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Know Your Client: The Mundane Case of Wiggins v. Smith

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I. INTRODUCTION

In the 2002 case *Bell v. Cone*,[1] the United States Supreme Court denied postconviction relief to a defendant whose counsel elected not to make a final plea for the defendant's life before the jury entered into deliberations.[2] Read broadly, *Bell v. Cone* raised concerns that if counsel could legitimately waive final argument, counsel could possibly waive other crucial opportunities to advocate for the defendant – opening statement, cross-examination of the prosecution's key witness – without violating the defendant's constitutional right to the effective assistance of counsel. These concerns were validated by other opinions that suggested counsel could be effective even if intoxicated, inebriated, or asleep during portions of capital sentencing cases.[3] With the propriety of such seemingly egregious deficiencies settled, only a Supreme Court decision that harangued lower courts for condoning unreasonable performance by appointed counsel would likely rectify the state of the law.

In the 2003 term, the Supreme Court agreed to hear another ineffective assistance of counsel claim in *Wiggins v. Smith*.[4] However, this claim was not based on the performance of an intoxicated or sleeping attorney. Rather, the Court agreed to hear a case

1. 535 U.S. 685 (2002).

2. *Id.* at 701-02.

3. *See, e.g.*, Ortiz v. Artuz, 113 F. Supp. 2d 327 (E.D.N.Y. 2000) (refusing to presume prejudice where defense counsel was asleep during portions of the trial); Gardner v. Dixon, No. 92-4013, 1992 U.S. App. Lexis 28147 (4th Cir. Oct. 21, 1992) (refusing to hear a claim of ineffective assistance of counsel after the defendant discovered that trial counsel abused alcohol and cocaine during the trial); Frye v. Lee, 89 F. Supp. 2d 693 (W.D.N.C. 2000) (holding that counsel's use of alcohol during the trial was not relevant to an ineffective assistance of counsel claim).

4. 539 U.S. 510 (2003).

of appointed counsel who failed to sufficiently investigate a defendant's background prior to trial.[5] The specific facts of the case revealed that counsel knew some – but not all – of the details of the defendant's background prior to selecting an argument to make at the sentencing hearing. The Supreme Court not only agreed to hear this rather mundane ineffective assistance of counsel case, but also decided the case in the defendant's favor.[6]

The Court's denial of relief in *Cone* after a seemingly egregious error by counsel, juxtaposed against the Court's willingness to grant relief to Wiggins, has brought into question the standards by which appointed counsel will be judged. On one side of the debate over the case's impact stand those who think that *Wiggins* will have a profound effect on the way capital sentences are reviewed.[7] These individuals read *Wiggins* as establishing that courts can no longer "dismiss claims of ineffectiveness lightly by characterizing the failure to present mitigation as a 'strategy.'"[8] These individuals say that the guidance provided by the Court "may result in fewer incompetent investigations of mitigating evidence."[9] At the very least, "it's going to be much harder for reviewing courts to ignore the results" of capital sentencing cases than it was before *Wiggins*.[10]

On the other side of the debate stand those who feel that *Wiggins* is very fact-specific and nothing more than an application of the Supreme Court's test for ineffective assistance of counsel as established in the 1984 decision, *Strickland v. Washington*.[11] Commenting on the effect of *Wiggins*, the Maryland Solicitor General said: "It's not a case that changes anything . . . . It just applies *Strickland*, the clearly established law."[12] A representative from the Criminal Justice Legal Foundation believes that the presumption of effective assistance as established in *Strickland* will still

5. *Id.* at 515-16.
6. *Id.* at 535.
7. Ira Mickenberg, *2002-2003 Term: Supreme Court Review: Criminal Cases*, THE NAT'L L.J., Aug. 4, 2003, at 9.
8. *Id.*
9. *Id.*
10. Charles Lane, *Death Penalty of Md. Man is Overturned*, WASH. POST, June 27, 2003, at A01.
11. 466 U.S. 668 (1984).
12. Lawrence Hurley, *Supreme Court Orders New Sentence for Maryland Death Row Inmate*, THE DAILY REC. (Baltimore), June 27, 2003.

require courts to defer to counsel's decisions in most claims of ineffective assistance of counsel.[13]

Even though *Wiggins* emphasizes the reasonableness of counsel's investigation in the analysis of ineffective assistance of counsel claims, *Wiggins* does not represent a change in the test for ineffective assistance of counsel. Rather, *Wiggins* stands as a strict application of *Strickland*. However, the Court's willingness to push the limits of deference given to counsel's trial decisions suggests that *Wiggins* will have profound effects on future ineffective assistance of counsel cases. First, after *Wiggins*, a court will be able to compare counsel's performance against the deficient performance by Wiggins's counsel. Furthermore, the federal courts will review not only trial decisions made by counsel, but also the thoroughness of investigations made by counsel to determine the reasonableness of assistance. Finally, and most importantly, *Wiggins* ultimately will improve the quality of representation at the trial level because appointed counsel, along with state trial judges, are now on notice as to the level of investigation required under the reasonableness standard. If counsel does not delve into the background of the defendant, or if the court does not approve funding for a social history report, counsel's subsequent trial strategy becomes suspect and may be the basis for a valid claim of ineffective assistance of counsel.

Because *Wiggins* is grounded in the law of ineffective assistance of counsel, Part II of this Note describes the development of this law through three Supreme Court cases and legislation enacted in 1996 that limited a federal court's ability to review claims for habeas relief. Part III of this Note analyzes *Wiggins*, emphasizing how the ambiguity in the state court's decision gave the Supreme Court an avenue to satisfy the federal habeas statute and review the merits of Wiggins's claim. Part IV then reconciles the differences in *Bell v. Cone* and *Wiggins*, while Part V describes the impact of *Wiggins* on federal review of ineffective assistance of counsel claims and on the performance of practitioners at the trial level.

13. "It is still the law that if the lawyer has the evidence, evaluates it and decides not to use it, that is close to unreviewable . . . ." Marcia Coyle, *New Standards in Death Cases*, THE NAT'L L.J., July 14, 2003, at P1.

II. EFFECTIVE ASSISTANCE OF COUNSEL LAW

Until 1984, the Supreme Court said little about the right to effective assistance of counsel. In that year, the Court decided *Strickland v. Washington*, which established the constitutional standard for a claim of ineffective assistance of counsel.[14] Then, in 1996, new legislation modified the process for requesting habeas relief and narrowed the right of federal courts to review state postconviction decisions.[15] After the passage of this legislation, the Supreme Court analyzed the impact of the statutory limits on ineffective assistance of counsel claims in *Williams v. Taylor*[16] and *Bell v. Cone*.[17] Of course, this precedent for *Wiggins v. Smith* depends entirely on a constitutional guarantee of assistance of counsel.

A. *The United States Constitution*

The Sixth Amendment of the Constitution states that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."[18] The Supreme Court interpreted this clause, in *Powell v. Alabama*[19] and *Gideon v. Florida*,[20] to mean that the government must appoint counsel to represent indigent defendants. These cases, however, did not establish any standard for counsel's performance. In the absence of any such standard, appointed counsel, the trial judge and the defendant were unable to adequately gauge the level of the constitutionally required assistance of counsel.

B. Strickland v. Washington

In *Strickland v. Washington* the United States Supreme Court established the standard for determining whether counsel's performance deprived a defendant of his Sixth Amendment right

14. Strickland v. Washington, 466 U.S. 668, 683 (1994).
15. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218 (1996) (codified as amended at 28 U.S.C. § 2254 (2003)).
16. 529 U.S. 362 (2000).
17. 535 U.S. 685 (2002).
18. U.S. CONST. amend. VI.
19. 287 U.S. 45, 47 (1932).
20. 372 U.S. 335, 343-44 (1963).

to assistance of counsel.[21] In that case, the defendant, Washington, pled guilty to three murders against the advice of his appointed counsel.[22] Standing before the judge during the plea colloquy, Washington freely accepted responsibility for his actions; the judge then praised him for accepting responsibility.[23] As a result of this conversation, defense counsel decided not to seek out character witnesses and chose not to order a psychiatric examination for the sentencing hearing.[24] Counsel believed that Washington's plea colloquy contained sufficient information about Washington's background to convince the judge that the death penalty was not appropriate.[25]

At the sentencing hearing, counsel relied on Washington's remorse and willingness to accept responsibility for the murders. He also advocated against the death penalty for the following reasons: Washington had no previous criminal history, he committed the murders while under "extreme mental or emotional disturbance," and he surrendered and confessed to the police on his own volition.[26] However, "the trial judge found numerous aggravating circumstances and no . . . mitigating circumstances."[27] To exacerbate Washington's position, all aggravating circumstances found by the judge related to the specific details of Washington's crimes.[28] Hence, the judge concluded that the aggravating circumstances clearly outweighed the mitigating circumstances and sentenced Washington to death on each of the three murder charges.[29]

In postconviction proceedings, the Florida Supreme Court and

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21. 466 U.S. 668, 687-88 (1994).

22. *Id.* at 672.

23. *Id.* However, the judge gave no indication of how he would use Washington's acceptance of responsibility in determining the sentence for the murders. *Id.*

24. Counsel spoke on the telephone once with Washington's mother and wife, and chose not to use them as character witnesses even though he never met with them. *Id.* at 673.

25. *Id.*

26. *Id.* at 673-74.

27. *Id.* at 675.

28. The three murders were "especially heinous, atrocious, and cruel, . . . committed in the course of at least one other dangerous and violent felony, . . . for pecuniary gain, [and] committed to avoid arrest for the accompanying crimes . . . ." *Id.* at 674.

29. *Id.* at 675.

the United States District Court for the Southern District of Florida denied relief on the grounds of ineffective assistance of counsel.[30] However, the United States Court of Appeals for the Fifth Circuit overruled the decision, "developed its own framework for analyzing ineffective assistance claims[,] . . . and remanded the case for new fact finding under the newly announced standards."[31]

In granting the government's petition for a writ of certiorari, the Supreme Court addressed for the first time "a claim of 'actual ineffectiveness' of counsel's assistance in a case going to trial."[32] The Court adopted the Fifth Circuit's "cause and prejudice" model in its two-pronged analysis for ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[33]

In its opinion, the Court also provided extensive guidance on how to analyze the two prongs of the test. Regarding the first prong, the Court stated: "[T]he proper standard for attorney performance is that of reasonably effective assistance."[34] The Court explained that

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30. *Id.* at 675, 678-79.

