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THE FOURTH CIRCUIT'S "DOUBLE-EDGED SWORD": EVISCERATING THE RIGHT TO PRESENT MITIGATING EVIDENCE AND BEHEADING THE RIGHT TO THE ASSISTANCE OF COUNSEL

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Even before the sea change of *Gideon v. Wainwright*,[1] the Supreme Court recognized not only an indigent's right to the assistance of counsel in capital cases, but also his right to the *effective* assistance of counsel in capital cases.[2] Since those auspicious beginnings, the Court has dramatically broadened the right to present mitigating evidence in the sentencing phase of a capital trial, thereby increasing the need for the guiding hand of counsel in capital sentencing. Thus, it is particularly tragic that the Fourth Circuit's swiftly evolving approach to the prejudice prong of the ineffective assistance of counsel standard[3] precludes capital defendants from winning ineffective assistance of counsel claims in the very cases where informed and effective assistance would have been most likely to have made a difference.

According to the Fourth Circuit, all psychologically based mitigating evidence is a "two-edged sword," because "although 'evidence of a defendant's mental impairment may diminish his blameworthiness for

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1. 372 U.S. 335, 339 (1963) (holding that the Due Process Clause requires the appointment of counsel for an indigent defendant charged with a felony).

2. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court held:

> [I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.

Id. at 71.

3. *See* Strickland v. Washington, 466 U.S. 668, 687, 694 (1984) (finding that a claim of ineffective assistance of counsel requires defendant to show that counsel's deficient performance prejudiced the defense, and defining prejudice as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

his crime,' it also may 'indicate[ ] that there is a probability that he will be dangerous in the future.'"[4] Thus for habeas petitioners in the Fourth Circuit, the possibility, however remote, that a jury would focus on dangerousness rather than culpability precludes *ever* winning an ineffective assistance of counsel based upon the failure to present psychologically-based mitigating evidence, no matter how compelling the neglected evidence is, or how derelict counsel was in failing to present that evidence. As this Article will demonstrate, the double-edged sword doctrine is wrong-headed in several respects. It both distorts the Supreme Court's ineffective assistance of counsel doctrine and renders the right to present mitigating evidence dependant upon whether the defendant is lucky enough to be assigned competent counsel. Moreover, it ignores generally recognized normative constraints on the imposition of the death penalty. Finally, its premise of a double-edged sword is not empirically supported.

No other circuit has adopted or even explored the double-edged sword doctrine, and even in the Fourth Circuit, this doctrine has most often, but not always, appeared as an alternative holding.[5] This Article hopes to persuade the reader that despite its newness, it is a doctrine already ripe for overruling—or reversal, if necessary. Part I briefly describes the capital defendant's right to have available mitigating evidence presented to the sentencing body; the real dimensions of this right can properly be understood only by considering both the breadth of the abstract right to present mitigating evidence and the limitations imposed by the interaction of that right with the ineffective assistance of counsel doctrine. Part II describes how the Fourth Circuit's double-edged sword doctrine departs from established doctrine and diminishes established rights. It begins with an example of the doctrine in action, the case of J.D. Gleaton, who was executed by the state of South Carolina on December 4, 1998. Gleaton's lawyer offered no reason for his failure to present evidence that Gleaton was organically brain-damaged and mentally ill, and the Fourth Circuit de-

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4. Beavers v. Pruett, No. 97-4, 1997 WL 585739, at *4 (4th Cir. Sept. 23, 1997) (quoting Barnes v. Thompson, 58 F.3d 971, 980-81 (4th Cir. 1995) (quoting Penry v. Lynaugh, 492 U.S. 302, 324 (1989))), *cert. denied*, 118 S. Ct. 621 (1997).

5. *See, e.g.*, *Beavers*, 1997 WL 585739, at *4 ("Moreover, even if [the defendant] had overcome the presumption that counsel's performance was within the broad range of professionally acceptable conduct, we are not convinced that he would have satisfied the prejudice prong of Strickland."); *Barnes*, 58 F.3d at 980 (asserting that even if the defendant could "show that [counsel] should have presented the evidence of abuse and dysfunction, it is unlikely that he could have satisfied *Strickland*'s second requirement of a 'reasonable probability' that the outcome would have been different but for [counsel's] failure to develop this case in mitigation").

nied Gleaton's petition for habeas corpus relief. The second half of Part II then sketches the misguided development of the double-edged sword doctrine that facilitated this denial. Part III presents the conceptual and empirical fallacies of the Fourth Circuit's approach.

I. THE RIGHT TO HAVE MITIGATING EVIDENCE PRESENTED

After the Supreme Court struck down the death penalty in *Furman v. Georgia*,[6] it was not clear what sort of death penalty statute, if any, could survive constitutional scrutiny.[7] A number of states revised their statutes in the hope of curing the arbitrariness and capriciousness that the Supreme Court had condemned. States tried two opposite approaches, with some states opting for mandatory death penalty statutes and others developing more elaborate statutory schemes specifying aggravating and mitigating factors that must be considered at sentencing. The Supreme Court responded by upholding the latter[8] and striking down North Carolina's broad mandatory scheme for its "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[9] Moreover, the Court deemed even Louisiana's narrower mandatory statute impermissible because evolving standards of decency are inconsistent with "the belief that 'every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.'"[10] With these decisions, the Court laid the foundation for constructing the expanded role that mitigation has come to play in post-*Furman* capital sentencing law and practice.

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6. 408 U.S. 238 (1972) (per curiam).

7. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion) (stating that in *Furman*, "[f]our Justices would have held that capital punishment is not unconstitutional *per se*; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed" (footnotes omitted)).

8. In *Gregg*, the Court stated:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg, 428 U.S. at 195 (plurality opinion).

9. Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion).

10. Roberts v. Louisiana, 428 U.S. 325, 333 (1976) (plurality opinion) (quoting Williams v. New York, 337 U.S. 241, 247 (1949)).

A. *The Role of Mitigation in Capital Sentencing*

Mitigating evidence neither justifies nor completely excuses an offense, but it is evidence which "in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."[11] The Supreme Court's mitigation decisions have reflected the breadth of this type of evidence, and increasingly have stressed that the sentencing body's possession of the fullest information possible concerning the defendant's life and character is highly relevant, if not essential, to the determination of the appropriate sentence.

In *Lockett v. Ohio*,[12] the first of the mitigation cases, a plurality of the Court announced the general principle that:

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[13]

The Court employed this requirement of individualized sentencing in striking down the Ohio statute at issue in *Lockett* because that statute did not permit consideration of the defendant's age or relatively minor role in the offense.[14] Then in *Eddings v. Oklahoma*,[15] the Court applied the *Lockett* rule to overturn a conviction where the sentencing judge refused to consider evidence of "a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance."[16]

Hitchcock v. Dugger[17] underscored the variety of psychological factors that fall within the ambit of *Lockett*. In the sentencing phase of his trial, Hitchcock's counsel presented evidence that, as a child, Hitchcock had habitually inhaled gasoline, that on one occasion he had passed out from doing so, that thereafter his mind wandered, that he had been one of seven children in a poor family forced to pick cotton, that his father had died of cancer, and that Hitchcock had been a loving uncle.[18] Because the advisory jury was instructed to consider only statutory mitigating circumstances, and the sentencing judge re-

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11. BLACK'S LAW DICTIONARY 903 (6th ed. 1990).
12. 438 U.S. 586 (1978).
13. *Id.* at 604 (plurality opinion).
14. *See id.* at 608 (plurality opinion) ("The limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments.").
15. 455 U.S. 104 (1982).
16. *Id.* at 115.
17. 481 U.S. 393 (1987).
18. *Id.* at 397.

fused to consider these other mitigating factors, the Court reversed Hitchcock's sentence.[19] Similarly, in *Penry v. Lynaugh*,[20] the Court held that the Texas death penalty statute did not provide the jury "with a vehicle for expressing its 'reasoned moral response'" to evidence of the defendant's mental retardation.[21] Relying on *Lockett* and *Eddings*, the Court deemed a resentencing remand necessary to avoid the "'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'"[22]

Even mitigating evidence that does *not* relate to culpability for the charged crime must be admitted under the *Lockett* principle, so long as it may serve as a "basis for a sentence less than death."[23] For example, in *Skipper v. South Carolina*,[24] the Court held that exclusion from the sentencing hearing of proffered testimony regarding the defendant's good behavior during pretrial incarceration violated the Eighth and Fourteenth Amendments.[25] Moreover, in *Simmons v. South Carolina*,[26] the Court found that the defendant's statutory ineligibility for parole, at least in a case where the prosecutor argued future dangerousness, might serve as a basis for a sentence less than death and therefore must be presented to the jury upon the defendant's request.[27]

