factual basis for full investigation for mitigating evidence). *But see Williams v. State*, 669 N.E.2d 1372, 1384 (Ind. 1996) (finding abuse of discretion in trial court's decision to limit mitigation specialist to 25 hours of investigation, but establishing no clear standards for determining when a judge's failure to authorize defense investigation will constitute an abuse of discretion).

65. 470 U.S. 68 (1985).

66. See Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 342.

67. In practice, however, "many defense attorneys [did] not do a good job of making a showing of the need for funds" prior to *Wiggins*. E-mail from Stephen Bright to author (Aug. 31, 2003) (on file with author). For further discussion of *Ake*, see *infra* notes 68 & 75 and accompanying text.

68. In some cases, the defense attorney's belief that she must choose between allocating resources to the guilt or penalty stage may be mistaken. If the attorney can make a sufficient showing under *Ake*, arguably she should be entitled to compensation for expert witnesses at the penalty trial regardless of the funds already expended for expert witnesses at the guilt trial.

dence” that can be obtained without placing a strain on the resources available for other purposes. Courts should be able to resolve this problem, however, by requiring that a capital defendant’s attorney make an adequate record of the resources needed for a full investigation of mitigating evidence. In deciding on the nature of the resources that the attorney should be required to seek, courts should be guided by the same ABA Guidelines the Court relied on in *Wiggins*.

Because the trial judge has broad discretion in allocating funds for defense investigation, a capital defendant’s attorney may understand that she will have to make choices as to how funds for investigation will be allocated. She may know, for example, that obtaining funds for a forensics expert whom she believes will enhance the defendant’s chances at the guilt phase will in practice make it impossible for her to obtain funds to conduct an adequate investigation of the defendant’s possible mental impairment. In this situation, the attorney’s strategic choices relating to resource allocation should generally be viewed as reasonable. If her highest priority is to obtain a forensics expert who will testify at the guilt trial, she should be allowed to first seek funds for that expert, thereby making it clear that this is the defense’s top priority.

But even if the attorney’s choices make it impossible in practice for her to obtain the resources necessary to conduct a full investigation for the potentially available mitigating evidence, she should be required to make a record showing that she sought such an investigation.<sup>69</sup> At a minimum, she should request that the court appoint a social worker (or other mitigation expert) who can conduct a full investigation relating to the defendant’s social history. Depending on the circumstances, she should also request funds that will allow an adequate investigation relating to the other areas that, as *Wiggins* noted,<sup>70</sup> the ABA Guidelines have identified as providing sources for mitigating evidence.<sup>71</sup> These include the defendant’s “medical history, educational history, employment and training history, . . . prior adult and juvenile correctional experience, and religious and cultural influences.”<sup>72</sup> In some cases, for example, the attorney might be able to

69. If the attorney believes allocating resources for the purpose of strengthening the defendant’s case at the guilt trial must be the defense’s first priority, she will generally be able to make that priority clear through presenting motions relating to these issues before making motions designed to obtain a full investigation for mitigation.

70. 123 S. Ct. at 2537.

71. *Id.*

72. *Id.* (citing American Bar Association, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.8.6, at 133 (1989)).

demonstrate the need for a mental health expert to conduct a meaningful investigation into the defendant's mental impairment or an expert in a specific culture to investigate the effect of religious or cultural influences on his conduct.<sup>73</sup>

Through requesting these resources, the defense attorney would make a record as to the type of investigation she believed to be necessary to present the "available" mitigating evidence. The attorney's request would alert the judge as to the extent and nature of potentially mitigating evidence. If the judge denied some or all of the attorney's request and the defendant subsequently received a death sentence, the defense would then be able to raise on appeal the question whether the capital defendant was provided with adequate resources to present the available mitigating evidence at the penalty trial. In some cases, the defense would have a strong argument that, based on *Ake v. Oklahoma*,<sup>74</sup> the judge's failure to provide adequate compensation for the experts needed to assist the defense in obtaining "any reasonably mitigating evidence" violated the defendant's right to due process.<sup>75</sup>