31. *Id.* at 679. The Fifth Circuit standard, which used a "cause and prejudice" standard similar to the test eventually adopted by the Supreme Court, included valuable insight into counsel's conduct during the investigation stages of the case. *Id.* at 682. The Fifth Circuit stated: "If there is more than one plausible line of defense . . . counsel should ideally investigate each line substantially before making a strategic choice about which lines to rely on at trial." *Id.* at 681.

32. *Id.* at 683. The Court previously addressed, in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), a claim that counsel's assistance was "rendered ineffective by a conflict of interest," but never a claim that counsel's assistance was rendered ineffective by the decisions made before or during trial. *Strickland*, 466 U.S. at 683.

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

34. *Id.*

> [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . [and] the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."
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> . . . .
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> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.[35]

To establish a showing of prejudice under the second prong, the Court stated that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[36]

After spending considerable verbiage developing its test, the Court applied the test to the facts of the case and concluded that counsel's performance was reasonable in two brief paragraphs.[37] Of crucial importance to the decision was the Court's deferral to counsel's strategic decision not to bring in additional information that could have been damaging to the defendant's case.[38] Furthermore, the Court evaluated counsel's performance in light of the "utterly overwhelming" aggravating circumstances of the defendant's crimes.[39] The Court held that "even without the application of the presumption of adequate performance,"[40] counsel provided reasonably effective assistance.[41] Thus, in its first appli-

35. *Id.* at 689-91 (citing Michel v. Louisiana, 350 U.S. 91 (1955)).
36. *Id.* at 694.
37. *Id.* at 699.
38. *Id.* at 700.
39. *Id.* at 699.
40. *Id.*
41. Although it was not essential to the holding since the first prong of the test was not met, the Court held, based on the comparative weight of the aggravating evidence and the withheld mitigating evidence, that Washington was not prejudiced by counsel's decision. *Id.* at 700.

cation of the test for ineffective assistance of counsel, the Court denied relief to the defendant.[42] This trend would continue for more than fifteen years.[43]

C. *The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)*

When *Strickland* was decided, United States Supreme Court case law established that "a federal habeas court owed no deference to a state court's resolution of . . . questions of law or mixed questions."[44] Hence, in *Strickland*, the Court was able to evaluate the defendant's claim of ineffective assistance of counsel independently, without regard to the conclusions of the state court. However, Congress superceded this standard by enacting the Antiterrorism and Effective Death Penalty Act (AEDPA).[45]

The federal habeas statute, as amended by the AEDPA, severely curtailed a federal court's right to review state court determinations of both law and fact. Under the amended statute, a federal court cannot perform a plenary review of the state court's conclusion of law unless the conclusion: (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law,"[46] or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence . . . ."[47] In addition, a federal court cannot reject a state court's finding of fact unless the petitioner rebuts the finding by "clear and convincing evidence."[48]

The impact of the amended statute was devastating for the state prisoner. A state prisoner seeking federal habeas relief must

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42. It is noteworthy that the test for determining whether the defendant received effective assistance of counsel is named for the government party of the principal case. Mr. Strickland was the Superintendent of the Florida State Prison.

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

44. Williams v. Taylor, 529 U.S. 362, 400 (2000) (O'Connor, J., concurring).

45. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218 (1996) (codified as amended at 28 U.S.C. § 2254 (2003)).

46. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d)(1) (2003).

47. 28 U.S.C. § 2254(d)(2).

48. 28 U.S.C. § 2254(e)(1).

convince the federal court to resolve two issues in favor of the prisoner: first, that the state court decision was based on either an unreasonable conclusion of law or finding of fact; and second, that the correct law or fact supports a favorable decision. In accordance with the statute's deference to the state, if the prisoner cannot succeed on the first issue, the merits of the case cannot be heard. More importantly, by establishing this two-issue hurdle for relief, Congress created the need for case law to interpret the burdens established in the statute.

D. Williams v. Taylor

In November of 1985, a man was found dead in his home in Virginia; the cause of death was determined to be blood alcohol poisoning.[49] While in the city prison for an unrelated offense, Terry Williams drafted a statement confessing to the murder six months after the deceased was found.[50] Counsel was appointed to Williams's case, but during the investigation before trial counsel failed to request Williams's juvenile and social services records.[51] Counsel mistakenly believed that the records were inaccessible according to state law.[52] Had counsel obtained these records, he would have learned of the abuse and numerous head injuries that Williams suffered as a child, and that Williams was "borderline mentally retarded."[53] After convicting Williams of murder and robbery, the jury sentenced him to death without hearing about his sympathetic background.[54]

The Virginia Supreme Court affirmed Williams's sentence and, in state postconviction-relief hearings, the court relied upon a test other than *Strickland* to conclude that Williams was not prejudiced by counsel's failure to perform a reasonable investigation.[55] In addition, the state court failed to review the totality of the available mitigating evidence when it rejected the trial judge's

49. Williams v. Taylor, 529 U.S. 362, 367 (2000).
50. *Id.*
51. *Id.* at 373.
52. *Id.*
53. *Id.* at 370.
54. *Id.*
55. *Id.* at 372. Conversely, in postconviction proceedings the trial court judge found that Williams was prejudiced by counsel's performance solely upon a *Strickland* analysis. *Id.* at 371.

conclusion that Williams was prejudiced by counsel's deficient performance.[56]

Williams then filed a federal petition for a writ of habeas corpus, and, after review by the district court and court of appeals, the Supreme Court granted Williams's petition for a writ of certiorari.[57] Because Williams filed the petition after the enactment of the AEDPA, the federal habeas statute as modified by the AEDPA governed in *Williams v. Taylor*.[58] In a sharply divided opinion, the Supreme Court determined that the state supreme court applied a standard that was both "contrary to"[59] and "an unreasonable application of"[60] existing federal law when it denied postconviction relief.[61] Justice Stevens, writing for five members of the court, provided the opinion that applied *Strickland* to Williams's case. Justice O'Connor, however, drafted the majority opinion for the Court's interpretation of the AEDPA amendments to the federal habeas statute.

In Justice O'Connor's opinion on the AEDPA amendments, the Court held that the "contrary to" clause of § 2254(d)(1) applies when the "state court applies a rule that contradicts the governing law set forth [in Supreme Court case law]."[62] The Court also held that the "unreasonable application" clause applies when "the state court identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case."[63] To further clarify the definition of "unreasonable application," Justice O'Connor explained that a federal court "should ask whether the state court's application of clearly established federal law was *objectively unreasonable*."[64]

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56. *Id.* at 397.
57. *Id.* at 374.
58. *Id.* at 402. Thus, Williams's claim was distinguished from the previous claims of ineffective assistance of counsel that came before the U.S. Supreme Court, which did not require the Court to jump the AEDPA hurdle before addressing the merits of the claim. *See, e.g.*, Strickland v. Washington, 466 U.S. 668 (1984); Darden v. Wainwright, 477 U.S. 168 (1986); Burger v. Kemp, 483 U.S. 776 (1987).
59. AEDPA, 28 U.S.C. § 2254(d)(1) (2003).
60. *Id.*
61. *Williams*, 529 U.S. at 397.
62. *Id.* at 405.
63. *Id.* at 407.
64. *Id.* at 409 (emphasis added). The Court rejected the standard of "all reasonable jurists" because it would result in a court's analysis of how other

In the review of Williams's claim, the Court first held that the state supreme court applied an incorrect test in evaluating whether Williams was denied the effective assistance of counsel.[65] Additionally, the state court did not look at the totality of the available mitigating evidence when determining whether Williams was prejudiced by his counsel's performance, which was an unreasonable application of federal law.[66] Thus, Williams satisfied his burden for federal review under § 2254(d)(1) of the AEDPA.

Relying on counsel's failure to sufficiently investigate Williams's background and his failure to introduce the evidence that counsel did possess, the Court held that counsel's decisions were not based on sound tactics and that counsel's performance was deficient.[67] Furthermore, the Court deferred to the judgment of the state trial judge, who applied the correct legal test and found that Williams was prejudiced by counsel's deficient performance.[68] Hence, both prongs of the test were satisfied and, for the first time since *Strickland* was decided, the Court remanded a case on the basis of ineffective assistance of counsel with an order for a new sentencing hearing.[69]

Even though the AEDPA created additional burdens for proving ineffective assistance of counsel before a federal court, *Williams v. Taylor* illustrated that the incorrect selection of the legal standard by a state court would subject the claim to review without deference. *Williams* also demonstrated that an *incorrect* application of the correct legal standard was objectively unreasonable and would subject the claim to plenary review. The Supreme Court addressed a slightly different question in the 2002 case, *Bell v. Cone*.[70]

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jurists have decided an issue. *Id.* at 409-10.

65. *Id.* at 395. The Virginia Supreme Court incorrectly applied the *Strickland* test as modified by *Lockhart v. Fretwell*, 506 U.S. 364 (1993), which shifts the focus, even after satisfying the two prongs of *Strickland*, to the "fundamental fairness" of the trial. *Williams*, 529 U.S. at 391-92.

66. *Williams*, 529 U.S. at 397-98.

67. *See id.* at 396. "[T]he failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." *Id.*

68. *Id.* at 398-99.

69. *See id.*

70. 535 U.S. 685 (2002).