The importance of mitigating evidence is also reflected in the Court's treatment of statutes that require the imposition of the death penalty when mitigation is absent or outweighed by aggravating factors. In *Blystone v. Pennsylvania*[28] the Court upheld a statute which required the sentencer to impose the death penalty upon finding at least one aggravating circumstance and no mitigating circumstances;[29] in *Boyde v. California*[30] the Court upheld a statute which required a death sentence when aggravating circumstances outweighed mitigating circumstances.[31] Moreover, in *California v. Brown*,[32] the Court

19. *Id.* at 398-99.
20. 492 U.S. 302 (1989).
21. *Id.* at 328.
22. *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion); citing Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring)).
23. *Id.* at 318 (citing *Eddings*, 455 U.S. at 113-14).
24. 476 U.S. 1 (1986).
25. *Id.* at 8.
26. 512 U.S. 154 (1994) (plurality opinion).
27. *Id.* at 156.
28. 494 U.S. 299 (1990).
29. *Id.* at 301, 309.
30. 494 U.S. 370 (1990).
31. *Id.* at 372-74, 377.
32. 479 U.S. 538 (1987).

deemed permissible instructions which informed jurors that they must not be swayed by factors such as sentiment or sympathy, which instructions a reasonable juror would interpret, according to the Court, "as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence."[33] In *Mills v. Maryland*,[34] the Court clarified that a state may not capitalize on disagreement regarding the presence of mitigation as a justification for imposition of the death penalty; juries may not be instructed to impose a sentence of death merely because all of the jurors do not unanimously agree on the existence of a mitigating circumstance.[35]

Although the Court has been adamant that the sentencer must consider those "compassionate or mitigating factors stemming from the diverse frailties of humankind,"[36] and has defined those factors broadly, the defendant's right to have relevant mitigating evidence *actually presented* to the jury depends not only upon what evidence the state must allow the jury to consider, but also upon what evidence defense counsel is constitutionally required to present. A jury can consider evidence in mitigation only if trial counsel investigates and vigorously presents such evidence.[37] What happens when counsel fails to present mitigating evidence?

B. The Standard for Assessing Claims of Ineffective Assistance of Counsel

As noted at the beginning of this Article, the right to effective assistance of counsel, like the right to any assistance at all, was first recognized in a capital case.[38] In *Strickland v. Washington*,[39] the Court explained that this right requires that counsel ensure that the adversarial process works to produce a just result at the penalty phases of a capital trial, as well as during the guilt phase.[40] When the adversarial process fails due to counsel's ineffectiveness, the Sixth Amendment is violated, and the verdict must be set aside.

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33. *Id.* at 542.

34. 486 U.S. 367 (1988).

35. *Id.* at 384.

36. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

37. *See* Delo v. Lashley, 507 U.S. 272, 277 (1993) (per curiam) ("Nothing in the Constitution obligates state courts to give mitigating circumstance instructions when no evidence is offered to support them.").

38. *See supra* notes 1-2 and accompanying text.

39. 466 U.S. 668 (1984).

40. *See id.* at 687 (explaining that counsel's role at both trial and sentencing is "to ensure that the adversarial testing process works to produce a just result under the standards governing decision").

In *Strickland*, the United States Supreme Court set forth the standard for determining counsel's ineffectiveness. That test is twofold: was counsel's performance in fact deficient; and, if so, was this deficiency prejudicial to the defense.[41]

In order to make the first determination, the proper inquiry is whether counsel's conduct fell below an objective standard of reasonableness.[42] In other words, a convicted, death-sentenced defendant must show that the particular acts of counsel were outside the "wide range of reasonable professional assistance."[43] In order to satisfy the prejudice requirement, 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."[44]

Although this is a stringent standard, it is significant that the *Strickland* Court explicitly rejected the *more* stringent outcome-determinative test in favor of the "reasonable probability" test for assessing prejudice, despite the fact that the government had argued for the outcome-determinative test.[45] The Court carefully explained that "a defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case";[46] instead, a defendant is prejudiced "even if the errors of counsel *cannot* be shown by a preponderance of the evidence to have determined the outcome."[47] Under *Strickland*, then, a defendant satisfies the prejudice prong of the test for ineffectiveness if he can demonstrate a reasonable probability that the outcome of the proceeding would have been different. Such a probability is proven if he can "undermine confidence in the outcome."[48]

One of an attorney's principal duties is "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[49] In a capital case, investigation of, preparation for, and presentation of mitigating evidence at the penalty phase is critical, and failure to prepare adequately and to present psy-

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41. *Id.*

42. *See id.* at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.").

43. *Id.* at 689.

44. *Id.* at 694.

45. *Id.* at 693-94.

46. *Id.* at 693 (emphasis added).

47. *Id.* at 694 (emphasis added).

48. *Id.*

49. *Strickland*, 466 U.S. at 691; *see, e.g.*, Darden v. Wainwright, 477 U.S. 168, 184-85 (1986) (finding that counsel met *Strickland*'s objective reasonableness standard where he engaged in extensive pre-trial preparation and investigation for the penalty phase of defendant's trial).

chologically based evidence is a ground for finding ineffective assistance of counsel.[50]

At this point, the reader unfamiliar with capital case post-conviction litigation may think this all sounds pretty good. Indeed, she may be wondering why we have asserted that ineffective assistance of counsel doctrine *limits* the right to have mitigating evidence actually presented to the sentencing body. Here it is important to point out what we have neglected thus far: the special role that "strategy" plays in assessing competence. In determining whether counsel's performance was in fact deficient, the Supreme Court has stressed that reviewing courts should be deferential to strategic choices made by trial counsel.[51] Moreover, whether counsel made a "tactical" or "strategic" decision is a question of historical fact ordinarily entitled to a presumption of correctness under the statutory rule governing federal habeas claims,[52] unless a review of the state court's factual findings shows the decision was not supported by the record.[53] Therefore, if the trial attorney comes forward with a strategic explanation for a seemingly incompetent action or omission, and the reviewing state court credits that explanation, then the ineffective assistance of counsel claim will frequently founder on the first prong. The Supreme Court has offered a dual rationale for this deference: the need "to

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50. *See, e.g.*, Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995) (stating that "where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting strategic reason, constitutes deficient performance" (citing Deutscher v. Whitley, 884 F.2d 1152, 1159 (9th Cir. 1989))); Antwine v. Delo, 54 F.3d 1357, 1368 (8th Cir. 1995) (holding that counsel at sentencing was ineffective because of "a reasonable chance that [defendant] would not have been sentenced to death if counsel had effectively presented evidence of [defendant's] mental impairment at the penalty phase"); Baxter v. Thomas, 45 F.3d 1501, 1512 (11th Cir. 1995) (holding that defendant was denied effective assistance of counsel because his counsel "did not reasonably investigate his long history of mental problems and consequently did not present evidence of his psychiatric problems at sentencing"); Loyd v. Whitley, 977 F.2d 149, 158-59 (5th Cir. 1992) (same); Brewer v. Aiken, 935 F.2d 850, 857-59 (7th Cir. 1991) (same). For empirical support for the proposition that mitigating evidence is important to jurors, see *infra* Part III.

51. *See Strickland*, 466 U.S. at 690 (noting that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment").

52. *See* 28 U.S.C. § 2254(d)(2) (Supp. III 1997) (requiring that a writ of federal habeas corpus shall not be granted unless the state decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

53. *See* Horton v. Zant, 941 F.2d 1449, 1462 (11th Cir. 1991) (noting that, whether a decision was tactical is a question of fact, and whether the tactic was reasonable is a question of law, and asserting that a state court's judgment is entitled to deference only on the former issue).

eliminate the distorting effects of hindsight,"[54] and the fact that there are countless was to provide effective assistance in any given case.[55]

The Court in *Strickland* did note that before making a "strategic" choice, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."[56] Consequently, the mere incantation of the word "strategy" does not insulate an attorney's behavior from review if he has not conducted a reasonable investigation that under the circumstances would allow him to make an informed decision.[57] Moreover, whether a tactic was "within the range of professionally reasonable judgments"[58] must still be determined by the reviewing court as a matter of law.[59]

II. THE FOURTH CIRCUIT'S DOUBLE-EDGED SWORD

In determining whether the failure to present psychological mitigating evidence constitutes ineffective assistance of counsel, *Strickland* requires a reviewing court to assess competence with deference to strategic decisions, and assess prejudice by determining whether there is a reasonable probability that, but for counsel's errors, the result would have been different. The Fourth Circuit's "double-edged sword" rule, however, creates an insurmountable barrier to finding prejudice in cases where the claimed ineffectiveness relates to the presentation of psychologically based mitigating evidence. The Fourth Circuit's application of the double-edged sword doctrine to the case of J.D. Gleaton is an illuminating example of the costs of this approach.