*The Defendant Instructs the Attorney Not to  
Look for Mitigating Evidence*

In *Wiggins*, there was no indication that the defendant had given his attorneys any instructions relating to investigating or introducing mitigating evidence. In some cases, however, a capital defendant will instruct the attorney that she is neither to investigate mitigating evidence nor to present any at the penalty trial in the event the defendant is convicted of the capital crime. In some cases, moreover, the defendant may instruct the attorney either to stop investigating mitigating evidence entirely or to omit some particular aspect of the investigation, such as interviewing members of the defendant's family. *Wiggins's* holding raises the question whether the

73. See, e.g., *Mak v. Blodgett*, 970 F.3d 614 (9th Cir. 1992) (holding counsel ineffective due to failure to conduct investigation that would have produced, *inter alia*, expert testimony about the difficulty of adolescent immigrants from Hong Kong assimilating to North America; this evidence would have humanized the defendant and could have resulted in a life sentence, even though the defendant would have been convicted of thirteen murders).

74. 470 U.S. 68 (1985).

75. *Wiggins* appears to recognize that introducing "any available mitigating evidence" will be a critical factor for the defense in many, if not most, capital cases. Whether *Ake* requires compensation for the expert requested by the defense should thus depend on whether the defense can make a sufficient showing that the expert is necessary to assist in obtaining or evaluating such evidence.

defense attorney's duty to investigate available mitigating evidence applies to cases in which the attorney receives these kinds of instructions.

The ABA Guidelines directly speak to the situation in which the capital defendant instructs his attorney not to present mitigating evidence at the penalty trial. In a sentence that immediately precedes the portion of the Guidelines relied on in *Wiggins*, the 1989 Guidelines state that “[t]he investigation for the preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation should not be offered.”<sup>76</sup> The basis for these Guidelines is that, unless the attorney conducts a full investigation of potential mitigating evidence prior to trial, the defendant will not be able to make an informed decision as to the sentencing strategy to be pursued at the penalty trial.<sup>77</sup>

At least as to a capital defense attorney's obligation to investigate for mitigating evidence, the *Wiggins* majority appeared to accept the ABA Guidelines as establishing “norms” for competent representation by capital defense attorneys. The ABA Guidelines' statement that a capital defense attorney has an obligation to investigate despite her client's initial instructions to the contrary are integrally related to the Guidelines accepted by the Court and thus should be viewed as also establishing the standard for competent performance in capital cases.

### *Strategic Choices to Ignore Potential Mitigating Evidence*

At *Wiggins*'s postconviction hearing, *Wiggins*'s senior attorney explained the attorneys' decision to curtail investigation, testifying that prior to trial they decided not to introduce mitigating evidence relating to the defen-

76. American Bar Association, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1(c), at 93 (1989). In February 2003, ABA updated these guidelines to read: “The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.” American Bar Association, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.4.A.2, at 76 (2003).

77. According to the 1989 ABA Guidelines, an attorney must first investigate and “evaluate the potential avenues of action and then advise the client on the merits of each.” American Bar Association, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 11.4.1, at 96 (1989). The most recent version of the Guidelines states that “[c]ounsel cannot reasonably advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation.” American Bar Association, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Commentary to Guideline 10.7, at 80–81 (2003).

dant's background because they did not want to dilute his claim of innocence.<sup>78</sup>

In *Strickland* and two later cases,<sup>79</sup> the Court had held that, under the circumstances presented in those cases, a capital defendant's attorney's decision to curtail investigation for mitigating evidence was a reasonable strategic decision and, therefore, did not constitute deficient performance. In *Wiggins*, on the other hand, the Court held that—assuming Wiggins's attorneys made the strategic decision not to investigate for mitigating evidence because they wanted to focus primarily on reasserting the defendant's innocence at the penalty trial—the decision was unreasonable. Based on *Wiggins*, when will an attorney's strategic decision to curtail investigation for mitigating evidence be unreasonable?

Characterizing Wiggins's attorneys' decision to curtail investigation as a strategic decision is questionable. As the Court indicated,<sup>80</sup> if the attorneys' bifurcation motion filed prior to the penalty trial had been granted, the attorneys would not have had to worry about the possibility of diluting the evidence of Wiggins's innocence that was presented at the penalty trial. The attorneys would have been able to introduce that evidence during the first phase of the bifurcated proceeding and, if that strategy was unsuccessful, introduce mitigating evidence relating to the defendant's background at the second phase.<sup>81</sup> As the Court stated,<sup>82</sup> there was thus reason to believe that the attorneys' decision was based on "inattention" rather than strategy.<sup>83</sup> If the Court had wanted to limit its holding in *Wiggins*, it could have distinguished *Wiggins* from other situations in which a capital defense attorney curtails investigation for mitigating evidence on the ground that in *Wiggins* the attorneys' decision to curtail investigation was not really a strategic choice.