E. Bell v. Cone

In the Supreme Court's next foray into ineffective assistance of counsel, it retreated from its position in *Williams* by denying postconviction relief where defense counsel chose to waive final argument to the jury during the sentencing phase of a capital sentencing case.[71] In *Bell v. Cone*, the defendant, Cone, killed an elderly couple with a blunt instrument.[72] At trial, Cone was convicted of first-degree murder and sentenced to death.[73] He appealed to the Tennessee Supreme Court which affirmed his conviction, and the United States Supreme Court denied Cone's petition for certiorari.[74]

Cone then pursued postconviction relief. In the state court, Cone's petition was based on a claim that his appointed counsel provided ineffective assistance by "failing to present mitigating evidence and by waiving final argument."[75] The state court rejected his claim, and the Tennessee Court of Criminal Appeals affirmed the lower court's denial.[76] In its opinion, the Court of Criminal Appeals based its decision upon the *Strickland* standard and expressly held that counsel's "performance was within the permissible range of competency."[77] The Tennessee Supreme Court denied permission to appeal.[78]

Cone then filed a petition for a federal writ of habeas corpus, but the United States District Court for the District of Tennessee held that the AEDPA barred relief and denied the petition.[79] On appeal, the United States Court of Appeals for the Sixth Circuit

71. *Id.* at 688-89. One attorney stated that in *Cone* the Supreme Court "reversed a lot of the progress they made in *Williams*." Jim Oliphant, *Second-Guessing Death Penalty Lawyers: High Court Weighs in on Ineffective-Assistance Issues*, TEXAS LAWYER, July 8, 2003.

72. *Bell*, 535 U.S. at 689. The killing occurred during Cone's evasion from the police after he robbed a jewelry store, shot two people including a police officer, and attempted to shoot one other individual. *Id.* His attempt to shoot the individual was foiled because he ran out of ammunition. *Id.* Cone subsequently escaped from Tennessee to Florida, but he was captured after robbing a drug store and returned to Tennessee for trial. *Id.* at 689-90.

73. *See id.* at 690-92.

74. *Id.* at 692.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 693.

granted the petition and held in Cone's favor on the basis of an incorrect test.[80] However, because the state court had identified the correct rule, the federal court was barred from disturbing the state court's conclusion of law unless that conclusion represented an "unreasonable application" of *Strickland*.[81]

After hearing the case, the Supreme Court determined that the state court's holding, which denied relief to Cone based on *Strickland*, was not objectively unreasonable.[82] Specifically, the Tennessee Court of Criminal Appeals pointed to evidence on the record, provided by Cone's counsel in the state postconviction hearing, as to why counsel made specific decisions in the sentencing hearing.[83] Counsel explained that his decision not to call family members and friends of the defendant as witnesses in the sentencing phase was based on a fear of the prosecutor's ability to elicit damaging information about the defendant's past criminal history from those witnesses.[84] Cone's mother was not called to testify because counsel felt that she made a poor witness in the guilt phase of the trial.[85] Finally, counsel explained that he chose

80. Cone v. Bell, 243 F.3d 961, 979 (6th Cir. 2001), *cert. granted*, 534 U.S. 1064 (2001). The Sixth Circuit applied the test from *United States v. Cronic*, 466 U.S. 648 (1984), which was decided on the same day as *Strickland*. *Cone*, 243 F.3d at 979. In *Cronic*, the Supreme Court held that prejudice is presumed when "counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing . . . ." *Cronic*, 466 U.S. at 659. Interpreting counsel's waiver of final argument as a failure to subject the case to adversarial testing, the Sixth Circuit presumed prejudice under *Cronic* for the second prong of the *Strickland* test. *Cone*, 243 F.3d at 979. However, the *Cone* majority explained that for *Cronic* to apply rather than *Strickland*, the "attorney's failure must be complete." *Bell*, 535 U.S. at 696-97. Cone's attorney, said the majority, only failed to oppose the prosecution at certain points of the trial. *Id.* The failure did not extend to the full duration of the trial; hence, *Cronic* did not apply to Cone's claim. *Id.* Thus, the Court held that the Sixth Circuit applied a rule of law "contrary to" the correct rule, which was the *Strickland* test. *See id.* at 698. Conversely, the dissent wrote that counsel's failure to subject the case to meaningful adversarial testing included failure to "perform[] a mitigation investigation, [present] available mitigation evidence, and mak[e] a plea for the defendant's life after the State has asked for death . . . ." *Bell*, 535 U.S. at 716 (Stevens, J., dissenting). Thus, the dissent believed that the failure was complete and agreed that *Cronic* was the proper standard. *See id.* at 719.

81. AEDPA, 28 U.S.C. § 2254(d)(1) (2003).

82. *Bell*, 535 U.S. at 699.

83. Cone v. Bell, 747 S.W.2d 353, 356-57 (Tenn. Crim. App. 1987).

84. *Id.* at 357.

85. *Id.* at 356-57.

to waive final argument because he feared the damaging impact of the prosecution's rebuttal to which he could not respond.[86] Moreover, counsel explained that he had made his opening argument just a few hours before he was to make his closing argument; hence, the jury did not need to hear a second plea for the defendant's life.[87]

In summary, the state court upheld counsel's decisions as trial strategy.[88] Thus, in accordance with *Strickland*'s presumption that "counsel's conduct falls within the wide range of reasonable professional assistance,"[89] the state court concluded that counsel's decisions were reasonable and held that the first prong of the *Strickland* test was not satisfied.[90] The Supreme Court concluded that this conclusion was not "objectively unreasonable" and denied Cone's petition for a writ of habeas corpus.[91]

At the end of the Supreme Court's 2002 term, ineffective assistance of counsel law was vastly different than it was at the end of the 1984 term. While the *Strickland* test remained unaltered, the amendments to the federal habeas statute created numerous barriers to federal review of ineffective assistance of counsel claims from state court proceedings. *Williams v. Taylor* demonstrated that federal review could be obtained only if the state court conclusion was reached via application of the incorrect legal test, or an objectively unreasonable application of the correct legal test.[92] However, *Bell v. Cone* illustrated that the deference given to state court conclusions, viewed in light of *Strickland*'s presumption of reasonable professional conduct by counsel, made the state court holdings practically unchallengeable on the merits. Therefore, it appeared that even facially outrageous decisions by counsel could not be successfully challenged after *Cone* unless counsel provided arbitrary or capricious reasons for decisions made during trial.[93] This was the landscape of ineffective assistance of counsel case law at the end of the 2002 United States Supreme Court Term.

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86. *Id.* at 357.
87. Cone v. Bell, 243 F.3d 961, 978 (6th Cir. 2001).
88. *Cone*, 747 S.W.2d at 357.
89. Strickland v. Washington, 466 U.S. 668, 689 (1984).
90. *Cone*, 747 S.W.2d at 357.
91. Bell v. Cone, 535 U.S. 685, 702 (2002).
92. *Supra* notes 62-64 and accompanying text.
93. Such as a decision to waive final argument.

III. *WIGGINS V. SMITH*[94]

A. *Facts and Procedural Posture*

In September, 1988, Kevin Wiggins worked as a painter at an apartment building in Woodlawn, Maryland.[95] On the evening of Thursday, September 15, between 5:00 p.m. and 5:50 p.m., Wiggins was seen speaking with an elderly female resident of the apartment complex.[96] This was the last time the woman was seen alive.[97] On the morning of Saturday, September 17, when the woman failed to attend a scheduled social gathering, friends contacted the police.[98] The police investigated the woman's disappearance and contacted the apartment complex manager.[99] When the apartment manager entered the woman's apartment, he found the woman dead in her bathtub.[100] The police, while examining the victim's apartment, discovered a baseball cap and five fingerprints.[101] The owner of the baseball cap and the source of the fingerprints were never established, but the fingerprints did not match Kevin Wiggins's prints.[102]

At approximately 7:45 p.m., on the evening of Thursday, September 15, Wiggins arrived at his girlfriend's house in the victim's car.[103] The two went shopping that evening, and Wiggins made purchases with the victim's credit cards.[104] On Saturday, September 17, Wiggins sold a ring that belonged to the victim in a local pawnshop.[105] Then, on Wednesday, September 21, Wiggins and his girlfriend were arrested while driving the victim's car.[106] Wiggins told the police that he found the car, the credit cards, and the ring

94. 597 A.2d 1359 (Md. 1991) [hereinafter *Wiggins I*].
95. *Id.* at 1363.
96. *Id.*
97. *Id.* at 1362.
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1363. The evidence of Wiggins's actions on the evening of September 15 came from Wiggins's girlfriend who admitted to signing for the purchases made with the victim's credit cards. *Id.*
104. *Id.*
105. *Id.*
106. *Id.*

on Friday, September 16, but his girlfriend refuted this story by disclosing that Wiggins possessed the three items on Thursday evening.[107]

Wiggins was charged with first-degree murder, which included a maximum penalty of death.[108] At trial, the prosecution introduced evidence of conversations between Wiggins and other inmates – one conversation during pretrial incarceration and one while in the county detention center; the two inmates testified that Wiggins revealed details of the crime and confessed to the murder.[109] Wiggins was convicted in a bench trial and requested a jury for the penalty phase.[110] Maryland law required the jury to determine "unanimously and beyond a reasonable doubt, that [Wiggins] was the actual killer" before sentencing Wiggins to death.[111] In addition, the jury had to find that the "aggravating circumstances outweighed the mitigating circumstances . . . ."[112]

Because Wiggins's conviction was decided entirely on circumstantial evidence, appointed counsel, Carl Schlaich and Michelle Nethercott, moved to bifurcate the sentencing phase of the trial.[113] With a bifurcated sentencing phase, counsel would first argue that Wiggins was not a principal actor in the murder.[114] Then, if the jury found that Wiggins was a principal, counsel would present the mitigating evidence to try to convince at least one juror that the sum of the mitigating evidence outweighed the aggravating evidence.[115] Counsel pursued the bifurcation in an attempt to avoid a "'shotgun approach,' attacking everything and hoping that something sticks."[116] After moving for a bifurcated sentencing hearing, counsel neither conducted a thorough investigation into

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107. *Id.* at 1363-64.

108. Wiggins v. State II, 724 A.2d 1, 5 (Md. 1999), *cert. denied*, 528 U.S. 832 (1999) [hereinafter *Wiggins II*].

109. *Wiggins I*, 597 A.2d at 1364.

110. *Wiggins II*, 724 A.2d at 5. The judge stated that in finding Wiggins guilty of murder, he did not rely on the testimony of the two inmates who testified that Wiggins confessed. *Wiggins I*, 597 A.2d at 1365. This statement may have provided some insulation from reversal since Wiggins could have challenged the weight of the testimony from the inmates.

111. *See Wiggins II*, 724 A.2d at 15.

112. *See Wiggins I*, 597 A.2d at 1366.