A. *J.D. Gleaton: An Extreme Example of the Fourth Circuit's Presumption of No Prejudice*

The case of J.D. Gleaton is a particularly compelling example of the costs of the Fourth Circuit's approach because, under a conven-

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54. The Fourth Circuit has ratcheted up its rhetoric by castigating "post-conviction attorneys [who] *stroll* in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (emphasis added). One of the authors "strolled in" to represent Mazzell.

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

56. *Id.* at 691.

57. *See, e.g.*, Cave v. Singletary, 971 F.2d 1513, 1518 (11th Cir. 1992) (finding attorney's behavior unreasonable despite the fact that attorney called conduct "strategy"); *Horton*, 941 F.2d at 1461-62 (same); Lightbourne v. Dugger, 829 F.2d 1012, 1025-26 (11th Cir. 1987) (per curiam) (same).

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

59. *See Horton*, 941 F.2d at 1462 (noting that the evaluation of the reasonableness of a tactic is a question of law on which the state court is not entitled to deference).

tional analysis that considered the particulars of the case, it would be impossible to conclude that this defendant suffered no prejudice from his counsel's derelictions.

1. J.D. Gleaton's Life and Trial.—On July 12, 1977, after being high for several days, J.D. Gleaton and his half-brother Larry Gilbert stumbled upon Ralph Stoudemire's South Congaree, South Carolina convenience store, looking for drugs or money.[60] Mr. Stoudemire resisted when Gleaton pulled out a knife.[61] In the ensuing struggle, Mr. Stoudemire was killed.[62] In his statement, admitted into evidence at trial, Gleaton related:

> On Tuesday morning, July 12, 1977, me and Larry Gilbert were riding around in Cola. We went to a Soc station in Cayce to try to buy some dope. . . . We had come [to] another service station earlier and got some brake fluid for the car. The guys at the Soc station in Cayce would not sell us any dope, so we left. We rode around in Cola. some more and went to another Soc station. I went in and asked the man how much his cigarettes were and he told me and I said I could get them cheaper somewhere else. Larry came in the door so we could rob the man. We decided to rob the man after we passed by and saw he was by himself. I was fixing to pay the man for the cigarettes when Larry pulled the gun. *The man said something and hit me and we started to scuffle.* I pulled the knife out and stabbed him and Larry came up and shot. I stabbed the man more than one time. I ran out the door and didn't look for any money.[63]

Detective John Dauth corroborated Gleaton's statement by noting that there appeared to have been "a tussle" in the storage room and that a box containing cartons of cigarettes had been knocked over.[64] Gilbert's statement to the police similarly gave no indication whatsoever that his brother had formed an intent to kill before he went into the store.[65] Gilbert stated that he was waiting outside when "[a] man reached into his pocket and I ran into the station and shot the man one time with a .22 caliber pistol."[66] Moreover, the victim was still

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60. Joint Appendix at 1823, 1981-82, Gilbert v. Moore, 134 F.3d 642 (4th Cir. 1998) (en banc) (No. 96-12, 96-16, 96-13, 96-15) [hereinafter JA].

61. *Id.* at 1982 (Gilbert's version); 1834, 2009-10 (Gleaton's version).

62. *Id.* at 1421 (stab wound to heart was cause of death); 1524 (account by victim's son).

63. *Id.* at 2009-10 (emphasis added).

64. *Id.* at 1538, 1543.

65. *Id.* at 1829-30.

66. *Id.* at 1830.

standing when the brothers left,[67] another indication that they did not intend to kill him.

The state court litigation of this relatively unaggravated homicide was in part a product of its times—the beginning of the post-*Gregg*[68] era in capital litigation in South Carolina. Only one attorney represented the two defendants in the capital trial, and then again at the resentencing trial.[69] Trial counsel did not speak to any of the state's guilt-phase witnesses. He filed only a handful of form motions, and he conducted no investigation into Gleaton's background or mental state, even though the state hospital report indicated that Gleaton was possibly brain damaged and borderline mentally retarded.[70] He hardly even spoke to his own client.[71] Another bizarre thing he did was to call both of his clients to the stand in the presence of the jury and instruct them to invoke their Fifth Amendment rights during cross-examination.[72] Trial counsel had no excuse for his lack of preparation.[73] He rebuffed offers of assistance and even pocketed extra money that Gleaton's mother had given him for the express purpose of finding a second attorney to assist with trial preparation.[74]

What was even more surprising was his performance at the resentencing trial several years later. It was so deficient that the resentencing judge took the unprecedented step of testifying about counsel's "indifference" and "cavalier approach" as well as counsel's poor preparation and presentation of witnesses.[75] The trial judge characterized

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67. *Id.* at 1520.

68. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (plurality opinion) (finding that the death penalty is not per se unconstitutional); *supra* notes 7-8 and accompanying text.

69. Neither the trial counsel nor the trial judge broached the obvious conflict of interest until just before the first trial began. At that point, trial counsel simply told the trial court that he did not see a conflict, and the matter was not discussed at all with Gleaton or Gilbert. JA at 2051. In spite of these assurances, during the guilt phase, counsel called both of his clients to testify. Counsel later observed that due to his multiple representation, he could not cross-examine each defendant to benefit the other. *Id.* at 2025. Although the trial judge again touched on the conflict just before the penalty phase began, neither he nor defense counsel explained the hazards of proceeding with joint representation to Gleaton, who was borderline mentally retarded and had organic brain damage. In fact, trial counsel later admitted that he himself did not appreciate the full magnitude of the conflict. Due to the debilitating conflict, trial counsel could not cross-examine Gleaton's co-defendant, argue that Gleaton was less culpable, or present any other evidence that would have made Gleaton appear more sympathetic than Gilbert.

70. *Id.* at 4536.

71. *Id.* at 4141, 4146 (judge's comments); 4185, 4194 (law clerk's comments); 4379-83, 4388, 4396, 4436, 4467-77, 4482-83.

72. *Id.* at 4246.

73. *Id.* at 4332.

74. *Id.* at 4146, 4332.

75. *Id.* at 4141, 4146.

counsel's performance as "poor" and "without [sic] the range" of competence expected of counsel,[76] and expressed dismay over counsel's "indifference" and "cavalier approach."[77] Indeed, the trial judge also testified that he did not believe trial counsel "seriously approached" preparation for the trial,[78] and that counsel did not seem as concerned as the judge thought counsel should have been on the eve of a capital trial.[79] In fact, the judge declared that he would not have hesitated to remove counsel if the court had appointed him to represent petitioner.[80] On a scale of one to ten, the trial judge rated counsel as a "two."[81] Similarly, the judge's law clerk testified that counsel "seemed to have no all consuming worry about his preparation for this trial," that counsel ignored his clients, and that he seemed most concerned about not having to work late so that he could spend time with his girlfriend.[82]

The least defensible and most damaging of all of counsel's derelictions was his neglect of the powerful mitigating evidence which was easily available to him. Counsel unconscionably failed to investigate or present *any* evidence of Gleaton's organic brain impairments, his borderline mental retardation, his possible psychosis at the time of the offense, his difficult struggle to break his heroin addiction, the excruciatingly painful injuries that he suffered in a car accident, how his efforts to deal with the agony from those injuries led him back to drugs, his otherwise peaceful and nonviolent character, his relationship with his family and children, or his solid employment history.[83]

All of this information was easily accessible to counsel, who spent virtually no time at all talking to Gleaton about Gleaton's past.[84] Even though Gleaton faced a sentencing retrial in which the only decision was whether he would live or die, counsel presented only two mitigation witnesses, one of whom knew next to nothing about Gleaton.[85]