The majority stated, however, that "assuming [Wiggins's attorneys] limited the scope of their investigation for strategic reasons,"<sup>84</sup> their decision was unreasonable. To justify this conclusion, Justice O'Connor explained

78. *Wiggins*, 123 S. Ct. at 2533.

79. See *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986).

80. *Wiggins*, 123 S. Ct. at 2532.

81. *Id.* at 2537–38.

82. *Id.* at 2542.

83. At the opening of the sentencing hearing, defense counsel "entreated the jury to consider not just what Wiggins is found to have done, but also 'who [he] is.'" *Id.* at 2538. She then informed the jury that it "would hear that Kevin Wiggins has had a difficult life." *Id.* Despite these comments, however, counsel never presented any evidence relating to "Wiggins's history." *Id.*

84. *Id.*

that the attorneys' decision to abandon their investigation when they did "mad[e] a fully informed sentencing strategy impossible."<sup>85</sup>

But why would it be unreasonable for the attorneys to decide that they would curtail the investigation into Wiggins's background because they wanted to focus exclusively on relitigating his guilt? The attorneys' reasoning might be as follows: (1) the evidence of the defendant's innocence was so strong that it was likely to have a powerful effect on the sentencing jury; (2) presenting mitigating evidence relating to the defendant's background might dilute the strength of that evidence, making it less likely that the jury would spare the defendant because of its lingering doubt as to his guilt; (3) therefore, investigating for mitigating evidence relating to the defendant's background was unnecessary because the defense would not introduce such evidence at the penalty trial.

The majority's analysis indicated that this type of reasoning is untenable. Justice O'Connor concluded that competent performance in the *Wiggins* case required a fuller investigation because in view of "the strength of the available evidence," a reasonable attorney might well have chosen to "prioritize the mitigation case over the responsibility challenge," or at least to adopt both "sentencing strategies" since they were "not necessarily mutually exclusive."<sup>86</sup> In other words, regardless of the attorneys' assessment of the strength of the evidence showing Wiggins's innocence, the attorneys could not automatically opt for a strategy that focused solely on presenting this evidence. The Court's analysis thus seemed to indicate that, at least in the absence of an adequate investigation, a capital defense attorney's decision to rely solely on relitigating the defendant's guilt at the penalty trial is unreasonable.

The majority was less clear, however, in delineating the circumstances under which a capital defendant's attorney can make a reasonable strategic decision to curtail investigation because her preliminary investigation convinces her that a full investigation for mitigating evidence would be unproductive. In *Wiggins*, the preliminary investigation indicated that the potential mitigating evidence related to the defendant's troubled childhood and severe mental problems.<sup>87</sup> *Wiggins* thus indicates that, in the absence of a substantial investigation, an attorney's strategic decision to reject the possibility of introducing these types of mitigating evidence is unreasonable. *Wiggins* intimated, however, that an attorney would be able to justify such

85. *Id.*

86. *Id.* at 2542.

87. *Id.* at 2536.

a choice in cases where the attorney could reasonably conclude that she would not want to introduce potential mitigating evidence because of a concern that it would be unproductive or double-edged.<sup>88</sup> A critical question left open by *Wiggins* thus concerns the circumstances under which a capital defendant's attorney can make a strategic decision to curtail investigation for mitigating evidence because she concludes that the investigation is likely to produce only evidence that the defense would not want to introduce at the penalty trial.