113. *See* Wiggins v. Smith 539 U.S. 510, 515 (2003).

114. *Id.*

115. *Id.*

116. *See Wiggins II*, 724 A.2d at 15.

Wiggins's background nor ordered a social history report, even through the prevailing professional standards in Maryland included generating a social history report.[117] Additionally, the public defender's office had funds available to hire a forensic social worker.[118] Thus, counsel knew only what was contained in two minimal reports of Wiggins's background: the written presentence investigation report (PSI) and a Department of Social Services (DSS) report.[119] The judge denied the motion to bifurcate the sentencing phase and the sentencing proceedings began on the following day.[120]

During the sentencing phase, Counsel introduced only a single mitigating fact: Wiggins had never before been convicted of a violent criminal offense.[121] Counsel failed to introduce evidence from the DSS records that "Wiggins possessed 'borderline intelligence' and in fact may have been mentally retarded."[122] In addition, counsel introduced no evidence of Wiggins's troubled background. The absence of mitigating evidence during the sentencing phase was noteworthy since counsel began her opening argument to the jury by stating: "You're going to hear that Kevin Wiggins has had a difficult life."[123]

Before giving the closing argument, counsel attempted to preserve the denial of the bifurcated sentencing hearing for appeal by making a proffer to the court.[124] The proffer, made outside of the jury's hearing, contained the evidence that counsel would have introduced had the bifurcation motion been granted.[125] Here counsel addressed Wiggins's limited mental capacities and his lack of a

117. *See Wiggins*, 539 U.S. at 515.
118. *Id.* at 517
119. *Id.* at 523-24. The presentence investigation report (PSI) included a single page that briefly described Wiggins's "personal history"; the Department of Social Services (DSS) report recorded Wiggins's experience with the state foster care system. *Id.* at 523.
120. *Id.* at 515.
121. *See id.* at 518.
122. Wiggins v. Corcoran, 164 F. Supp. 2d 538, 559 n.15 (D. Md. 2001) [hereinafter *Corcoran I*]. The court noted that the Supreme Court had previously held "that mental retardation was a mitigator to be considered in capital cases." *Id.* (citing Penry v. Lynaugh, 492 U.S. 302 (1989)).
123. *Wiggins*, 539 U.S. at 515.
124. *Id.* at 515-16.
125. *Id.*

criminal history or aggressive tendencies.[126] However, counsel made no mention of Wiggins's background or upbringing.[127] For the second time, counsel failed to disclose what she knew of Wiggins's background. At the close of the trial, the jury found that Wiggins was a principal in the murder, and that the murder was committed in the course of robbing the victim.[128] Finally, the jury found that the aggravating evidence outweighed the mitigating evidence, and sentenced Kevin Wiggins to death.[129]

The Court of Appeals of Maryland affirmed Wiggins's death sentence and his petition for a writ of certiorari was denied.[130] He then filed a petition for postconviction relief with the state. The petition included a claim that counsel provided ineffective assistance, but the state circuit court denied his petition, and the Court of Appeals of Maryland affirmed.[131]

Wiggins then filed a petition for postconviction relief in the federal court system.[132] Unlike the state courts, the United States District Court for the District of Maryland held that Wiggins did not receive the effective assistance of counsel in the sentencing phase of his trial.[133] The district court compared Wiggins's claim to that in *Williams v. Taylor*,[134] noting that Wiggins's mitigating evidence was much stronger, and that his aggravating evidence much weaker.[135] Specifically, the district court cited the following information regarding Wiggins's social history – contained in Wiggins's postconviction report but excluded from the DSS report and PSI – as the sum of mitigating evidence that counsel needed to make an educated decision on selection of tactics for the sentencing hear-

126. *Id.* at 516.
127. *Id.*
128. Wiggins I, 597 A.2d 1359, 1365 (Md. 1991), *cert. denied*, 503 U.S. 1007 (1992).
129. *Id.* at 1366.
130. *Wiggins I,* 597 A.2d at 1359. In Maryland, the highest state court is named The Court of Appeals of Maryland.
131. The Court of Appeals of Maryland, in denying Wiggins's petition for post conviction relief, held that "counsel made a deliberate, tactical decision to concentrate their effort at convincing the jury that appellant was not a principal in the killing of [the victim]." Wiggins II, 724 A.2d 1, 15 (Md. 1999), *cert. denied*, 528 U.S. 832 (1999).
132. Corcoran I, 164 F. Supp. 2d 538 (D. Md. 2001).
133. *Id.* at 560.
134. 529 U.S. 362 (2000).
135. *Corcoran I,* 164 F.Supp. 2d at 558 ("Therefore, it follows *a fortiori* that Wiggins was prejudiced by his counsels' unprofessional errors.").

ing:

> As an infant, Wiggins and his siblings were routinely left alone and unfed for days at a time. . . .
>
> As a toddler, Wiggins witnessed one of his sisters routinely being sexually abused by an adult male friend of his mother.
>
> At age 6, Wiggins was intentionally burned by his own mother on a hot stove as punishment for playing with matches.
>
> Wiggins was physically abused by his first foster family and, from the age of 8 on, was sexually abused for many years by his second foster father.
>
> Wiggins was raped by the teenaged sons of his fourth foster family.
>
> At age 16, Wiggins was molested by his Job Corp Supervisor.[136]

Because the record contained no evidence that counsel knew this information, the district court held that counsel could not make an informed decision on a strategy for the sentencing hearing.[137] Furthermore, the district court held that had the jury heard this mitigating evidence, it might have imposed a different sentence.[138]

Wiggins's victory, however, was short-lived. The United States Court of Appeals for the Fourth Circuit reversed the district court holding.[139] The court of appeals noted that "[Wiggins's] sentencing counsel, Mr. Schlaich, did know about [Wiggins's] difficult childhood . . . [which was] sufficient to make an informed strategy choice."[140] Because the Fourth Circuit found this determination to be reasonable, the AEDPA prohibited federal court

136. *Id.* at 559 (citations omitted).
137. *Id.* at 560.
138. *Id.*
139. Wiggins v. Corcoran, 288 F.3d 629, 643 (4th Cir. 2002) [hereinafter *Corcoran II*].
140. *Id.* at 641.

review of the merits of Wiggins's claim.[141] The United States Supreme Court granted Wiggins's petition for a writ of certiorari with respect to his claim of ineffective assistance of counsel in the sentencing phase of the trial.[142]

B. *The Majority Opinion*

The majority opinion, drafted by Justice O'Connor,[143] began its analysis by explaining that the state court denied relief using the correct legal standard; thus, AEDPA permitted a very narrow review by the federal courts.[144] Then, focusing on an ambiguous conclusion in the Fourth Circuit's opinion, the Court expanded its review to the merits of Wiggins's claim and conducted a plenary review of the scope of counsel's investigation.[145] Finally, based on the Court's determination of the scope of the investigation, the Court found that Wiggins was prejudiced by counsel's deficient performance and remanded the case for a new sentencing hearing.[146]

After a discussion of the facts and procedural posture of the case, the Court applied the AEDPA to Wiggins's claim. Justice O'Connor first focused on § 2254(d)(1) and stated that "the 'unreasonable application' prong of § 2254(d)(1) permits a federal habeas court to 'grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts' of the case."[147] As explained in *Williams*, the Court must defer to a state court's conclusion unless the conclusion is "objectively unreasonable."[148]

Unlike in *Williams*, the state court in *Wiggins* denied post-

141. *Id.*

142. The Supreme Court granted the petition for a writ of habeas corpus only on the question of ineffective assistance of counsel in the sentencing phase. The Court denied the petition for the question of whether the evidence was sufficient to sustain the murder conviction. Wiggins v. Smith, 537 U.S. 1027 (2002) (granting the petition for a writ of certiorari in part).

143. Justice O'Connor also drafted the majority opinion in *Strickland*, and drafted the majority opinion regarding how AEDPA should be applied in *Williams v. Taylor*. These are the two key opinions on which *Wiggins v. Smith* relies.

144. *Wiggins*, 539 U.S. at 518-20.

145. *Id.* at 523.

146. *Id.* at 538.

147. *Id.* at 520 (quoting Williams v. Taylor, 529 U.S. 362, 413 (2000)).

148. *Wiggins*, 539 U.S. at 521 (quoting *Williams*, 529 U.S. at 409).

conviction relief based on the correct legal standard: the *Strickland* test.[149] Furthermore, the Maryland Court of Appeals denied relief to Wiggins because his counsel's decision to withhold mitigation evidence in the sentencing phase was a matter of trial tactics.[150] Hence, under § 2254(d)(1) of the AEDPA, the Supreme Court had to find this application of *Strickland* to be objectively unreasonable. As a means of gauging the reasonableness of the state court decision, the Court conducted its own evaluation of Wiggins's ineffective assistance of counsel claim.

Under *Strickland*, "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense."[151] Wiggins's claim of ineffective assistance of counsel stemmed from counsel's decision not to develop a mitigation argument for the sentencing hearing.[152] Hence, Justice O'Connor looked to the guiding language of *Strickland*: "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."[153] Keying in on this language, the Court focused not on the reasonableness of counsel's decision to withhold mitigating evidence from the sentencing phase of the trial, but rather on the reasonableness of counsel's decision to *limit the investigation into Wiggins's background*.[154] More importantly, this analysis required the Court to consider what counsel knew about the defendant, Kevin Wiggins, when the decision was made to cease further investigation.

Without determining whether the state court unreasonably applied *Strickland*, the Court performed its own *Strickland* analysis. Among the first issues discussed was the crucial determination by the state court of the scope of counsel's investigation.[155] The Court noted that "both the Fourth Circuit and the Maryland

149. Wiggins II, 724 A.2d 1, 12, 17 (Md.. 1999), *cert. denied*, 528 U.S. 832 (1999).

150. *Id.* at 17-18.

151. *Wiggins,* 539 U.S. at 521 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)).

152. *Id.*

153. *Wiggins,* 539 U.S. at 521-22 (quoting *Strickland*, 466 U.S. at 691).

154. "[W]e focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence of Wiggins' background *was itself reasonable*." *Wiggins,* 539 U.S. at 523.

155. *Id.* at 521-22.