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76. *Id.* at 4141.
77. *Id.* at 4146.
78. *Id.* at 4130.
79. *Id.* at 4136.
80. *Id.* at 4146.
81. *Id.* at 4138.
82. *Id.* at 4185, 4194.
83. *Id.* at 4364-77.
84. *Id.* at 4536-38, 4553.
85. At the retrial, counsel called Gradie Fulmer, who was Gleaton's minister and who inadvertently made Gleaton seem more culpable than Gilbert. Fulmer stated that he did not have much contact with Gleaton and, although counsel's apparent purpose was to stress Gleaton's religious devotion, Fulmer informed the jury that Gleaton was not very active in the church before he moved to Florida. *Id.* at 3727-28. Counsel also called Lizzie Gilbert, Gleaton's mother. She told the jury only that Gleaton had gone to church until he moved to Florida at age seventeen, that he had moved back and had held a job at Morri-

Despite the knowledge that he was representing an illiterate, borderline mentally retarded man with organic brain damage, a drug problem, and no significant experience with the criminal justice system for even nonviolent offenses,[86] counsel did not discuss possible witnesses or make an attempt to locate witnesses; he made only one trip to Gleaton's hometown of Salley, South Carolina, the purpose of which was to pick up his fee.[87] Counsel did not seek *any* expert assistance despite the state hospital's report that Gleaton possibly had an organic brain impairment and was borderline mentally retarded.[88] Counsel admitted that he was focused on the narrow question of Gleaton's competency to stand trial and did not grasp the broader significance of that report.[89] The problem was not financial: Gleaton's mother stated that counsel never asked her to raise money for a psychologist.[90]

Mental health expert assistance, basic investigation, and the simple chore of spending time with his clients would have enabled counsel to make a profound difference at Gleaton's sentencing retrial. The mitigating evidence available in this case was extraordinary. Gleaton's problems began at birth due to either a prenatal disease or condition that caused his borderline mental retardation.[91] Subsequent neuropsychological tests indicated that he was brain damaged.[92] He was raised by his grandparents, who were sharecroppers.[93] When he was six years old, Gleaton too was forced to work on the farm picking

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son's until he had an accident, and that he had never been in trouble before. *Id.* at 3730-31, 3733.

86. *Id.* at 4535-36. Gleaton was convicted in 1965 for breaking a public telephone and in 1972 for shoplifting fishing equipment worth only about one dollar. *Id.* at 4366.

87. *Id.* at 4305. Counsel claimed that he at least had asked his clients if they could think of any witnesses who could be helpful. *Id.* at 4817. Gleaton explained, however, that he had thought counsel was referring to alibi witnesses, and Gilbert stated that he did not fully understand the process of a capital trial because it was the first time he had any dealings with a lawyer or the criminal justice system. *Id.* at 4484.

88. *Id.* at 4536-38, 4553.

89. *Id.* at 4825. Counsel also called Gleaton and Gilbert to the stand. Gleaton testified that he had worked as a cook in Florida, had moved back to South Carolina and had taken a job at Morrison's Cafeteria as a cook, a job he held until he became disabled in an automobile accident. *Id.* at 3738. Gleaton also testified that he and Gilbert had been together before the incident, getting high on amphetamines and marijuana. *Id.* at 3739. He denied that he had an intent to harm the victim and attributed his actions to the effects of the speed he had been taking. Gilbert corroborated parts of Gleaton's account of the offense. Counsel, however, neither cross-examined Gilbert to highlight his greater culpability, nor argued to the jury that Gleaton was less culpable than Gilbert.

90. *Id.* at 4332.

91. *Id.* at 4536.

92. *Id.* at 4536-38.

93. *Id.* at 4358.

cotton.[94] During his adolescence, he had to feed, carry around, and change the diapers of an older, invalid uncle.[95] He attended school only as far as the sixth grade, failed several grades, and never learned to read because the "boss man" threatened to evict the family from the land if Gleaton attended school instead of working.[96] At age seventeen, when he was earning only $2 per day on the farm, Gleaton moved to Florida.[97]

After working for some time as a migrant farm worker, Gleaton found a job as a cook.[98] He met his wife, and they had a daughter.[99] He had no problems with the law, he was steadily employed, and by all accounts he was a devoted father and peaceful man.[100] He did become addicted to heroin, but checked himself into a rehabilitation hospital and later moved back to South Carolina to avoid the drug-saturated environment of Florida.[101] With the help of his family, he overcame his addiction to heroin and found a full-time job as a cook in Columbia.[102]

Gleaton's new life was shattered, however, when his neck and both ankles were broken in an automobile accident.[103] To set his neck, doctors installed a halo brace that was held in place by four pins that were screwed into his skull.[104] Because of the pins, Gleaton had to keep the brace on at all times for six months. The brace was extraordinarily painful, and the pins often felt like they were pushing further into his skull.[105] Gleaton kept his family awake many nights crying in pain. Although he went to the doctor several times, even at three or four o'clock in the morning,[106] doctors were unable successfully to readjust the brace.[107] Overdoses of the prescribed painkillers did nothing to diminish the excruciating agony.[108] Eventually, when legal drugs could not ease his suffering, Gleaton returned to heroin despite the shame and disappointment that it caused.[109]

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94. *Id.* at 4359.
95. *Id.* at 4361.
96. *Id.* at 4360.
97. *Id.* at 4362.
98. *Id.* at 4364.
99. *Id.* at 4365.
100. *Id.* at 4365-67.
101. *Id.* at 4367.
102. *Id.* at 4369.
103. *Id.* at 4369-70.
104. *Id.*
105. *Id.* at 4371.
106. *Id.*
107. *Id.*
108. *Id.* at 4371-72.
109. *Id.* at 4297, 4372-73.

Later, Gleaton turned to amphetamines, marijuana, and Valium. In the days preceding the offense, he injected speed every four to six hours and smoked one marijuana cigarette per hour.[110] He did not sleep and ate only cinnamon rolls and drank orange juice during that period.[111] As expert testimony could have informed the jury, such misuse of amphetamines causes aggressive, impulsive behavior; overdoses of speed also cause acute anxiety and can even trigger a psychotic state like schizophrenia.[112] Such information would have corroborated Gleaton's testimony that he had lost his senses once his struggle with the victim began and that he was not aware that he was striking Mr. Stoudemire's body.[113]

Finally, probably because of his traumatic and deprived childhood, Gleaton was mentally ill with a borderline personality disorder.[114] This disorder made him more susceptible to developing a drug problem and also exacerbated the effects of the drugs.[115] Moreover, the borderline personality disorder caused Gleaton to have disturbances in his thinking, sharp mood swings which were not necessarily tied to anything happening in his life, problems with interpersonal relationships, and a tendency toward impulsive actions.[116] Under stressful conditions, he could drift into a psychotic state;[117] under the influence of amphetamines, he would be likely to be erratic, impulsive, and paranoid.[118] Finally, due to his limitations and personality disorder, Gleaton was close to being incompetent.[119] He had to have matters explained to him very carefully, and his attorney should have spent more time talking to him to develop a trusting relationship.[120] Instead, however, counsel hardly visited his clients even after their family repeatedly implored him to see them.[121]

2. The Fourth Circuit's Response.—The Fourth Circuit was unmoved by counsel's abysmal performance, the extraordinary accumulation of overlooked mitigating evidence, and the complete absence of any strategic reason for failing to investigate or present this evi-

110. *Id.* at 4377-78, 4427-29, 4462-63.
111. *Id.*
112. Such testimony was presented at the post-conviction hearing. *See id.* at 4533, 4589.
113. *Id.* at 3751-52.
114. *Id.* at 4536-38, 4553.
115. *Id.* at 4553.
116. *Id.* at 4539-42.
117. *Id.*
118. *Id.* at 4560.
119. *Id.* at 4549.
120. *Id.* at 4546, 4555-58.
121. *Id.* at 4304, 4337.

dence.[122] The court determined that Gleaton's ineffectiveness claim failed both the competence and prejudice prongs of the *Strickland* test.[123] While the second prong is of interest here, we digress a moment to observe that the court's evaluation of the competence prong was as bizarre as its evaluation of prejudice was unjustifiable.