### *Williams's Interpretation of Strickland's Second Prong*

In *Williams v. Taylor*,<sup>89</sup> the government's evidence established that Williams had written a letter to the police in which he confessed to the murder of Mr. Stone, the crime for which he was on trial. The government was also able to show that "the murder of Mr. Stone was just one act in a crime spree that lasted most of Williams's life."<sup>90</sup> As the Fourth Circuit stated, "[T]he jury heard evidence that, in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw."<sup>91</sup> At the penalty trial, Williams's defense counsel called Williams's mother and two neighbors, one of whom he had not previously interviewed, who testified that Williams was a "nice boy" and not a violent person. He also introduced a taped excerpt from Williams's statement to a psychiatrist in which Williams stated that when committing "one of his earlier robberies, he had removed the bullets from a gun so as not to injure anyone."<sup>92</sup> The jury sentenced Williams to death.

Williams alleged that his attorney was ineffective because of his failure to discover and introduce mitigating evidence at the penalty trial. The evidence that could have been introduced included documents that "dramatically described mistreatment, abuse, and neglect during his early child-

88. The Court cited with apparent approval earlier cases in which it had held that a capital defendant attorney's decision to curtail investigation was reasonable because the attorney reasonably concluded that the evidence likely to be disclosed by further investigation would be double-edged or unproductive. *See* 123 S. Ct. at 2537 (citing *Strickland v. Washington*, 466 U.S. 668, 699 (1984); *Burger v. Kemp*, 483 U.S. 776, 794 (1987); *Darden v. Wainwright*, 477 U.S. 168, 186 (1986)).

89. 529 U.S. 362 (2000).

90. *Id.* at 418.

91. *Id.*

92. *Id.* at 369.

hood” and testimony that he was “borderline mentally retarded” and “had suffered repeated head injuries, and might have mental impairments organic in origin.”<sup>93</sup> In addition, the defense could have introduced expert testimony that Williams would not pose “a future danger to society” if he were “kept in a ‘structured environment.’”<sup>94</sup>

The lower courts concluded that Williams was not entitled to relief under *Strickland* because, even assuming his attorney’s representation at the penalty trial was unreasonable, Williams was unable to show that his attorney’s deficient performance resulted in prejudice.<sup>95</sup> Given the strength of the government’s aggravating circumstances, Williams was unable to establish a “reasonable probability” that he would not have been sentenced to death if his attorney had effectively represented him at the penalty trial.<sup>96</sup>

As in *Wiggins*, the issue before the Supreme Court was whether the lower courts’ finding that Williams’s attorney’s representation was not ineffective under the *Strickland* test was an “unreasonable application of . . . clearly established Federal law.”<sup>97</sup> Justice Stevens’s opinion for a six-Justice majority concluded that the lower courts’ finding with respect to prejudice was unreasonable. In reaching this conclusion, the majority evaluated the strength of the aggravating circumstances introduced by the government and the mitigating evidence that was introduced or should have been introduced by the defense. The majority intimated that the mitigating evidence relating to Williams’s cooperation with the police (including turning himself in and thereby “alerting [them] to a crime they otherwise would never have discovered”)<sup>98</sup> and the testimony suggesting he would not be dangerous in prison<sup>99</sup> would not be enough to establish prejudice.<sup>100</sup> The majority added, however, that “the graphic description of Williams’s childhood, filled with abuse and privation, or the reality that he was ‘borderline mentally retarded,’ might well have influenced the jury’s appraisal of his moral culpability.”<sup>101</sup> It thus concluded that the attorney’s failure to introduce this mitigating evidence so clearly established prejudice within the meaning of

93. *Id.* at 370–71.

94. *Id.*

95. *Id.* at 373–74, 393–94.

96. *Id.*

97. *Id.* at 376.

98. *Id.* at 398.

99. *Id.* at 396.

100. *Id.* at 398.

101. *Id.*

*Strickland*'s second prong that the state courts' contrary finding was an "unreasonable application of . . . clearly established Federal law."<sup>102</sup>

*Williams*'s holding is important because it demonstrates that, even in capital cases in which the government establishes significant aggravating circumstances, defense counsel's inexcusable failure to introduce mitigating evidence at the penalty trial can result in prejudice. *Williams*'s analysis, however, provides few if any guidelines for lower courts considering this issue in other cases. Determining the circumstances under which a defense attorney's failure to introduce mitigating evidence at a capital defendant's penalty trial can result in prejudice is thus another question that needs to be addressed.