Court of Appeals referred only to" the written PSI and the DSS report when describing the limits of counsel's investigation into Wiggins's background.[156] Thus, the Supreme Court concluded that counsel went no further than these two reports in investigating Wiggins's background prior to trial, and held that this decision "fell short of the professional standards that prevailed in Maryland in 1989."[157] Counsel's failure to comport to the state professional standards and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases essentially established a *per se* violation of the first prong of *Strickland.*[158]

Furthermore, the Court found a violation of the first prong of *Strickland* in counsel's failure to investigate further into Wiggins's background based on what counsel actually knew.[159] The DSS report contained numerous indicators of Wiggins's troubled childhood that might have led counsel to additional mitigating factors for use at trial, but counsel chose to look no further.[160] Here, the Court distinguished previous Supreme Court cases, such as *Burger v. Kemp,*[161] where counsel conducted a limited investigation for a valid reason.[162] Thus, the Court did not disturb valid *Strickland* precedent. After *Wiggins v. Smith* counsel can still terminate an

156. *Id.* at 523-24.

157. *Id.* at 524. This limitation of investigation satisfied the first prong of unreasonable practice by defense counsel. Here, the Court compared counsel's performance with the standard practice in the state at the time of the trial, and also compared counsel's performance against the American Bar Association standards. *Id.*

158. *Id.* While the Court did not expressly call this a *per se* violation, there is no citation to testimony of competent counsel to support that these standards are the standards of reasonable counsel. The evidence that the Court used to support its conclusion is the admission, by one of Wiggins's trial counsel, that the "standard practice in Maryland in capital cases at the time of Wiggins' trial included the preparation of a social history report." *Id.*

159. *Id.* at 525.

160. *Id.* The DSS report contained the following facts of Wiggins's life history: his natural mother was a practicing alcoholic; he lived in numerous foster homes throughout his childhood; he was frequently absent from school; and at least once "his mother left him and his siblings alone for days without food." *Id.*

161. 483 U.S. 776 (1987). The court held that counsel's decision to limit the search for mitigating evidence was reasonable where the evidence "would not have minimized the risk of the death penalty." *Id.* at 795.

162. *Id.* In *Burger v. Kemp* counsel interviewed all witnesses brought to his attention and stopped the investigation when those interviews yielded little helpful information. *Wiggins,* 539 U.S. at 525.

investigation if the mitigation case may turn out to be "counterproductive," or if "further investigation would [be] fruitless."[163]

Finally, the Court evaluated the whole of the record to rebut the state court's holding that counsel's decision not to present mitigating evidence at the trial was a tactical choice. Counsel moved to bifurcate the sentencing phase of the trial, but the motion was not decided until the day before sentencing.[164] Thus, counsel had every reason to conduct a thorough investigation into the mitigating evidence in Wiggins's background.[165] Justice O'Connor warned lower courts against "*post-hoc* rationalization of counsel's conduct" when determining whether counsel's decision was strategic.[166]

Based on the determination that counsel's investigation went no further than the PSI or DSS report, the Court returned to the AEDPA burden and held that the state court's "application of *Strickland*'s governing legal principles was objectively unreasonable."[167] First, the Court stated that "the Court of Appeals' assumption that the investigation was adequate . . . reflected an unreasonable application of *Strickland*."[168] Second, the Court held that "the court's subsequent deference to counsel's strategic decision not 'to present every conceivable mitigation defense,' despite the fact that counsel based this alleged choice on what . . . was an unreasonable investigation, was also objectively unreasonable."[169] Based on its own analysis of Wiggins's claim, the Court held that the first prong of *Strickland* was satisfied.[170]

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163. *Id.*
164. *Id.* at 515.
165. *Id.* at 526. The Court does not address what would have happened had the motion to bifurcate been granted, but it serves to put *Wiggins* in perspective with the sum of ineffective assistance of counsel case law. Assuming counsel had introduced all its mitigating evidence, the Court still could have found a violation of the first prong of *Strickland* based either on the reasonable standards in the community or on the sum of knowledge counsel possessed at the time of trial. Hence, the Court's determination of the issue in the case becomes even more telling: even strong mitigating cases can be the basis for an ineffective assistance of counsel claim where the investigation is unreasonable. Of course, the defendant must still satisfy the prejudice prong of the *Strickland* test to gain relief.
166. *Id.* at 527.
167. *Id.*
168. *Id.*
169. *Id.* at 528 (citation omitted).
170. *Id.* at 533-34.

Before analyzing the results of counsel's deficient performance, however, the Court addressed a second avenue of review. Under § 2254(d)(2), the Court could review a state court conclusion of law if the state court decision "was based on an unreasonable determination of the facts."[171] The Maryland Court of Appeals denied postconviction relief because counsel knew of Wiggins's sexual abuse by reading the "social services records that recorded incidences of physical and sexual abuse . . . ."[172] However, on federal habeas review, the parties conceded that the social service records did not contain any evidence of sexual abuse.[173] Furthermore, the records contained none of the sordid details of rape and molestation included in a report prepared by a social worker for the state postconviction hearing.[174] Therefore, the Supreme Court determined that counsel did not know of the sexual abuse experienced by Wiggins, and found the state postconviction denial of relief to be based on "clear factual error,"[175] error "shown to be incorrect by 'clear and convincing evidence.'"[176]

Justice Scalia, dissenting, criticized the majority opinion for not adhering to the state court's factual determination that Wiggins's trial "'counsel *did* investigate and *were* aware of [Wiggins's] background.'"[177] The majority responded with a presumption that silence is not a determination: "*Had* the [state] court found that counsel's investigation extended beyond the PSI and the DSS records, the dissent, of course, would be correct that § 2254(e) would require that we defer to that finding. But the state court made no such finding."[178] This comment is crucial to the Court's analysis for many reasons. First, and most importantly, had the state court expressly determined that the investigation extended beyond the PSI and DSS report, then § 2254(e) would require Wiggins to

171. AEDPA, 28 U.S.C.A. § 2254(d)(2) (Supp. 2004).
172. *Wiggins,* 539 U.S. at 518 (citing to Wiggins II, 724 A.2d 1, 15 (Md. 1999), *cert. denied*, 528 U.S. 832 (1999)).
173. *Id.* at 528.
174. *Id.*
175. *Id.*
176. *Id.* (citing 28 U.S.C. § 2254(e)(1) (Supp. 2004)). § 2254(e)(1) of the AEDPA requires that "determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). In federal review, this presumption can only be rebutted by "clear and convincing evidence." *Id.*
177. *Wiggins,* 539 U.S. at 528 (citing *Wiggins II,* 724 A.2d at 15-16).
178. *Id.* at 530.

prove the contrary by "clear and convincing evidence."[179] Furthermore, the Supreme Court would be bound by the state's factual determinations, unless rebutted by Wiggins, in determining whether either prong of § 2254(d) was satisfied. If the scope of investigation had not been subject to a plenary review by the Supreme Court, the focus of the Court would have shifted from the question of whether the investigation was reasonable to the question of whether the decision not to introduce mitigating evidence, once known by counsel, was reasonable. As shown by the deference given to counsel under *Strickland*, the defense will not prevail on that issue unless counsel's decision was entirely arbitrary. Thus, the state court's failure to precisely determine the scope of counsel's investigation serves as the lynchpin of this case.[180]

Having satisfied the barrier to federal review from the AEDPA and the first prong of the *Strickland* test, the Court then looked to the prejudice that resulted from counsel's failure to investigate Wiggins's background: "In order for counsel's inadequate performance to constitute a Sixth Amendment violation, [Wiggins] must show that counsel's failures prejudiced his defense."[181]

Because counsel was not sufficiently aware of Wiggins's background to make an informed decision about whether to introduce evidence of his background in mitigation, the Court made two determinations to find that the prejudice prong was satisfied. First, the Court determined that had counsel performed a reasonable investigation and learned of Wiggins's background, counsel would have introduced the mitigation evidence at the trial.[182] Second, the Court determined that the introduction of this evidence might have resulted in a different sentence.[183] In answering the first question, the Court noted that Wiggins's background, which noticeably contained no prior criminal history, lacked the "double

179. 28 U.S.C.A. § 2254(e)(1) (Supp. 2004).

180. In oral argument, counsel for Wiggins stressed this point: "[W]hat AEDPA requires deference to is factual findings made by a State court." Oral Argument for Wiggins at *16, *Wiggins,* 539 U.S. 510, 123 S.Ct. 2527 (2003) (No. 02-311), *available at* 2003 WL 1699820. However, the only factual finding made by the state court regarding the scope of counsel's knowledge, was that "counsel was indeed aware of [Wiggins's] unfortunate background." *Id.*

181. *Wiggins,* 539 U.S. at 534 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

182. *Id.* at 535.

183. *Id.* at 536.

edge" that infects potential mitigating evidence to make it counterproductive.[184] The Court then looked to the "totality of the evidence" from the trial and the habeas proceeding to determine that there was a "reasonable probability that at least one juror would have struck a different balance" had the jury heard the mitigating evidence.[185] Thus, the Court reversed the Fourth Circuit decision and, for the second time in effective assistance of counsel case law, remanded the case for a new sentencing hearing.

C. *The Dissent*

Unlike the majority, Justice Scalia, joined by Justice Thomas in dissent, believed that the Court exceeded the limits established by Congress in the AEDPA. The dissent's primary objection was that the majority relied upon *Williams v. Taylor* in using the prevailing standards of professional conduct to judge counsel's conduct.[186] According to *Strickland*, the dissent argued, courts should use the standards only as guides for determining the required level of performance.[187] *Williams* later added the professional standards to counsel's obligations under the *Strickland* analysis.[188] Since *Williams* was decided by the Supreme Court one year *after* Maryland denied postconviction relief to Wiggins, it was not, at that time, the existing federal law for purposes of the AEDPA. Justice O'Connor countered the dissent's criticism by noting that *Williams*, which was "squarely governed by [the Court's] holding in *Strickland*,"[189] created no new law.[190]

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184. *Id.* at 535. Had the material from the postconviction report been introduced at the sentencing phase of the trial, the jury "would have heard that [Wiggins] hated his biological mother, that he was in fights with other foster children, that he had once stolen some gasoline and tried to set fire to [] a building. . . ." Oral Argument for Smith at *46, Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003) (No. 02-311), *available at* 2003 WL 1699820. Because the Court did not address this evidence in its opinion, it likely felt that this evidence could not have reasonably dissuaded counsel from introducing the vast amount of truly mitigating evidence from the report.