The court found that counsel was not deficient for failing to present psychological expert testimony because the state hospital report "did not suggest any serious mental or emotional problems warranting further investigation for potentially mitigating evidence,"[124] which is impossible to reconcile with the state hospital's determination that Gleaton was borderline mentally retarded and that he suffered from organic brain damage, both of which the hospital attributed to prenatal causes.[125] The court's finding was especially strange in view of the fact that counsel never articulated a strategic reason for failing to conduct the investigation, but instead conceded that he did not realize that the hospital report was relevant to any issue other than competence to stand trial.[126] Counsel also conceded that he had no tactical reason for not seeking expert assistance about Gleaton's drug use or for not presenting evidence about the painful and tragic consequences of the halo brace, and even acknowledged that further investigation would have been helpful.[127]

In response to the claim that counsel was ineffective for failing to procure the testimony of other witnesses who might have been able to present mitigating evidence, the court mockingly stated that counsel was not "constitutionally required to interview every family member, neighbor, and coworker in the search for mitigating evidence."[128] This assertion is neither true nor fair. The state court testimony established that counsel conducted almost no investigation, had very little contact with Gleaton, failed to present any significant testimony from people who were well acquainted with Gleaton even though those witnesses were readily available and willing to testify, and never explained to Gleaton or his family the nature and purpose of mitigating evi-

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122. *See* Gilbert v. Moore, 134 F.3d 642, 654-55 (4th Cir.) (en banc), *cert. denied sub nom.* Gleaton v. Moore, 119 S. Ct. 103 (1998).

123. *Id.* at 655 (concluding that counsel's performance was "within the broad range of professionally acceptable conduct," and stating that even if counsel's conduct did not meet that standard, "we are not convinced that [petitioners] have satisfied the prejudice prong of *Strickland*").

124. *Id.* at 654.

125. JA at 4536.

126. *Id.* at 4825.

127. *Id.* at 4864-66.

128. *Gilbert*, 134 F.3d at 655.

dence.[129] What is most unusual here is not the court's finding of competent representation, but that the court made this finding despite the absence of either reasonable investigation by counsel or a deliberate, reasoned choice to forego such investigation. In short, deference to trial strategy cannot explain the Fourth Circuit's decision on the competence prong.[130]

As cavalier as the Fourth Circuit's discussion of counsel's performance was, the court's analysis of prejudice caused by counsel's performance was even worse. Instead of applying the standard articulated in *Strickland* of whether there was a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different,[131] the Fourth Circuit merely stated: "Although evidence that a defendant suffers from a mental impairment or has abused drugs or narcotics may diminish his blameworthiness for his crime, this evidence is a two-edged sword."[132] Abjuring the question of reasonable probability that a juror would have been swayed by the specific mitigating evidence proffered in post-conviction, and ignoring its likely impact in a relatively unaggravated case, the Fourth Circuit found the mere possibility that a juror would have viewed the proffered evidence as aggravating rather than mitigating a sufficient basis to dismiss the claim.[133] Unvarnished speculation is all the en banc court offered; the court did not even explain how the evidence of Gleaton's mental impairment or drug abuse was "two-edged," nor did it point to a reason why counsel might have thought that such evidence would have been damaging. It is highly doubtful, if not inconceivable, that a reasonable juror would have viewed the evidence as "two-edged," especially because in Gleaton's trial the jury heard the worst aspects of the testimony about drugs and the offense

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129. JA at 4302, 4332, 4380-81, 4709-20.

130. *See* Strickland v. Washington, 466 U.S. 668, 691 (1984) (stating that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary"); *see also* Hill v. Lockhart, 28 F.3d 832, 837 (8th Cir. 1994) ("Reasonable performance of counsel includes an adequate investigation of facts, consideration of viable theories, and development of evidence to support those theories." (internal quotation marks omitted) (quoting Foster v. Lockhart, 9 F.3d 722, 726 (8th Cir. 1993))); *Foster*, 9 F.3d at 726 ("Although we generally give great deference to an attorney's informed strategic choices, we closely scrutinize an attorney's preparatory activities." (citing Chambers v. Armontrout, 907 F.2d 825, 831, 835 (8th Cir. 1990) (en banc))).

131. *Strickland*, 466 U.S. at 694 ("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.").

132. *Gilbert*, 134 F.3d at 655 (citing Howard v. Moore, 131 F.3d 399, 420-21 (4th Cir. 1997) (en banc)).

133. *Id.* (noting that "[t]he evidence that Petitioners argue would have been obtained if counsel had performed competently does not undermine our confidence in the verdict").

itself without hearing any testimony, expert or otherwise, in mitigation.[134]

Under the court's analysis, every ineffectiveness of counsel allegation for failing to present evidence on behalf of the client will necessarily fail. The Fourth Circuit will simply imagine how a juror might possibly view the mitigating evidence in a negative light, find that the mitigating evidence is "two-edged," and conclude that the defendant cannot show prejudice. Since Gleaton's case was decided, the Fourth Circuit has employed this "two-edged" rationale in subsequent capital cases to evade application of the *Strickland* prejudice test. The court has invoked this rationale in dismissing evidence of a defendant's organic brain dysfunction,[135] evidence of a defendant's abuse as a child,[136] and evidence of a defendant's drug addiction, a history of abuse, and mental impairment.[137]

The Fourth Circuit's double-edged sword rationale simply does not comport with the Supreme Court's holding in *Strickland.* Under *Strickland,* properly applied, the prejudice to Gleaton is plain. Due to counsel's inadequate performance, the jury never learned that Gleaton had organic brain impairments, suffered from a borderline personality disorder, and was borderline mentally retarded. This type of evidence alone would have radically changed the picture of the case, and *all* other circuits that have addressed this issue have held that counsel's performance is prejudicial for failure to present exactly this type of evidence.[138] Moreover, the Fourth Circuit's approach is also

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134. JA at 4536-38, 4553.

135. *See* Wright v. Angelone, 151 F.3d 151, 162 (4th Cir. 1998) (finding reasonable a lawyer's decision not to present juvenile reports of defendant's mental retardation or brain damage because his mental health expert disagreed with them, and because such mental health evidence is a double-edged sword (citing Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir. 1998))); *Truesdale,* 142 F.3d at 754 ("Mental health evidence like that of Truesdale's organic brain dysfunction is a double-edged sword that might as easily have condemned Truesdale to death as excused his actions."), *cert. denied,* 119 S. Ct. 380 (1998).

136. King v. Greene, No. 97-28, 1998 WL 183909, at *12 (4th Cir. Apr. 20, 1998) (stating that counsel's failure to present additional evidence of child abuse was not prejudicial because "the jury *might have* interpreted such a history of abuse as evidence that King would be dangerous in the future" (emphasis added)), *cert. denied,* 119 S. Ct. 4 (1998).

137. Johnson v. Moore, No. 97-33, 1998 WL 708691, at *13 (4th Cir. Sept. 24, 1998) ("Although evidence that a defendant suffers from a mental impairment, has abused drugs or narcotics, or suffered a history of abuse may diminish his blameworthiness for his crime, this evidence is a double-edged sword that a jury could well find to be aggravating rather than mitigating." (citing Howard v. Moore, 131 F.3d 399, 421 (4th Cir. 1997) (en banc))), *cert. denied,* 119 S. Ct. 1340 (1999).

138. *See* Williamson v. Ward, 110 F.3d 1508, 1520 (10th Cir. 1997) (holding that the prejudice prong of *Strickland* was satisfied because of counsel's failure to investigate and present mitigating evidence relating to defendant's mental condition); Emerson v. Gramley, 91 F.3d 898, 906-07 (7th Cir. 1996) (same); DeLuca v. Lord, 77 F.2d 578, 588-90

inconsistent with the Supreme Court's decision in *Zant v. Stephens*.[139] In *Stephens*, the Court stated that reviewing courts must not label as aggravating "conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness"[140]—exactly what the Fourth Circuit does in its double-edged sword cases.

As this Article went to press, the Supreme Court decided *Williams v. Taylor*,[141] which casts further doubt upon the double-edged sword doctrine. *Williams* does not directly address the double-edged sword doctrine, but it holds that the defendant was denied the effective assistance of counsel due to his counsel's failure to present mitigating evidence of severe childhood abuse and borderline mental retardation. In the course of finding that Williams was "prejudiced" by these omissions, the Court noted that the unpresented evidence "might well have influenced the jury's appraisal of his moral culpability."[142] As would be consistent with *Stephens*—but not with the Fourth Circuit's approach—the Supreme Court did not even *consider* whether such evidence might be viewed as aggravating, let alone *presume* that aggravating effects would cancel out mitigating effects.

B. The Manufacture of the Double-Edged Sword

How did the Fourth Circuit come to this strange distortion of *Strickland*? Certainly the Fourth Circuit has always been particularly inhospitable to ineffective assistance of counsel claims in capital cases; it is the only circuit that has never found counsel to be ineffective in a capital case. Thus one might predict that if the double-edged sword doctrine would be adopted anywhere, the Fourth Circuit would be the place. Putting predisposition aside, however, it is easy to trace the origins of the Fourth Circuit's replacement for the *Strickland* prejudice test.