### Conclusion

The Court's interpretation of *Strickland* in *Wiggins* and *Williams* has already had a significant impact. As a result of *Wiggins*, lower courts have been more inclined to find that an attorney's failure to conduct a full investigation for mitigating evidence constitutes deficient performance.<sup>103</sup> *Williams*'s application of *Strickland*'s second prong has also made a difference.<sup>104</sup> Prior to *Williams*, the Fifth Circuit had almost never found that an attorney's deficient performance in an aggravated capital case could constitute prejudice. Since *Williams*, however, this has changed.<sup>105</sup>

The cases also have considerable symbolic significance. *Wiggins* indicates that the Court embraces the ABA Guidelines, suggesting that courts should refer to ABA Guidelines to resolve issues relating to a defense attorney's obligation to prepare for a capital defendant's penalty trial. Both cases demonstrate, moreover, that even in cases decided under Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), capital defendants will be able to establish ineffective assistance of counsel. The cases thus signal to lower court judges that the *Strickland* test must be applied more rigorously than it has been in the past.

Lawyers familiar with capital litigation know that *Wiggins* and *Williams*

102. *Id.* at 376.

103. *See, e.g.*, *Hamblin v. Mitchell*, 354 F.3d 482, 486–88, 493–94 (6th Cir. 2003); *Nance v. Fredrick*, 596 S.E.2d 62 (S.C. 2004).

104. *See, e.g.*, *Thompson v. Bell*, 373 F.3d 688 (6th Cir. 2004); *Soffar v. Dretke*, 368 F.3d 441 (5th Cir. 2004); *Allen v. Woodford*, 366 F.3d 823 (9th Cir. 2004); *Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003); *Burns v. State*, 813 So. 2d 668 (Miss. 2001); *Sanford v. State*, 25 S.W.3d 414 (Ark. 2000).

105. *See, e.g.*, *Roberts v. Dretke*, 356 F.3d 632 (5th Cir. 2004).

are not extreme examples of ineffective assistance in capital cases. Indeed, John Blume, a Cornell law professor who has extensively studied capital habeas cases, characterizes them as “garden variety cases.”<sup>106</sup> According to Blume, there are many cases in which capital defendants were denied relief under *Strickland* even though “the defendants’ lawyers were just as bad or worse” than in *Williams* or *Wiggins* and the “mitigating evidence that could have been presented was even stronger” than the evidence presented in those cases.<sup>107</sup> *Wiggins* and *Williams* thus signal that judges must adopt a new perspective in evaluating ineffective assistance of counsel claims in capital cases.

In seeking to resolve the two critical issues left open by *Wiggins* and *Williams*, courts should consider data relating to current capital punishment litigation. In deciding when a capital defense attorney’s decision to curtail investigation for mitigating evidence should be viewed as a reasonable strategic choice within the meaning of *Wiggins*, courts should examine experienced capital defense attorneys’ strategic choices with respect to investigating mitigating evidence. Both chapter 4, which considers these attorneys’ strategies with respect to seeking and introducing mitigating evidence when representing capital defendants with strong claims of innocence, and chapter 5, which describes defense attorneys’ strategies when representing defendants against whom the government is able to establish strong aggravating circumstances, provide pertinent data.

In addressing the issue left open by *Williams*, courts should consider a different kind of empirical data. In *Williams*, the Court stated that the evidence that defense counsel should have introduced could have influenced the jury’s appraisal of Williams’s moral culpability, suggesting that evidence diminishing the defendant’s responsibility for his criminal conduct may be especially significant. While this observation identifies an area of inquiry, it does not provide a clear guideline. In capital cases, mitigating evidence relating to the defendant’s background or mental state will often be available. *Williams*’s analysis indicates that a defense attorney’s failure to introduce such evidence may establish prejudice, but it did not provide guidelines for the lower courts to apply in determining when such prejudice should be found.

In seeking to develop such guidelines, courts should examine results in

106. Telephone Interview with John Blume, a professor at Cornell Law School who has extensively studied federal habeas death penalty cases (Feb. 2, 2004).

107. *Id.*

aggravated capital cases. As I will show in chapter 5, penalty juries are quite likely to return life sentences when the defense introduces sufficiently powerful mitigating evidence—even in highly aggravated capital cases. Evaluating the mitigating evidence introduced in these cases would assist in developing guidelines to be used in determining when the defense's failure to introduce mitigating evidence should establish prejudice within the meaning of *Williams*.