185. *Wiggins,* 539 U.S. at 536, 537.

186. *Id.* at 542 (Scalia, J., dissenting).

187. Strickland v. Washington, 466 U.S. 668, 688 (1984).

188. *Williams* was the case in which the Court imposed on counsel the "obligation to conduct a thorough investigation of the defendant's background." Williams v. Taylor, 529 U.S. 362, 396 (2000).

189. *Wiggins,* 539 U.S. at 522 (quoting *Williams*, 529 U.S. at 395).

190. Thus, the majority established a distinction for the purpose of AEDPA § 2254(d)(1) review: those cases that create new law and those cases

The dissent put forth one additional argument under § 2254(d)(1), one argument under § 2254(d)(2), and an argument against the majority's finding of prejudice as a result of counsel's deficient performance. While persuasive, these arguments only drew the support of two of the nine Justices.[191]

IV. RECONCILING THE HOLDINGS IN *WIGGINS* AND *CONE*

The unique juxtaposition of *Wiggins v. Smith* and *Bell v. Cone*, at first blush, produces more questions than answers. The Court took a strong position against postconviction relief in its eight-to-one decision in *Cone*, and then granted postconviction relief to Wiggins in a seven-to-two decision in the next term. Without looking further into the specific holdings of each case, these two decisions seem reconcilable by nothing more than the weight of the evidence against each individual defendant. In *Cone*, the Court noted that Cone committed "a horribly brutal and senseless crime against two elderly persons in their home."[192] Furthermore,

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that simply apply the holdings of existing case law. Based on the language in *Wiggins*, the decision, as in *Williams*, is an application of *Strickland*. Hence, *Wiggins* is exempt from the requirement of "clearly established" precedent for the purpose of federal review, and can be relied upon to reverse state court postconviction denials even if those decisions were made before *Wiggins* was decided.

191. The dissent's second objection under § 2254(d)(1) of the AEDPA was that the majority violated the AEDPA by using the silence regarding counsel's scope of investigation as an opportunity to determine how far counsel investigated. The dissent averred that the Supreme Court could not conclude that the state court conclusion was "*unreasonable*" based on a factual determination made by the Court in violation of AEDPA. *Wiggins*, 539 U.S. at 543-44 (Scalia, J., dissenting). The dissent also disagreed with the majority's reliance on § 2254(d)(2) because the state court determination of counsel's knowledge was based primarily on counsel's testimony in the postconviction hearing. *Id.* at 551-52. The dissent believed that the state court conclusion was not unreasonable; thus, the Supreme Court should have deferred to the state court factual finding. *Id.* at 552. Finally, the dissent also disagreed with each step of the majority's reasoning that led to the finding of prejudice. First, Justice Scalia doubted that counsel would have altered the chosen strategy of trying to convince the jury that Wiggins "was not a principal in the killing" of the victim, even if counsel had additional mitigating evidence. *Id.* at 552, 553 (quoting *Wiggins II*, 724 A.2d 1, 15 (Md. 1999), *cert. denied*, 528 U.S. 832 (1999)). Second, Justice Scalia looked to the nature of the mitigating evidence to conclude that it would not have been admissible as "reliable" evidence since it was nearly all provided by Wiggins himself. *Id.* at 554 (quoting Whittlesey v. State, 665 A.2d 223, 243 (Md. 1995)).

192. Bell v. Cone, 535 U.S. 685, 699 (2002).

"[t]he State had near conclusive proof of [Cone's] guilt. . . ."[193] Conversely, Wiggins's guilt was determined based on "almost entirely circumstantial" evidence.[194] However, the weight of the evidence supporting each defendant's guilty verdict does not tell the entire story since the Supreme Court granted Wiggins's petition for a writ of certiorari for only the sentencing phase of the trial.[195] Rather, the reconciliation of these two cases is grounded in the completeness of the records in the state postconviction evidentiary hearings, the thoroughness of each court's holding, and the nature of the claims made in each case.

In *Bell v. Cone*, the prisoner's claim was based on counsel's choice of trial tactics. During the state postconviction hearings, counsel was able to articulate the reasoning behind his selected tactics. Extending great deference to counsel's decisions, the trial court judge found the tactics to be reasonable. Furthermore, the state court of appeals affirmed on the ground that defense counsel "made a diligent and thorough investigation of the facts and the law."[196] Thus, on federal habeas review, there were no disputes about the thoroughness of counsel's performance, only questions of counsel's judgment.

When the Supreme Court reviewed the state court conclusion, the review was extremely limited. The Court did not evaluate whether it believed that counsel was deficient under the *Strickland* test. Rather, the only question before the Court was whether the state court conclusion of law was "objectively unreasonable."[197] Under *Strickland*, a court must extend great deference to counsel's strategic trial decisions.[198] Thus, combining the *Strickland* analysis and the AEDPA burden, the Supreme Court could not have performed a plenary review of Cone's claim unless the state

193. *Id.*

194. *Wiggins II*, 724 A.2d 1, 5 (Md. 1999), *cert. denied*, 528 U.S. 832 (1999). As reported, there was "no forensic evidence linking Wiggins to the murder, though there was unidentified forensic evidence – fingerprints, hair, fibers and a baseball cap left at the scene." Deborah Sontag, *The Power of the Fourth*, N.Y. TIMES MAGAZINE, Mar. 9, 2003, at 40.

195. The Supreme Court could have reversed Wiggins's conviction had it granted the petition for the writ of certiorari on both issues raised by Wiggins. *See supra* note 147 and accompanying text.

196. Cone v. State, 747 S.W.2d. 353, 357 (Tenn. Crim. App. 1987).

197. Wiggins v. Smith, 539 U.S. 510, 527 (2003).

198. *Id.* at 521.

court was objectively unreasonable in deferring to counsel's decisions. Only if counsel provided a patently arbitrary reason for his tactics would this test be satisfied. Because reasonable minds might disagree on whether counsel's tactics were arbitrary, Cone could not meet his burden. The Supreme Court did not reject the state court's conclusion that counsel's tactics were legitimate, and no independent review into the reasonableness of counsel's tactics was permitted by the AEDPA.

Conversely, in *Wiggins*, the scope of review by the Supreme Court was expanded not by the AEDPA, but by the incompleteness of the state court's decision. Unlike Cone, Wiggins raised a claim that required a factual determination of counsel's performance. The question was not whether counsel made a reasonable decision, but whether counsel conducted sufficient investigation to make a reasonable decision. Thus, to answer this question, the state court had to determine what counsel knew before deciding against a mitigation argument. The state court, in concluding that counsel's performance was not deficient, made a general statement that counsel "*were* aware of [Wiggins's] background."[199] However, this general statement did not address the scope of counsel's investigation. It is undisputed that counsel knew of the contents of the DSS report and the PSI, but the state court did not determine or question whether counsel looked beyond those documents. Counsel admitted during the postconviction hearing that no social history report was prepared. Furthermore, based on the limited mitigation evidence introduced at the sentencing hearing and the incomplete proffer made before closing arguments, counsel likely did not possess the pertinent information regarding Wiggins's background. However, under AEDPA, the Supreme Court was bound to the state court holding unless the holding reflected an unreasonable application of the law or was based upon an unreasonable determination of the facts.

Ultimately, the state court's general conclusion about the scope of counsel's investigation opened the door for the Supreme Court to evaluate the reasonableness of counsel's performance under *Strickland*. Contrary to the conclusion made by the state court, the Supreme Court determined that counsel did not look beyond the two perfunctory reports of Wiggins's background. This

199. *Wiggins II*, 724 A.2d at 16.

level of investigation did not comport with effective assistance of counsel under *Strickland*; hence, the state court conclusion was unreasonable, and the AEDPA burden was satisfied. More importantly, the first prong of *Strickland* was satisfied. Thus, while the holding in *Cone* is grounded in the scope of review as limited by AEDPA, the holding in *Wiggins* is grounded in the Court's language from *Strickland*.

Based on this conclusion, each case could have yielded different results under both the AEDPA and *Strickland*. For example, counsel for Cone waived final argument to prevent the prosecution from delivering a rebuttal. At the state postconviction hearing counsel justified his decision by explaining that the lead prosecutor was capable of delivering "devastating closing arguments."[200] In hindsight, Cone could have questioned trial counsel's personal knowledge of the lead prosecutor's abilities during the state postconviction relief hearing. Had this factual question gone unanswered by the state court, the Supreme Court could have performed a factual review and possibly concluded that classifying the waiver as a trial tactic without sufficient knowledge was objectively unreasonable. In this manner, Cone might have met the AEDPA burden. Furthermore, an evaluation of Cone's claim under the *Strickland* analysis may have resulted in a reversal of the sentence since the decision to waive final argument, made without adequate justification, arguably satisfies the harm and prejudice prongs of the test.

Conversely, in *Wiggins*, a more specific conclusion of the scope of counsel's investigation by the state court would have halted the Supreme Court's review of Wiggins's claim before reaching the merits. Had the state court made a factual determination that counsel looked beyond the two reports when preparing for trial, and if that determination was reasonable, the challenge on federal postconviction review would have become a question not of fact, but of counsel's trial tactics. In that situation, the Court would have been limited to determining whether the state court's finding of sufficient performance by counsel was objectively unreasonable. A judge determined Wiggins's guilt; the jury entered the trial at the sentencing phase and knew nothing of the evidence admitted in the guilt phase. In this circumstance, with knowledge of Wig-

200. *Cone*, 747 S.W.2d at 357.

gins's background, counsel probably would have made a reasonable tactical decision to try to convince the jury that Wiggins was not a principal actor in the murder. Thus, had the state court made a reasonable factual finding that counsel looked beyond the two reports and selected the tactic of retrying guilt, the Supreme Court would have had no authority to reverse the state court decision.