Ironically, the double-edged sword doctrine stems from a fundamental misunderstanding of *Penry v. Lynaugh*,[143] a case that established the right to present evidence of mental retardation to a capital sentencing jury.[144] In *Penry*, the Supreme Court found that evidence

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(2d Cir. 1996) (same); Glenn v. Tate, 71 F.3d 1204, 1211 (6th Cir. 1995) (same); Clabourne v. Lewis, 64 F.3d 1373, 1387 (9th Cir. 1995) (same); Baxter v. Thomas, 45 F.3d 1501, 1515 (11th Cir. 1995) (same); Hill v. Lockhart, 28 F.3d 832, 847 (8th Cir. 1994) (same); Loyd v. Whitley, 977 F.2d 149, 160 (5th Cir. 1992) (same).

139. 462 U.S. 862 (1983)

140. *Id.* at 885.

141. 120 S. Ct. 1479 (2000).

142. *Id.* at 1515.

143. 492 U.S. 302 (1989).

144. *Id.* at 328.

of Penry's childhood abuse and mental retardation were beyond the reach of the three factors (called "special issues") presented to the jury at sentencing under the Texas statutory scheme, particularly the issue concerning future dangerousness.[145] As the Court explained, evidence of a defendant's mental impairment "is . . . a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future."[146] Because Penry's mitigating evidence suggested an answer of "yes" to the issue concerning future dangerousness, the jury, absent additional instructions, would have been unable adequately to consider the mitigating character of his retardation and abuse in assessing whether Penry deserved to die; as the Court put the point, the special issue on future dangerousness "did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse."[147]

The *Penry* Court was clear that double-edged evidence could, in fact, make a difference even in the context of the narrowly-framed special issues, provided that the jury was properly instructed.[148] The Fourth Circuit, however, has taken the Supreme Court's discussion in *Penry* about the double-edged character of some types of mitigating evidence completely out of context. Instead of recognizing that even double-edged mitigation evidence can and does make a favorable impression on jurors, the Fourth Circuit has assumed, without empirical or doctrinal justification, that a jury is so likely to choose to interpret this type of evidence in an exclusively negative fashion that a lawyer's failure to present it is never prejudicial to a defendant.

Barnes v. Thompson[149] is the first Fourth Circuit case to incorporate the *Penry* language into its discussion of an ineffectiveness claim.[150] In *Barnes*, the court found that the mitigating evidence that

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145. *Id.* at 322-28 (determining that the jury instructions did not allow the jury to give effect to mitigating evidence in responding to three special issues).

146. *Id.* at 324.

147. *Id.*

148. *See id.* at 326 (noting that "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence").

149. 58 F.3d 971 (4th Cir. 1995).

150. *See id.* at 980-81 (stating that "evidence of a defendant's mental impairment 'may diminish his blameworthiness for this crime even as it indicates that there is a probability that he will be dangerous in the future'" (quoting *Penry*, 492 U.S. at 324)). The Fourth Circuit had previously discussed the "double-edged" character of some mitigating evidence, but only in the context of counsel's strategic reasons for not pursuing it. *See* Smith v. Procunier, 769 F.2d 170, 173 (4th Cir. 1985) (stating that counsel was not ineffective for failing to explore the defendant's potentially mitigating mental deficiency because "inquiry into the area meant resort to a double-edged sword, requiring the application of profes-

had not been produced at trial could also have been used to support a finding of future dangerousness, which under Virginia law functions as an aggravating circumstance.[151] Significantly, however, the Fourth Circuit also noted that trial counsel testified that for strategic reasons he sought to avoid any possible evidence of future dangerousness.[152] Thus *Barnes* is not a true double-edged sword case, but instead a garden variety reasonable-strategic-choice case. So far so good.

However, relying on *Barnes*, the Fourth Circuit next found counsel's failure to present evidence of mental impairments harmless in *Beavers v. Pruett*.[153] Rather than asking whether there was a reasonable probability that the result would have been different, the court simply held that the jury "could well have found" the mitigating evidence sufficient to support a finding of future dangerousness.[154] Although *Beavers* was also a Virginia case, and therefore a focus on future dangerousness was statutorily mandated, it was not long before the "could well have found" formulation replaced the *Strickland* "reasonable probability" test, even in cases from states in which future dangerousness is not an aggravating circumstance.[155]

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sional judgement whether to pursue a subject that already had proved unproductive"), *aff'd sub nom.* Smith v. Murray, 477 U.S. 527 (1986).

151. *Barnes*, 58 F.3d at 980-81. Even though in Virginia, like Texas, the jury is asked to consider a defendant's future dangerousness, Virginia jurors have never been restricted to answering special issues and thus have had a vehicle for giving mitigating effect to double-edged evidence. *See* VA. CODE ANN. § 19.2-264.2 (Michie Supp. 1995) (listing as an aggravating factor "that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society"). Thus, even in Virginia, *Penry* is inapposite.

152. *Barnes*, 58 F.3d at 980 (stating that Barnes's attorney "testified that he . . . concluded that his primary task at the sentencing hearing was to prevent a finding of 'future dangerousness,'" and noting that "[t]his tactical approach required that [counsel] portray Barnes as a sane or nonviolent individual").

153. No. 97-4, 1997 WL 585739, at *4 (4th Cir. Sept. 23, 1997), *cert denied*, 118 S. Ct. 621 (1997).

154. *Id.* at *4 (quoting *Barnes*, 58 F.3d at 981).

155. *See* Johnson v. Moore, No. 97-33, 1998 WL 708691, at *14 (4th Cir. Sept. 24, 1998) ("Although evidence that a defendant suffers from a mental impairment, has abused drugs or narcotics, or suffered a history of abuse may diminish his blameworthiness for his crime, this evidence is a double-edged sword that a jury could well find to be aggravating rather than mitigating." (citing Howard v. Moore, 131 F.3d 399, 421 (4th Cir. 1997) (en banc))), *cert. denied*, 119 S. Ct. 1340 (1999); Truesdale v. Moore, 142 F.3d 749, 755 (4th Cir.) ("Mental health evidence like that of Truesdale's organic brain dysfunction is a double-edged sword that might as easily have condemned Truesdale to death as excused his actions."), *cert. denied*, 119 S. Ct 380 (1998); Gilbert v. Moore, 134 F.3d 642, 655 (4th Cir.) (en banc) ("Although evidence that a defendant suffers from a mental impairment or has abused drugs or narcotics may diminish his blameworthiness for the crime, this evidence is a two-edged sword." (citing *Howard*, 131 F.3d at 420-21)), *cert. denied sub nom.* Gleaton v. Moore, 119 S. Ct. 103 (1998); *Howard*, 131 F.3d at 420-22 (same).

The Fourth Circuit now applies the label "double-edged" in a knee-jerk manner even to evidence that any reasonable person would deem mitigating, despite the fact that reasonable people could disagree as to how much weight that evidence should be given. For example, in *King v. Greene*,[156] the Fourth Circuit actually held that evidence of the defendant's childhood sexual abuse "might have" been seen as an indication of future dangerousness, and thus as aggravating.[157] Even if a hard-boiled cynic could imagine some way in which this type of evidence really is "double-edged" or does not render the defendant less culpable than someone not so disadvantaged, that does not mean that a petitioner fails *Strickland*'s "reasonable probability" test, which, read in conjunction with *Mills v. Maryland*,[158] arguably requires that only *one* juror would have been swayed by the mitigating evidence.[159]

III. THE DOUBLE-EDGED SWORD: EMPIRICALLY INDEFENSIBLE AND DOCTRINALLY DISASTROUS

With *Barnes*, the Fourth Circuit began to incorporate language about double-edged evidence from *Penry* into a context in which it did not fit. The court next began to imagine the ways in which certain types of evidence could be viewed as double-edged and then concluded that failure to present evidence of that sort can never be prejudicial. And in light of cases decided in the last few months, it is clear that Gleaton's case is no aberration; the court has now reached the bottom of the slippery slope and has effectively held *Strickland* inapplicable to capital sentencing in Fourth Circuit states.

It is easy to demonstrate that the doubled-edge sword doctrine departs from *Strickland*, but it is, of course, another question whether this departure from Supreme Court precedent is otherwise an undesirable innovation. In fact, however, both an examination of relevant empirical data and an analysis of the doctrine's inherent contradictions reveal the undesirability, and indeed the injustice, of the Fourth Circuit's double-edged sword.

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156. No. 97-28, 1998 WL 183909 (4th Cir. Apr. 20, 1998), *cert. denied*, 119 S. Ct. 4 (1998).

157. *Id.* at *12.

158. 486 U.S. 367 (1988); *see also supra* text accompanying notes 34-35 (discussing *Mills*).

159. *See supra* note 44 and accompanying text (discussing the prejudice prong of *Strickland*). The Fourth Circuit has explicitly rejected the one juror rule. Williams v. Taylor, 189 F.3d 421, 428 (4th Cir. 1999), *rev'd on other grounds*, 120 S. Ct. 1479 (2000).

A. *The Double-Edged Sword Doctrine Has No Support in Available Empirical Data*

The double-edged sword doctrine hypothesizes that evidence that seems intuitively mitigating may be, in the minds of some jurors, actually aggravating.[160] Put differently, the court speculates that for some subset of jurors, psychological evidence which decreases the defendant's moral culpability may be interpreted as also increasing his future dangerousness, and for some subset of this subset, that that increase in perceived future dangerousness will outweigh the decrease in perceived culpability, thereby increasing the likelihood of a death sentence. Stated in this weak form, the underlying empirical proposition is undoubtedly true. However, stated in this weak form, no inference concerning prejudice is warranted. If, for example, only one juror in 100 took this view, it is unlikely that such a juror would sit on the defendant's jury. Thus, his or her views would be irrelevant to the assessment of prejudice.

Given the structure of capital sentencing, a much stronger empirical claim would have to be made to justify an inference of no prejudice. Even if jurors were equally split about the net effect of a neglected kind of mitigation evidence, the double-edged sword conclusion would be unwarranted. In South Carolina, for example, if a sentencing jury cannot agree upon a verdict, the defendant receives a life sentence.[161] The case for inferring prejudice from the omission of a factor would seem strong if half of the jurors would perceive a factor as greatly increasing the likelihood that they would vote for death while half would perceive it as greatly decreasing the likelihood of a vote for death. In fact, if even one in twelve jurors would perceive a factor as weighing heavily toward life—and would remain committed to that view—an inference of prejudice would seem warranted.

One can, of course, imagine post-conviction counsel labeling evidence "mitigating" that a reasonable jury would nearly unanimously view as more aggravating than mitigating. If the defendant tortured his victim, this could be argued to be mitigating in so far as it is likely to reflect mental illness, but one could be confident that the omission

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160. *See King*, 1998 WL 183909, at *12 ("[W]hether or not counsel should have presented more extensive evidence of the abuse [the defendant] suffered as a child, not presenting such further evidence did not prejudice [the defendant]. In fact, more such evidence might have harmed [his] defense.").

161. *See* S.C. CODE ANN. § 16-3-20(A) (Law Co-op. Supp. 1998); *see also* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1549 (1998) ("The jury's sentencing decision, whether for life imprisonment or for death, must be unanimous; otherwise, the defendant is sentenced by operation of law to 'life imprisonment.'").

of such evidence from the defense case was not prejudicial. It does not, however, take the two-edged sword doctrine to reach that conclusion. Rather, following the conventional *Strickland* analysis, one would first observe that the "reasonable competence" prong was not satisfied, and then note that the claim also fails on the prejudice prong because there is no reasonable likelihood that the presentation of that evidence would have altered the jury's verdict. With respect to bizarre forms of "mitigating" evidence, it is reasonable to assume an absence of prejudice, and not to require empirical support for this assumption. It is also beside the point, because a lawyer would never be found to have acted outside professional standards for failing to present such evidence.

The mitigating evidence omitted in Gleaton's case—and the other Fourth Circuit double-edged sword cases—is not, however, of the bizarre sort. Mental retardation, organic brain damage, childhood abuse or extreme hardship, mental illness, drug addiction, and alcoholism are all conventional forms of mitigating evidence. As such, strong empirical assumptions that virtually all jurors would find such evidence more aggravating than mitigating seem completely unwarranted.

Indeed, to the extent that there is relevant empirical data, it supports the inference that failure to present significant psychologically based mitigating evidence is prejudicial. Poll data from 1997 shows a population that is very receptive to such evidence.[162] Only forty-seven percent of the population favor imposition of the death penalty on persons who were severely abused as a child; only fifty-five percent favor its imposition on persons who were under the influence of drugs or alcohol at that time of the offense.[163] Most strikingly, in 1995, only nine percent of the population favored imposition of the death penalty on mentally retarded defendants.[164]

Data from the Capital Jury Project point in the same direction. Seventy-four percent of the surveyed capital jurors from South Carolina said that if the defendant were mentally retarded, they would be less likely to vote for the death penalty, and only three percent said that mental retardation would make them more likely to vote for the

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162. *See* Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1469 (1998) (noting that "[w]hen confronted with only one of several disparate factors—from becoming a different person in jail to having suffered severe abuse as a child—support for the death penalty drops considerably").

163. *Id.* at 1468.

164. *Id.*

death penalty.[165] A history of mental illness also influences far more of those jurors surveyed away from the death penalty (fifty-six percent) than toward it (three percent).[166] Serious abuse as a child made thirty-seven percent less likely to impose the death penalty and only one percent more likely to do so.[167] Even with respect to alcoholism, more than twice as many jurors were less inclined to impose the death penalty if the defendant were alcoholic (thirteen percent) than were more likely to impose it (five percent).[168] Only drug addiction was more often viewed as aggravating than mitigating; even here, however, the numbers were close, with nearly ten percent of jurors stating that it decreased the likelihood of imposing death and nearly twelve percent saying the opposite.[169]

Thus, with respect to any of the traditional forms of psychologically based mitigation about which data exists, there is no support for a blanket assumption that presentation of such evidence would not alter the jury's determination of the sentence. Of course there might be particularly aggravated cases in which it would be reasonable to determine that failure to present one of the less persuasive forms of mitigation evidence would have made no difference; it would also be reasonable to determine, even in a relatively unaggravated case, that the neglected evidence of a particular psychological condition was so weak that its omission did not create prejudice. Such determinations, however, would not be examples of the double-edged sword per se rule, but instead would be *Strickland* mandated analyses of the actual prejudice that flowed from a particular omission in a particular context.

B. The Double-Edged Sword Doctrine Thwarts the Right to Present Mitigating Evidence and Robs Ineffective Assistance Doctrine of Coherence

Looking to precedent, it is plain that the double-edged sword doctrine deviates from the established *Strickland* standard; looking to available empirical data, it is clear that this reformulation of *Strickland* misstates likely juror responses to mitigating evidence, and therefore presumes no prejudice in many cases where an informed *Strickland* analysis would find prejudice. The only question that remains then is whether there is a justification for preferring the double-edged sword

165. Garvey, *supra* note 161, at 1559.
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*

doctrine to *Strickland*. Whether one considers this question from the vantage point of the right to present mitigating evidence or from the vantage point of the right to counsel, however, the Fourth Circuit's creation is indefensible.

1. Thwarting the Right to Present Mitigating Evidence.—As discussed in Part I, mitigation plays a central role in current capital punishment jurisprudence. Ultimately, it is mitigation that provides the individualized judgment that saves capital punishment from invalidity under the Eighth and Fourteenth Amendments.[170] The right to present mitigating evidence is therefore a broad one, but it has roulette wheel significance to the capital defendant unless it is fortified by a right to effective assistance of counsel in sentencing. Certainly *Strickland* itself provides less than comprehensive support for the right to present mitigating evidence, because both the competence prong and the prejudice prong contain avenues for dismissing the failure to present mitigating evidence.

Under *Strickland*, failure to present mitigating evidence will sometimes, but not always, satisfy the competence prong. The defendant's attorney may choose not to present mitigating evidence, believing that it conflicts with her theory of the case; for example, she may choose not to present evidence of mental illness out of concern that the jury will infer that the defendant, rather than his codefendant, was more likely to have tortured the victim. Or, in very narrow circumstances, the defendant's attorney may reasonably conclude that the available mitigating evidence, for example, unadorned evidence of drug use, is more likely to harm the defendant than to help him. These reasonable strategic choices preclude a finding that the attorney's assistance was outside the range of competence, and in that sense, limit the right to present mitigating evidence. This limitation, however, at least in theory, derives from the pursuit of the defendant's overriding interest in decreasing the likelihood of a death sentence. Unless a reviewing court irresponsibly uses "strategic choice" as a mantra, it is only where the attorney *reasonably* believed that not presenting mitigation evidence was in the defendant's best interest that an ineffective assistance of counsel claim for failure to present such evidence would founder on the competence prong.