Thus, while the difference between *Wiggins* and *Cone* seems to extend no further than the quantity and quality of evidence supporting the guilty verdicts and capital sentences, this understanding misses the nuances of the Court's decisions. The true difference lies in the type of review conducted by the Supreme Court under the federal habeas statute and the *Strickland* analysis in each case, and in the Court's authority to conduct such review based upon the record from the postconviciton relief hearing.

V. IMPACTS OF *WIGGINS V. SMITH*

In support of the determination that *Wiggins* is merely an application of *Strickland*, one need go no further than recent case law in the federal appellate circuits to see that an analysis similar to that used by Justice O'Connor is not unique. Where counsel has conducted a limited investigation, and the investigation was reasonable based on what counsel knew when the decision to (or not to) investigate was made, relief will be denied.

As in *Wiggins*, failure to investigate is not a reasonable decision. For example, in *Clark v. Redman*,[201] the defendant in a murder trial claimed to be out of town on the day of the murder. Rather than pursue and interview the defendant's alibi witnesses, the appointed defense counsel chose, as his only defense, to cross-examine the prosecution's witnesses.[202] Furthermore, counsel failed to interview the one potential witness who could rebut the prosecution's key witness.[203] Counsel claimed that he chose not to interview the potential witness because the man had been in prison and would not be reliable.[204] The court held that counsel's decision to forego interviewing potential witnesses "was unques-

201. No. 86-2050, 1988 WL 138971, at *1 (6th Cir. Dec. 28, 1988).
202. *Id.*
203. *Id.* at *1-2.
204. *Id.* at *2.

tionably an unreasonable decision, even after 'applying a heavy measure of deference' to [counsel's] judgment . . . ."[205]

United States v. Kaufman[206] is similarly illustrative. Even though counsel had a letter from a psychiatrist which diagnosed the defendant as "psychotic" at the time the defendant received stolen property, counsel recommended that the defendant plead guilty to federal charges without first performing any independent investigation into a possible insanity defense.[207] The court stated that "[o]nly if [counsel] had investigated [defendant's] long history of serious mental illness, and conducted *some* legal research regarding the insanity defense could his counseling be characterized as 'strategy.'"[208] The court held counsel's performance to be unreasonable.[209]

Furthermore, as in *Wiggins*, counsel's decision to limit investigation will be held unreasonable if further investigation may yield mitigating evidence. In *Valdez v. Johnson*,[210] the United States District Court for the Southern District of Texas noted that counsel did not conduct even a minimal investigation into the defendant's background.[211] If counsel had, they would have discovered indicators "suggesting mental retardation."[212] The district court held, just as Justice O'Connor had in *Wiggins*, that "[w]hen counsel is on notice of a potential mitigating factor, counsel must make a more thorough and independent investigation into the defendant's background for substantiating evidence."[213] Furthermore, "counsel's failure to thoroughly investigate and present mitigating evidence [was not] born of some tactical fear of 'opening the door' to evidence of prior bad conduct or criminal convictions."[214] Throughout the decision, the district court cited to language in *Strickland* for support in evaluating the claim.[215]

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205. *Id.* at *3.
206. 109 F.3d 186 (1997).
207. *Id.* at 188.
208. *Id.* at 190.
209. *Id.* at 191.
210. 93 F. Supp. 2d 769 (S.D. Tex. 1999), *rev'd on other grounds*, 274 F.3d 941 (5th Cir. 2001), *cert. denied*, 537 U.S. 883 (2002).
211. *Id.* at 782.
212. *Id.*
213. *Id.* (citing Ransom v. Johnson, 126 F.3d 716, 723 (5th Cir. 1997)).
214. *Id.* at 785.
215. *Id.* at 778-87.

However, the United States Court of Appeals for the Fifth Circuit later vacated the district court's decision to grant relief to Valdez.[216] The district court violated the AEDPA by ordering an evidentiary hearing even through the prisoner did not rebut the state's findings of fact through "clear and convincing evidence."[217] Thus, under the AEDPA, the federal court could only grant relief based on the facts as determined in the state postconviction hearing.

The ultimate issue in both *Wiggins* and *Valdez* was a question of fact: What was the scope of counsel's investigation into the defendant's background prior to trial? That question could be answered by reviewing the record in *Wiggins*. In *Valdez*, that question could only be answered with the evidence obtained in the inappropriately ordered evidentiary hearing. Thus, these cases are distinguished by the completeness of the record in the state habeas proceedings. Although *Valdez* was overruled because the district court had violated the AEDPA, the similarity in the reasoning used to decide both *Valdez* and *Wiggins* supports the conclusion that *Wiggins* was also grounded in the language from *Strickland*.

Also consistent with the guidance from *Strickland*, courts have held that counsel is not expected to exhaust every lead in an investigation.[218] In *Rogers v. Zant*[219] counsel chose not to bring out that the defendant was high on PCP when the he killed his neighbor.[220] Even without investigating the effects of the hallucinogenic drug, counsel's knowledge of the negative impact introducing the defendant's intoxication during the commission of the crime would have supported the reasonableness of the decision not to investigate.[221] The court held the decision to be reasonable, and

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216. Valdez v. Cockrell, 274 F.3d 941 (5th Cir. 2001).

217. AEDPA, 28 U.S.C. § 2254(e)(1) (Supp. 2004).

218. Interestingly, the state court that denied Cone's petition for postconviction relief and concluded that counsel's decision to waive final argument was reasonable stated that "[n]o stone was left unturned in the preparation of appellant's defense." Cone v. State, 747 S.W.2d. 353, 357 (Tenn. Crim. App. 1987).

219. 13 F.3d 384 (11th Cir. 1994).

220. *Id.* at 385.

221. Looking at the totality of the circumstances surrounding counsel's decision, the court reasoned:

> Defense counsel knew, at least, four important things when they in-

stated that "'strategy' can include a decision not to investigate.[222] *Strickland* indicates clearly that the ineffectiveness question turns on whether the decision not to make a particular investigation was reasonable."[223]

A review of case law decided after *Wiggins* demonstrates little change in ineffective assistance analysis. In *Anderson v. Johnson*[224] the Fifth Circuit cited *Wiggins*, decided just a few days before, to justify the conclusion that "a witness's character flaws cannot support a failure to *investigate*."[225] As Justice O'Connor implied in *Wiggins*, deciding not to call a witness to testify due to a perceived lack of credibility is a trial tactic; deciding not to *interview* a witness for the same reason is no strategy at all. Such a course of action leaves counsel without sufficient information to justify the decision not to call the witness. However, *Wiggins* was not required for the court to reach its opinion, nor was *Wiggins* even the primary source to which the court cited. Rather, the court cited *Bryant v. Scott*,[226] a 1994 case from the Fifth Circuit, which relied upon *Strickland* for its holding.[227]

In another recent case, *Byram v. Ozmint*,[228] the court distinguished *Wiggins* by citing to the vast amount of time counsel spent in preparation for Byram's trial.[229] In addition, the court

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> vestigated no further about PCP: (1) they knew that there was some evidence of PCP use; (2) they knew that PCP was a hallucinogen; (3) they knew that a [local] jury would likely react hostilely to an assertion that a person should in some way be excused from the consequences of his acts because he had voluntarily taken drugs; and (4) they knew there were other possible defenses and mitigating factors that might be advanced.
>
> . . . .
>
> [Furthermore, c]ounsel could have reasonably believed that developing Rogers' drug use as a defense would have . . . been perceived by the jury as *aggravating* instead of mitigating.

Id. at 387-88.

222. *Id.* at 387.

223. *Id.*

224. 338 F.3d 382 (5th Cir. 2003).

225. *Id.* at 392.

226. 28 F.3d 1411 (5th Cir. 1994).

227. *See generally id.*

228. 339 F.3d 203 (4th Cir. 2003). Notably, *Wiggins* came to the Supreme Court through the Fourth Circuit, which denied relief to Wiggins.

229. In addition to making over thirty visits with the defendant, counsel ordered examinations by a forensic psychologist and a forensic psychiatrist, searched the defendant's school records, and interviewed the defendant's

recognized that the reasonableness and extent of counsel's investigation must be viewed "in light of the scarcity of counsel's time and resources in preparing for a sentencing hearing and the reality that counsel must concentrate his efforts on the strongest arguments in favor of mitigation."[230] Most importantly, the court distinguished the holding in *Wiggins* by noting that Byram's counsel presented a strong mitigation argument before the jury, and that the mitigation evidence not introduced was "largely cumulative."[231]

In both *Anderson v. Johnson* and *Byram v. Ozmint* the respective courts relied upon the language from *Strickland* to evaluate the claims of ineffective assistance of counsel. The addition of *Wiggins v. Smith* to this landscape did not modify the underlying analysis.

A. *The Impact On Federal Postconviction Review*

While *Wiggins* added little to the holdings of the preceding cases, it cannot be said that *Wiggins* has no value to courts during review of claims of ineffective assistance. Of the ineffective assistance of counsel claims heard by the Supreme Court, *Wiggins* sits with *Williams v. Taylor* as the only two cases in which relief was granted.[232] Thus, *Wiggins* provides a lower boundary in the range of acceptable performance by counsel against which future claims of ineffective assistance of counsel must be measured.

In addition, the conclusion that *Wiggins* does not change the way the federal courts review claims of ineffective assistance of counsel is not without value to defendants who wish to raise federal habeas claims. Because *Wiggins* is grounded solidly in the reasoning of *Strickland*, it is not new law. Hence, just as the majority opinion in *Wiggins* was able to rely upon *Williams* because the *Williams* decision was grounded in *Strickland*, future claims

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birth parents and adoptive family members. The court held this level of investigation to be reasonable. *Id.* at 210.

230. *Id.* (citing McWee v. Weldon, 283 F.3d 179, 188 (4th Cir. 2002)).

231. *Byram*, 339 F.3d at 211.

232. In *Kimmelman v. Morrison*, 477 U.S. 365 (1986), the Supreme Court held that counsel's failure to make a timely motion to suppress evidence gathered in violation of the Fourth Amendment because counsel did not perform adequate discovery constituted ineffective assistance of counsel. *Id.* at 383-91. The Court remanded the case because the record was insufficient to determine the question of prejudice. *Id.*

that rely on *Wiggins* for support are not defeated by the government's argument that *Wiggins* is new law for the purpose of § 2254(d)(1) analysis.

Furthermore, petitioners raising claims of ineffective assistance of counsel should look to the nature of Wiggins's claim. Rather than challenge the decision made by counsel, Wiggins challenged the knowledge that counsel possessed when the decision was made. Thus, just as Cone could have argued that his counsel did not possess sufficient knowledge of the prosecutor's ability to deliver a devastating rebuttal argument, future petitioners may find more success by challenging the basis for counsel's decisions rather than the actual decisions. Of course, because of the fact-finding limitations imposed on federal courts by the AEDPA, the petitioner must establish a basis for counsel's deficient knowledge during state postconviction proceedings.

Finally, *Wiggins* demonstrates that federal courts can probe into unanswered questions on the state court record. As Justice O'Connor admitted in the *Wiggins* opinion, had the state court clearly identified what counsel knew about Wiggins's background prior to the sentencing hearing, the Supreme Court would have been bound to that finding unless rebutted by "clear and convincing evidence."[233] Because the state did not answer the factual question at issue, the Supreme Court was free to probe into the knowledge counsel possessed when selecting the trial strategy. The corollary to the result in *Wiggins* is that a state court must not leave factual findings unresolved if the court wants to retain its presumption of correctness during federal habeas review.

B. *The Impact in the Trial Court*

While the case will have some impact on how cases are reviewed during federal postconviction proceedings, *Wiggins* is foremost a case about an individual who did not have a sufficient opportunity to convince a jury that his life should be spared. Therefore, perhaps most importantly, *Wiggins* changes how appointed counsel will manage capital sentencing cases.

In the Court's opinion, Justice O'Connor concluded that counsel's investigation was unreasonable for two reasons. First, counsel's decision not to look past the PSI or DSS report was

233. AEDPA, 28 U.S.C. § 2254(e)(1) (Supp. 2004).

unreasonable, regardless of what counsel knew when this decision was made.[234] Second, counsel's decision to forego further investigation beyond the PSI or DSS report was unreasonable based on what counsel actually knew when the decision was made.[235] Hence, the Court created two means by which future investigatory decisions may be deemed unreasonable: a *per se* determination and a totality of the circumstances determination.

The benefit created with two potential avenues for relief is readily apparent. First, to avoid a *per se* determination of unreasonableness, counsel must conduct an investigation of the defendant's background in accordance with the prevailing standards in the jurisdiction. Additionally, the investigation must go beyond what is included in standard pre-sentencing reports prepared by the state prior to the penalty phase of the trial.[236] Second, if counsel can articulate any suspicions that justify further investigation into the defendant's background, and if the mitigating evidence that might result from further investigation is not "fruitless" or "counterproductive," counsel must continue the investigation.[237]

Most importantly, counsel can argue the language of either avenue of unreasonableness as explained in *Wiggins* to receive additional funding from the state for the purpose of furthering the investigation of mitigation evidence. On the day after the Supreme Court announced the decision in *Wiggins*, court-appointed defense counsel in Texas cited to *Wiggins* "in a request for money to pay for a mitigation expert" in a capital sentencing case.[238] The judge, although somewhat skeptical of the need for a mitigation expert, granted counsel up to $2,500 for the purpose of hiring an expert.[239] Thus, in light of *Wiggins* and the subsequent response

234. Wiggins v. Smith, 539 U.S. 510, 524 (2003).

235. *Id.* at 525.

236. While the Court does not expressly relate the thoroughness of the investigation to the proximity of the trial, counsel who does not complete the investigation of mitigation evidence due to counsel's own mismanagement of the trial cannot be exempt from a *Strickland/Wiggins* case law analysis. Counsel who fails to complete the investigation due to limited time allowed by the court may prevail in an effective assistance of counsel challenge. Such a result might, however, violate fundamental fairness.

237. *Wiggins, 539* U.S. at 525.

238. John Council, *Defense Lawyers Must Dig Deeper into Death Cases*, TEXAS LAWYER, July 7, 2003, at 1.

239. *Id.*

by the trial judge, this argument could and should be made in every capital sentencing case.

Once funds are available, appointed counsel should pursue, in order to meet professional standards, the hiring of a mitigation specialist who "possesses expertise in the monumental task of identifying, developing and presenting mitigating evidence that most attorneys do not have."[240] While not presently required, the value of "expert help in fleshing out mitigation issues" may ultimately result in the appointment of mitigation experts as a matter of course.[241]

However, as a strict application of *Strickland*, *Wiggins* is not a panacea. Once the investigation is conducted and counsel has mitigation evidence available, counsel need only be able to explain a decision not to use the evidence to defeat an ineffective assistance of counsel claim.

Furthermore, the value of the mitigation evidence before a jury is uncertain. As a matter of law, the Supreme Court has held that evidence of a defendant's background and upbringing is "relevant to assessing a defendant's moral culpability."[242] "Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case."[243] The head of the Texas Defender Service in Houston maintains that "[w]hen this sort of mitigating evidence is presented to a jury, it makes a difference."[244] For example, the introduction of a troubled family history in a recent Indiana case convinced the jury to reject a death sentence.[245]

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240. Pamela Blume Leonard, *A New Profession for an Old Need: Why a Mitigation Specialist Must be Included on the Capital Defense Team*, 31 HOFSTRA L. REV. 1143, 1151 (2003). Ms. Leonard indicates that "it takes hundreds of hours to conduct a thorough social history investigation . . . ." *Id.* at 1154.

241. Council, *supra* note 238.

242. *Wiggins*, 539 U.S. at 535.

243. Williams v. Taylor, 529 U.S. 362, 398 (2000).

244. Henry Weinstein, *High Court's Term Ends: Man's Death Sentence Overturned*, L.A. TIMES, June 27, 2003, at § 1, 31.

245. The impact of the mitigating evidence on the jurors was described as follows:

> A recent article in The New York Times Magazine concerning a death penalty case in Indiana included an excellent example of a case in which a defendant's social history was used successfully as a

However, the jury's use of the evidence may reflect a different attitude. A jury may interpret the evidence to indicate that the defendant will remain a threat to society even while serving a life sentence in prison. "[T]he dysfunctional and abused childhood defense is not always successful; judges and juries have condemned to death defendants with equally tragic childhoods."[246] The foreman of Kevin Wiggins's jury stated, after the Supreme Court announced its decision, that "'it wouldn't have made any difference' if she had known about his background." [247] She continued: "The maltreatment he suffered at the hands of his mother was nothing compared to the maltreatment he inflicted on the woman he murdered .... [I]t does not excuse him from accepting the consequences of his actions."[248] Maryland Attorney General Joseph Curran also commented on the mitigation evidence and felt that "'it is equally likely' the jury would have treated evidence about Wiggins's difficult upbringing as a reason to see him 'as a future danger.'"[249] Such viewpoints may provide future counsel with the requisite ammunition to justify the decision to leave out such evidence as "counterproductive"[250] or "fruitless"[251] in a sentencing hearing.[252]

> mitigating factor in sentencing. After hearing about the defendant's history – which was bad, but not as bad as Wiggins's – the jurors not only rejected the death penalty, but in subsequent interviews they 'referred to [the defendant] by his first name, as if they were speaking of a family member or a friend.'

Craig M. Bradley, *Court Confirms Importance of Mitigation in Sentencing*, TRIAL, Oct. 2003, at 62-63 (citing to Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAGAZINE, July 6, 2003, at 32).

246. *Wiggins II*, 724 A.2d 1, 17 (Md. 1999), *cert. denied*, 528 U.S. 832 (1999).

247. Lawrence Hurley, *Supreme Court Orders New Sentence for Maryland Death Row Inmate*, THE DAILY RECORD (Baltimore), June 27, 2003.

248. *Id.* It is uncertain, and practically impossible to determine, if those statements truly reflect the outcome that would have occurred had counsel introduced the abundant quantity of mitigating evidence of Kevin Wiggins's background. It is possible that the statements were made to reinforce the decision that the jury actually made: to sentence Kevin Wiggins to death.

249. Charles Lane, *Death Penalty of Md. Man is Overturned*, WASH. POST, June 27, 2003, at A01.

250. Wiggins v. Smith, 539 U.S. 510, 525 (2003).

251. *Id.*

252. Lending credence to such an argument, during oral argument of *Wiggins v. Smith*, the Supreme Court asked Mr. Verrilli, Wiggins's counsel, the following question regarding the mitigation evidence available to counsel:

VI. CONCLUSION

While *Wiggins v. Smith* reads as a strict application of *Strickland*, it demonstrates the Supreme Court's willingness to ensure that defendants are given a fair chance to convince a jury to spare their lives. Certainly Wiggins's counsel were not intoxicated, inebriated, or asleep during the trial, but they provided Kevin Wiggins with a poor chance to convince at least one juror that his life should be spared. Unlike the vast majority of defendants who receive questionable counsel, Kevin Wiggins now has a second opportunity to make that argument to a new jury. Though the next group of twelve individuals may sentence Kevin Wiggins to death, they may not. The question is not whether the jury is convinced that Wiggins deserves to live; the question is whether it reaches the decision after hearing evidence that effective counsel decides is relevant. Wiggins's trial counsel was right in her first statement to the jury: he has had a hard life. But every indigent client who receives effective representation from appointed counsel in the future has Kevin Wiggins to thank.

Wayne M. Helge*

> Why couldn't counsel for the defense think if we introduce this, it's going to be subject to cross-examination? And if we look at that social history, we find out that the whole thing is – the defendant himself was the source of the information about the horrible sexual abuse he had been exposed to as a child. The jury might find that a person who had been so abused would be full of hate and therefore very likely would have had the mental state to carry out this brutal murder that – in other words, that this kind of information could be a two-edged sword. The jury could infer from it he's not fully responsible for his acts or, on the other hand, that this person was violent, full of hate, and indeed committed this brutal murder.

Oral Argument for Wiggins at *21-22, Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003) (No. 02-311), *available at* 2003 WL 1699820. Such a justification could either be a post hoc rationalization or a legitimate reason. It will be up to the state court to determine which is the truth. If the state court makes a specific finding, federal habeas relief will be available *only* if the state court factual determination is rebutted by clear and convincing evidence or if the legal conclusion is objectively unreasonable.

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