Under *Strickland*, ineffective assistance in sentencing claims may also fail because the defendant cannot show a "reasonable probability" that neglecting to present mitigating evidence altered the outcome of

170. *See supra* notes 10-27 and accompanying text.

the trial. This constraint on the right to present mitigating evidence, unlike the strategy constraint, does not serve the defendant in any way. It is supposed to conserve resources, and it does so at the expense of the defendant's interest in avoiding a death sentence. Even if the presentation of neglected mitigating evidence would not create a "reasonable probability" of a different sentence than death, it usually would create *some* increased probability of a life sentence, a possibility that the defendant is denied by the prejudice prong of *Strickland.*

One may on this ground criticize *Strickland,*[171] and both of us would be quick to do so, were it not for the fact that the apparent alternative—the double-edged sword doctrine—is far more destructive of the right to present mitigating evidence. Under the double-edged sword, the reviewing court need not assess the competence of a particular strategic decision because the wisdom, or even existence of a strategic decision becomes irrelevant. This is because *every* claim fails the prejudice prong: There is no need to calculate prejudice in the context of the case, because the Fourth Circuit simply presumes lack of prejudice by affixing the "double-edged" label to the unpresented mitigating evidence. Thus, adoption of the double-edged sword doctrine means that the right to present mitigating evidence depends upon the defendant's wallet and his luck; only if he can buy a good lawyer, or has the good fortune to be assigned one, does he have the right to any meaningful presentation of mitigating evidence.[172]

2. *Robbing Ineffective Assistance Doctrine of Coherence.*—Why should courts not reverse all death sentences when available mitigating evidence was not presented to the fact-finder? The answer to this question, whether fully satisfying or not, lies in *Strickland*'s dual rationale for its deference to the reasonable strategic decisions of counsel. The *Strickland* Court justified the requirement of deference first by noting that hindsight is always biased, and that absent deference, speculation that another course of action would have been wiser would be ram-

171. *Strickland* may of course be criticized on a number of grounds, including the vagueness of the standard of "reasonable competence," and consequent likelihood of lax enforcement, and the virtual impossibility of determining the likely results of competent assistance, particularly in capital sentencing determinations. More broadly, *Strickland* reflects a very restricted view of the purpose of the constitutional guarantee of the assistance of counsel: The only interest *Strickland* recognizes is the interest in reliability, neglecting entirely the inherent importance of fundamentally fair procedures that respect the dignity of the defendant. These criticisms are all foreshadowed in Justice Marshall's dissenting opinion. Strickland v. Washington, 466 U.S. 668, 706 (1984) (Marshall, J., dissenting).

172. *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Penalty Not for the Worst Crime but for the Worst Lawyer,* 103 YALE L.J. 1835 (1994) (discussing the prevalence of dreadful representation of indigent capital defendants).

pant. Concomitantly, the Court observed that there are countless ways to provide effective assistance of counsel in any given case, but no way to determine before trial which one is superior.[173]

Neither of these rationales, however, justifies the double-edged sword doctrine, or its far broader curtailment of the right to present mitigating evidence. The double-edged sword doctrine neither defers to reasonable strategy over hindsight nor defers to a particular lawyer's choice of one among many strategies, for it does not depend upon a reasonable strategic choice or even any choice at all. Instead it usurps the trial lawyer's function of choosing among strategies with a mechanical rule: No mitigation is as good as some mitigation—no matter how powerful the available mitigation, no matter how marginal the aggravating factors in the case, no matter how sympathetic the defendant. Following this line of reasoning, one might next ask: Is no lawyer as good as some lawyer? Lawyers themselves are also two-edged swords, sometimes helping defendants and sometimes harming them.[174]

The Fourth Circuit may in fact be contemplating expansion of the double-edged sword doctrine beyond its mental-health-mitigation/future-dangerousness-aggravation origins. In *Howard v. Moore*,[175] the en banc court deemed the failure to present evidence concerning the defendant's prison record a "'double-edged sword' in that any further evidence may have detrimentally highlighted his past criminal record." This is a remarkable assertion given that trial counsel *did* present similar but much weaker evidence that the defendant was cooperative and remorseful during pretrial incarceration; counsel also stated that he was aware of the defendant's very positive prison record both from interviewing him and from counsel's investigator's report, and yet made no effort to obtain Howard's more persuasive and ex-

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

174. This is why the right to counsel is more accurately described as the right to the *assistance* of counsel. *See* Faretta v. California, 422 U.S. 806, 819 (1975) (holding that the Sixth Amendment guarantees the accused the right to personally make his defense, and therefore implies the right of self-representation).

In a recent trial in Lexington County, South Carolina, a pro se defendant in a capital case, Johnny Bennett, was sentenced to life imprisonment, a remarkable outcome given that more defendants have been sentenced to death in Lexington County than in any other county in the state. Mr. Bennett fired his attorneys over a dispute concerning the presentation of mitigating evidence. That a lawyer may do more harm than good in one case, however, hardly permits the conclusion that the absence of a lawyer should be *presumed* nonprejudicial.

175. 131 F.3d 399, 410-21 (4th Cir. 1997) (en banc), *cert. denied*, 119 S. Ct. 108 (1998).

traordinarily positive federal prison records.[176] Certainly prison adaptability, at least where unambiguous, as in *Howard*, is not double-edged even in the way that mental illness is; given that the jury certainly will be informed of the defendant's prior criminal record by the prosecutor, there is no foreseeable downside to presenting prison adaptability evidence, and certainly no way that it could be interpreted as increasing the likelihood of future dangerousness. The observer is left to wonder whether there is any right to the effective assistance of counsel in sentencing in the Fourth Circuit.

The title of this Article is harsh, but we think it is accurate. The right to present mitigating evidence is figuratively eviscerated by its total dependence on the ability and diligence of the counsel appointed in a particular case; the right to counsel is effectively beheaded because no one is required actually to exercise judgment in making strategy decisions, nor required to calculate the prejudice that flowed from the failure to make such decisions in a particular case. The violence of these metaphors is not accidental. The double-edged sword doctrine departs from the specific precedent of *Strickland*, is inconsistent with broader underlying Sixth and Eighth Amendment jurisprudence, and is contradicted by available empirical data. The Fourth Circuit uses this doctrine to kill rights—and to kill people.

CONCLUSION

We have spent much of this Article on J.D. Gleaton's story, and we have done so for several reasons. First is the fact that it was a story—not just a case, but a man's story—that generated this conference. Gideon's story has proved extraordinarily powerful, moving not only the Supreme Court, but a generation of public defenders. J.D. Gleaton's story, however compelling to some readers, will never have the wide appeal of Gideon's story. Why? Because J.D. was guilty, if not of murder, at least of robbery and some form of homicide.

But in his very guilt lies the second reason to tell his story. The *only* story that the jury heard was the story of his guilt. They did not hear about the man—his weaknesses, his hardships, his disabilities, his strengths—really, they did not hear about his humanity. Through its

176. One of the authors represented Howard. The records contained no reported misconduct, and several glowing reports, all indicating the defendant's excellent adjustment and adaptability to prison. Unit managers and a prison psychologist were in agreement. Record at 2496-98, Howard v. Moore, 131 F.3d 399 (4th Cir. 1997) (en banc) (No. 95-4017). The makers of these reports signed affidavits stating that they would have appeared at trial if they had been contacted.

double-edged sword doctrine, the Fourth Circuit has declared that failing to tell the jury that story does not matter.

The double-edged sword doctrine suggests that because some hypothetical hard-hearted juror could have refused to consider mitigating evidence for the light it might have shed on J.D.'s humanity, J.D. was not entitled to have an actual juror consider that humanity before sentencing him to death. In short, the Fourth Circuit imagines the worst juror as the only juror, and in so doing, reduces the right to individualized capital sentencing to the right to be lucky.

But J.D. was more than his worst act, and most jurors are better than the worst juror. While it is possible that a jury might have heard all of J.D.'s story and still sentenced him to death, at least that process would have acknowledged J.D's unique personhood, and it would have permitted him to be judged for himself. J.D.'s lawyer should have told his story. Because he did not, the Fourth Circuit judges should have insisted that someone else do so. Instead, they allowed the state of South Carolina to execute J.D. Gleaton on December 8, 1998, and we will never know whether a fair process would have let him live.